IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40237
	)	
Airman (E-2)	)	USCA Dkt. No. 23-0223/AF
JEREMY J. STRADTMANN	)	
United States Air Force	)	16 October 2023
Appellant.	)	

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v.	)	Crim. App. No. 40237
Master Sergeant (E-7) **JEREMY J. STRADTMANN** United States Air Force *Appellant.*	)	USC 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, UCMJ OF THE 2016 MANUAL FOR COURTS-MARTIAL.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant pleaded guilty unconditionally to one charge and three specifications[1] of child endangerment in violation of Article 134, UMCJ. (JA at 29-30, 34). The three specifications of Charge II at issue stated:

> Specification 6: [Appellant] . . . did, at or near Colorado Springs, Colorado, between on or about 25 December 2016 and on or about 5 January 2017, had a duty for care of M.S., a child under the age of 16 years, and did endanger the mental health of M.S. and that such conduct constituted ***culpable negligence***, by assaulting A.S., the mother of M.S. while M.S. was present, and that said conduct was of a nature to bring discredit to upon the armed forces.
>
> Specification 7: [Appellant] . . . did, at or near Colorado Springs, Colorado, between on or about 1 April 2017 and on or about 30 April 2017, had a duty for care of M.S., a child under the age of 16 years, and did endanger the mental health of M.S. and that such conduct constituted ***culpable negligence***, by wrongfully communicating a threat to injure A.S., the mother of M.S. while M.S was present, and that said conduct was of a nature to bring discredit to upon the armed forces.
>
> Specification 8: [Appellant] . . . did, at or near Colorado Springs, Colorado, between on or about 1 June 2017 and on or about 30 June 2017, had a duty for care of M.S., a child under the age of 16 years, and did endanger the mental health of M.S. and that such conduct constituted ***culpable negligence***, by wrongfully communicating a threat to injure A.S., the mother of M.S. while M.S was

[1] Appellant also pleaded guilty to Specifications 5, 6, 7, and 12 of Charge I (violations of Article 128, UCMJ) and Specifications 2, 3, and 4 of Charge II (violations of Article 134, UCMJ). (JA at 25-30, 33-34).

> present, and that said conduct was of a nature to bring discredit to upon the armed forces.

(JA at 23) (emphasis added).

At trial, before entering pleas, Appellant moved to dismiss Specifications 6, 7, and 8 of Charge II for failure to state an offense because culpable negligence was an insufficient mens rea to commit the offense of child endangerment and the mens rea should have been recklessness in light of Elonis v. United States, 575 U.S. 723 (2015). (JA at 83-91). The military judge denied Appellant's motion to dismiss for failure to state an offense because "the specifications allege the mens rea of culpable negligence which is appropriate considering the language of the enumerated offense, congressional intent and judicial concurrence." (JA at 104).

STATEMENT OF THE FACTS

During trial, the military judge read Appellant the elements for Specifications 6, 7, and 8 of Charge II before delving into the Care[2] inquiry about each specification. (JA at 37, 47, 54-55). The military judge stated the theory of liability was "through culpable negligence" for all three specifications. (Id.). The military judge read Appellant the definition of culpable negligence twice – once for Specification 6 and once for Specification 7 – and Appellant declined a

[2] United States v. Care, 18 U.S.C.M.A. 535 (C.M.A. 1969).

recitation of the definition before the Care inquiry into Specification 8. (JA at 38, 48, 55). The military judge 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 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. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provision made for the care of the child, and the location of the parent or adult responsible for the child relative to the location of the 16 child, among others, may be considered in determining whether the conduct constituted culpable negligence.

(JA at 38, 48).

Appellant admitted that he argued with his wife, AS, on 31 December 2016. (JA at 36, 39). Then Appellant swung at AS and pushed her while they were on the stairs making her stumble backwards onto her bottom. (Id.). Appellant was holding MS, AS's daughter, when he swung his arm at AS on the stairs. (JA at 36, 39). Appellant explained during his Care inquiry that his actions against AS in the presence of MS endangered MS's mental health and his actions amounted to culpable negligence. (JA at 41-44). MS was just 13 months old at the time. (Id.)

Appellant yelled at and threatened AS during an April 2017 fight, and MS was again present for the argument. (JA at 49). MS was 17 months old then and

walking between Appellant and AS while Appellant threatened AS. (JA at 49, 50). Appellant told the military judge, "I have since learned that children this young can react to disturbances in the home such as these, and those disturbances have a negative effect on their mental health." (JA at 49). He admitted his actions amounted to culpable negligence. (JA at 51).

Appellant admitted during a June 2017 fight that he yelled at AS and threatened to beat her. (JA at 54). MS was present during this June 2017 fight. (JA at 55). MS was 19 months old at the time. (Id.). When asked why he believed MS's mental health was endangered, Appellant stated, "Because, Your Honor, I've learned that children that young, they can react to disturbances and those disturbances can have a negative effect on their mental health." (JA at 57). He admitted his actions amounted to culpable negligence. (JA at 58).

The military judge found Appellant's pleas to be provident, and she found him guilty of Specifications 6, 7, and 8 of Charge II. (JA at 59-60).

SUMMARY OF THE ARGUMENT

The statutory "text of Article 134, UCMJ, does not explicitly contain a mens rea requirement." United States v. Tucker, 78 M.J. 183, 185 (C.A.A.F. 2018). Because the statute is silent on mens rea, this Court looks to see if a statute, precedent, custom, or ancient usage supports the appropriate mens rea. Id. at 185-186. Child endangerment contains a presidentially promulgated mens rea of

culpable negligence that is supported by this Court's precedent and military custom.

Congress authorized the President to enumerate examples of violations of Article 134, UMCJ, and the President operated within that power when he determined culpable negligence was the appropriate mens rea for child endangerment. Article 36, UCMJ, 10 U.S.C. § 836. As the executive officer tasked with securing the "exact effect intended by [Congress'] acts of legislation," the President specified culpable negligence as the appropriate mens rea for child endangerment. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928); Manual for Courts-Martial, pt. IV ¶ 68a.b. (2016 ed.).

In doing so, the President leaned on this Court's child neglect precedent in United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003). In Vaughan, the appellant was charged with child neglect, a novel offense under Article 134, UCMJ, that was not then presidentially enumerated. Id. at 30. This Court determined military case law, state law, and military custom provided sufficient notice that child neglect via culpable negligence, without actual harm to a child, was a viable offense under Article 134, UMCJ. Id. The President incorporated Vaughan when establishing child endangerment as an offense in the Manual. MCM, Appendix 23-22, ¶ 68a. (2016 ed.). The Drafter's Analysis explicitly stated the President based the offense's elements – which included a possible mens rea of culpable negligence –

on this Court's precedent in Vaughan, military custom, regulation, and state statutes. Id. Appellant offers no law providing that the President cannot recognize an offense under Article 134 that has a mens rea of culpable negligence Thus, this Court should follow the President's highly persuasive enumerated elements and maintain culpable negligence as a possible mens rea for child endangerment.

This Court should not ignore its well-established precedent on child neglect and child endangerment. Vaughan focused on whether the military judge's use of culpable negligence as the requisite mens rea was correct. Id. at 34- 35. The Vaughan Court held it was. Since Vaughan, culpable negligence has remained an established mens rea for child endangerment offenses under Article 134, even after the Supreme Court's decision in Elonis that stated simple negligence cannot be inferred if a statute is silent on mens rea. 575 U.S. 723.

What is more, Congress has now weighed in on the appropriate mens rea for child endangerment and concurred that child endangerment can be proven by showing culpable negligence. 10 U.S.C. § 919b (2019 ed.). Although the statute was not effective at the time of Appellant's offenses, the congressional concurrence is persuasive.

Appellant argues recklessness is the baseline mens rea for Article 134 offenses required by Elonis. (App. Br. at 12.) But neither Elonis nor Tucker

established recklessness as the default mens rea for criminal offenses. 575 U.S. at 736; 78 M.J. at 186. This Court said:

> To be clear, we are not holding that negligence can never be a mens rea for an Article 134, UCMJ, offense. We simply hold that negligence is an insufficient mens rea with respect to this particular Article 134, UCMJ, offense of providing alcohol to minors.

Tucker, 78 M.J. at 186, n. 3 (internal citations omitted).

This Court need not change the mens rea for child endangerment to recklessness after Elonis, and this Court should not consider doing so. And this Court should decline Appellant's implicit invitation to overrule 20 years of jurisprudence and should instead maintain its well-established precedent.

Finally, the military judge did not abuse her discretion when she instructed Appellant on the element of culpable negligence. The military judge followed 20 years of legal precedent established by this Court and provided the persuasive presidentially promulgated definition of culpable negligence to Appellant. (JA at 38, 48, 55.) Appellant failed to meet his burden to establish "that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015). Appellant's pleas were provident, and this Court should affirm the decision of the Air Force Court.

ARGUMENT

CULPABLE NEGLIGENCE IS AN APPROPRIATE MENS REA TO SUSTAIN A CONVICTION FOR CHILD ENDANGERMENT UNDER ARTICLE 134, UCMJ, OF THE 2016 MANUAL FOR COURTS-MARTIAL.

Standard of Review

This Court reviews "a military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." Tucker, 78 M.J. at 185. "The mens rea applicable to an offense is an issue of statutory construction, reviewed de novo." United States v. McDonald, 78 M.J. 376, 378 (C.A.A.F. 2019).

Law

Discerning Mens Rea

"In determining the mens rea applicable to an offense, [this Court] must first discern whether one is stated in the text, or, failing that, whether Congress impliedly intended a particular mens rea." McDonald, 78 M.J. at 378-379. "As in all statutory construction cases, we begin with the language of the statute." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

The statutory text of Article 134, UCMJ says:

> Though not specifically mentioned in this chapter [10 USCS §§ 801 et seq.], all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed

> forces, and crimes and offenses not capital, of which persons subject to this chapter [10 USCS §§ 801 et seq.] may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (2016 ed.). "[T]he text of Article 134, UCMJ, does not explicitly contain a mens rea requirement." Tucker, 78 M.J. at 185.

"When interpreting federal criminal statutes that are silent on the required mental state, [courts] read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." Elonis, 575 U.S. at 736 (internal citations omitted). "[T]his Court has recognized in the context of Article 134, UCMJ, that it is inappropriate to infer a negligence mens rea" unless a statute, precedent, custom, or ancient usage exists supporting negligence as the appropriate mens rea. Tucker, 78 M.J. at 185-186.

Presidential Authority to Enumerate Offenses Under Article 134, UCMJ

Congress has the power "[t]o make rules for the government and regulation of the land and naval forces." U.S. CONSTITUTION, art. I, § 8. To execute their legislation:

> Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

J. W. Hampton, Jr., & Co., 276 U.S. 394. Congress may delegate to the President the power "to fill up details and implement statutory provisions, or to determine the details of the legislative scheme." United States v. Smith, 13 U.S.C.M.A. 105, 118 (C.M.A. 1962). Congress delegated the prescription of procedural rules for courts-martial to the President as the "Commander in Chief of the Army and Navy of the United States." U.S. CONSTITUTION, art. II, § 2; *See also* Article 36, UCMJ, 10 U.S.C. § 836.

Under the authority granted to him by Congress, the President cannot create substantive law, but he may list examples of offenses that violate Article 134, UCMJ. United States v. Jones, 68 M.J. 465, 471-472 (C.A.A.F. 2010). The President "is not defining offenses but merely indicating various circumstances in which the elements of Article 134, UCMJ, could be met." Id. The President's enumerated offenses under Article 134, UCMJ, are persuasive authority for the courts and "offer[] guidance to judge advocates under his command regarding potential violations of the article." Id. Historically, "to determine the elements" of an Article 134, UCMJ, offense, this Court looks "at both the statute and the President's explanation in MCM pt. IV. . ." United States v. Zachary, 63 M.J. 438, 441 (C.A.A.F. 2006).

Article 134, UCMJ, Child Endangerment

The President provided these elements for child endangerment:

> (1) That the accused had a duty for the care of a certain child;
>
> (2) That the child was under the age of 16 years;
>
> (3) That the accused endangered the child's mental or physical health, safety, or welfare through design or ***culpable negligence***; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, pt. IV ¶ 68a.b. (2016 ed.) (emphasis added); Exec. Order No. 13447, 28 September 2007. The President then 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, even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

MCM, part IV, ¶ 68a.c.(3) (2016 ed.); Exec. Order No. 13447.

Acceptance of a Guilty Plea

In reviewing the providence of a plea, a military judge abuses her discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[A]ppellant bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." Phillips, 74 M.J. at 21-22 (citation omitted).

Analysis

A. Child endangerment contains a presidentially promulgated mens rea of culpable negligence that is supported by this Court's precedent and military custom.

Congress may enact criminal laws when reasonably related to its enumerated powers. U.S. CONSTITUTION, art. I, § 8. Generally, Congress may choose the mens rea they deem appropriate for certain conduct when they are criminalizing behavior. Thus, Congress may lawfully and constitutionally establish a crime with a mens rea lower than culpable negligence like strict liability or simple negligence. *See* Congressional Research Service, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, R46836, Michael A. Foster (7 July

2021)[3]. Then "courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense." United States v. Bailey, 444 U.S. 394, 406 (1980).

The statutory "text of Article 134, UCMJ, does not explicitly contain a mens rea requirement." Tucker, 78 M.J. at 185. Because the statute is silent on mens rea, this Court looks to see if a statute, precedent, custom, or ancient usage supports the appropriate mens rea. Tucker, 78 M.J. at 185-186. In this case, this Court should look to the language of the presidentially enumerated offense of child endangerment, military custom, judicial concurrence, and congressional intent.

Appellant argues "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." (App. Br. 13). Appellant's argument fails for three reasons: (1) the President enumerated culpable negligence as the required mens rea for child endangerment; (2) 30 years of military custom and 20 years of this Court's precedent support culpable negligence as the appropriate mens rea for child endangerment; and (3) Elonis and its progeny did not establish recklessness as the default mens rea for criminal offenses.

[3] https://crsreports.congress.gov/product/pdf/R/R46836

1. *The President enumerated culpable negligence as an appropriate mens rea for child endangerment, and his elements and definitions are persuasive authority.*

First, the President's explanation of Article 134 in Part IV of the Manual is persuasive authority to determine the mens rea for child endangerment "which is necessary to separate wrongful conduct from otherwise innocent conduct." Zachary, 63 M.J. at 441; Elonis, 575 U.S. at 736. Congress authorized the President to enumerate examples of violations of Article 134, UMCJ, and the President operated within that power when he determined culpable negligence was the appropriate mens rea for child endangerment. As the executive officer tasked with securing the "exact effect intended by [Congress'] acts of legislation," the President specified culpable negligence as the appropriate mens rea for child endangerment. J. W. Hampton, Jr., & Co., 276 U.S. at 406; MCM, pt. IV ¶ 68a.b. (2016 ed.).

But the President did not decide the appropriate mens rea for child endangerment in a vacuum, he considered this Court's child neglect precedent in Vaughan, 58 M.J. 29. In Vaughan, appellant left her 47-day-old daughter unattended in a crib for six hours while appellant went to a club 90 minutes away. Vaughan, 58 M.J. at 30. Appellant was charged with child neglect by culpable negligence, a novel offense under Article 134, UCMJ, that was not presidentially enumerated then. Id. The military judge defined the elements of child neglect

without specifying her sources. Id. at 35. Appellant argued she was not provided fair notice of the offense. Id. This Court disagreed with appellant and determined military case law on child neglect (though "scant" in 2003), state law, and military custom provided sufficient notice that child neglect via culpable negligence without actual harm to a child was a viable offense under Article 134, UMCJ. Id. at 31-33.

When the Manual incorporated Executive Order No. 13447 in 2008, the Analysis of Punitive Articles section of the 2008 Manual explained:

> 2007 Amendment. This offense is new to the Manual for Courts Martial. Child neglect was recognized in United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003). It is based on military custom and regulation as well as a majority of state statutes and captures the essence of child neglect, endangerment, and abuse.

MCM, Appendix 23-22, ¶ 68a. (2016 ed.). The Analysis explicitly stated that the President based the offense's elements on this Court's precedent in Vaughan, military custom, regulation, and state statutes. Id. Appellant has offered no authority to suggest that the President cannot enumerate an offense under Article 134 that has a mens rea of culpable negligence, especially where the President bases the choice of mens rea on military custom and state law. This Court should therefore follow the President's highly persuasive enumerated elements and uphold culpable negligence as an acceptable mens rea for child endangerment.

2. *This Court's 20-year-old precedent in Vaughan established culpable negligence as an appropriate mens rea for child neglect and child endangerment, and this Court continues to affirm that precedent.*

Second, Appellant's argument ignores 20 years of this Court's legal precedent and more than 30 years of military custom. *See* Vaughan, 58 M.J. 29. This Court should not ignore its well-established precedent. Vaughan focused on whether the military judge's use of culpable negligence as the requisite mens rea was correct. Id. at 34- 35. The Vaughan Court held it was:

> In our view, the elements [the military judge] listed capture the essence of "child neglect" as reflected in military custom and regulation as well as a majority of state statutes. The military judge correctly determined that child neglect requires culpable negligence and not just simple negligence.

Id. at 35.

When this Court decided Vaughan, 34 states criminalized child neglect due to a lack of due care and regardless of actual harm to the child, and the state statutes provided constructive notice of child neglect. 58 M.J. at 32. As of the date of this filing, approximately 21 states criminalize child neglect or child endangerment due to culpable or criminal negligence. After discussing state law, the Vaughan Court relied on Parker v. Levy, in which the Supreme Court recognized that "less formalized custom and usage" may further define the scope of conduct proscribed by Article 134. 417 U.S. 733, 754 (1974). Vaughan recognized the military custom "of protecting dependents from harm"

demonstrated by several Department of Defense regulations, noting that "[d]ependents are an integral part of the specialized military community." 58 M.J. at 32. As the source of military custom, this Court cited to Department of Defense Family Advocacy Program regulations from 1989 and 1992. Id. at 32-33. But Appellant's brief ignores the 30 years of military custom associated with child neglect and child endangerment cases. Appellant's brief only cites Vaughan once, and he does not mention the Manual's analysis of Article 134's child endangerment offense, both these sources highlight that the offense is based on military custom. MCM, Appendix 23-22, ¶ 68a. (2016 ed.).

Since Vaughan, culpable negligence has remained the established mens rea for child endangerment offenses. In United States v. Norman, this Court determined the appellant's conviction for child endangerment by culpable negligence was legally sufficient when the only testimony offered to prove its service discrediting nature was admitted in error. 74 M.J. 144, 146 (C.A.A.F. 2015). Although the mens rea was not at issue in Norman, the Court explicitly stated culpable negligence was an element of child endangerment under Article 134. Id. at 148. In United States v. Plant, this Court determined no rational trier of fact could have found beyond a reasonable doubt that appellant's actions, either through design or culpable negligence, led to a reasonable probability that the child

would be harmed. 74 M.J. 297 (C.A.A.F. 2015). This Court reiterated once that culpable negligence was an acceptable mens rea for child endangerment.

Appellant claims no post-Elonis precedent exists affirming culpable negligence as the required mens rea. (App. Br. at 13). But Appellant's argument disregards this Court's precedent in Plant decided a month and a half after Elonis. 74 M.J. 297. In Plant, this Court analyzed the legal sufficiency of a child endangerment offense and laid out the offense's elements, including the third element at issue in the case: "[t]hat the accused endangered the child's mental or physical health, safety, or welfare through design or ***culpable negligence***." Id. at 299 (emphasis added). This Court would have known of the Elonis decision when writing Plant. But the fact this Court did not to use Elonis to apply a different mens rea was proper, because the President's enumerated elements and definitions, precedent, and military custom established culpable negligence as the appropriate mens rea for child endangerment.

What is more, Congress has now weighed in on the appropriate mens rea for child endangerment and concurred that child endangerment requires culpable negligence. In December 2016, before Appellant's misconduct against his daughter, Congress passed the Military Justice Act of 2016, which codified child endangerment as an offense under Article 119b, UCMJ. Article 119b states culpable negligence is needed to commit the offense. 10 U.S.C. § 919b (2019 ed.).

Although the statute was not effective at the time of Appellant's offenses, Congress passed the Military Justice Act of 2016 before Appellant committed the offenses charged in this case. National Defense Authorization Act for Fiscal Year 2017, 114 P.L. 328, 130 Stat. 2000, 2016 Enacted S. 2943, 114 Enacted S. 2943. Congress concurred with this Court that culpable negligence was a proper mens rea for a child endangerment offense.

This Court should follow 20 years of its own legal precedent and over 30 years of military custom establishing culpable negligence as the appropriate mens rea for child endangerment. This Court should also be confident in affirming culpable negligence as an appropriate mens rea because Congress followed this Court's lead and codified child endangerment by culpable negligence as an offense under the UCMJ.

3. Elonis and Tucker did not establish recklessness as the default mens rea for Article 134, UCMJ offenses.

Third, neither Elonis nor Tucker established recklessness as the default mens rea for criminal offenses, as Appellant suggests. (App. Br. 12). The facts of Elonis and Tucker are distinguishable from this case. The statutes at issue in both Elonis and Tucker were silent on mens rea, but here the President provided culpable negligence as a possible mens rea for child endangerment. 575 U.S. at 740; 78 M.J. at 185. The government charged simple negligence, not culpable negligence. Elonis 575 U.S. at 737; Tucker 78 M.J. at 184. The Supreme Court in

Elonis did not prohibit the use of simple negligence as a criminal mens rea but decided simple negligence should not be inferred if the statute was silent on mens rea. Elonis, 575 U.S. at 736. This Court in Tucker stated:

> To be clear, we are not holding that negligence can never be a mens rea for an Article 134, UCMJ, offense. We simply hold that negligence is an insufficient mens rea with respect to this particular Article 134, UCMJ, offense of providing alcohol to minors.

78 M.J. at 186, n. 3 (internal citations omitted).

Appellant seems to use negligence and culpable negligence interchangeably to argue that negligence is the wrong mens rea for child endangerment. But this Court should not apply Elonis to this case because simple negligence is not at issue. Culpable negligence – a higher standard – is at issue. Negligence, also known as simple negligence, is "[T]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." Negligence, BLACK'S LAW DICTIONARY (11th ed. 2019). But culpable negligence requires more; it is "a degree of carelessness greater than simple negligence." MCM, part IV, ¶ 68a.c.(3) (2016 ed.) (emphasis added). Culpable negligence "is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." MCM, part IV, ¶ 68a.c.(3) (2016 ed.); Exec. Order No. 13447.

Appellant argues recklessness is the baseline mens rea required by Elonis. (App. Br. at 12). But Justice Alito highlighted that the Elonis majority did not articulate a default mens rea when he wrote, "Would *recklessness* suffice? The Court declines to say." Elonis, 575 U.S. at 742 (Alito, J., dissenting) (emphasis in original). The Court said simple negligence cannot be inferred but did not even require a baseline of recklessness for offenses silent on mens rea. Id. at 741. This Court should not read Elonis so broadly as to require recklessness in this case.

Appellant then turns to Tucker for the proposition that recklessness is the default mens rea for all Article 134 offenses. (App. Br. at 12). But this interpretation of the case is again too broad. This Court disagreed with the government's argument for simple negligence in Tucker because it "failed to identify any statute, precedent, custom, or ancient usage that would cause us to conclude that negligence is the proper standard for the Article 134, UCMJ, offense of providing alcohol to minors." 78 M.J. at 186. As in Elonis, this Court's decision in Tucker did not broadly proclaim recklessness as the requisite mens rea for all Article 134 offenses *only* for providing alcohol to underage individuals. Id. at 186, n. 3. This Court should continue to narrowly interpret Tucker and interpret the requisite mens rea for Article 134, UCMJ on an offense-by-offense basis.

This Court has found no issue in affirming cases involving the culpable negligence mens rea for child neglect and child endangerment offenses for nearly

20 years. Whereas in Tucker this Court was left to "infer a mens rea requirement," no such inference is needed in this case, since the President has articulated a mens rea of culpable negligence, and this Court in Vaughan properly found culpable negligence was the suitable mens rea for child neglect and endangerment offenses.

Appellant also points to United States v. Haverty, in which this Court held "the minimum mens rea that is required for *this* Article 92, UCMJ, offense is recklessness." 76 M.J. 199, 201 (C.A.A.F. 2017) (emphasis added). The appellant challenged his conviction for violating a hazing regulation issued by the Secretary of the Army that was silent on mens rea. Id. But once again, no precedent or military custom existed to support a mens rea lower than recklessness in Haverty, and the regulation at issue was amended before this Court decided the case. But here we have precedent and military custom supporting culpable negligence as an appropriate mens rea for child endangerment.

This Court need not change the mens rea for child endangerment to recklessness after Elonis, and this Court should not consider doing so.

B. This Court should not overturn precedent that culpable negligence is an appropriate mens rea for child endangerment.

The doctrine of stare decisis is "the preferred course because it promotes the even handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003)

(citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)). Appellant implies this Court should ignore 20 years of jurisprudence and overturn the long-standing precedent that culpable negligence is a viable and correct mens rea for a child neglect and child endangerment offense. But Appellant does not address the stare decisis factors or explain why Vaughan, Norman, and Plant were wrongly decided and should be overturned. This Court should decline Appellant's implicit invitation to overrule 20 years of jurisprudence and maintain its well-established precedent.

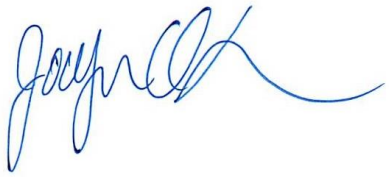
C. Appellant's guilty plea is provident because the military judge followed this Court's precedent and the President's elements and definitions.

Finally, Appellant argues that "the military judge erred by instructing Appellant on a culpable negligence mens rea during the Care inquiry." (App. Br. at 14). The military judge did not abuse her discretion. In reviewing the providence of a plea, a military judge abuses her discretion *only* when there is "a substantial basis in law and fact for questioning the guilty plea." Inabinette, 66 M.J. at 322. No such basis exists here. The military judge followed 20 years of legal precedent established by this Court and provided the persuasive Presidentially promulgated definition of culpable negligence to Appellant. (JA at 38, 48, 55). Then the military judge walked Appellant through every element of the offense, and Appellant articulated why he was guilty of each element and ultimately each specification. (JA at 36, 49-44. 49-50, 54-60).

Appellant has not pointed to any legal or factual error made by the military judge. He simply argued the military judge erred when she instructed Appellant on the element of the culpable negligence. (App. Br. at 14). But that element was reaffirmed again and again by this Court and the President. Thus, Appellant failed to meet his burden to establish "that the record shows a substantial basis in law or fact to question the plea." Phillips, 74 M.J. at 21-22. Appellant's pleas to three specifications of child endangerment of his toddler daughter were provident, and the military judge did not abuse her discretion in concluding that the plea was provident.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court uphold 20 years of jurisprudence and maintain culpable negligence as an acceptable mens rea for the offense of child endangerment under the 2016 version of Article 134, UCMJ. This Court should deny Appellant's claims.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and appellate defense counsel being served via email to jarett.merk@us.af.mil on 16 October 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because:

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(Appellee) Dated: 16 October 2023