IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Craig R. Becker, Lieutenant (O-3E) U.S. Navy, Appellant	**REPLY TO APPELLEE'S ANSWER** Crim. App. Dkt. No. 201900342 USCA Dkt. No. 21-0236/NA

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

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Index of Reply

TABLE OF AUTHORITIES

Issue Presented

WHETHER THE LOWER COURT ERRED IN ITS ABUSE OF DISCRETION ANALYSIS BY FAILING TO GIVE THE TRIAL JUDGE'S FINDINGS OF FACT DEFERENCE, SUBSTITUTING ITS OWN DISCRETION FOR THE MILITARY JUDGE'S, AND ENGAGING IN FACT-FINDING BEYOND THE SCOPE OF ARTICLE 62 REVIEW.

Law and Argument

1. This Court can avoid "piecemeal litigation" by reversing the lower court and affirming the military judge's ruling.

Inveighing against "piecemeal appellate litigation," the government asks this Court to (1) partially grant review in order to address certain errors made by the lower court; (2) decline to review directly the military judge's ruling; (3) send the case back to the trial court so that the government can have a third chance to convince a judge of a question of fact; and (4) potentially review that third decision on direct review.

The government's unorthodox request that this Court grant review narrowly and only as to errors made by the service court is inconsistent with this Court's precedent. Certainly the lower court's errors are sufficient reason to review this case. But "[i]n an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial."[1] This Court should do what it always does: review directly the military judge's admissibility ruling for an abuse of discretion, using the correct scope and standard of review.

Lieutenant Becker shares the government's concern with piecemeal litigation. It has been seventeen months since the military judge first found that the

[1] *United States v. Henning*, 75 M.J. 187, 190-91 (C.A.A.F. 2016) (internal quotation omitted).

government failed to prove that Lieutenant Becker acted to prevent his wife's testimony. That finding of fact is supported by the record and does not represent an abuse of discretion. The government is not entitled to another try. The most efficient disposition in this case is also the one suggested by precedent: this Court should reverse the lower court and affirm the military judge's ruling.

2. *Commisso* noted that a military judge abuses his discretion when he "fail[s] to consider important facts."[2] The lower court misreads this passage as an expansion of its scope of review in Article 62 cases.

The government argues that this Court has used the *failure to use important facts* test in cases other than *Commisso*, and that Lieutenant Becker's contention to the contrary is incorrect.[3] This is an apparent disagreement worth exploring. The *failure to consider critical (or important) facts* test has its roots in this Court's 2013 opinion in *United States v. Solomon*.[4] In *Solomon*, a military judge permitted the government to present Military Rule of Evidence 413 evidence that the accused had broken into a barracks room and assaulted two victims. The record in that case indicated that the assaults must have happened between 0230 and 0300—a time when, according to police records, the accused was in police custody.[5] This Court

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[2] *United States v. Commisso,* 76 M.J. 315, 325 (C.A.A.F 2017).

[3] Gov't Answer at 25.

[4] *United States v. Solomon*, 72 M.J. 176 (C.A.A.F. 2013).

[5] *Id.* at 180.

found that the military judge abused his discretion because, he "failed to reconcile, or even mention, the fact that an uncontroverted military police report situates Appellant in police custody for the entire period of time that [the victims] allege they were being assaulted."[6]

Solomon did not purport to change the abuse of discretion standard. The *Solomon* court described the abuse of discretion standard in the familiar way: "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[7] And this seems to be the standard actually applied by the Court, since it found that the military judge "clearly erred."[8]

Even though *Solomon* did not purport to alter the abuse of discretion standard, a passage from *Solomon*'s analysis has taken on a life of its own, ultimately misleading the lower court. The *Solomon* court's assessment that the military judge "altogether failed to mention or reconcile Appellant's important alibi evidence" reappeared four years later in a slightly different form in *United States v. Commisso*.[9] In *Commisso*, this Court, citing this passage from *Solomon*,

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[6] *Id.* at 181.

[7] *Id.* at 179 (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)).

[8] *Id.* at 181.

[9] *Commisso*, 76 M.J. at 321 (C.A.A.F. 2017).

stated that a military judge abuses his discretion when "he fails to consider important facts."[10] In that case, the military judge was asked to consider whether court-martial members' previous exposure to the facts of a case supported the appellant's motion for a mistrial. This Court found that the military judge abused his discretion because "he neglected to consider facts that should have been weighed heavily in resolving the question whether the defense established actual or implied bias. *Cf. Solomon*, 72 M.J. at 180 ('[T]he problem is that the military judge altogether failed to mention or reconcile Appellant's important alibi evidence . . . .')."[11]

The subtle switch from *Solomon*'s failure-to-consider-important-*evidence* test to *Commisso*'s failure-to-consider-important-*facts* test is almost certainly what misled the lower court in this case. This Court has never used *Commisso*'s exact formulation of the abuse of discretion standard—using *fact* instead of *evidence*—in any other opinion of the court. The lower court uses it regularly, however, and the opinion below suggests that the lower court understands this standard of review to be a license to conduct its own review of controverted evidence and assemble its own slate of new facts. This Court can correct the lower court's misunderstanding and ensure service courts adhere to their proper scope of review under Article 62.

[10] *Id.* at 321.

[11] *Id.* at 323.

3. The lower court's misreading of *Commisso* affected its analysis.

The government concedes that this Court should grant review, and that the lower court erred by finding facts not found by the military judge. But the government asks this court to deny review "on the merits"[12] because the lower court's error did not, in the government's view, affect its abuse of discretion analysis.

The lower court's opinion shows that this is not true. The lower court explicitly relied on *United States v. Commisso* for the proposition that a military judge abuses his discretion when he "fails to consider important facts."[13] Following this citation to *Commisso*, the lower court adopts the government's facts and theory of the case wholesale, concluding that "the trial court erred in failing to consider important facts . . . ."[14] There can be little doubt that the lower court understands *Commisso* to authorize its embrace of the government's case, including its facts.

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[12] Gov't answer at 29.

[13] *Becker II* at 10 (citing *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F 2017)).

[14] *Becker II* at 14.

4. In its answer, the government makes the same error as the lower court.

Although its critique of the opinion below suggests it knows better, the government makes the same error as the lower court. In its answer, the government seeks to do subtly what the lower court naively did with gusto: import decisional facts into the case not found by the military judge. Even as it concedes that the lower court erred by finding facts not found by the military judge, the government, in its Statement of Facts, posits that "[a]ppellant assaulted the Victim at the Army Lodge in Belgium."[15] The military judge did not find this fact. Lieutenant Becker has consistently denied this allegation since it was made, and denies it again here. There is considerable evidence that the allegation is not true. Yet the government considers this a fact before this Court, and even asks this Court to rely on it in its analysis.[16]

The government persists in this error in its discussion of which "facts" the military judge is supposed to have disregarded. The government's statement of these alleged facts can be found on page 20 of its answer. There, the government urges that "[a]s the Victim was freeing herself from Appellant's control . . . Appellant attempted to reassert control by disallowing the Victim's new boyfriend

[15] Gov't answer at 3.

[16] *See* Gov't answer at 19 (noting that, under *Giles v. California*, a "prior abusive relationship 'highly relevant' to whether defendant acted with intent necessary for forfeiture by wrongdoing. (quoting *Giles*, 554 U.S. at 377)).

from helping her move . . . ."[17] This supposed motive (control over Mrs. Becker) is a factual conclusion,[18] and represents another controverted decisional "fact" not found by the military judge. In reality, the military judge found "no evidence that, leading up to 8 October 2015, the accused was engaged in behaviors intended to isolate the victim from outside help. . . . Far from being isolated, Mrs. Becker maintained regular contact with numerous family, friends, and co-workers."[19] The military judge's findings are supported by the record. The government has no basis in law to ask this Court to substitute its preferred facts for those found by the military judge. This Court should correct the lower court's errors—not recreate them.

Like the lower court, the government then uses its new "facts" to cast the rest of the evidence in a light least favorable to the party that prevailed at trial. Lieutenant Becker has already addressed the government's difficulties with this evidence in his initial pleading. The suggestion that Lieutenant Becker incapacitated his wife with zolpidem-laced wine is belied by (1) the fact that Lieutenant Becker did not have a prescription for, or other apparent access to zolpidem; (2) his boss, whose zolpidem the government alleges Lieutenant Becker

[17] Gov't Answer at 20.

[18] *United States v. Gonzalez*, 42 M.J. 469, 473 (C.A.A.F. 1995).

[19] Appellate Exhibit LXXXIII at 3.

stole, testified that his zolpidem was not in the form of small, round, pink pills;[20] (3) the amount of zolpidem in Mrs. Becker's system at the time of her death was well below even a therapeutic level;[21] and, (4) the toxicology report in which no alcohol was detected in Mrs. Becker's system.[22] And of course, even if this evidence was relevant to show a plan to commit murder, none of it would prove Lieutenant Becker acted with a motive to prevent testimony that no one anticipated Mrs. Becker ever giving.

The only evidence in the government's answer that plausibly touches on a relevant motive is Lieutenant Becker's "living nightmare" remark made to one of Mrs. Becker's friends. The government pins a lot of hope on this evidence. A word search of the government's answer for *living nightmare* returns nine results. But Lieutenant Becker's passing and unsurprising remark in a 58-minute phone call was explicitly considered by the military judge. The military judge's treatment of this evidence reflects its significance—or lack of significance—better than the government's. The military judge did not abuse his discretion in his handling of this evidence.

[20] Appellate Exhibit VI, Gov't Exhibit 60 at 2.

[21] Appellate Exhibit VI, Gov't Exhibit 32 at 6.

[22] *Id.* at 2.

5. The most important decisional issue in this case is also the simplest: Did the military judge clearly err by finding that Lieutenant Becker did not intend to prevent Mrs. Becker's future testimony.

Both the lower court's opinion and the government's answer tend to make this case more complicated than it needs to be. Ultimately, the decisional issue in this case is whether the military judge clearly erred by finding that Lieutenant Becker did not intend to prevent Mrs. Becker from giving testimony.

The lower court's opinion and the government's answer, with their erroneous scope of review and focus on supposed evidence of homicide, serve primarily to distract from this question. The military judge did not abuse his discretion by resolving this forfeiture question on the issue of intent. The government failed to prove an intent to prevent testimony. There was no need for the military judge to address the rest of the government's contentions. And because the question of Lieutenant Becker's intent is a question of fact, the military judge's finding on this prong should only be disturbed if it is clearly erroneous. It is not.

The military judge considered the evidence bearing on the question of intent. He considered the fact that there were no active or anticipated investigations against Lieutenant Becker; that Mrs. Becker never expressed any dissatisfaction with the fact that the earlier investigations were closed nor expressed an intent to reopen them before or after their divorce; that there was no evidence that Lieutenant Becker knew of any of her more recent complaints about his behavior

toward her; and that the two had agreed to a separation agreement that included a future business partnership.[23] In light of all the evidence bearing on the factual question of intent, the government had not carried its burden to prove that Lieutenant Becker intended to prevent his wife's testimony. This conclusion is supported by the record and is not clearly erroneous.

Conclusion

This Court should grant review, reverse the lower court, and affirm the military judge's ruling.

Respectfully submitted.

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[23] Appellate Exhibit LXXXIII at 3.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on May 13, 2021.

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This supplement complies with the page limitations of Rule 21(b) because it contains fewer than 4,000 words. Using Microsoft Word version 2010 with 14-point Times New Roman font, this supplement (not including the appendix) contains 2,734 words.

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