

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

UNITED STATES
Appellee

v.

Specialist (E-4)
PHILLIP E. THOMPSON, JR.,
United States Army
Appellant

REPLY BRIEF ON BEHALF OF
APPELLANT

Crim. App. Dkt. No. ARMY 20190525

USCA Dkt. No. 25-0254/AR

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

Granted Issue

**WHETHER THE SPECIAL FINDINGS WARRANT REVERSAL
OF APPELLANT’S CONVICTION FOR INVOLUNTARY
MANSLAUGHTER.**

Law and Argument

The Government’s attempt to save this case with theories it never advanced below fails. By dismissing a critical legal issue as a “distinction without a difference,” the Government’s approach offends due process. At trial, the Government disclaimed any theory that Appellant personally committed a “reckless killing on the accused’s part” and agreed it was proceeding only on aiding and abetting principles. (JA 253). The military judge adopted that theory in his special findings, finding Sergeant [SGT] Shaquille Craig committed the killings

and Appellant was “vicariously liable” based on his “knowing and willful assistance.” (JA 310-12).

The Army Court nevertheless affirmed on a different rationale (now advanced by the Government for the first time), that Appellant was convicted “as a perpetrator rather than as an aider and abettor.” (JA 014). That is not, as the Government claims, a distinction without a difference. It is a different theory of guilt, and a conviction cannot be affirmed on a theory different from the one presented to and adopted by the factfinder. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008); *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980).

The Government cannot change its charging decision on appeal.¹ This Court has rejected the “closely related offense” doctrine in a guilty plea context because appellate affirmance cannot rest on something close enough to what was charged and litigated. *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010). The same principle applies in this contested case. Here, the charge sheets and the

¹ This Court has repeatedly recognized that the Government controls the charge sheet and the specifications within it. *United States v. Smith*, 85 M.J. 283, 287 (C.A.A.F. 2024) (reasoning the Government chose how to charge the appellant and could have made other choices); *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022) (“[I]t is the government that controls the charge sheet from the inception of the charges through the court-martial itself”; “it is the government that has both the opportunity *and the responsibility* to ensure that the . . . specifications align with the facts of the case.”).

special findings control the basis for Appellant’s convictions—and they cannot be cured by appellate refinement.

A. The Government’s “distinction without a difference” argument fails because the distinction is constitutional.

At trial, the Government disclaimed perpetrator liability with respect to Appellant. (JA 253). To clarify, the military judge drew the distinction plainly, using “perpetrator for whoever pulled the trigger and principal for aiding and abetting as a theory.” (JA 254). The Government agreed. It told the court that its theory was that Appellant was liable “as an aide[r] and abettor,” “[n]ot that he pulled the trigger and it was a reckless killing on the accused’s part.” (JA 253).

The military judge adopted that framework in his special findings. He found that SGT Craig committed the killings, found Appellant “vicariously liable as a principle [sic],” and identified Appellant’s “knowing and willful assistance” as the basis for guilt. (JA 310-12). Those findings are consistent with accomplice liability. They are not findings that Appellant directly perpetrated involuntary manslaughter through his own acts.

But the Army Court affirmed on a different rationale, holding that Appellant was convicted “as a perpetrator rather than as an aider and abettor” and brushing off the difference as “a distinction without a difference.” (JA 014, 016-17). The Government now embraces that new theory. (Gov. Br. at 9-10; 19-21).

Indeed, this was not the Government's position at trial or before the Army Court. (JA 75-76). This shift highlights the lack of notice in this case. "After all, it is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not." *United States v. Mendoza*, 85 M.J. 213, 231 (C.A.A.F. 2024) (quoting *Morton*, 69 M.J. at 16) (Sparks, J., concurring in part and dissenting in part and in the judgment) (cleaned up). *Morton* emphasized fair notice and made clear that it is the Government's burden to select and charge the proper offense, including charging in the alternative when needed. *Morton*, 69 M.J. at 16. See also *United States v. English*, 79 M.J. 116, 120-21 (C.A.A.F. 2019).

B. Article 77 does not permit the Government to change the actus reus on appeal.

The Government's reliance on Article 77 does not cure the problem. Article 77 makes an aider and abettor punishable as a principal for the underlying offense. (Gov't Br. at 11). It does not erase the elements of the offense, and it does not collapse accomplice liability and perpetrator liability into the same thing. UCMJ art. 77. At trial, Appellant's conduct, driving SGT Craig to the apartment, checking the door, lying to gain entry, and remaining inside, mattered because the Government said those acts aided and abetted SGT Craig's shootings. On appeal,

the Army Court (and now the Government) treated those same acts as Appellant's culpably negligent conduct that directly caused death.

That is a different theory, with a different actus reus. Under one theory, accomplice liability for another man's homicidal conduct was alleged. In the other, perpetrator liability for Appellant's own homicidal conduct was imposed. The Government's reliance on Article 77 assumes the answer. It uses the word "principal" to blur the distinction that due process requires courts to respect.

The Government describes the difference as only "one of intent." (Gov't Br. 19-20). That cannot be true. Under aiding and abetting principles, proof of specific intent to facilitate a crime by another, guilty knowledge, and participation in that offense is required. *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A. 1990). See also *Rosemond v. United States*, 572 U.S. 65, 75-78 (2014).

The Government's reliance on *Jackson*, *Foushee*, and related cases misses the point for the same reason.² (Gov't Br. at 17-23). Those cases stand only for the proposition that different participants in the same criminal episode may bear different degrees of culpability with respect to the outcomes of the act. Appellant does not dispute that. But that is not the issue here. At issue here is whether an

² *United States v. Jackson*, 6 U.S.C.M.A. 193, 202-03, 19 C.M.R. 319, 328-29 (1955); *United States v. Foushee*, 13 M.J. 833, 835-36 (A.C.M.R. 1982); *United States v. Hofbauer*, 2 M.J. 922, 926 (A.C.M.R. 1976); *United States v. Richards*, 56 M.J. 282, 286 (C.A.A.F. 2002); *United States v. Rowden*, ACM 30481, 1994 CCA LEXIS 100 (A.F. Ct. Crim. App. 25 Oct. 1994).

appellate court may affirm on a theory different from the one the Government charged and the military judge found.

Morton highlights the flaw in the Government's argument. If a conviction in a guilty plea cannot be saved by affirmance on a different but "closely related offense," then it certainly may not be saved here by affirmance on a different theory of guilt in a contested case, after the disclaimed theory was rejected at trial and then revived on appeal as supposedly close enough. *Morton*, 69 M.J. at 16. The Government has not provided, nor has Appellant found, any authority that authorizes an appellate court to convert an accomplice liability case into a perpetrator case on appeal.

C. The special findings should control, and approximation should not be countenanced.

The special findings permit an informed appellate review. See *United States v. Truss*, 70 M.J. 545, 546-47 (Army Ct. Crim. App. 2011). They announce the theory the military judge found. Here, those special findings state SGT Craig committed the killings, Appellant was "vicariously liable," and identify Appellant's "knowing and willful assistance" as the basis for guilt. (JA 310). The Army Court recognized that aider and abettor doctrine "may not be a perfect fit" for involuntary manslaughter by culpable negligence, then tried to solve that misfit by recasting Appellant as the "perpetrator" of involuntary manslaughter. (JA 014). That was not review. It was revision.

Close enough is for horseshoes and hand grenades, not involuntary manslaughter convictions. When one theory of guilt is identified in special findings, affirming on another may not be sustained because the two are thought to be close enough. What was actually found by the military judge is what must be reviewed. *Ober*, 66 M.J. at 405; *Chiarella*, 445 U.S. at 236-37. Under *Morton* and *English*, there is no path to affirmance. *Morton*, 69 M.J. at 16 (rejecting affirmance on a different but supposedly “closely related” offense or theory); *English* 79 M.J. at 121 (rejecting appellate revision of findings to preserve a conviction on a basis not actually found below). The answer is proper charging and litigation at trial.

D. The Government’s fallback position is a concession on the legal principle and should be rejected.

The Government’s fallback argument confirms the weakness of its “distinction without a difference” position. It argues that the Army Court correctly affirmed on a perpetrator culpable negligence theory. (Gov’t Br. at 17-22). It then argues in the alternative that, even if the Army Court introduced a new and unnoticed theory, the military judge still correctly found Appellant guilty as an aider and abettor. (Gov’t Br. at 22). If the Army Court’s reasoning were sound, no fallback would be necessary. The alternative argument implicitly concedes that the Army Court affirmed on the wrong theory and asks this Court to overlook that

defect because the conviction might be salvageable on some other ground. This Court reviews the decision of the court below. It does not rewrite it. *Ober*, 66 M.J. at 405; *Chiarella*, 445 U.S. at 236-37.

In any event, the Government’s fallback position fails too. The special findings never identify the offense Appellant specifically intended to facilitate. But aiding and abetting requires “specific intent to facilitate [a] crime by another” and “guilty knowledge.” *United States v. Vela*, 71 M.J. 283, 286 (C.A.A.F. 2012). The Government now suggests “at the absolute minimum,” assault by offer as the missing predicate offense. (Gov’t Br. at 23). But that theory was not presented to the military judge as the basis for involuntary manslaughter.³

The military judge found accomplice liability. The Army Court affirmed perpetrator liability. Article 77 does not bridge the difference. Because Appellant was tried and convicted on one theory and the Army Court affirmed on another, the Army Court’s decision cannot stand. *Ober*, 66 M.J. at 405; *Chiarella*, 445 U.S. at 236-37.

³ The Government’s assault by offer theory also collapses under the findings. Appellant was acquitted of conspiracy to commit aggravated assault with a loaded firearm, even though the Charge and The Specification relied on the same overt acts the Government now suggests as an assault by offer predicate. *See* The Specification of Additional Charge III. (JA 308; JA 032).

Conclusion


Appellant respectfully requests this Court set aside the Army Court's decision, and remand for further proceedings consistent with this Court's guidance.



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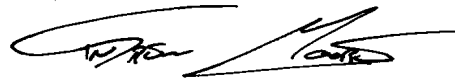
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CERTIFICATE OF COMPLIANCE WITH RULES 24(B) AND 37


1. This reply brief complies with the type-volume limitation of Rule 24(b)(2) because it contains approximately 2,020 words.
2. This reply brief 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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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Thompson*, Crim App. Dkt. No. ARMY 20190525, USCA Dkt. 25-0254/AR was electronically filed with the Court and Government Appellate Division on March 27, 2026.



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