**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES<br>Appellee<br><br>v.<br><br>Sergeant First Class (E–7)<br>**JOSEPH A. SANTIAGO**<br>United States Army<br>Appellant | SUPPLEMENT TO PETITION FOR GRANT OF REVIEW<br><br><br><br>Crim. App. Dkt. No. 20230419<br><br>USCA Dkt. No. 26–0114/AR |

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

## Issues Presented

**I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE INTRODUCTION OF IMPROPER HEARSAY UNDER THE "FORFEITURE BY WRONGDOING" EXCEPTION PURSUANT TO *GILES V. CALIFORNIA.***

**II. WHETHER THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER CONSTITUTED REVERSABLE ERROR.**

## Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2018).[1]

## Statement of the Case

On August 1, 2023, a general court-martial consisting of a panel of officers convicted Appellant, contrary to his pleas, of one specification of murder and one specification of injuring an unborn child in violation of Articles 118 and 119a, UCMJ, 10 U.S.C. §§ 918 and 919a (2018). (Charge Sheet; R. at 3147).[2]

On August 2, 2023, the military judge sentenced Appellant to be confined for life with the eligibility for parole for the specification and charge of murder, to run concurrently with the six-month sentence for the specification and charge of injuring of an unborn child, to be reduced to the grade of E–1, and to receive a dishonorable discharge. (R. at 3235). On September 11, 2023, the convening authority approved the findings and sentence. (Action). The military judge entered judgment on September 18, 2023. (Judgment of the Court).

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[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in Appendix D.
[2] The court–martial acquitted Appellant of two specifications of domestic violence (Article 128b, UCMJ).

On December 5, 2025, the Army Court affirmed the findings and sentence. *United States v. Santiago*, ARMY 20230419, 2025 CCA LEXIS 564 (A. Ct. Crim. App. Dec. 5, 2025) (contained in App'x A). Appellant was notified of the Army Court's decision. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, on February 2, 2026, the undersigned appellate defense counsel filed a Petition for Grant of Review, while seeking leave to file the Supplement to the Petition for Grant of Review separately. Appellant filed two additional motions for extension of time. This Court granted appellant's motions, granting until March 31, 2026, to file the Supplement. The undersigned counsel hereby file the Supplement to the Petition for Grant of Review under Rule 21.

**Reasons to Grant Review**

The Army Court's summary affirming Appellant's case both sanctioned a departure from accepted court-martial practice and let stand a question of law this Court has yet to address. This Court should grant Appellant's petition pursuant to this Court's internal Rule 21(b)(5)(A) and (F).

The Government was erroneously allowed to introduce hearsay under the forfeiture by wrongdoing exception.[3] This Court should take the opportunity to provide guidance to trial practitioners as to this narrow and complex exception.

[3] The military judge originally denied the Government's motion to admit the hearsay, but the Army Court granted the Government's Article 62 appeal. *United States v. Santiago*, 2023 CCA LEXIS 194 (A. Ct. Crim. App., May 3, 2023),

Further, the military judge declined to provide an instruction on involuntary manslaughter – a lesser included offense of murder. The Army Court's summary affirmance let stand this erroneous view of the law. This issue was not waived and the lack of proper instruction prejudiced Appellant.

## Issues Presented

**I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE INTRODUCTION OF IMPROPER HEARSAY UNDER THE "FORFEITURE BY WRONGDOING" EXCEPTION PURSUANT TO *GILES V. CALIFORNIA.***

## Facts Relevant to Issue Presented

On the eve of trial, the Government informed the defense and the military judge it intended to offer 1) text messages between Mrs. MS and her paramour and 2) messages/emails between Mrs. MS and her mother. (App. Ex. XXXII). In these messages, Mrs. MS accused Appellant of domestic violence, and sent pictures of herself with black eyes she alleged were because of Appellant. She also claimed Appellant stated he would kill her if she ever called the police. (App. Ex. XXXII; Pros. Exs. 73, 95–98). The defense objected on confrontation and hearsay grounds. (R. at 694). The Government argued the messages were admissible

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holding the military judge abused his discretion because it disagreed with the weight the military judge placed on Appellant's attempt to save his wife's life after she became unconscious. *Id.* at *9.

under the forfeiture by wrongdoing exception to hearsay under Military Rule of Evidence [M.R.E.] 804(b)(6). (App. Ex. XXXII).

The military judge issued his written ruling on January 28, 2023, sustaining the defense objection. (App. Ex. XXXVI). The Government appealed the military judge's ruling pursuant to Article 62, UCMJ. (App. Ex. XXXVII).

On May 3, 2023, the Army Court vacated the military judge's ruling and returned the case to the military judge for action consistent with the Army Court's decision. *Santiago,* 2023 CCA LEXIS 194, at *10 (App'x B). The Army Court held the military judge abused his discretion when he barred Mrs. MS's messages from being introduced. *Id.* at *10. The Army Court found *Giles v. California* supported its findings that the military judge did not conduct a full analysis of M.R.E. 804 and that he did not fully consider one of the Government's arguments. *Id.* at *7–10 (citing *United States v. Giles,* 554 U.S. 353 (2008)).

Upon return of the case to the trial court, a new military judge had been assigned. The defense again raised the same objections. (R. at 714). The military judge overruled the defense's objection and allowed the Government to introduce Mrs. MS's messages under the MRE 804(d)(6) exception to hearsay. (R. at 891; App. Ex. LXXIII).

## Standard of Review

"A military judge's decision to admit evidence is reviewed for an abuse of discretion." *United States v. Ayala,* 81 M.J. 25, 27 (C.A.A.F. 2021) (citing *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). "'A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.'" *Id.* at 27–28 (quoting *Frost*, 104 M.J. at 109).

If this Court finds error, it then determines prejudice. The Government "'bears the burden of demonstrating that the admission of erroneous evidence is harmless.'" *Frost,* 79 M.J. at 111 (quoting *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014)). "'For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings.'" *Id.* (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)).

"'In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *Id.* (quoting *Kohlbeck,* 78 M.J. at 334).

**Law**

"As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts-martial." *Ayala,* 81 M.J. at 28; M.R.E. 801, 802. Military Rule of Evidence 804(b)(6), commonly referred to as the "forfeiture by wrongdoing exception," provides a narrow exception to the general rule against hearsay if the statement is offered "against a party that 1) wrongfully caused…the declarant's unavailability as a witness, and 2) did so intending that result." *See Giles,* 554 U.S. at 367.

In *Giles,* the Supreme Court addressed the forfeiture by wrongdoing exception as it applied to domestic violence cases. Giles was alleged to have shot his ex-girlfriend. The Court focused on the "requirement of intent" and found the "'exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'" 554 U.S. at 367 (quoting C. Mueller & L. Kirkpatrick, Federal Evidence, § 8:134, p 235 (3d ed. 2007)). If the accused had no intent to keep the witness from testifying, the testimony was inadmissible per the Confrontation Clause under *Crawford v. Washington* (541 U.S. 36 (2004)). *Id.* at 375–76.

The Court addressed the dissent, which complained the majority opinion ignored domestic abuse cases. *Giles*, 554 U.S. at 376. "Is the suggestion that we should have one Confrontation Clause for all other crimes, but a special,

improvised, Confrontation Clause for those crimes directed against women?" *Id.* The Court observed that lawmakers may combat domestic violence through many means, but "abridging the constitutional rights of criminal defendants is not in the State's arsenal." *Id.*

The Court noted the "domestic-violence context" could be relevant to show the intent of a murder "was to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution, and the state court was free to consider if that was the case in *Giles* on remand. *Id.* at 377.

In *United States v. Becker*, 81 M.J. 483 (C.A.A.F. 2021), this Court reviewed a decision by the Navy-Marine Corps Court of Criminal Appeals reversing a military judge's decision to not admit hearsay through the forfeiture by wrongdoing exception. *Id.* at 485. Two years before her murder, Becker's wife made claims, which she followed up with a police report, that Becker had assaulted her because of her infidelity. *Id.* The military judge hearing Becker's case twice denied the Government's motion to admit statements via the forfeiture by wrongdoing exception, and the Government twice appealed. *Id.* at 486.

The Navy-Marine Corps Court twice found the military judge abused his discretion. After the two separate findings, Becker appealed to this Court, claiming the Navy-Marine Court erred. This Court agreed. 81 M.J. at 490. This Court found the military judge did not abuse his discretion, but rather the service

court erred because it conducted its *Giles* analysis based on its own set of facts, and not those found by the military judge. *Id.*

## Argument

Improper hearsay testimony was admitted under the forfeiture by wrongdoing exception. The Government did not prove by a preponderance of the evidence that Appellant had the intent to render Mrs. MS unavailable to testify. The erroneous introduction of this evidence had a substantial influence on the findings, was not harmless, and mandates reversal of Appellant's conviction.

### A. The Government Did Not Prove Appellant Had the Intent to Make Mrs. MS Unavailable to Testify.

The military judge's original ruling was correct. "The Government has not met its burden to show that the alleged assault by the Accused was undertaken with the intent of preventing [Mrs. MS] from providing evidence against him." (App. Ex. XXXVI). The military judge correctly "considered all evidence submitted in support of all motions," cited to the correct case law including *Giles* and *Crawford*, and determined the Government had not proved by a preponderance of the evidence that Appellant intended to make Mrs. MS unavailable to testify. This was not an abuse of discretion. (App. Ex. XXXVI). And yet the Army Court vacated the military judge's decision on interlocutory appeal. (App'x B).[4]

[4] Appellant did not appeal the Army Court's decision. Appellant raises ineffective assistance of counsel in his *Grostefon* matters for this error.

When the case was returned to the trial court, a new military judge had been assigned. No manifestly new evidence was introduced. The Government's theory did not change. And yet the messages were allowed to be introduced. This was error.

*Giles* only invited the lower court in that case to consider an accused's intent to keep a victim from testifying. But that invitation was neither a requirement nor meant to be interpreted—as the Army Court appeared to do—as determination that forfeiture by wrongdoing applied in every domestic violence case. The Government did not meet its burden to show that Appellant intended to keep Mrs. MS from testifying against him. As the original military judge found, the government did not provide evidence that Appellant ever formed the intent to keep Mrs. MS from reporting him on the night in question. There was susceptible proof that Appellant killed Mrs. MS, even less he sought to silence her. For example, one of the government's proffered theories—that Appellant found out she was speaking to another man—cuts against an intent to keep her quiet. Rather, it suggests anger and jealousy, neither of which lend themselves to an intent to keep Mrs. MS from reporting Appellant.

Indeed, the evidence showed Mrs. MS engaged with her family, Appellant's family, and neighbors regularly. Even if prior domestic violence occurred, this alone does not allow the introduction of hearsay without the Government

establishing by a preponderance of the evidence that he murdered, even assaulted his wife, to keep her from reporting his actions to authorities. Rather, as the original military judge found, it was a factor to consider, not dispositive.

**B. The Military Judge's Findings of Fact Were Incorrect and Internally Inconsistent.**

In the "Wrongful Causation" section of his ruling, the military judge found that Appellant "hit her in the chest, rendering her unconscious—a state from which she never recovered." (LXXIII, p. 3). Yet only several bullet points later, the military judge found, "The accused then knew that she was impaired by alcohol and may have passed out from drinking alcohol." (LXXIII, p. 4). These findings are internally inconsistent and of great import. One suggests Appellant hit her so hard Mrs. MS lost consciousness *because of* his actions. One suggests Appellant found Mrs. MS to be passed out from alcohol – a state she had been in many times before. The military judge did not reconcile these two distinct findings.

The military judge also makes leaps of logic not supported by the evidence. As the government did not present additional evidence—and none was presented at the first hearing—it was left unproven that Appellant both hit Mrs. MS in the chest *and* this hit caused her to lose consciousness. Indeed, this theory was also not proven at trial, as the stopping of one's heart leads to death, not being unconscious. While there is evidence through Appellant's Google searches that he hit Mrs. MS

in the chest, it does not lend itself to the finding that this sole hit was the proximate cause of her death.

The military judge also discussed Mrs. MS's high blood alcohol concentration, but dismissed it as an issue for a fact finder to consider. This is error. Her passing out from alcohol consumption—as the military judge had previously found had occurred—points to Appellant's negligence in failing to assist her. It cuts against any theory that suggests Appellant killed her, let alone did so with the intent to keep her from reporting him. Again, the military judge failed to reconcile these findings, but rather dismissed key facts that disproved the Government's proffered theories.

The Army Court and the trial judge abused their discretion in allowing messages containing prejudicial hearsay to be introduced. The introduction of the messages had an outsized impact on the trial, allowing the Government to argue multiple theories while painting Appellant as an abuser, a feat the Government could not have otherwise accomplished based on the relative lack of inculpatory evidence. The introduction of the messages was error and it prejudiced Appellant.

Further, this case presents this Court with the opportunity to address the forfeiture by wrongdoing exception to hearsay and provide guidance as to the circumstances in which this narrow exception applies.

## II. WHETHER THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER CONSTITUTED REVERSABLE ERROR.

### Facts Relevant to Issue Presented

### A. The Events That Led to Mrs. MS's Death.

The evening of September 27, 2021, Appellant returned home from work around 1634. (R. at 2029). At some point during the next three hours, Mrs. MS, Appellant's wife, lost consciousness. Appellant, unsure of the nature of her incapacitation, tried multiple ways to wake her, which included burning her hand with a lighter. (R. at 2138–39). At the hospital, doctors noted that Mrs. MS had a "constellation" of injuries, the most severe of which was a brain hemorrhage (though she had no skull fracture). (R. at 2354, 2654). Doctors deemed the hemorrhage was not survivable. (R. at 2442). Ultimately, Mrs. MS's mother made the decision to take Mrs. MS off life support on October 6, 2021, and she passed away. (R. at 2354).

### B. The Government Argued Multiple Theories at Trial.

The Government was unsure what caused Mrs. MS's injuries. The Government argued multiple, competing theories as to what occurred over those three hours on September 27. One theory was that Appellant punched Mrs. MS in the chest which caused her heart to stop. This theory was based on Appellant's Google searches such as "hit in chest but not responding," "hit hard in chest and

passed out," and "how to tell if someone is faking unconsciousness." (Pros. Ex. 19). Appellant had no injuries to his hands. (Def. Exs. FF, KK, OO, PP, QQ, TT, YY, VV). Nor did the Government present evidence that a punch to her chest stopped Mrs. MS's heart.

The Government also theorized that Appellant beat Mrs. MS with a broom to "teach her a lesson" because she was highly intoxicated. (R. at 2981–82).

In addition to the multiple theories of how Appellant allegedly killed his wife, the Government also argued multiple theories as to why he would do so. The multiple theories focused on why he might have intentionally killed her, but if the panel was "not on board with" Appellant intentionally murdering Mrs. MS, the Government also argued a theory of prior abuse that culminated in her death. (R. at 2978).

For instance, one theory was that Appellant was in a rage because he found out Mrs. MS had a paramour. (R. at 2399). Another theory was that Appellant was angry because Mrs. MS had secured employment in Florida and was going to leave. (R. at 2343). Both theories implied Appellant reacted violently to a provocation. A third theory argued no provocation and no intent to kill, but rather that he abused Mrs. MS to "teach her a lesson" about her heavy drinking. (R. at 2981). The Government never argued Appellant murdered his wife to silence her or to prevent her from reporting his abuse of her to authorities.

### C. The Military Judge Informed Counsel That He Believed Involuntary Manslaughter Was Not a Lesser Included Offense of Murder.

Prior to closing arguments, the parties discussed final instructions in a Rule for Courts-Martial [R.C.M.] 802 conference, but that full discussion was not placed on the record. The only discussion as to involuntary manslaughter was that, at the time, "Government was leaning toward asking for an instruction on involuntary manslaughter. At the same time, the defense was leaning against such an instruction." (R. at 2940). No further discussion whether to include an instruction on involuntary manslaughter as a lesser included offense occurred on the record. As the military judge stated, "I just find that it's not required to put on the record exactly how we reached certain things." (R. at 2939).

However, in post-trial submissions pursuant to R.C.M. 1106, trial defense counsel stated that the military judge had informed the parties that "the bench book did not authorize the lesser included offense of involuntary manslaughter" as a lesser included offense of murder. (App'x C, p. 3). Defense counsel asserted this was "an abuse of discretion" and had the military judge applied the correct case law, he would have properly instructed on involuntary manslaughter. *Id.* Further, this error "prejudiced" Appellant because it "stripped [him] of his right to a fair trial." *Id.* Defense stated that had the instruction been given, the trial "would have had a different result." *Id.*

After a short colloquy about instructions, the defense affirmatively declined instruction as to voluntary manslaughter and any other instruction on "lesser-included offenses or any other defense." (R. at 2942).

**Standard of Review**

"Whether a required instruction on findings contained within R.C.M. 920(e) is reasonably raised by the evidence is a question of law that [this Court] reviews de novo." *United States v. Davis,* 76 M.J. 224, 229 (C.A.A.F. 2017) (citing *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014)) (internal quotations omitted). "The question of whether a jury was properly instructed [is] a question of law, and thus, review is de novo." *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (citation omitted). "Whether the error is harmless beyond a reasonable doubt is a question of law that [this Court] reviews de novo." *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004).

If an accused "fails to preserve the instructional error by an adequate objection or request, [this Court] tests for plain error." *Davis*, 76 M.J. at 229 (citing R.C.M. 920(f); *United States v. Johnson*, 520 U.S. 461, 468-69 (1997) (reviewing instructional error for "plain error" where no objection was made at trial); *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). "Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially

prejudiced a substantial right of the accused." *Id.* at 230. (internal quotations omitted).

**Law**

Article 79(a), UCMJ, allows an accused to be found guilty of a lesser included offense [LIO], and Article 79(b) defines a "lesser included offense" as meaning either "(1) an offense that is necessarily included in the offense charged or (2) any lesser included offense so designated by regulation prescribed by the President."

Unpremeditated murder has four elements: (1) a death; (2) that the accused caused the death by an act or omission; (3) the killing was unlawful; and (4) at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person. Article 118, UCMJ; MCM, Part IV, ¶ 56.b.(2).

Involuntary manslaughter similarly has four elements, but the intent element differs: (1) a death; (2) that the accused caused the death by an act or omission; (3) the killing was unlawful; and (4) that this act or omission constituted culpable negligence. Article 119a, UCMJ; MCM, Part IV, ¶ 57.b.(2).

Though not Presidentially prescribed, this Court has held involuntary manslaughter is a lesser included offense of unpremeditated murder.[5] *United*

[5] Dep't of the Army, Pam. 27–9, Legal Services: Military Judges' Benchbook, para. 3A-42-2 (Feb. 29, 2020) [Benchbook], only lists voluntary manslaughter as a

*States v. Dalton,* 71 M.J. 632, 633 (N.M. Ct. Crim. App. 2012) (aff. without op. by C.A.A.F., 72 M.J. 446, n. 1 (C.A.A.F. 2013) ("We agree with the Court of Criminal Appeals that involuntary manslaughter under Article 119(b)(1)…is a lesser included offense of unpremeditated murder under Article 118(2), UCMJ…."). "The physical act and gravamen of the crimes, unlawfully causing the death of another, are the same. The difference in [unpremeditated murder] and [involuntary manslaughter] lies in the degree of culpability assigned to the appellant…." 71 M.J. at 634. "While the murderer intends the consequence of death, the culpably negligent killer makes his act or omission without regard to its potential lethality." *Id.*

Federal civilian courts hold that involuntary manslaughter is a lesser included offense of unpremeditated murder. For example, the Ninth Circuit affirmed the requirement to instruct on involuntary manslaughter if any reasonable version of the evidence would give rise to the lesser included offense. "We have observed that in a homicide case, 'if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter instruction must be given.'" *United States v. Crowe*, 563 F.3d 969, 973–74 (9th Cir. 2009) (quoting

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lesser included offense of unpremeditated murder. It does not address involuntary manslaughter.

*United States v. Anderson*, 201 F.3d 1145, 1150 (9th Cir. 2000)); *see also United States v. Brown*, 287 F.3d 965, 975 (10th Cir. 2002); *United States v. Browner*, 889 F.2d 549, 552 (5th Cir. 1989).

Rule for Courts-Martial 920(e)(2) requires a military judge to instruct the members on the "description of the elements of each lesser included offense in issue[.]" If an accused fails to object to the omission of an instruction, the Rules for Courts-Martial presume forfeiture—not waiver. R.C.M. 920(f).

**Argument**

The military judge erred when he failed to instruct the members on involuntary manslaughter. Appellant did not waive the instruction because the military judge foreclosed defense's ability to seek instruction on involuntary manslaughter. Therefore, Appellant could not affirmatively or intelligently waive the issue because the military judge erroneously informed counsel involuntary manslaughter was not a lesser included offense and he would not provide the instruction. This error was prejudicial and mandates reversal.

**A. The Military Judge Had a Sua Sponte Duty to Instruct on Involuntary Manslaughter. He Failed to Do So.**

At trial, the Government argued numerous theories as to both how and why Appellant killed his wife. At least one of the theories—that he beat Mrs. MS to "teach her a lesson"—does not implicate an intent to murder. Rather, it implicates an indifference to Mrs. MS's injuries. Had Appellant hit Mrs. MS and caused her to lose consciousness, he was negligent in not seeking immediate assistance, but negligence does not evince an intent to murder. "While the murderer intends the consequence of death, the culpably negligent killer makes his act or omission without regard to its potential lethality." *Dalton*, 71 M.J. at 634. The Government's own theories raise the possibility of involuntary manslaughter.

"A military judge has a sua sponte duty to instruct the members on lesser included offenses reasonably raised by the evidence." *United States v. Upham,* 66 M.J. 83, 87 (C.A.A.F. 2008) (citing *United States v. Miergrimado,* 66 M.J. 34, 36 (C.A.A.F. 2016)); *see also United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) ("Military judges *must* instruct the members on LIOs reasonably raised by the evidence.") (emphasis added). This duty is enumerated in R.C.M. 920(e)(2), which requires military judges to instruct on "the elements of each lesser included offense in issue."

This Court's precedent has established involuntary manslaughter as a lesser included offense of unpremeditated murder. This precedent was manifest well

before Appellant's court-martial. A look at case law would have disabused him of the notion that involuntary manslaughter was not a lesser included offense. This was plain error.

When this Court has declined to find error for omitted instructions, it has done so for cases where there is "not an iota of evidence" that would implicate the lesser offense. *Davis,* 76 M.J. at 230. Here, Appellant's intent was central to the case, and the Government acknowledged the lesser included offense was at play because it was "leaning" towards requesting the instruction. However, the error does not stem from a battle of whether an iota of evidence was present. Rather, the error is the military judge's declaration that involuntary manslaughter was not a lesser included offense and his declination to properly instruct the panel.

If Appellant intended to injure but was careless to the injury's "potential lethality," he is guilty of involuntary manslaughter—not murder. Appellant's culpable negligence is further evidenced by his attempts to wake Mrs. MS and figure out why she may have lost consciousness. The Government argued multiple theories and if the panel had been given the ability to consider the proper lesser included offenses, a different result was likely.

Based on the evidence brought forth during trial, and certainly based on counsels' arguments, whether Appellant had the intent to kill was *the* central issue. The panel should have been instructed on involuntary manslaughter as a lesser

included offense. The military judge had a sua sponte duty to provide such an instruction whether a party was "leaning toward" it or not. He failed to do so. This was prejudicial error.

**B. The Military Judge Foreclosed Appellant's Ability to Intentionally Waive.**

"An 'express' waiver occurs when there is 'the 'intentional relinquishment or abandonment of a known right.'" *United States v. Malone,* 2026 CAAF LEXIS 26, at *9 (C.A.A.F. 2026) (quoting *United States v. Gladue,* 67 M.J. 311, 313 (C.A.A.F. 2009); *United States v. Olano*, 507 U.S. 725, 733 (1993)). However, the failure to raise an objection is presumed to be forfeiture, "absent an affirmative waiver." *Id.* at *7 (quoting R.C.M. 905(e)). "'The determination of whether there has been an intelligent waiver…must depend, in each case, upon the particular facts and circumstances surrounding that case.'" *Id.* at *10 (quoting *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014)).

This was a contested court-martial that took two years to come to trial. The trial itself spanned two weeks. There were numerous arguments made by both sides, vast amounts of evidence introduced, and multiple experts who testified about intricate details of injuries and cause of death.

But the instructions available to Appellant were improperly limited by the military judge's erroneous view of the law. Thus, no waiver occurred as to an instruction on involuntary manslaughter because, based on what the military judge

represented to the parties, there was no right to waive. The military judge deprived Appellant of the LIO; therefore, he had no ability to waive the instruction.

This issue was only discovered in post-trial matters because the military judge informed counsel that he believed involuntary manslaughter was not a lesser included offense and he would not instruct on it during an R.C.M. 802 session – not on the record. The only mention on the record as to involuntary manslaughter instruction is one instance during the summary of an R.C.M. 802 conference where the parties were "leaning" different ways on whether to request the instruction. It was never confirmed whether defense "expressly" or "affirmatively" waived the instruction, nor even whether they made the request. Rather, the only lesser included offense that was affirmatively discussed and declined was voluntary manslaughter, for which defense specifically did not request an instruction. (R. at 2940).

The military judge's erroneous view that involuntary manslaughter was not a lesser included offense precluded the members from being instructed on involuntary manslaughter. This is forfeiture. As defense discussed in the R.C.M. 1106 materials, the instruction was sought but declined by the military judge behind closed doors. On the record, the defense never affirmatively waived the instruction because they had been told it was not available. This is not in the spirit of waiver – it is not meaningful nor intentional as to involuntary manslaughter.

The "not requesting any instructions on lesser-included offense" language did not encompass involuntary manslaughter because the military judge had improperly taken that instruction off the table. This was plain and obvious error and it materially prejudiced Appellant.

## Conclusion

This Court should grant Appellant's petition for grant of review because the Army Court's summary affirmance sanctioned the military judge's erroneous view of the law as to lesser included offenses and decided a novel area of law pertaining to a rarely utilized exception to hearsay.

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**Certificate of Compliance with Rules 24(c) and 37**

1. This Supplement to the Petition complies with the type-volume limitation of Rule 24(c) because it contains 5,329 words.

2. This Supplement to the Petition complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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# Appendix A: Army Court's Decision

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLOR, COOPER, and FLEMING
Appellate Military Judges

**UNITED STATES, Appellee**
**v.**
**Sergeant First Class JOSEPH A. SANTIAGO**
**United States Army, Appellant**

ARMY 20230419

Headquarters, Fort Campbell
Travis Rogers and John H. Cook, Military Judges
Lieutenant Colonel Ryan W. Leary, Staff Judge Advocate

For Appellant: Jonathan F. Potter, Esquire; Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Captain Patrick McHenry, JA; Captain Eli M. Creighton, JA (on brief); Jonathan F. Potter, Esquire; Colonel Frank E. Kostik, Jr., JA; Lieutenant Colonel Kyle C. Sprague, JA; Major Kelsey Mowatt-Larssen, JA; Captain Eli M. Creighton, JA (on reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA; Captain Nicholas A. Schaffer, JA (on brief).

5 December 2025

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DECISION

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Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court

## Appendix B: Army Court's Decision Pursuant to Article 62

# *United States v. Santiago*

United States Army Court of Criminal Appeals

May 3, 2023, Decided

ARMY MISC 20230094

**Reporter**
2023 CCA LEXIS 194 *; 2023 WL 3540457

UNITED STATES, Appellant v. Sergeant First Class JOSEPH A. SANTIAGO, United States Army, Appellee

**Notice:** NOT FOR PUBLICATION

**Prior History: [*1]** Headquarters, Fort Campbell. Travis L. Rogers, Military Judge. Lieutenant Colonel Ryan Leary, Staff Judge Advocate.

**Counsel:** For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Melissa Eisenberg, JA; Major Jennifer A. Sundook, JA (on brief); Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Melissa Eisenberg, JA; Major Jennifer A. Sundook, JA (on reply brief).

For Appellee: Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Bryan A. Osterhage, JA; Captain Andrew R. Britt, JA (on brief).

**Judges:** Before FLEMING, HAYES, and MORRIS, Appellate Military Judges. Senior Judge FLEMING and Judge MORRIS concur.

**Opinion by:** HAYES

## Opinion

SUMMARY DISPOSITION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO *ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE*

HAYES, Judge:

This case is before this court pursuant to a government appeal of the military judge's ruling in accordance with *Article 62, UCMJ*. The military judge sustained appellee's objection to the admission of his decedent wife's statements under the forfeiture by wrongdoing exception to the hearsay rule.

The government appeal alleges the military judge failed to make essential findings of fact, misapplied the law, and abused his discretion by sustaining appellee's **[*2]** objection. The government requests this court vacate the ruling and order additional findings of fact. Upon review of the record pursuant to *Article 62, UCMJ*, and as specified in the discussion below, we conclude the military judge erred in his application of the law and direct action in our decretal paragraph.

**BACKGROUND**

Appellee is charged at a general court-martial with one specification of murder, one specification of injury of an unborn child, and two specifications of assault, in violation of *Articles 118*, *119a*, and *128*, *Uniform Code of Military Justice, 10 U.S.C. §§ 918*, *919a*, and *928* [UCMJ].

In late September 2021, appellee's wife, then in her third trimester of pregnancy, was in her home with appellee and their children. In the late afternoon or early evening, she sustained blunt force trauma rendering her unconscious. Prior to emergency responders being notified of her injuries, internet queries were made from the home searching for ways to awaken someone rendered unresponsive due to a blow to the chest. Appellee allegedly made several attempts to revive his wife, to include burning her. Six days later, having never regained consciousness, appellee's wife died from multiple blunt force injuries, including a fractured sternum. The baby was delivered by emergency cesarean **[*3]** section and survived.

On the eve of trial, appellee provided notice to the military judge that he would object if the government moved to admit statements of his deceased wife. These statements allege: (1) appellee's prior abuse, to include the charged assaults, and (2) appellee's threats of additional abuse. Most relevant to the forfeiture by wrongdoing analysis and representative of similar statements, four days prior to sustaining the injuries resulting in her death, the alleged victim sent her friend a text message alleging that appellee "told he [sic] if the

cops show up he'd kill me."

During voir dire, the government filed a bench brief seeking a ruling on the admissibility of her statements under the forfeiture by wrongdoing hearsay exception. Finding the government failed to prove appellee's alleged murder of his wife was undertaken, at least in part, with the intent to make her unavailable as a witness, the military judge sustained the defense objection.

On appeal, the government argues, *inter alia*, the military judge misapplied the law by limiting his consideration of the possible theories by which appellee may have intended to make his wife unavailable. Specifically, even though **[*4]** appellee's futile attempts to revive his wife might indicate he did not intend to kill her at the time of the alleged assault, he may have intended to discourage her from testifying. The government argues either the alleged victim's death, or her refusal to testify had she lived, would have resulted in her unavailability, and appellee's intent to cause either scenario would satisfy the requirements for admission of her statements under the forfeiture by wrongdoing hearsay exception. For the reasons set forth below, we agree with the government that the military judge erred by failing to consider and rule on both theories of admissibility.

**LAW AND DISCUSSION**

*Jurisdiction*

The government may appeal "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." *UCMJ art. 62(a)(1)(B)*. Such a ruling is subject to the court's jurisdiction when it has "directly limited the pool of potential evidence that would be admissible at the court-martial." *United States v. Wuterich, 67 M.J. 63, 75 (C.A.A.F. 2008)*.

When deciding appeals brought under *Article 62, UCMJ*, this court "may act only with respect to matters of law." *United States v. Baker, 70 M.J. 283, 287-88 (C.A.A.F. 2011)*. "On questions of fact, [this] court is limited to determining whether the military judge's findings are clearly erroneous or **[*5]** unsupported by the record." *United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995)*. A failure to consider important facts may constitute an abuse of discretion. *United States v. Becker, 81 M.J. 483, 489 (C.A.A.F. 2021)*. We review matters of law de novo. *Lincoln, 52 M.J. at 323*.

The court has jurisdiction over this appeal. If admitted, some of appellee's wife's statements affected by the military judge's ruling would be direct evidence in support of the charged assaults. These statements would also provide proof regarding appellee's motive and intent to kill his wife. These statements are substantial proof of material facts for the government, and their exclusion would limit the pool of potential evidence. As the decision to exclude appellee's wife's statements resulted from the military judge's conclusions of law, we may act on the appeal.

*Forfeiture by Wrongdoing*

An out-of-court statement offered for the truth of the matter asserted is inadmissible hearsay. Military Rule of Evidence [Mil. R. Evid.] 801, 802. However, there are numerous exceptions to the hearsay rule. *See generally*, Mil. R. Evid. 803, 804. Military Rule of Evidence 804(a)(4) provides for the possible admission of a hearsay statement when a witness is deemed unavailable to testify because of their death. The cause of the witness' death is immaterial to determining their unavailability to testify at trial for the purposes of Mil. R. Evid. 804(a). Mil. R. Evid. 804(a)(4).

Once a witness is deemed **[*6]** unavailable under Mil. R. Evid. 804(a), the party offering the hearsay statement must establish a further exception exists under Mil. R. Evid. 804(b) to warrant its admission. One such exception is forfeiture by wrongdoing, which allows for the admission of an unavailable witness' statement when "offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result." Mil. R. Evid. 804(b)(6).

The standard for admitting evidence under Mil. R. Evid. 804(b)(6) is a preponderance of the evidence. *United States v. Marchesano, 67 M.J. 535, 544 (Army Ct. Crim. App. 2008)*. To establish that a declarant's statements qualify for the exception, "(1) the party against whom the statement is offered must have wrongfully caused the declarant's unavailability as a witness, and (2) the party caused the witness's unavailability with the intent to make that witness unavailable, i.e., that the accused intended their conduct to prevent the witness from testifying against them in court." *Becker, 81 M.J. at 489*.

Federal courts "have sought to effect the purpose of the forfeiture-by wrongdoing exception by construing broadly the elements required for its application." *United States v. Gray, 405 F.3d 227, 242 (4th Cir. 2005)*, *cert. denied*, *546 U.S. 912, 126 S. Ct. 275, 163 L. Ed. 2d 245 (2005)*. An intent to cause a declarant to be unavailable "need not be motivated solely by the desire to prevent the declarant's **[*7]** would-be testimony, rather, only that it was a motivating factor in [his] decision to take such an action." *Becker, 81 M.J. at 489* (citing *United States v. Jackson, 706 F.3d 264, 269 (4th Cir. 2013)*). Furthermore, the forfeiture by wrongdoing exception applies even to situations where there was no "ongoing proceeding in which the declarant was scheduled to testify." *United States v. Miller, 116 F.3d 641, 668 (2nd Cir. 1997)*.

In *Giles v. California*, the Supreme Court found a defendant's right to confrontation is satisfied by the forfeiture by wrongdoing hearsay exception only when the defendant made the victim unavailable with an intent to prevent the witness's testimony. *Giles v. California, 554 U.S. 353, 359-362, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008)*. Giles was convicted of murdering his ex-girlfriend. *Id. at 356-57*. At trial, the government admitted the victim's prior statements to police responding to a domestic violence report three weeks before the murder. *Id.* The statements allege Giles threatened to kill the victim if he found her cheating on him. *Id. at 357*. Since there was no evidence that either the murder or prior assault were committed with the intent to prevent the victim's testimony, the admission of the victim's prior statements against Giles violated his *Sixth Amendment* right to confront the witnesses against him. *Id. at 377*. The Court held the forfeiture by wrongdoing exception only applies to situations where the defendant causes the witness' absence **[*8]** with the intention of preventing that witness from testifying at trial. *Id. at 359-362, 377*.

In determining whether there is evidence of an intent to prevent the witness' testimony, the *Giles* court recognized the distinct nature of domestic violence relationships:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution - - rendering her prior statements admissible under the forfeiture doctrine.

*Id. at 377*.

The Supreme Court went on to specifically invite the lower court to consider evidence of the defendant's intent on remand. *Id.*

In the present case, in contrast to *Giles*, appellee allegedly threatened to kill his wife in conjunction with a previous assault if police were notified of the abuse. This indicates an intent to prevent her from providing a statement against him, which the *Giles* court said may support a finding of a **[*9]** similar intent at the time of the alleged murder.

The military judge placed significant weight on the fact appellee tried to revive his wife, finding it evinced a lack of intent to make her unavailable to testify. Appellee's alleged efforts to revive his wife may be evidence that he did not intend to kill her and render her unavailable under Mil. R. Evid. 804(a)(4). While that is a logical conclusion, further analysis in accordance with *Giles* is required.

As the government argued to the military judge, appellee may have committed the alleged fatal assault not with the intent to kill her *but instead* with the intent to isolate, intimidate, or threaten her to discourage her from testifying, and her refusal to do so would result in her unavailability under Mil. R. Evid 804(a)(2).[*]

The government argues, consistent with the alleged victim's statements they seek to introduce, that appellee previously assaulted and threatened his wife with the intent of making her unavailable to testify against him out of fear. Following *Giles'* analysis, prior incidents of similar abuse would be highly relevant in determining if this was also appellee's intent at the time of the assault resulting in his wife's death. Put simply, if appellee's wife had survived **[*10]** and refused to testify out of fear, and that was appellee's intent when he assaulted her, her

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[*] Military Rule of Evidence 804(a)(2) states a witness is considered unavailable if they refuse "to testify about the subject matter despite the military judge's order to do so." Statements made by a witness deemed to be unavailable under Mil. R. Evid. 804(a)(2) are not excluded by the rules against hearsay if the statement is "offered against a party that wrongfully caus[ed] the declarant's unavailability as a witness and did so intending that result." Mil. R. Evid. 804(b)(6).

statements would be admissible under Mil. R. Evid. 804(a)(2) and (b)(6). Appellee should not benefit from his wife's death by the exclusion of her statements if the preponderance of the evidence suggests he intended to silence her through fear, but ultimately—perhaps inadvertently—instead silenced her through her death.

Accordingly, it was an abuse of his discretion for the military judge not to consider or issue a ruling regarding the government's additional proffered theory of admissibility, and the evidence supporting it, when determining if appellee intended to render his wife unavailable to testify at the time of the alleged fatal assault. As the Supreme Court in *Giles* emphasized, in domestic violence cases, if there is an intent to prevent witness' testimony through prior acts of abuse, the prior acts may support a finding that an accused harbored a similar intent at the time of the ultimate act of abuse.

**CONCLUSION**

The government's appeal under *Article 62, UCMJ* is GRANTED. The military judge's ruling is VACATED. The record of trial is returned for further action consistent with this opinion.

Senior Judge FLEMING and Judge MORRIS concur. **[*11]**

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# Appendix C: Post-Trial Submissions Pursuant to R.C.M. 1106

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
MISSISSIPPI VALLEY REGION
FORT CAMPBELL FIELD OFFICE
FORT CAMPBELL, KENTUCKY 42223

AFZB-JA-TDS 1 September 2023

MEMORANDUM FOR Commanding General, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, Kentucky 42223

SUBJECT: Rule for Court-Martial (RCM) 1106 Matters – SFC Joseph Santiago

1. **BLUF:** Pursuant to RCM 1106 and 1109, the Defense, on behalf of SFC Santiago, respectfully requests that you reduce, commute, or suspend SFC Santiago's adjudged reduction in pay grade. Defense also requests that you recommend to the Clemency and Parole Board that SFC Santiago go on parole at his 20 year hearing.

Additionally, Defense requests you recommend the Appellate Court set aside findings and sentencing in this case due to the numerous prejudicial legal errors amounting to violations of SFC Santiago's Constitutional right to a fair trial, his Constitutional right to a trial before a panel/jury, and his Constitutional right to present a defense.

2. On 2 August 2023, SFC Santiago was found guilty to one charge of Murder in violation of Article 118, Uniform Code of Military Justice (UCMJ) and one charge of Injury to an Unborn Child in violation of Article 119A, UCMJ. SFC Santiago was reduced to the grade of E-1, to be discharged from service with a Dishonorable Discharge, and sentenced to confinement of Life with the eligibility for parole. Throughout the trial the Military Judge (MJ) displayed bias against the Defense, the effect of which undermined the Accused's right to a fair trial.

3. **Recommendation to Set Aside Findings and Reducing or Commuting Sentencing.** Throughout the course of this trial, the MJ made numerous legal errors and abused his discretion. As a result, the Government was given an unfair advantage and SFC Santiago was stripped of his right to a fair trial. The following sections layout examples of the legal errors committed by the MJ and highlight the need for clemency.

a. Pre-trial Rulings:

(1) *Admission of Statements of AV under MRE 804(b)(6) over Defense Objection*

(a) On 22 June 2023, the Government filed a motion for ruling on admissibility under MRE 804(b)(6) for all previous statements allegedly made by the AV. On 30 June 2023, Defense submitted a response, objecting to the admission of the statements allegedly made by the AV. On 6 July 2023, the Government filed a reply to Defense's response. The MJ issued a ruling on 15 July 2023 admitting all previous statements allegedly made by the AV.

(b) The MJ abused his discretion and committed legal error. As such, SFC Santiago was prejudiced and stripped of his right to a fair trial. The requirement under MRE 804(b)(6) and relevant case law[1] is that SFC Santiago would have to—at the time he caused her unavailability—intended to do so for the purpose of ensuring the AV would be unavailable as a *witness*. The MJ incorrectly inferred that the Accused intended the AV's unavailability as a witness because there was no evidence that the Accused had any knowledge about any plan of the AV, and therefore could not have intended her unavailability at the time he caused her unavailability. Additionally, SFC Santiago made several google searches and visited several webpages which were directed towards helping the AV medically, including webpages about when to seek medical assistance. Throughout the time the AV was unconscious, SFC Santiago attempted to wake her up through different means and sought outside help from his neighbor. This is evidence that SFC Santiago did not intend that AV would be unavailable.

(2) *Admission of Digital Evidence over Defense Objection*

(a) On 14 October 2022, Defense filed a motion to suppress evidence obtained from SFC Santiago's cell phone and digital devices. On 19 October 2022, the Government filed a response in opposition of Defense motion. On 26 October 2022, the MJ denied Defense's motion after arguments were presented at an Article 39(a). On 22 May 2023, Defense received the written ruling, dated 27 January 2023, denying Defense's motion to suppress. On 22 June 2023, Defense filed a motion to reconsider a previously filed motion to suppress evidence obtained from SFC Santiago's cell phone and digital devices. On 30 June 2023, Government filed a response in opposition. On 15 July 2023, the MJ denied Defense's motion to suppress.

(b) The MJ abused his discretion and committed legal error. As such, SFC Santiago was prejudiced and stripped of his right to a fair trial. The first ruling The MJ stated that exigent circumstances existed to seize SFC Santiago's cell phone, but the record is completely devoid of any evidence that exigency ever existed. The MJ incorrectly applied the law and stated, without evidence, that it was foreseeable that SFC Santiago would dispose of his cell phone while the Government took further investigative steps. However, Defense argued that the Government could have sought a warrant in a matter of minutes, but chose not to, and this act runs afoul of the Constitution. Additionally, the search authorization and supporting affidavit were completely lacking in particularity and specificity.

(3) *Panel Selection and Impanelment*

(a) On 12 July 2023, Defense filed a motion challenging selection and impanelment of members. On 16 July 2023, Government filed a response motion in

[1] Specifically, US v Becker, 81 M.J. 487 (CAAF) (CAAF found that, despite the fact that there were prior domestic violence allegations, at the time of the murder, the accused "was not under any active investigation, nor was there any indication that he would be investigated in the future).

opposition of Defense's motion. On 17 July 2023, oral argument was heard regarding the motions. On 17 July 2023, the MJ denied Defense's motion.

(b) The MJ abused his discretion and committed legal error. As such, SFC Santiago was prejudiced and stripped of his right to a fair trial. Defense argued that the Convening Authority improperly and unlawfully excused members after assembly of the court-martial and that there was improper selection under Article 25 creating an appearance of unlawful command influence. At oral argument, Defense presented evidence that a member of the Office of the Staff Judge Advocate, Master Sergeant Slaughterbeck, removed an entire branch from the panel selection documents without the knowledge of the Staff Judge Advocate, COL Jason Coats nor the Convening Authority, Major General Joseph McGee. The MJ stated in his ruling that "the Government has provided credible, competent evidence that 5th Group nominees were removed from the spreadsheet only for a sound reason: a reasonable likelihood of a member challenge for having prior knowledge of the case" – however this is incorrect. MSG Slaughterbeck testified that she removed the members from branch of Special Forces all within 5th Special Forces Group because they may be otherwise busy. MSG Slaughterbeck had no authority to remove any person from the spreadsheet. Even if it can be said that the members in that branch within that unit can be said to have prior knowledge of the case, there is a process in the Rules for Courts-Martial regarding when and how challenges are made. It does not occur on a whim and at the behest of the NCOIC of the Military Justice shop of the OSJA.

b. Mid-trial Rulings:

(1) *A Lesser Included Offense of Murder Was Not Authorized by the MJ*

(a) The MJ informed counsel in an 802 session that the bench book did not authorize the lesser included offense of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, for murder, in violation of Article 118. On the record,

(b) The MJ interpretation of the bench book was incorrect and, as such, he abused his discretion and committed legal error. Due to this SFC Santiago was prejudiced stripped of his right to a fair trial. A lesser included offense should have been included for the panel's consideration. Had a lesser included offense been included SFC Santiago would have had a different result.

(2) *Discovery Violation During Trial*

(a) The Government failed to disclose evidence in the possession of the Government to the Defense prior to trial. Specifically, the Government did not disclose the existence of the CID's crime casebook which had information in it not contained in any other discovery item. The "casebook" had sketches of SFC Santiago's house, detailed descriptions of where items were found, including the alcohol bottles which were hidden in and under children's items/toys.

(b) The Defense raised the discovery violation to the MJ and stated that this type of violation requires a dismissal with prejudice. The MJ disagreed and no dismissal was provided.

(c) The MJ abused his discretion and committed legal error. As such, SFC Santiago was prejudiced and stripped of his right to a fair trial. The Government has a duty to disclose discovery, but failed to do so despite the fact that the information was in the possession of the Government for its entire existence. The casebook has date and timestamps from 28 September 2021 meaning that despite the fact that the Government had this information in their possession 22 months, they made no effort to disclose it to Defense. This is a clear violation which requires a clear remedy. The MJ merely offered a delay to the proceedings which would prejudice SFC Santiago and was really no remedy at all.

(3) *Determination that there was "Good Cause" for the Government to Add a Witness*

(a) During the trial, the Government informed the MJ and Defense that the Government intended on adding a witness to their witness list which previously was not noticed to Defense. This witness is one who was going to testify to evidence which the Government obtained in the middle of the trial. The Defense argued that the only time a witness can be added is for good cause and that good cause did not exist. The MJ disagreed and stated that the Government has met their burden for good cause, but stated that they could not add a witness at this point in the trial because it would be unduly prejudicial to SFC Santiago.

(b) The MJ abused his discretion and committed legal error. As such, SFC Santiago was prejudiced and stripped of his right to a fair trial. The Government failed to meet their burden establishing good cause. The Government failed because it was their own dilatory action in not investigating a crime scene which they had possession of for nearly two years that made them unable to meet the deadline to provide notice of the new witness. The Government's failure to investigate their case fully cannot and should not be considered as good cause. Here, the Government in many ways had put their head in the sand and only reacted when Defense pointed out the deficiencies of the investigation during the trial.

(4) *Ongoing Investigation During Trial*

(a) During the trial, Defense, through cross examination of several CID agents, pointed out the defects in their investigation, their failure to fully investigate the incident that occurred. After the CID agents were excused from the courtroom, the CID agents—in coordination with the prosecution team—went back to the crime scene to investigate the items and issues that Defense had raised. The Government then recalled the CID agent and the MJ allowed the Government to introduce evidence from the new investigation in their case in chief, to rebut the cross examination done by Defense. The

MJ stated that Defense had opened the door by pointing out the flaws in their investigation.

(b) The MJ abused his discretion and committed legal error. As such, SFC Santiago was prejudiced and stripped of his right to a fair trial. The ruling by the MJ to allow any evidence procured during the middle of trial to be introduced during the case in chief of the Government, after Defense has already raised issues and revealed their theory of the case, was prejudicial to SFC Santiago. If Government counsel are permitted to engage in this type of case perfection in the middle of trial, after Defense investigated the facts provided by the Government and pointed out defects in the investigation, then there is an chilling effect. It sends the message that Defense counsel cannot put on a case or defense for their client based on existing evidence because the Government will—in the middle of trial—attempt to procure more. The rules for discovery and evidence collection are in effect in the Rules for Courts-Martial in the "pre-trial" section. This is undoubtedly because discovery and evidence collection is to be done before trial begins, not in the middle of trial.

(5) *Brady Issue – Statement of Accused from SA Lurz*

(a) During SA Lurz's testimony, she stated that SFC Santiago had reported that the AV had fallen down the stairs. However, this was the first time that particular statement of SFC Santiago had been disclosed.

(b) This is a clear violation of the Rules for Courts-Martial, Section III disclosures. At no point in time did the Government notify the Defense that SFC Santiago made that report. Had Defense known this information it would have changed the way Defense approached the case and the court-martial theory. Since the statement was not disclosed, SFC Santiago was prejudiced in his defense and right to a fair trial.

(6) *Reconsideration of the Verdict Multiple Times by the Panel*

(a) During panel deliberations, the panel notified the court twice of its intent to reconsider the vote. Defense objected to the reconsideration under Article 52(b)(1), UCMJ. Defense argued that a reconsideration may only be done if it is for a finding of guilty or to lower a sentence, but not on findings of not guilty. The MJ overruled Defense's objection and allowed the panel to reconsider their vote. The panel then returned a verdict of guilty for the Article 118 and Article 119A, UCMJ.

(b) The MJ abused his discretion and committed legal error. As such, SFC Santiago was prejudiced and stripped of his right to a fair trial. Article 36, UCMJ, gives the President authority to prescribe rules of trial procedure, "but which may not . . . be contrary to or inconsistent with this chapter." Said another way, where the Rules for Courts-Martial and the Statute conflict, the Statute controls. Therefore, Article 52(b)(1) UCMJ is controlling, and it states that reconsideration occurs for "a finding of guilty or reconsideration of a sentenced, with a view toward decreasing the sentence." There is no contemplation of a reconsideration vote when "not guilty" is the original verdict and

no contemplation of reconsidering a sentence to make it worse. The intent of a vote for reconsideration is only to allow reconsideration votes on verdict and sentence in order to make them more favorable to the accused. This is not what occurred and as such SFC Santiago received a guilty verdict, when in fact he would have otherwise been found not guilty.

4. **Request to Reduce, Commute, or Suspend Adjudged Reduction in Pay Grade.** In accordance with RCM 1109(c)(5)(E), the Convening Authority may reduce, commute, or suspend an adjudged reduction in pay grade. The factors you should consider include:

**a. The Accused's Family History**

(1) The Defense Forensic Psychiatrist, Dr. Wendy Elliot, provided a report for pre-sentencing. In this report she detailed how SFC Santiago is very much a product of his upbringing. SFC Santiago witnessed and sustained emotional and physical abuse from both of his parents, including a circumcision done—against his will—at the age of 10-years-old. SFC Santiago lacked the support needed through his life in order to be successful, with the exception of when he lived with his grandmother. SFC Santiago thrived in his grandmother's house, but much of the damage to his development had already been ingrained. SFC Santiago

b. **The Accused's Character and Service Record.** Numerous Soldiers testified during presentencing about how reliable SFC Santiago was and how much he cared for his Soldiers. Leaders testified that SFC Santiago would go out of his way to ensure that the unit was succeeding professionally and personally. They stated that if they would deploy with SFC Santiago again, if given the chance; that his experience and technical expertise are superior. His conviction does not remove his achievements or change how he cared for his Soldiers. He should be allowed to keep his rank in light of his service.

5. **Request for Recommendation of Reduction in Sentence to the Clemency and Parole Board.** SFC Santiago respectfully requests that you make a recommendation to the Clemency and Parole Board to allow him to take parole at his 20-year hearing. When considering the totality of the circumstances, the Defense respectfully requests you consider life with the possibility of parole of confinement too severe in this case.

a. In a recent Army Court of Criminal Appeals case (ACCA), US v Craig, ACCA considered the severity of the Appellant's "sentence, the nature and seriousness of the offenses, appellant's record of service, and all other matters contained in the record of trial." US v Craig, 2022 CCA LEXIS 639 (A. Ct. Crim. App. Nov. 3, 2022). The appellant in Craig shot and killed two people and plead guilty to premeditated murder to avoid the death penalty as a possible sentence. The appellant's plea agreement permitted confinement for life without parole, and life without parole was the sentenced adjudged. After making all considerations, ACCA deemed the appellant's sentence to be inappropriately severe because the sentence neither fit the circumstances in the record of trial nor the offender himself. Id.

b. When considering the record of trial in Craig, ACCA took note of the significant mitigation and extenuation evidence that was presented. Id. In the present case, significant mitigation and extenuation evidence in the form of military witnesses and a report from a forensic psychiatrist were presented. Individuals close to SFC Santiago described him as the type who is always willing to help others. SFC Santiago was described as hardworking and someone who makes hard circumstances better because of his work ethic and demeanor.

c. In his Unsworn Statement, SFC Santiago spoke about his life and openly admitted to his failures as a husband. He gave a sincere, tearful apology to the family of the AV for failing her. SFC Santiago had to take several moments and clung to a tissue as tears streamed down his face. The Government did not present any evidence to rebut the extenuation or mitigation evidence or to show the SFC Santiago committed any misconduct in the 22 months prior to trial. The presentencing evidence gave no indication that SFC Santiago would commit further misconduct in the future, negating the need for such a lengthy time in confinement. In this case, SFC Santiago's confinement sentence is inappropriately severe in that it fits neither the circumstances in the record of trial, nor the characteristics of SFC Santiago himself.

d. When considering whether to make a recommendation to the Clemency and Parole Board to reduce SFC Santiago's sentence and allow him to go on parole, Defense requests that you take into account not only the sentence length, but also the collateral consequences of SFC Santiago's convictions and his demonstrable ability to rehabilitate.

(1) Collateral consequences. As a result of his convictions, SFC Santiago will continue to suffer even after he is released from confinement. His conviction and dishonorable discharge will severely interfere with SFC Santiago's future job opportunities. SFC Santiago will forever have the black mark of federal felony convictions on his record and bear the burden and stigma of receiving a dishonorable discharge. The existence of this record will prevent him from ever possessing a firearm, prevent him from voting, restrict his travel to see loved ones abroad, and will inhibit future employment opportunities. Once he is free from confinement, his punishment continues indefinitely.

(2) Rehabilitation. SFC Santiago has much of his life ahead of him and is committed to being a positive and productive member of society. He is very close to his family and has a strong support system at home. He has friends and family who believe in him. He has children who love him and need him in their lives. He and his loved ones know he will do whatever it takes to overcome this conviction in whatever way possible. The probability of SFC Santiago's of other offenses is non-existent. A favorable recommendation to the Clemency and Parole Board will allow SFC Santiago to re-enter society, and more quickly become a productive member.

6. For the reasons above, SFC Santiago requests that you reduce, commute, or suspend the adjudged reduction in pay grade, recommend to the Clemency and Parole

board to reduce his confinement to 20 years, and recommend the Appellate Court set aside findings and sentencing due to numerous, shocking legal errors. This small act of compassion will have an enormous impact on SFC Santiago and will give him the opportunity to better transition out of the military and find rehabilitative success.

7. The point of contact for this request is the undersigned who may be reached at elizabeth.m.paillere.mil@army.mil or (270) 798-5178.

PAILLERE.ELIZABETH.MARIE.1388387005
Digitally signed by PAILLERE.ELIZABETH.MARIE.1388387005
Date: 2023.09.01 14:55:12 -05'00'

ELIZABETH M. PAILLERE
CPT, JA
Defense Counsel

## Appendix D: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

**I. WHETHER THE REMOVAL OF ALL 5TH SPECIAL FORCES GROUP MEMBERS BY A PARALEGAL WITHIN THE OSJA, WITHOUT APPROVAL OF THE CONVENING AUTHORITY, CONSTITUTED UNLAWFUL COMMAND INFLUENCE AND AN IMPROPER SELECTION OF PANEL MEMBERS IN VIOLATION OF ARTICLE 25, UCMJ.**

**II. WHETHER THE MILITARY JUDGE ERRED WHEN HE ALLOWED IN DIGITAL EVIDENCE AND TEXT MESSAGES THAT WERE OBTAINED FROM APPELLANT'S PHONE IN VIOLATION OF HIS 4TH AMENDMENT RIGHTS AND MISAPPLIED THE LAW AS TO EXIGENCIES.**

**III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED DEFENSE'S MOTION FOR DISMISSAL AFTER THE GOVERNMENT COMMITTED MULTIPLE DISCOVERY VIOLATIONS.**

**IV. WHETHER THE MILITARY JUDGE ERRED WHEN HE DID NOT ORDER A *DAUBERT* HEARING TO BE CONDUCTED PRIOR TO THE INTRODUCTION OF EVIDENCE BY DR. DANIEL COUSIN.**

**V. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING PHOTOS OF MRS. MS FROM THE AMBULANCE AND HOSPITAL TO BE INTRODUCED AND PUBLISHED.**

**VI. WHETHER PREVIOUSLY UNDISCLOSED EXCULPATORY STATEMENTS BY APPELLANT, ELICITED FROM CID SPECIAL AGENT KL IN THE MIDDLE OF TRIAL, CONSTITUTED A *BRADY* VIOLATION.**

**VII. WHETHER THE MILITARY JUDGE ERRED IN HIS RULING AS TO THE PANEL'S REQUEST TO RECONSIDER FINDINGS.**

**VIII. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR DILATORY POST-TRIAL DELAY WHEN IT TOOK 531 DAYS FOR APPELLANT TO RECEIVE HIS COPY OF THE RECORD OF TRIAL.**

**IX. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE IN NOT SEEKING FURTHER APPEAL OF THE ARMY COURT'S ARTICLE 62 DECISION.**

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing in the case of United States v. Santiago, Crim. App. Dkt. No. 20230419, USCA Dkt. No. 26-0114/AR was electronically filed with the Court and Government Appellate Division on March 31, 2026.

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