IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Specialist (E-4) **PHILLIP E. THOMPSON, JR.**, United States Army, Appellant	)	Crim. App. Dkt. No. 20190525 USCA Dkt. No. 25-0254/AR

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

Issue Presented

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

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 [UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On July 30, 2019, a military judge sitting as a general court-martial found Appellant guilty, consistent with his pleas, of two specifications of premeditated murder, in violation of Article 118, UCMJ, 10 U.S.C. § 918 (2016). (JA 003, 127). The following day, the court sentenced Appellant to a dishonorable discharge and

confinement for life with eligibility for parole. (JA 128). Pursuant to the applicable pretrial agreement, the convening authority approved the dishonorable discharge and thirty-five years of confinement. (JA 129–30). The Army court subsequently found Appellant's plea improvident, setting aside the findings and sentence and authorizing a rehearing in its December 6, 2021, opinion. *United States v. Thompson*, 81 M.J. 824 (Army Ct. Crim. App. 2021); (JA 372, 390).

On August 12, 2023, a general court-martial composed of a new military judge found Appellant guilty, contrary to his pleas, of two specifications of involuntary manslaughter, in violation of Article 119, UCMJ, 10 U.S.C. § 919 (2016). (JA 307–08, 314).[1] The military judge then sentenced him on August 14, 2023, to a dishonorable discharge and confinement for eight years; Appellant received 1,004 days of confinement credit. (JA 030, 315).

On November 21, 2023, the convening authority approved the sentence. (JA 028). The military judge entered judgment on December 14, 2023. (JA 029). On June 30, 2025, a panel on the Army court issued a memorandum opinion on further review, affirming the findings and sentence. *United States v. Thompson*, ARMY 20190525, 2025 CCA LEXIS 303 (Army Ct. Crim. App. 30 Jun. 2025) (mem. op.); (JA 002–20).

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[1] The court found Appellant not guilty of all other charges and specifications, including premeditated murder under Article 118, UCMJ. (JA 307–08).

Statement of Facts

A. Appellant assisted Sergeant SC in the murder of two Soldiers.

While in church with his family, Appellant answered a phone call from Sergeant [SGT] SC and agreed to meet up with him shortly thereafter. (JA 316). He dropped his wife at home, and, with his infant son still in the backseat, he drove to a library parking lot in Hinesville, Georgia. (JA 316). When Appellant arrived, he noticed that SGT SC had a jacket tucked under his arm and had driven a friend's red Infiniti instead of his own car. (JA 316). Getting into Appellant's car, SGT SC immediately related seeing his wife "hugged up with" another man on the previous night. (JA 316).

At that time, SGT SC and his wife were separated and seeking a divorce. (JA 134, 316). Appellant previously had acted as the intermediary between them, reaching out on SGT SC's behalf on multiple occasions. (JA 137–38). On this occasion, however, when Appellant asked if SGT SC had taken pictures of this perceived infidelity, SGT SC responded that he was not concerned about the divorce. (JA 316). Sergeant SC instead pulled a Glock pistol from his waistband, set it on his lap, and stated "they 'got to go[,]' referring to the dude who was with his wife." (JA 150, 316). Sergeant SC told Appellant to drive to the apartment where the victims were. (JA 151, 316). Appellant then drove them to the apartment complex's parking lot. (JA 316).

While parked outside the apartment, Sergeant SC made a plan to get inside. (JA 180, 316). Following the plan, Appellant went to the back door, checking if it was locked. (JA 316). The door was locked, so Appellant knocked and rang the doorbell; Private [PV2] MJ answered and directed Appellant to go to the front door. (JA 278, 316). Appellant then lied, stating he had attended the party on the previous night, had left a laptop in the apartment, and wanted to retrieve it. (JA 316). Once inside, Appellant watched PV2 MJ text on his phone and proceed toward a separate room, talking to the apartment's actual tenant, Specialist [SPC] MB. (JA 316).

Around this time, SGT SC entered through the front door and confronted PV2 MJ. (JA 316). After a short exchange, SGT SC raised up the jacket he was carrying and shot PV2 MJ in the chest. (JA 316). As Appellant watched, SGT SC stood over a gasping PV2 MJ, taunting him and ultimately shooting him again in the head. (JA 316–17). The other Soldier, SPC MB, ran for the front door, near where Appellant stood; SGT SC shot SPC MB in the jaw, grabbed him in a headlock, and tossed him on the ground. (JA 317). Appellant then saw SGT SC shoot SPC MB again through his jacket. (JA 317).

After SGT SC told him to leave,[2] Appellant went outside but did not leave the area. (JA 317). He and SGT SC had a phone conversation about watching for people to clear out of the area, and he tried to pick up SGT SC before meeting up at the library parking lot. (JA 317). Appellant then received the Glock pistol from SGT SC and stored it at his house. (JA 152–53, 317).

B. Appellant stood trial for aiding and abetting premeditated murder.

In Specifications 1 and 2 of Charge I, the Government charged Appellant with the premeditated murders of PV2 MJ and SPC MB, "by means of shooting [them] with a handgun." (JA 21). The Government's theory of liability remained consistent: Appellant did not pull the trigger himself, but he aided and abetted SGT SC's premeditated murder of both victims. (JA 253, 267, 323, 339). A year before trial, the Government proposed a specific instruction on the lesser included offense [LIO] of involuntary manslaughter; the proposal included the intent to commit aggravated assault. (JA 338). Shortly before trial, trial counsel clarified the Government's position about this LIO's elements, now requiring "[t]hat the accused's assistance constituted culpable negligence." (JA 343). The Defense requested that involuntary manslaughter require proof that SGT SC's shooting amount to culpable negligence. (JA 346).

[2] In his sworn statement, Appellant claimed that, at this point, SGT SC also threatened to kill his son if he told anybody about the murders. (JA 317).

While discussing instructions,[3] the Defense agreed that involuntary manslaughter was a general intent offense, making the ignorance or mistake (when specific intent or actual knowledge is required) instruction inapplicable. (JA 240–41).[4] The Defense also requested an ignorance or mistake instruction for when only general intent is at issue, affirming its applicability to involuntary manslaughter and discussing how Appellant's potential misunderstanding of SGT SC's intent may raise a reasonable mistake of fact defense. (JA 242). When pressed on LIOs, trial defense counsel agreed that, if found not to share the perpetrator's intent, appellant still could be found guilty of involuntary manslaughter as an aider and abettor of SGT SC's premeditated murders. (JA 244–46).

The Defense objected that the government failed to notice their argument for Appellant being the perpetrator of involuntary manslaughter, proximately causing the victims' deaths. (JA 250–51). The Defense, however, agreed that involuntary manslaughter was a proper LIO of premeditated murder under an aider and abettor theory of liability. (JA 252). The military judge specified that he used "perpetrator for whoever pulled the trigger" and principal for "aiding and abetting as a theory."

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[3] The trial was by military judge alone, so the military judge did not read the instructions into the record. (JA 030).

[4] Within this discussion, the Defense mentioned the knowledge requirement for aiding and abetting but only related it to premeditated murder and accessory after the fact. (JA 241–42).

(JA 254). Standing by its bench brief, the Government stated involuntary manslaughter required proof that Appellant's actions and state of mind were culpably negligent. (JA 253). The military judge clarified, and the Government agreed, that this position argued Appellant was a principal as "an aide[r] and abettor. Not that he pulled the trigger and it was a reckless killing on the accused's part." (JA 253).

C. The military judge provided special findings explaining the general verdict.

During trial, the Defense made a general request for special findings. (JA 140). The military judge announced his special findings following the overall verdict. (JA 308–14). He found that SGT SC had committed premeditated murder in shooting both PV2 MJ and SPC MB. (JA 308–09). The military judge then found Appellant was "vicariously liable as a principle [sic] to the unlawful killings of both" victims. (JA 310). The special findings laid out the general legal principles for aider and abettor liability, then listed the actions that Appellant "knowingly and willfully" took to assist SGT SC. (JA 310). These acts were: (1) driving SGT SC to SPC MB's apartment; (2) checking if the apartment door was locked; (3) knocking and/or ringing the doorbell; (4) getting into the apartment by lying to PV2 MJ; and (5) remaining inside until SGT SC gained entry. (JA 311).

The military judge stated that "a person may be an aider and abettor to a lesser degree than the active perpetrator if he did not share the required criminal

intent or purpose of the active perpetrator." (JA 311); *United States v. Foushee*, 13 M.J. 833, 835 (A.C.M.R. 1982) (citing *United States v. Jackson*, 6 U.S.C.M.A. 193 (1955)). He then found that the Government had not proven beyond a reasonable doubt that Appellant had a premeditated design to kill, intent to kill, or intent to inflict great bodily harm. (JA 312). The military judge did find, however, that Appellant's "knowing and willful assistance to [SGT SC] amounted to culpable negligence, which was a proximate cause of" both deaths. (JA 312). The Government also disproved duress and reasonable mistake of fact as they pertained to involuntary manslaughter. (JA 313–14).

D. The Army court's memorandum opinion.

After receiving briefs and oral argument on the present issue, the Army court found the military judge's special findings clearly supported by the record, ultimately affirming Appellant's convictions. *Thompson*, ARMY 20190525, 2025 CCA LEXIS 303; (JA 002–019). The Army court also found "that appellant was convicted of involuntary manslaughter as a perpetrator rather than as an aider and abettor to that offense." *Id.* at *19; (JA 014). The memorandum opinion recognized that case law surrounding aider and abettor liability "may not be a perfect fit for involuntary manslaughter by culpable negligence." *Id.* at *22; (JA 014).

The Army court relied on *Jackson* and *Foushee* to show that Appellant need not share SGT SC's intent to have some criminal liability. *Id.* at *17–*18; (JA

013). The Army court also determined that Appellant's acts did not change, only his mens rea. *Id.* at *25; (JA 016). Because an aider and abettor is a principal just as the perpetrator, its opinion found Appellant's argument about lack of notice unpersuasive as it was "a distinction without a difference." *Id.* at *25–*26; (JA 016–017). The military judge's special findings addressed all necessary elements and "properly found appellant's culpably negligent acts were a proximate cause of" PV2 MJ's and SPC MB's deaths. *Id.* at *26; (JA 017). Therefore, the Army court affirmed the findings as legally sufficient. *Id.* at *26–*27; (JA 017).

Argument

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

Standard of Review

Special findings at a bench trial are analogous to instructions in a court-martial before a panel. *United States v. Falin*, 43 C.M.R. 702, 704 (A.C.M.R. 1971). "Special findings for an ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error." *United States v. Truss*, 70 M.J. 545, 547 (Army Ct. Crim. App. 2011).

This court reviews questions of legal sufficiency de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). "The test for legal sufficiency is whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014) (internal citations and quotation marks omitted). Though review is de novo, this is a deferential standard: while considering legal sufficiency, appellate courts must "draw every reasonable inference from the evidence in the record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). "The criterion thus impinges upon [factfinder] discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The "standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221.

Summary of Argument

The military judge's special findings properly established appellant's guilt for the involuntary manslaughter LIO. Appellant had sufficient notice of the "perpetrator" theory of liability for culpable negligence, both through the Government's explicit assertions and the consistent actus reus of his assisting actions. But whether conceptualized as aiding and abetting SGT SC's deadly violence at a lesser mens rea or as having his own culpable negligence serve as the deaths' proximate cause, Appellant remains liable as a principal; this is a

distinction without a difference. Therefore, the special findings are legally sufficient, and this Court should affirm the findings and sentence.

Law

A. Aiding and abetting.

Article 77, UCMJ, treats a person who "aids, abets, counsels, commands, or procures" the commission of an offense as a principal, just as if he or she personally committed the offense. 10 U.S.C. § 877. "Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute the offense to be guilty of it." *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], pt. IV, ¶ 1.b.(1). Under common law, there was a distinction between principals in the first degree (the perpetrator) and in the second degree (the aider and abettor); this punitive article eliminated that distinction and instead mandates equal culpability. *Id.*

Aiding and abetting requires an actus reus; mere presence at the crime or failure to stop its commission (in the absence of a duty to do so) is insufficient to establish guilt. *See Hicks v. United States*, 150 U.S. 442, 447–48 (1893); *United States v. Williams*, 341 U.S. 58, 65 n. 4 (1951); *cf. United States v. Simmons*, 63 M.J. 89, 92–93 (C.A.A.F. 2006) (stating that a failure to act can reflect criminal intent when accompanied by an affirmative duty to act) (internal citations omitted). For aiding and abetting liability to apply, a person need not assist in every part or

element of the offense. *Rosemond v. United States*, 572 U.S. 65, 72 (2014).

An act alone, however, is insufficient: "a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission." *Id.* at 76 (internal citations omitted). The required level of intent must extend to the entire crime. *Id*. The Supreme Court has adopted Judge Learned Hand's explanation as the "canonical formulation"[5] for aider and abettor intent: "it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). For aider and abettor liability, *Rosemond* also required advance knowledge of necessary facts establishing the crime's elements.[6] 572 U.S. at 78.

Generally, the government must prove the following elements to establish aider and abettor liability: "(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense." *United States v. Pritchett*, 31 M.J.

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[5] *Rosemond*, 572 U.S. at 76.

[6] In *Rosemond*, the Supreme Court specifically found that aiding and abetting the carrying of a firearm during a drug transaction required advanced knowledge of the "confederate's design to carry a gun." 572 U.S. at 78.

213, 217 (C.M.A. 1990).[7] "[C]riminal liability as a principal under an aider and abettor theory is one of shared intent." *Thompson*, 81 M.J. at 831 (citing *Nye & Nissen*, 336 U.S. 613 (1949)).

B. Differing degrees of culpability between principals.

This requirement for sharing the requisite intent, however, does not mandate that an aider and abettor must have the exact same mens rea. "It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense." *MCM*, pt. IV, ¶ 1.b.(1). In *United States v. Jackson*, two Soldiers chased down and assaulted a German citizen over a perceived slight; the government charged the appellant as an aider and abettor for the other Soldier stabbing the victim to death. 6 U.S.C.M.A. 193, 196–98 (1955). The Court of Military Appeals [C.M.A.] found the evidence legally sufficient to establish that the appellant aided and abetted unpremeditated murder, but it also found that involuntary manslaughter presented a reasonable alternative explanation requiring a panel instruction. *Id.* at 202–03.[8] The C.M.A. stated that an "aider and abettor may be guilty in a different degree from the principal, each to be held to account according

[7] The MCM condensed these elements down to two: actus reus ("Assist . . . another to commit" offense) and mens rea ("Share in the criminal purpose or design"). *MCM*, pt. IV, ¶ 1.b.(2)(b).
[8] The "reasonable alternative" discussed in *Jackson* involved the appellant's willingness to join his confederate in the assault but not sharing in the intent to kill or inflict grievous bodily harm. *Id.* at 203.

to the turpitude of his own motive." *Id.* at 203 (internal quotation marks and citations omitted).

Foushee repeated this principle, citing to *Jackson*. 13 M.J. at 835. This case also involved an altercation between two young Soldiers and a German national, where the appellant engaged in an assault but did not know the victim was stabbed until afterwards. *Id.* at 835. In that case, the Army court's predecessor found "no legal reason why [the appellant] could not be an accessory after the fact to the greater offense as well as being individually guilty as an aider and abettor to the lesser offense." *Id.* at 835–36. Again, the aider and abettor did not share the perpetrator's intent, but he remained culpable for his particular mens rea. *See also United States v. Hofbauer*, 2 M.J. 922, 926 (A.C.M.R. 1976) (holding that evidence only established beyond a reasonable doubt that the appellant intended assault consummated by battery, not aggravated assault); *United States v. Richards*, 56 M.J. 282, 286 (C.A.A.F. 2002) (citing *Foushee* and *Hofbauer* while discussing shared intent and level of culpability).

C. Involuntary manslaughter.

Article 119(b), UCMJ, criminalizes involuntary manslaughter, which involves the killing of a human being by a person who did not intend to kill or inflict great bodily harm. 10 U.S.C. § 919(b). The government can prove involuntary manslaughter in two ways: (1) the killing was culpably negligent; or

(2) the killing occurred while committing or attempting to commit a separate offense[9] directly affecting the victim's person. *Id*. Culpable negligence requires a "degree of carelessness greater than simple negligence." *MCM*, pt. IV, ¶ 44.d.(2)(a)(i). "It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." *Id.* The President specifically designated involuntary manslaughter as an LIO of premeditated murder. *MCM*, A12A-3.

Despite being a general intent offense, courts have found that involuntary manslaughter directly resulting from another's actions can still support a conviction for another principal. In *United States v. Brown*, the appellant gave his keys to an intoxicated Soldier, who subsequently struck two children with the appellant's car and killed one of them. 22 M.J. 448, 449 (C.M.A. 1986). Originally charged with murder, the appellant pled guilty to involuntary manslaughter, admitting his culpably negligent acts foreseeably and proximately caused the victim's death. *Id.* The appellant challenged the conviction, "contending that he cannot be held accountable on a theory of aiding and abetting [involuntary manslaughter] because there was no conscious sharing of criminal purpose." *Id.* The C.M.A. cited various persuasive cases upholding involuntary manslaughter

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[9] The applicable offense cannot be the inherently violent offenses listed in Article 118(4), UCMJ, including burglary, rape, robbery, and various sexual offenses against children. 10 U.S.C. § 918(4).

convictions against car owners who permitted intoxicated drivers to operate their vehicles.[10] Ultimately, this Court's predecessor did not decide whether aiding and abetting liability can attach when assisting another person's culpable negligence. *Id*. at 450; *but see United States v. Waluski*, 6 U.S.C.M.A. 724, 728 (1956) (recognizing that a vehicle passenger can qualify as a principal and be held accountable for a death if affirmatively aiding or encouraging the driver's culpable negligence). Instead, the C.M.A. upheld the guilty plea's providence because the appellant's "conduct . . . was itself culpably negligent." *Brown*, 22 M.J. at 450.

In *United States v. Rowden*, the Air Force Court of Criminal Appeals [Air Force court] affirmed an involuntary manslaughter conviction on a culpable negligence theory, despite the appellant being initially charged as a principal for murder as an aider and abettor. ACM 30481, 1994 CCA LEXIS 100, at *2 (A.F. Ct. Crim. App. 25 Oct. 1994). An individual expressed hatred for the victim and had stated he wanted to kill him. *Id.* Later, that same individual asked to borrow the appellant's gun; they retrieved it together, and the appellant drove this

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[10] *Id.* at 449–50 (citing *Story v. United States*, 16 F.2d 342 (D.C. Cir. 1926); *State v. Whitaker*, 259 S.E.2d 316 (N.C.App. 1979); *Freeman v. State*, 362 S.W.2d 251 (Tenn. 1962); *Stacy v. State*, 306 S.W.2d 852 (Ark. 1957); *but see People v. Marshall*, 106 N.W.2d 842 (Mich. 1961) (finding, where owner of vehicle was home in bed at time of accident, owner was not accomplice in death); *Lash v. State*, 103 S.E.2d 653 (Ga.App. 1958) (holding that owner could not be convicted of involuntary manslaughter where driver was on a mission of his own without owner's knowledge and consent)).

individual to another neighborhood at the latter's direction. *Id.* The other individual left the car alone and came back ten minutes later, stating, "I did it." *Id.* The appellant expressed in his confession that he had hoped it was a joke and that he could not believe it. *Id.* at *2–*3.

The Air Force court found that the military judge instructing on culpable negligence (instead of aiding and abetting) did not create a fatal variance. *Id*. at *6. The wrongful act remained the same under both murder and involuntary manslaughter, namely giving his gun to the perpetrator. *Id*. The only difference "was the intent behind appellant's actions." *Id.* The Air Force court stated that, "[I]n effect, the offense of involuntary manslaughter was pled by implication." *Id.*

Discussion

A. The Army court correctly affirmed the involuntary manslaughter convictions on a culpable negligence theory.

The Army court affirmed Appellant's convictions on a proper theory of liability because it derived from the military judge's special findings and because Appellant was sufficiently on notice. The actus reus—his actions assisting SGT SC—did not change; the only difference between the charged offense and the LIO was the mens rea. Based on that, the military judge correctly held Appellant accountable for his individual level of culpability, even though it differed from the perpetrator.

Importantly, the question here is narrow: whether the military judge's

findings are legally problematic when applying a culpably negligent mens rea to a principal who is not the perpetrator of the murders. Otherwise, the parties appear to agree on various points. The Defense never objected to involuntary manslaughter as an applicable LIO for aiding and abetting premeditated murder. (Appellant's Br. 7). Trial Defense Counsel generally agreed that *Jackson* and *Foushee* permitted an accused to face an LIO conviction when possessing a less culpable state of mind. (JA 245–46). Through his counsel, Appellant described involuntary manslaughter as a general intent offense and asked for the military judge to consider reasonable mistake of fact as to SGT SC's intent. (JA 242).

While the military judge correctly found Appellant guilty as a principal using an aider and abettor theory (see below discussion), the Army court's holding that the Appellant was a perpetrator in his own right did not introduce a theory of liability distinct from that which the military judge employed. It is true that the military judge used the phrases "vicariously liable" and "aided and abetted" to describe the involuntary manslaughter. (JA 351–52).[11] But he ultimately described Appellant's acts as "culpably negligent" and as proximately causing the victims' deaths. (JA 352–53). After evaluating the special finding's contents, the Army

[11] The military judge's special findings included the law of aider and abettor liability, but this was appropriate. (JA 352). The special findings did not focus solely on involuntary manslaughter; they discussed (and ultimately acquitted on) aiding and abetting premeditated murder, making recitation of this law applicable and even necessary. (JA 352).

court reasonably determined that "the factfinder, in essence, found that appellant was the one who actually committed the offense of involuntary manslaughter." *Thompson*, ARMY 20190525, 2025 CCA LEXIS 303, at *22; (JA 014).

This determination did not constitute an inappropriate shift in theories of liability, regardless of the special finding's characterization. The military judge never strayed from evaluating Appellant's acts of assistance to SGT SC, with only the required state of mind changing between offenses. He understood the Government was not changing its theory to allege that Appellant pulled the trigger himself. (JA 253). Like in *Rowden*, the actus reus remained consistent regardless of liability theory, with the sole difference being "one of intent." *Id.* at *25; (JA 016). With Appellant treated as a principal[12] either way, aiding and abetting *or* perpetrating involuntary manslaughter by culpable negligence, "appellant's argument is a distinction without a difference." *Id.* at *26; (JA 016–17).

The Government also put Appellant on sufficient notice that it intended to present a culpable negligence theory for involuntary manslaughter. In its bench brief submitted on August 5, 2023, the Government proposed elements for this LIO, including that "the accused's assistance constituted culpable negligence." (JA

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[12] Appellant's brief confuses "principal" with "perpetrator." (Appellant's Br. 16, 18). An aider and abettor is a principal to the same degree as the person who actually committed the offense. UCMJ art. 77, 10 U.S.C. § 877.

343).[13] Prior to closing arguments, trial counsel then confirmed "the government's intent to pursue a perpetrator liability theory for" involuntary manslaughter. (JA 251). The Defense recognized this fact and objected. (JA 250–51). In its closing argument, the Government contended that Appellant's assistance constituted, at minimum, "culpable negligence." (JA 291). While the Government focused its case on aiding and abetting premeditated murder, Appellant cannot reasonably claim that the Army court or the military judge concocted an unpresented theory of liability.

Appellant relied on *United States v. Ober* and *Chiarella v. United States* for the proposition that a "reviewing court may not affirm a conviction on a theory of liability different from the one presented to the factfinder." (Appellant's Br. 10–11) (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) and *Chiarella v. United States*, 445 U.S. 222, 236–37 (1980)). Those cases, however, examined theories of liability that involved different acts.[14] In the present case, both theories of liability rested on Appellant's acts of assistance. Even if the Government had

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[13] The Government proposed elements which included the victims' deaths resulting from SGT SC's acts, but its focus for culpable negligence was the "accused's assistance," not SGT SC's shooting. (JA 343).

[14] *Ober*, 66 M.J. at 405 (discussing the act of downloading files and the act of allowing others to obtain his shared files as two different theories of liability); *Chiarella*, 445 U.S. at 232–36 (finding that failing to disclose information to stock sellers and breaching duty of silence to the acquiring corporation by purchasing stock are distinct theories of liability).

not put the Defense on notice about culpable negligence, these cases would prove distinguishable. Instead, *Rowden* provides the more applicable authority, albeit persuasive: finding guilt on a perpetrator theory of liability for the involuntary manslaughter LIO did not create a fatal variance from the Government's overall aider and abettor theory for the charged murder. 1994 CCA LEXIS 100, at *6.

Involuntary manslaughter is a general intent offense, requiring only culpable negligence. UCMJ art. 119, 10 U.S.C. § 919; (JA 241). Aiding and abetting another in killing a person while possessing a culpably negligent state of mind or having culpably negligent acts of assistance serve as a proximate cause of another person's death: this is a distinction without a difference. *Thompson*, ARMY 20190525, 2025 CCA LEXIS 303, at *26.[15] *Jackson* dictates that courts-martial should hold principals accountable to the degree appropriate to the "turpitude of his own motive." 6 U.S.C.M.A. at 203. The military judge properly did so by finding Appellant guilty of involuntary manslaughter, and Appellant had sufficient notice of this theory, both through the Government's explicit statements and the consistent actus reus. Therefore, this Court should affirm the Army court's decision.

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[15] *See also United States v. Uno*, 47 C.M.R. 683, 684 (A.C.M.R. 1973) (stating "appellant's conduct was that of an aider and abettor in assisting the deceased to administer the [deadly] narcotic" but also the "[d]eath was directly caused by the culpably negligent act of appellant").

B. Even if the Army court erred by introducing a new and unnoticed theory, the military judge correctly found appellant guilty as an aider and abettor.

Assuming arguendo the Army court's determination on theory of liability is truly distinct from that of the military judge, the special findings remain legally sufficient in establishing aider and abettor liability for involuntary manslaughter. First, an aider and abettor need not have identical intent or purpose with the perpetrator. *See Foushee*, 13 M.J. at 835. Aider and abettor liability does require that Appellant had "sufficient knowledge and participation to indicate that he knowingly and willfully participated in the offense in a manner that indicated he intended to make it succeed." *Pritchett*, 31 M.J. at 217. This requirement does not alter the proposition that principals can have varying states of mind and need not specifically intend the same results. *See Richards*, 56 M.J. at 286.

Aider and abettor liability includes "crimes that are likely to result as a natural and probable consequence of the criminal venture or design." *MCM*, pt. IV, ¶ 1.b.(5). While the special findings did not list a specific offense Appellant intended, they are legally sufficient to support such liability. The military judge found, among other findings, that Appellant "knew [SGT SC] had a weapon with which he could confront and probably kill" PV2 MJ and SPC MB; "knew that [SGT SC] intended to confront and probably kill" the victims; and "knew [SGT SC] had the motive to confront and probably kill" them. (JA 353). Furthermore, "their deaths were the foreseeable result of" his knowing and willful assistance.

(JA 353). At the absolute minimum, these findings established that Appellant's shared knowledge and intent extended to the commission of assault by offer, a general intent crime. UCMJ art. 128, 10 U.S.C. § 928; *see also Foushee*, 13 M.J. at 835–36 (finding that the appellant did not share the intent to murder but was guilty to a lesser degree when intent only extended to assault and battery); *Hofbauer*, 2 M.J. at 926 (finding that appellant aided and abetted stabbing but was only culpable for the intent to commit assault consummated by a battery).

In this case, Appellant was not merely present at the scene of the crime; he actively, knowingly, and willfully assisted his close friend, and he did so with a culpably negligent state of mind. The special findings properly found this mens rea, which is necessary for involuntary manslaughter. Based on the principle of *Jackson*, *Foushee*, and *Hofbauer*, Appellant's acts of negligence aided and abetted SGT SC's murders, but the military judge held him accountable only to his level of culpability. Thus, the military judge's special findings are legally sufficient, necessitating affirmance in this case.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court uphold the Army court's judgment.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 6,266 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins on all four sides.

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March 17, 2026

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 17, 2026.

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