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	**SUPPLEMENT TO PETITION FOR GRANT OF REVIEW** Crim. App. Dkt. No. 201900342 USCA Dkt. No. _____/NA

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

Marcus N. Fulton
CAPT, JAGC, USN
Appellate Defense Counsel
(Code 45) Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, DC 20374
Ph: (202) 685-7299
Fx: (202) 685-7426
marcus.fulton@navy.mil
CAAF Bar No. 32274

Daniel Moore
LT, JAGC, USN
Appellate Defense Counsel
(Code 45) Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, DC 20374
Ph: (202) 685-7291
Fx: (202) 685-7426
dan.o.moore@navy.mil
CAAF Bar No. 37340

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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.

Introduction

Lieutenant Becker stands accused of murdering his wife, Mrs. Becker, in 2015 by causing her to fall from his Mons, Belgium apartment's seventh-floor window. Two years earlier, his wife had accused him of assaulting her after Lieutenant Becker learned that she had had an affair. The Navy closed its investigation into these allegations after Mrs. Becker explained that overuse of prescription migraine medication made her confused and paranoid, leading to her false report. Nevertheless, the government added this alleged assault to the charge sheet, and charged Lieutenant Becker with conduct unbecoming for other alleged abuses between 2013 and 2015.

This case concerns out-of-court statements made by Mrs. Becker. The government seeks to admit Mrs. Becker's statements under the forfeiture by wrongdoing exception to the Sixth Amendment's Confrontation Clause and the hearsay rule. This is the second government appeal of the military judge's determination that Lieutenant Becker did not intentionally procure Mrs. Becker's

unavailability in order to prevent her testimony.

Both in his original ruling and on remand, the military judge made extensive findings of fact. On remand, answering the precise question put to him by the lower court, the military judge determined that Lieutenant Becker did not intend to prevent his wife "not only from testifying at some formal proceeding, but also from reporting abuse, cooperating with law enforcement, or resorting to outside help." The military judge further found as fact that Lieutenant Becker did not take any action with an intent to "prevent Mrs. Becker from making any testimonial statements, such as a formal report to law enforcement." These findings are supported by the record.

The government appealed again, this time arguing that the military judge failed to consider important facts. In a divided, published opinion, the lower court again vacated the military judge's ruling. In a remarkable departure from its role under Article 62, the lower court made its own extensive findings of controverted facts. New facts in hand, the lower court substituted its own discretion for the trial judge's by making its own ruling.

This Court should vacate the lower court's decision for two reasons: First, this Court should correct the lower court's published precedent in which it erroneously—indeed brazenly—overran the statutory limits on its scope of review. Second, this Court should reverse the decision of the lower court because the

military judge did not abuse his discretion.

Statement of Statutory Jurisdiction

This Court has jurisdiction under Article 67(a)(3). Under Article 67(c)(1)(B), this Court may act only with respect to the decision of the military judge as set aside as incorrect by the lower court.

Statement of the Case

Charges were referred to a general court-martial on January 29, 2019.[1] On December 9, 2019, the military judge issued his first ruling in this case on the admissibility of Mrs. Becker's out-of-court statements. The government filed an interlocutory appeal under Article 62. On July 24, 2020, the lower court vacated the military judge's ruling and remanded for further proceedings in accordance with its decision.[2]

On August 10, 2020, the military judge again found the forfeiture by wrongdoing exception inapplicable to Mrs. Becker's out-of-court statements. The government appealed again, and on February 25, 2021, the lower court, in a divided, published opinion, vacated the military judge's second ruling. It determined that the out-of-court statements were admissible under the forfeiture by

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[1] Charge Sheet, Jan. 29, 2019.

[2] *United States v. Becker*, 80 M.J. 563 (N-M. Ct. Crim. App. 2020).

wrongdoing exception to prohibition on hearsay and Lieutenant Becker's right to confront witnesses against him.[3]

Statement of Facts and Procedural History

1. Mrs. Becker accuses Appellee of assault shortly after they arrive in Belgium.

In August 2013, military police responded to a call from the Army Lodge in Chievres, Belgium.[4] The lodge staff directed the responding officer to Mrs. Becker.[5] When he entered the Beckers' hotel room, the responding officer saw no signs of a struggle.[6] Mrs. Becker told him she and Lieutenant Becker were discussing their separation.[7] She said Lieutenant Becker threw her across the room, pinned her to the bed in the hotel room, and that she either punched or kicked him in the groin to get him off her.[8]

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[3] *United States v. Becker*, 2021 CCA LEXIS 76 (N-M. Ct. Crim. App. Apr. 25, 2021) - *Becker* II.

[4] Appellate Exhibit VI, Gov't Exhibit 10 at 1.

[5] *Id*.

[6] *Id*.

[7] Appellate Exhibit VI, Gov't Exhibit 4a at 1.

[8] *Id*.

Despite her report, Mrs. Becker said she did not require medical attention.[9] The responding officer did not see any injuries.[10] Mrs. Becker told the officer that she did not have any visible injuries.[11] Mrs. Becker stated that she had had four glasses of wine in the hours leading up to her report and that she was taking prescription medication for migraines and anxiety.[12] The responding officer asked Mrs. Becker if Lieutenant Becker had threatened her, and she reported that she did not think he had made any threats.[13]

2. Mrs. Becker denies that she had been abused hours later.

Later that day, Mrs. Becker told the provost marshal that her initial report to the police was not true.[14] Days later, she reported to her doctor that the recent increase in her migraine medicine had been causing her severe side effects.[15] Three months later, she confirmed this in a statement to NCIS, explaining that her perception of the events was distorted by having been prescribed twice the

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[9] *Id*. at 2.

[10] Appellate Exhibit V at MMM.

[11] Appellate Exhibit V at EEE at 2.

[12] *Id*.

[13] *Id*.

[14] Appellate Exhibit VI, Gov't Exhibit 9 at 1.

[15] Appellate Exhibit VII, Def. Attachment Q at 1.

recommended dosage of her migraine medicine.[16] The medication left her "seriously paranoid" and caused her to experience a "personality change."[17] A committee within the Family Advocacy Case Review Committee concluded the complaint was unsubstantiated.[18] Eight months later, Lieutenant Becker's command told NCIS that it would take no action in the case and NCIS closed its investigation.[19]

3. Mrs. Becker discusses the August 2013 assault allegation and other aspects of her relationship with her family and friends.

In spite of what she told NCIS and the Family Advocacy Program, Mrs. Becker continued to tell some people (but not others) that Lieutenant Becker had assaulted her. The military judge found that Mrs. Becker told three friends that Lieutenant Becker had assaulted her after learning that she had had an affair, telling two of them that she had recanted out of concern for Lieutenant Becker's career.[20] The military judge also found that between August 2013 and October 2015, Mrs. Becker also told friends and family members that Lieutenant Becker

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[16] Appellate Exhibit VI, Gov't Exhibit 43 at 1.

[17] Appellate Exhibit VI, Gov't Exhibit 11 at 1.

[18] Appellate Exhibit LXXIX at 4.

[19] *Id.*

[20] Appellate Exhibit LXXIX at 5.

had engaged in controlling behavior and spied on her.[21] While the military judge did find that Mrs. Becker made these statements to friends and family, he did not find that Lieutenant Becker had ever abused his wife.

4. The Beckers agree to divorce.

In 2015, the Beckers agreed to separate and divorce. The couple arrived at a written separation agreement that settled matters such as custody of their infant daughter.[22] They even agreed to continue as partners in their joint business selling athletic gloves.[23] Mrs. Becker described the separation as amicable.[24]

Both Mrs. Becker and Lieutenant Becker began seeing other people.[25] Mrs. Becker sometimes spent the night at her new boyfriend's residence.[26] Mrs. Becker paid a deposit on an apartment and bought a washer and a dryer.[27]

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[21] Appellate Exhibit LXXIX at 5.

[22] R. at 10.

[23] *Id.*

[24] Appellate Exhibit LXXIX at 5.

[25] R. at 85

[26] *Id.*

[27] R. at 86.

5. Mrs. Becker dies in October of 2015.

On October 8, 2015, Lieutenant Becker, Mrs. Becker, and their daughter had dinner in his apartment.[28] At approximately 2100, witnesses heard a scream.[29] One identified witness saw Mrs. Becker fall from a window in Appellee's apartment.[30] About an hour after the fall, Mrs. Becker died from her injuries.[31]

6. The government charges Lieutenant Becker with murder, assault, and conduct unbecoming.

On July 30, 2018, Appellee was charged with the murder and assault of his wife.[32] The assault charge stems from the alleged 2013 assault at the Army Lodge. The government also accused him of conduct unbecoming of an officer and a gentleman for his allegedly controlling and emotionally abusive behavior toward Mrs. Becker on divers occasions between August of 2013 and October of 2015.[33]

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[28] *Id*.

[29] Appellate Exhibit VI, Gov't Exhibits, 3, 26, 27.

[30] Appellate Exhibit VI, Gov't Exhibit 26.

[31] Appellate Exhibit VI, Gov't Exhibit 25 at 15.

[32] *See* Charge Sheet.

[33] *Id*.

7. The military judge rules that the forfeiture by wrongdoing exception did not apply to Mrs. Becker's out-of-court statements.

In September of 2019, the government asked the military judge to rule that Mrs. Becker's out-of-court statements were admissible under the forfeiture by wrongdoing exception to hearsay and the Sixth Amendment's Confrontation Clause.[34] The government argued that Lieutenant Becker had forfeited his right to confrontation because he killed his wife with the intent to prevent her from reasserting her recanted claim of assault from 2013.[35] In his ruling, the military judge focused his analysis on the second element of that exception: whether Lieutenant Becker intended to prevent Mrs. Becker from testifying.

Without direct evidence of a potential motive, the military judge considered the circumstantial evidence, finding that it "fails to show that the accused intended to prevent Mrs. Becker's testimony by his conduct on 8 October 2015."[36] The military judge noted that at the time of Mrs. Becker's death, "there were no active investigations and no anticipated investigations into any of Mrs. Becker's allegations regarding physical or emotional abuse against the accused."[37] Those

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[34] Appellate Exhibit XVIII

[35] *Id.*

[36] Appellate Exhibit LXXIX at 6.

[37] *Id.*

investigations had been "formally closed in June 2014 with the affirmative assertion by the accused's command that they were not pursuing any administrative or criminal actions against the accused."[38]

The military judge further found that Mrs. Becker "never expressed any disappointment that the original investigation had closed or a desire to see the accused further investigated."[39] "She never articulated a plan to report him after they separated or upon divorce. She made no statements indicating a change in heart regarding her desire to protect the accused's naval career."[40] The military judge found that although Lieutenant Becker harbored animosity toward Mrs. Becker, "he never raised any concerns that she might file a complaint with his command or law enforcement regarding any prior alleged misconduct."[41] And although the military judge had found that Mrs. Becker had told friends and family that Lieutenant Becker had been emotionally abusive, he found "no evidence that [Lieutenant Becker] was even aware of the other allegations that Mrs. Becker made to friends and family regarding emotional abuse.[42]

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Appellate Exhibit LXXIX at 7.

[42] *Id.*

Based on these findings, the military judge found that "it was not reasonably foreseeable that the accused would be investigated as a result of any prior, formal or informal allegations made by Mrs. Becker" and that "the accused could not have reasonably foreseen that he might face charges . . . and that Mrs. Becker might be required to testify against him."[43] Because Mrs. Becker's testimony was not reasonably foreseeable, the military judge declined to infer that Lieutenant Becker intended to prevent Mrs. Becker's testimony, and that the forfeiture by wrongdoing exception therefore did not apply.[44]

8. The lower court vacates the military judge's first decision.

On 24 July 2020, the lower court granted the Government's appeal and vacated the military judge's ruling.[45] The lower court did not take issue with any of the military judge's facts, nor did it suggest that the military judge ought to have considered additional facts. Rather, the lower court found that the military judge erred as a matter of law. The lower court held that by considering whether Mrs. Becker's testimony was reasonably foreseeable, the military judge introduced an

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[43] *Id.*

[44] Appellate Exhibit LXXIX at 7, 10.

[45] *United Sates v. Becker*, 80 M.J. 563 (N-M. Crim. Ct. App. 2020).

"objective gloss" on a test that focuses on the subjective intent of an accused.[46] The lower court vacated the military judge's ruling and remanded the case so that the military judge could determine whether Appellee had the subjective intent to prevent Mrs. Becker from testifying at some formal proceeding, reporting abuse, cooperating with law enforcement, or resorting to outside help.[47]

9. The military judge finds that Appellant did not act to prevent Mrs. Becker from making any testimonial statement.

Answering the precise question put him by the lower court, the military judge found that "[t]he preponderance of the evidence fails to establish that the prior allegations were—*in any way*—a motivation for the events of 8 October 2015."[48] The military judge concluded that "the preponderance of the evidence fails to establish that the accused intended to prevent Mrs. Becker from making any testimonial statements, such as a formal report to law enforcement."[49] The government appealed again. The lower court's second ruling is discussed below.

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[46] *Id.*

[47] *Id.* at 569.

[48] Appellate Exhibit LXXXIII at 3 (emphasis in original).

[49] *Id.*

Reason for Granting Review

THE MILITARY JUDGE'S FINDING THAT APPELLEE DID NOT ACT WITH THE INTENT TO PREVENT MRS. BECKER FROM MAKING ANY TESTIMONIAL STATEMENTS IS SUPPORTED IN THE RECORD AND NOT CLEARLY ERRONEOUS. THE LOWER COURT ERRED BY CONDUCTING ITS OWN FACT-FINDING AND SUBSTITUTING ITS OWN DISCRETION FOR THE MILITARY JUDGE'S.

Standard of Review

This Court reviews a military judge's evidentiary rulings for an abuse of discretion.[50] "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."[51] This Court will only reverse "if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law."[52] Under the abuse of discretion standard, "findings of fact are reviewed for clear legal error and conclusions of law

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[50] *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010).

[51] *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citations and internal quotation marks omitted).

[52] *United States v. Henry*, __ M.J.__, 2021 CAAF LEXIS 322 at * 4 (C.A.A.F. Apr. 9, 2021) (citing *United States v. Feltham* 58 M.J. 470, 474-75 (C.A.A.F. 2003)).

are reviewed *de novo.*"[53] In reviewing an Article 62 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"—in this case, Lieutenant Becker.

Analysis

I. The lower court erred by finding facts not found by the military judge.

As was the case in *United States v. Gore*, "[a] preliminary issue before this Court is determining the decisional facts in this case."[54] On matters of fact, this Court is bound—and the lower court was supposed to be bound—by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous.[55] "Neither court has authority to find facts in addition to those found by the military judge."[56] The lower court's role in determining the facts of this case should have been "limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record."[57] "If the findings are incomplete

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[53] *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (internal citations omitted).

[54] 60 M.J. 178, 184-85 (C.A.A.F. 2004).

[55] *Id.* at 185.

[56] *Id.*

[57] *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995).

or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings."[58]

Despite blackletter law and binding precedent, the lower court found its own facts. With remarkable candor about what it was doing, the lower court assessed that "the evidence reveals a number of important facts that are absent from the trial court's ruling" and struck out on its own fact-finding expedition. On its way, the lower court found many controverted facts not found by the military judge. Facts like:

- Lieutenant Becker killed his wife;[59]
- He did so intentionally;[60]
- This killing was "the result of planning and design;"[61]
- His motive was, in part, to prevent her from causing the same kinds of problems she had caused him when she made her earlier abuse allegation.[62]

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[58] *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (quoting *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994)).

[59] *Becker* II at *22.

[60] *Id.*

[61] *Id.*

[62] *Id.*

These "facts" are not "decisional facts in this case" before this Court because the military judge did not find them to be facts.[63] Neither are any of the many other facts erroneously found by the lower court in its independent, *de novo*, and unauthorized pronouncement of the facts. The decisional facts in a government appeal under Article 62 are those found by the military judge.[64] By finding its own facts, the lower court "so far departed from the accepted and usual course of judicial proceedings . . . as to warrant review by [this] Court."[65]

II. The abuse of discretion standard does not justify the lower court's disregard of Article 62.

The lower court's opinion suggests that it exceeded its scope of review because it was misled by the government's characterization of the standard of review.

Appellate courts review a trial judge's evidentiary ruling for an abuse of discretion. In this case, the government urged that the military judge had abused his discretion because he "failed to consider critical facts" regarding Lieutenant Becker's intent.[66] This Court has only used the *failure to consider critical facts* test

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[63] *United States v. Gore*, 60 M.J. at 184-85.

[64] *Id.*

[65] CAAF Rule of Practice and Procedure 21(b)(5)(F).

[66] Gov't brief of Sept. 11, 2020 at 12.

once,[67] although Navy-Marine Corps Court of Criminal Appeals now uses it frequently.[68] It does not commonly appear in other jurisdictions. But a look at how this Court applied this standard reveals that it is not really a new standard. It is simply another way of asking whether a military judge's findings of fact are supported by evidence in the record. And this Court has certainly never held that the abuse of discretion standard of review permits a service court to disregard the limits Congress placed on it in Article 62.

The case in which this Court first articulated the *failure to consider critical facts* test is *United States v. Commisso*.[69] In that case, the military judge considered a mistrial motion after learning that three members—all of whom displayed a "lack of candor" regarding their knowledge of the case during voir dire—had attended at least four Sexual Assault Review Board meetings at which the case was discussed from the alleged victim's point of view.[70] One of the members had even expressed

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[67] *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) ("A military judge abuses his discretion when . . . he fails to consider important facts."); *see also United States v. Criswell*, 78 M.J. 136, 147 (C.A.A.F. 2018) (Ohlson, J., dissenting).

[68] *See, e.g.*, *United States v. MacWhinnie*, No. 201900243, 2021 CCA LEXIS 92, at *7 (N-M. Ct. Crim. App. Mar. 2, 2021); *United States v. Beauge*, No. 201900197, 2021 CCA LEXIS 9, at *10 (N-M. Ct. Crim. App. Jan. 11, 2021).

[69] 76 M.J. at 321.

[70] *Commisso*, 76 M.J. at 317-18.

antipathy toward defense counsel who were "aggressive" about "finding something to remove members from the panel."[71]

In his consideration of the mistrial motion, the military judge did not ask any of the members why they had concealed their previous exposure to the case—a question that would have been especially critical given at least one member's thoughts about "aggressive" defense counsel conduct during voir dire.[72] The military judge's failure to inquire further was an abuse of 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."[73]

The military judge's failure to consider the most significant evidence before him on the mistrial motion meant that many important questions had gone unanswered: Had the members intentionally misled the court-martial during voir dire? Why did the members deny having had exposure to the case during voir dire? Was the failure to disclose intentional, perhaps motivated by animus toward defense counsel? Did it evince actual bias? The *Commisso* court held that the military judge's failure to grapple with the evidence and answer these questions

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[71] *Commisso*, 76 M.J. at 323.

[72] *Commisso*, 76 M.J. at 323-24.

[73] *Id.* at 323.

was an abuse of discretion, and cast substantial doubt as to the fairness of the court-martial.[74] But the *Commisso* court did not do what the lower court has done here: conduct its own fact-finding in an attempt to answer those questions. The *Commisso* court recognized "[i]t is the role of the military judge to conduct this analysis in the first instance . . . 'because appellate tribunals are a poor substitute for trial courts in developing a record or for resolving factual controversies.'"[75] And nothing in *Commisso*, a case on direct appeal before this Court, can be read to suggest that service courts of appeals are not bound by the Article 62's limit on their scope of review.

Appellate courts need not find original facts to review a trial judge's ruling for an abuse of discretion. Article 62 does not permit it. This Court should review this published case because it erroneously expands the lower court's scope of review in Article 62 cases.

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[74] *Id.* at 324.

[75] *Id.* at 323-24 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)).

III. The military judge did not abuse his discretion by focusing on the facts in his written ruling.

Forfeiture by wrongdoing has two elements.[76] First, the proponent must demonstrate that the party opposing the statements' admission caused the unavailability of the declarant at trial.[77] Second, the proponent must show that the opposing party intended to prevent the declarant from testifying or making testimonial statements when he or she caused the declarant's unavailability.[78] If the proponent fails to prove either of these elements, the exception does not apply.[79]

The military judge was not required to resolve both elements. If the government could not demonstrate by a preponderance of the evidence that one of the elements was met (in this case, the intent element), it was reasonable—indeed prudent—for the military judge to decline to decide factual questions that no longer bore on the evidentiary question before him. In this case, the military judge did not abuse his discretion—and did not fail to consider important facts—by

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[76] *Giles v. California*, 554 U.S. 353, 361-62 (2008) ("In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declarations exception.").

[77] *Id.*

[78] *Id.*

[79] *Id.*

beginning and ending his consideration of this issue with an inquiry into whether the government had proven the requisite intent.

In connection with this inquiry into Lieutenant Becker's intent, the military judge considered the important facts. Unsurprisingly, direct evidence of Lieutenant Becker's intentions on October 8, 2015 does not exist. But the military judge considered the circumstances of Mrs. Becker's alleged 2013 assault, and the Beckers' relationship at the time of her death. He gave fair consideration to every important fact bearing on the question the lower court put to him on remand: whether Lieutenant Becker intended to prevent his wife from making testimonial statements.

With respect to the circumstances of the abuse allegations, the military judge considered their effect on Lieutenant Becker. He considered Lieutenant Becker's characterization of the ensuing investigations as "a living nightmare."[80] He considered Mrs. Becker's recantation, and the fact that, even after she recanted, she continued to tell other people that she had been assaulted.[81] He considered that Mrs. Becker never expressed any disappointment with the results of the law

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[80] Appellate Exhibit LXXIX at 4.

[81] *Id.*

enforcement or Family Advocacy investigations.[82] He considered whether Lieutenant Becker knew about allegations of emotional abuse Mrs. Becker had made to third parties.[83] He considered that the investigations into the allegations were closed, and that the command was not pursuing any action against Lieutenant Becker.[84]

The military judge also considered the circumstances of the Beckers' relationship at the time of her death. He found no evidence that Mrs. Becker had any plan to once again accuse Lieutenant Becker of assault, or that she was dissatisfied with the way the assault investigation concluded. He considered that Lieutenant Becker had privately expressed increased animosity toward Mrs. Becker at the time of her death, but also that he had never raised any concerns that she might complain to his command about earlier alleged misconduct.[85] He found no evidence that Mrs. Becker planned to report Lieutenant Becker for earlier abuse after they were separated or divorced.[86] He found that the two had agreed to a separation agreement in which Lieutenant Becker would pay Mrs. Becker for her

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[82] *Id.* at 6.

[83] *Id.* at 7.

[84] *Id.* at 6.

[85] *Id.*

[86] *Id.*

contributions to their joint private business selling athletic gloves—a joint business that was to continue after the separation.[87] He considered the fact that Mrs. Becker had described the divorce as "amicable" to her friends.[88] He considered the fact that Mrs. Becker had never articulated a plan to report Lieutenant Becker to the command, and that she never indicated that she had had a change of heart about protecting his career.[89]

These facts are all supported by the record. The lower court did not determine that any of these facts were clearly erroneous.

Considering these and other relevant facts as circumstantial evidence bearing on Lieutenant Becker's subjective state of mind on October 8, 2015, the military judge found that the government had "fail[ed] to establish that the prior allegations of abuse were—*in any way*—a motivation for the events of 8 October 2015."[90] And although it reversed the military judge's ruling, the lower court never states that this finding of fact was clearly erroneous, either. This is where this government appeal should have ended.

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[87] *Id.* at 5; Appellate Exhibit LXXXIII at 3.

[88] R. at 66.

[89] Appellate Exhibit LXXXIII at 6.

[90] *Id.* (emphasis in original).

IV. The lower court's "important facts" aren't important. Some aren't even facts.

Setting aside that the lower court had no authority to find facts at all, its assessment of the facts is erroneous at every turn. The lower court acknowledged that it had a duty to "review the evidence 'in the light most favorable to the party which prevailed at trial.'"[91] But over and over again, it failed in that duty. A review of some the lower court's "important facts" demonstrate how it arrogated to itself the trial judge's fact-finding role and his discretion.

Some of the lower court's new findings of fact are clearly erroneous. Some can claim some slim support in the record, but do not reflect the lower court's duty to view the evidence in a light most favorable to Lieutenant Becker. Other facts cited as important by the lower court had in fact been appropriately considered by the military judge.

None of the lower court's new-found facts are important to the decisional issue in this appeal. On remand, the lower court directed the military judge to determine whether Lieutenant Becker subjectively intended to prevent his wife from making any testimonial statements. To the extent they matter at all, the lower court's "facts" go to the question of whether Lieutenant Becker committed assault

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[91] *Becker* II at *17.

and premeditated murder. Unlike the military judge, the lower court concluded that he committed both. But that determination—even if it were supported—would not prove that Lieutenant Becker intended to prevent Mrs. Becker's testimony. These new "facts" bear no resemblance to the important facts ignored by the military judge in *Commisso*.[92]

a. The lower court's erroneous findings of fact pertaining to the time surrounding Mrs. Becker's death.

The lower court made seven bulletized findings of fact that it believed were "important" but had not been appropriately considered by the military judge.[93] The lower court used these findings to further find as fact that Lieutenant Becker killed his wife with premeditation. These bulletized findings of fact are largely without support in the record.

- In the first bulletized fact, the lower court finds it important that "[t]wo days before her death, Appellee was concerned about Mrs. Becker 'making problems' for him upon moving out. While informing the police of his concern, Appellee also reported the problematic effects of Mrs. Becker's alcohol consumption, yet bought a bottle of wine for their apartment that same day."[94]

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[92] *Commisso*, 76 M.J. at 323.

[93] *Becker II* at 20-21.

[94] *Id*.

This is a clearly erroneous finding of fact by the lower court. The record shows that Lieutenant Becker bought the wine two days after his meeting with the police—not the day of the meeting.[95] But why does this purchase matter at all? The record also shows he bought three bottles of the same wine, "Nouveau Monde Rouge," four days before he met with the police.[96] Besides being clearly erroneous, the wine purchase finding isn't important. The lower court never explains its importance, other than to hint that it was part of a plan to subdue Mrs. Becker. The record contains no evidence that Lieutenant Becker bought the wine for Mrs. Becker to drink, a problem the lower court skirts by vaguely positing that Lieutenant Becker bought it "for their apartment."[97] Mrs. Becker's father reported that Lieutenant Becker remembered Mrs. Becker having two glasses of wine that evening.[98] The investigation found no alcohol in Mrs. Becker's system at the time of her death.[99] Whether Mrs. Becker had two glasses of wine, or no wine, that fact would not tell us very much about how she died, let alone who was responsible. It

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[95] Appellate Exhibit VI, Gov't Exhibit 24 at 1.

[96] Appellate Exhibit VI, Gov't Exhibit 24 at 1.

[97] *Becker II* at *20.

[98] Appellate Exhibit VI, Gov't Exhibit 36 at 2.

[99] Appellate Exhibit VI, Gov't Exhibit 32 at 2.

tells us nothing about whether Lieutenant Becker intended to prevent her testimony—the relevant decisional issue in this case.

Lieutenant Becker's visit to the Belgian police is also not relevant. The lower court makes much of Lieutenant Becker's statement that he was worried that his wife would cause him "problems."[100] As he explained to the police, he was concerned with the potential for confrontation with people Mrs. Becker had arranged to help her move.[101] The Belgian police explained the relevant law to him.[102] The potential for conflict then disappeared when members of Lieutenant Becker's command agreed to help move.[103] The record contains nothing that would suggest Lieutenant Becker was referring to the possibility that his wife would seek to reopen the long-since-closed assault investigation. Even if this were an inference that a trial judge could make, it is not the only possible inference, and certainly not the inference to be made when viewing the evidence in a light most favorable to Lieutenant Becker.

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[100] *Becker II* at *20.

[101] R. at 67.

[102] Appellate Exhibit VI, Gov't Exhibit 23 at 4; Gov't Exhibit 25 at 40.

[103] R. at 67 (Ms. Litchfield stated that Mrs. Becker turned down an offer of assistance because Lieutenant Becker and his friends agreed to help Mrs. Becker move).

- The second bulletized finding of fact is almost as bad: The lower court found as fact that "Appellee retrieved pills from his old office matching the physical description of prescription pills containing the same sedative later found in Mrs. Becker's system."[104] The sedative in question is zolpidem, better known under the trade name Ambien.[105] The witness who saw Lieutenant Becker retrieving the pills described them as "small round pink pills."[106] The record contains no evidence that Lieutenant Becker had a prescription for zolpidem. The only potential source for zolpidem suggested by the government was Lieutenant Becker's boss, but his zolpidem was not in the form of small pink pills.[107] And the zolpidem levels in Mrs. Becker's blood at the time of her death were well below even the useful therapeutic levels.[108] There is no reason to find that Lieutenant Becker had zolpidem, or that zolpidem from any source is important even to the homicide case. Moreover, as with the wine purchase, even if Lieutenant Becker had obtained and used zopidem in this manner, that fact would tell us nothing

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[104] *Becker II* at *20.

[105] Appellate Exhibit VI, Gov't Exhibit 60 at 1.

[106] Appellate Exhibit VI, Gov't Exhibit 21 at 1.

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

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

about whether he did so with the intent to prevent his wife from making testimonial statements.

- The third bulletized finding of fact finds that "text messages evidencing [Mrs. Becker's] ostensible desire to get back together with Appellee, but being distraught about being rejected by him, were sent from Mrs. Becker's phone to her new boyfriend, at times when Appellee was not using his own phone."[109] The lower court never explains why this is an important fact. Presumably we are to infer that Lieutenant Becker sent the messages himself to misdirect investigators. That Lieutenant Becker was not using his own phone when these text messages were sent is hardly a reason to think that he sent these messages. This does not reflect the lower court's viewing the evidence in a light most favorable to Lieutenant Becker. It also provides us with no insight into the dispositive question of motive.

- The fourth bulletized finding of fact states that Lieutenant Becker claimed to have heard only a scream, whereas "multiple bystanders heard Mrs. Becker repeatedly and fearfully crying for help, saw her struggling to hold onto a

[109] *Becker II* at *20.

window ledge for a period of time before falling, and the saw him looking down from the window to where she fell, which he denied."[110]

This finding demonstrates that the lower court is making factual determinations reserved for trial judges—and why it shouldn't. The investigation identified only three witnesses to Mrs. Becker's fall: two companions walking together (Brys and Hamou), who heard screams but didn't see Mrs. Becker until she was lying on the street, and a nurse (Lejeune), who actually witnessed Mrs. Becker's fall from her hospital across the street.[111] The three witnesses give three different accounts. From these three accounts, the lower court created a fourth account by cherry-picking the most incriminating statements of the three witnesses, even when other witnesses provided contrary evidence.

For instance, the lower court's finding that "multiple bystanders . . . saw her struggling to hold onto a window ledge"[112] is clearly erroneous. Contrary to the lower court's finding, only one of the three witnesses (Lejeune) claims to have seen Mrs. Becker try to hang on to the window.[113] Likewise, the claim that

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[110] *Becker II* at *21.

[111]Appellate Exhibit VI, Gov't Exhibit 54 at 18-20; *see also* Gov't Exhibit 26 at 2.

[112] *Becker II* at *21.

[113] Appellate Exhibit VI, Gov't Exhibit 26 at 2.

"multiple bystanders" saw Lieutenant Becker "looking down from the window to where she fell"[114] is unsupported, particularly when one views the evidence in a light most favorable to Lieutenant Becker. Of the three witnesses, Brys and Hamou claimed to have seen a man looking down from a window after the fall. But Belgian officials who reconstructed the events insist that Brys could not have seen the Beckers' window from her vantage point.[115] Unlike Brys and Hamou, Lejeune saw Mrs. Becker's fall, so we know that she saw the window in question.[116] Lejeune told investigators plainly, "I never saw anyone behind this . . . window."[117] The lower court does not explain how this evidence justifies its finding that multiple people saw Lieutenant Becker looking down from the window, or why it disregarded the testimony of the only witness we know saw the window in question. The lower court certainly didn't consider this evidence in a light most favorable to Lieutenant Becker. And, again, none of this is important to the requisite intent to prevent testimony.

- The fifth bulletized finding of fact—that days after his wife's death,

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[114] *Becker II* at *21.

[115] Appellate Exhibit. VI, Gov't Exhibit 70 at 6.

[116] Appellate Exhibit VI, Gov't Exhibit 26 at 2.

[117] *Id*.

Lieutenant Becker told one of his wife's friends that the assault investigation had made his life a "living nightmare"—is supported by the record. This fleeting reference to the long-since-closed investigation occurred in the context of a fifty-eight-minute phone conversation about the Beckers' marriage after Mrs. Becker's death.[118] The statement is unremarkable in the context of the call. It is not compelling evidence of motive. The statement contains no indication that Lieutenant Becker thought that the allegations might have resurfaced. Indeed there is no evidence that he knew or believed it was even possible for his wife to revive her recanted complaint after Family Advocacy and NCIS had closed their investigations, and after his command had decided to take no action.[119]

The lower court's treatment of this evidence also demonstrates that the lower court is substituting its own judgment and discretion for the military judge's. The military judge expressly considered this statement in his ruling, and gave it the weight it deserved.[120] The lower court erred by giving no deference to the military judge's assessment of this evidence.

- The sixth bulletized finding of fact states that Lieutenant Becker "had

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[118] Appellate Exhibit VI, Gov't Exhibit 28 at 7.

[119] Appellate Exhibit LXXIX at 7; *See also* Appellate Exhibit LXXXIII at 3.

[120] Appellate Exhibit LXXIX at 4.

an ongoing child custody dispute over children from a previous marriage, which he feared would be negatively impacted by even the report that Mrs. Becker had committed suicide or accidentally fallen."[121] While there is some support for this finding in the record, the finding does not support an inference that Lieutenant Becker killed Mrs. Becker, or that he did so to prevent her testimony. If anything, the finding makes it *less* likely that Lieutenant Becker would connive at a scenario in which he falsely reports that his wife accidentally fell or committed suicide. This finding makes no sense, and the inference drawn by the lower court would represent an abuse of discretion even if it were found by a trial judge authorized to make it.[122] It is certainly erroneous here.

- The seventh bulletized finding, that "Mrs. Becker revealed to friends and family members . . . her fear of what Appellee would do if he lost his career"[123] also makes no sense. If true, it is less likely—not more likely—that Mrs. Becker would seek to revive any abuse allegations against Lieutenant Becker. Furthermore, as acknowledged by the military judge, the record contains no

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[121] *Becker II* at *12.

[122] *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2009) (recognizing application of correct legal principles to the facts in a clearly unreasonable way represents an abuse of discretion).

[123] *Becker II* at *12.

evidence that Lieutenant Becker knew anything about what his wife was telling other people about their marriage.[124] Lieutenant Becker's state of mind is what matters in this case. If he did not subjectively believe that Mrs. Becker was going to testify against him, he would not have acted to prevent that testimony, and the forfeiture by wrongdoing exception does not apply.

b. The lower court's erroneous findings pertaining to the abuse allegation at the Army Lodge.

Unlike the military judge, the lower court found as fact that Lieutenant Becker physically abused his wife in 2013 at the Army Lodge in Belgium.[125] This conclusion is not supported by the record.

Though the lower court mentions that Mrs. Becker recanted her allegations, no thought is given to crediting the recantation. In fact, Mrs. Becker stated several times that the alleged abuse never happened, beginning hours after she made the allegation.[126] About two months after making her allegations, she told NCIS that Lieutenant Becker was trying to prevent her from harming herself, and that Lieutenant Becker "DID NOT choke [her] or hurt [her] in any way."[127] She

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[124] Appellate Exhibit LXXIX at 7.

[125] *Becker II* at 3.

[126] Appellate Exhibit VI, Gov't Exhibit 9 at 1.

[127] Appellate Exhibit VI, Gov't Exhibit 11 at 1 (emphasis in the original).

explained that her perception of the events was distorted by having been prescribed twice the recommended dosage of her migraine medicine.[128] Her use of the medication is corroborated by her medical records, and she reported the same side effects to her doctor.[129] The medication left her "seriously paranoid" and she had experienced a "personality change."[130] Her explanation was credited by the Family Advocacy Case Review Committee.[131]

The police found no sign of a struggle in the hotel room,[132] and Lieutenant Becker has consistently denied assaulting his wife.[133] Unsurprisingly, NCIS closed its investigation "[because of a] lack of evidence of a crime and the command's decision to take no judicial/administrative action against S/BECKER."[134] The Family Advocacy Case Review Committee also closed its investigation with no adverse action.[135]

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[128] Appellate Exhibit VI, Gov't Exhibit 43 at 1.

[129] Appellate Exhibit VII, Def Attachment Q at 1 ("Pt states symptoms include paranoia, panic attacks . . . confusion . . .").

[130] Appellate Exhibit VI, Gov't Exhibit 11 at 1.

[131] Appellate Exhibit VII, Def Attachment CCC at 2.

[132] Appellate Exhibit VI, Gov't Exhibit 10 at 1.

[133] Appellate Exhibit VI, Gov't Exhibit 43 at 1.

[134] Appellate Exhibit VI, Gov't Exhibit 42 at 1.

[135] Appellate Exhibit VI, Gov't Exhibit 42 at 1; Gov't Exhibit 43 at 1.

The lower court relies on evidence that Mrs. Becker told others that Lieutenant Becker had in fact abused her even after she had explained why she made the allegations. The lower court does not reconcile any of the contrary evidence with its finding that Lieutenant Becker assaulted his wife. It certainly did not review the evidence in a light most favorable to him.

While the focus here has been on facts found exclusively (and therefore improperly) by the lower court, one of that court's clearly erroneous findings was also found by the trial judge. The erroneous finding pertains to the desk clerk's observation of Mrs. Becker at the time she made the complaint. The error is not important to the military judge's ruling, since he did not find that Lieutenant Becker abused his wife. The error is important, however, to the lower court's conclusion that he did.

The lower court found that when Mrs. Becker approached the front desk clerk, the desk clerk "observed she had marks on her face and neck."[136] The evidence does not support this finding. In his first statement to law enforcement, the desk clerk does not mention any injuries. About a month after the incident, the desk clerk made a second statement in which he clarified that he "did not see any

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[136] *Becker II* at 3.

marks on Mrs. Becker."[137] The responding police officer stated, "I also remember checking Mrs. Becker for physical injuries, specifically on her arms and neck. There were no injuries apparent to me at that time."[138] Even Mrs. Becker, when asked by the responding officer if she "ha[d] any visible injuries," answered "no."[139] The lower court never mentions any of this evidence, and relies on a third interview of the clerk conducted *five-and-a-half years later*¸ in which the clerk suddenly claimed to remember seeing red marks on Mrs. Becker's neck and face.[140]

All of this evidence was presented in documentary form. None of it was presented in the form of live testimony. The finding does not represent a credibility determination made by the military judge after having observed testimony. The documentary evidence does not suggest any reason to credit the five-year-stale recollection of the desk clerk over his two earlier statements, the contemporaneous observation of the responding police officer, and Mrs. Becker's own contemporaneous statement.

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[137] Appellate Exhibit VI, Gov't Exhibit 77 at 1.

[138] Appellate Exhibit V at MMM.

[139] Appellate Exhibit V at EEE at 2 ("Q: Do you have any visible injuries? A: [N]o.").

[140] Appellate Exhibit V at DDD at 1.

The lower court does not account for any of the evidence against the contention that Mrs. Becker had visible injuries on her face and neck at the Army Lodge in 2013, or of any of the other evidence tending to show that she was not abused. Nor did the lower court consider this evidence in a light most favorable to Lieutenant Becker. And of course none of it demonstrates that Lieutenant Becker acted with an intent to prevent testimony.

Conclusion

In a published opinion, the lower court used *Commisso*'s *failure to consider critical facts* test as an Article 62 escape hatch, allowing it to usurp the military judge's role as fact finder and supplant his discretion with its own. It conducted its own review of controverted evidence and established its own slate of new facts. From these facts it inferred other facts.

The abuse of discretion standard does not authorize an appellate court to ignore the statutory limits on its scope of review, or to engage in independent fact-finding in government appeals. *United States v. Commisso*, properly understood, does not stand for that proposition. Instead, *Commisso* represents a finding that a trial judge abused his discretion by unreasonably failing to consider and reconcile record evidence that a reasonable fact-finder would have to consider to decide the legal issue before the court.

This Court should clarify how service courts should apply the abuse of discretion standard of review, and make clear that application of that standard does not alter the service courts' statutory role assigned them by Congress under Article 62.

Respectfully submitted,

Marcus Fulton
CAPT, JAGC, USN
Appellate Defense Counsel
(Code 45) Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, DC 20374
Ph: (202) 685-7299
Fx: (202) 685-7426
marcus.fulton@navy.mil
CAAF Bar No. 32274

Daniel Moore
LT, JAGC, USN
Appellate Defense Counsel
(Code 45) Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, DC 20374
Ph: (202) 685-7291
Fx: (202) 685-7426
dan.o.moore@navy.mil
CAAF Bar No. 37340

Appendix

1. *United States v. Beauge*, No. 201900197, 2021 CCA LEXIS 9 (N-M, Ct. Crim. App. Jan. 11, 2021)

2. *United States v. Becker*, 2021 CCA LEXIS 76 (N-M. Ct. Crim. App. Feb. 25, 2021)

3. *United States v. MacWhinnie*, No. 201900243, 2021 CCA LEXIS 92 (N-M. Ct. Crim. App. Mar. 2, 2021)

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 26 April, 2021.

CERTIFICATE OF COMPLIANCE

This supplement complies with the page limitations of Rule 21(b) because it contains fewer than 9,000 words. Using Microsoft Word version 2010 with 14-point Times New Roman font, this supplement (not including the appendix) contains 8,444 words.

Daniel Moore
LT, JAGC, USN
Appellate Defense Counsel
(Code 45) Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, DC 20374
Ph: (202) 685-7291
Fx: (202) 685-7426
dan.o.moore@navy.mil
CAAF Bar No. 37340

United States v. Beauge

United States Navy-Marine Corps Court of Criminal Appeals

January 11, 2021, Decided

No. 201900197

Reporter
2021 CCA LEXIS 9 *; 2021 WL 82854

UNITED STATES, Appellee v. Frantz BEAUGE, Chief Petty Officer (E-7), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Subsequent History: Petition for review filed by *United States v. Beauge, 2021 CAAF LEXIS 224 (C.A.A.F., Mar. 12, 2021)*

Motion granted by *United States v. Beauge, 2021 CAAF LEXIS 233 (C.A.A.F., Mar. 15, 2021)*

Prior History: **[*1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Hayes Larsen (arraignment), Michael Luken (trial). Sentence adjudged 1 March 2019 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of officer and enlisted members. Sentence approved by the convening authority: reduction to E-1 and confinement for one year.

Core Terms

military, communications, child abuse, psychotherapist, records, disclosure, patient, ineffective, privileged communication, trial defense counsel, privileged, mental health records, in camera, confidential, discovery, confidential communication, psychotherapist-patient, authorities, mandatory, reasonable probability, cross-examination, penetration, asserts, abuser

Case Summary

Overview

HOLDINGS: [1]-In connection with the service member's prosecution for sexual abuse of a child, the trial court did not err in denying his motion for discovery of the victim's mental health records under Mil. R. Evid. 513 because the records of the communications to the treating mental health professional were privileged; [2]-Mandatory disclosure of child abuse under *Fla. Stat. § 39.201* did not mandate disclosure of the child's communications in the prosecution because the reporting law was created to protect alleged child abuse victims, not to thwart a child-victim's access to diagnosis or treatment; [3]-Trial defense counsel was not ineffective for failing to pursue the aforementioned communications because there was no reasonable probability of success of a motion under Mil. R. Evid. 513(d)(2) or based on an alleged constitutional right to pierce the psychotherapist-patient privilege.

Outcome

Findings and sentence affirmed.

Counsel: For Appellant: Lieutenant Commander Christopher Riedel, JAGC, USN.

For Appellee: Major Clayton L. Wiggins, USMC; Lieutenant Joshua C. Fiveson, JAGC, USN.

Judges: Before GASTON, STEWART, and HOUTZ, Appellate Military Judges. Judge STEWART delivered the opinion of the Court, in which Senior Judge GASTON and Judge HOUTZ joined. Senior Judge GASTON and Judge HOUTZ concur.

Opinion by: STEWART

Opinion

STEWART, Judge:

Appellant was convicted, contrary to his pleas of two specifications of sexual abuse of a child, in violation of *Article 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b*, for committing lewd acts upon his twelve-year-old niece by intentionally rubbing her genitalia with his finger and by kissing her and putting his tongue in her mouth, with an intent to gratify his sexual desire.

Appellant asserts two assignments of error [AOEs]: (1) the military **[*2]** judge abused his discretion in denying Appellant's motion for discovery of the victim's mental health records under Military Rule of Evidence [Mil. R. Evid.] 513(d)(3) when the victim's psychotherapist had reported information from the victim's confidential communications to her under a duty imposed by Florida state law; and (2) Appellant's trial defense counsel were ineffective by failing to pursue access to the victim's mental health records under either the child abuse exception to the psychotherapist-patient privilege, Mil. R. Evid. 513(d)(2), or as constitutionally required. We find no prejudicial error and affirm the findings and sentence.

I. BACKGROUND

A. The Summer of 2014

Appellant's convictions stem from conduct during the summer of 2014. In June of that year, Ms. "Golf,"[1] Appellant's twelve-year-old niece, moved into Appellant's home because Ms. Golf's parent's home entered foreclosure. Facing eviction and potential homelessness, Appellant and his wife offered to take in Ms. Golf and her brother. Ms. Golf's parents were initially reluctant but ultimately assented to the offer. Ms. Golf and her brother spent several weeks of the summer at Appellant's home where twelve people resided, including Appellant and his three children, **[*3]** Ms. Golf's cousins. Sometime prior to the beginning of the school year, Ms. Golf returned to her own home.

Early in Ms. Golf's stay with Appellant, Appellant requested that she meet him in his garage. Initially thinking that she was in trouble, she met Appellant in the garage where he explained to her how he had put a roof over Ms. Golf's and her brother's heads, watched over other children, and that it "wasn't fair that he wasn't getting anything back."[2] Ms. Golf felt scared and guilty as a result of this comment. She assumed Appellant wanted money in exchange for staying at his home, but after Appellant's comment, he leaned in and kissed her on the lips and put his tongue into her mouth. Ms. Golf left the garage and went to the bathroom where she began to cry.

That night, Appellant approached Ms. Golf again, this time while she was in bed in a room that she shared with her cousin. Appellant asked Ms. Golf to follow him into the master bedroom. Once in Appellant's bedroom, Appellant kissed Ms. Golf and placed his hands on her lower back and buttocks underneath her clothing. Appellant told Ms. Golf to "hump" him, meaning to rub herself against his pelvic area.[3] This went on for approximately **[*4]** ten to fifteen minutes and at

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[1] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

[2] R. at 375.

the conclusion of the episode, Appellant thanked Ms. Golf. This same process occurred several times during Ms. Golf's stay with Appellant, and only whenever Appellant's spouse worked at night.

On another occasion, Appellant approached Ms. Golf while she showered. Ms. Golf noticed a figure standing in the bathroom as she concluded her shower. She could tell that the figure was that of Appellant, because she noticed the colors of his uniform and his general figure. Ms. Golf wrapped herself in a towel, and as she attempted to exit the shower, Appellant asked her if she "missed him."[4] In an effort not to anger Appellant and quickly leave the bathroom, Ms. Golf replied "yes."[5] At that point, Appellant placed his hand in between the edges of Ms. Golf's towel and rubbed Ms. Golf's clitoris.

Charges stemming from the above-described conduct were referred to a general court-martial after Ms. Golf reported Appellant's activity to a teacher and a school guidance counselor. The guidance counselor referred Ms. Golf to a local therapist,[6] Ms. Delta, who reported Appellant's conduct to local law enforcement authorities via the Florida Abuse Hotline Information System ["Hotline"], **[*5]** as she was required to do pursuant to Florida law.[7]

B. Appellant Unsuccessfully Sought Production of Hotline Records

At trial, Appellant submitted a discovery request asking for the production of records pertaining to Ms. Delta's Hotline report. The Government responded by providing a "Confidential Investigative Summary" ["summary"] of the Hotline report. The summary contains no information identifying the reporter of the information within the report, and contains a brief narrative apparently summarizing the information provided by the reporter to the Hotline.[8] The narrative portion of the summary describes an allegation that Ms. Golf's uncle fondled her, and "even attempted to penetrate her on some occasions; however, he was never successful with his attempts to penetrate her."[9] Later, Appellant's Defense team and representatives from the Child Protective Team of Brevard County, Florida, separately, interviewed Ms. Golf. It appears that Ms. Golf made no mention of "penetration" during those interviews.[10]

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[3] *Id.* at 387-88.

[4] *Id.* at 397.

[5] *Id.*

[6] Appellant conceded below that Ms. Delta was a "psychotherapist / clinical counselor." R. at 29. There appears to be no dispute that as a threshold matter, the communications between Ms. Golf and Ms. Delta fall within the psychotherapist-patient privilege. *See* Mil. R. Evid. 513(b).

[7] *Fla. Stat. § 39.201*.

[8] App. Ex. X at 16.

[9] *Id.*

[10] *Id.* at 7.

Later, Appellant moved to compel the discovery of "all records of communications between [Ms. Golf] and Ms. [Delta] on or about 15 December 2016 leading to a report of child sexual **[*6]** abuse allegedly committed against [Ms. Golf] being made to the [Florida] Department of Children and Families."[11] Appellant argued below—as he does on appeal—that while these records would normally constitute privileged communications between a psychotherapist and her patient, the privilege should have been pierced because Florida law imposed a duty to report information contained in those communications. *See* Mil. R. Evid. 513(d)(3). Appellant argued that Mil. R. Evid. 513(d)(3) should be read such that if state law imposes a duty to report, then all communications from patient to psychotherapist made during the meeting in which the psychotherapist learns of reportable abuse are not privileged. The Government argued that the exception should be read more narrowly, such that the rule excepts from privilege only the specific information that state law requires to be disclosed. The military judge heard argument at a pretrial Article 39a, UCMJ, session, and ordered Appellant and the Government to submit bench memoranda dealing with how the exception to the privilege came to be, and what the drafters intended with its issuance.

After reviewing the additional briefs, the military judge ruled that the communications between Ms. Golf and **[*7]** Ms. Delta were privileged, and that only the information reported to authorities was exempt from that privilege.[12] On the first day of trial, the Government additionally provided the Defense with the audio recording of Ms. Delta's report to the Hotline.

C. The Military Judge's Analysis

The military judge relied heavily on the purposes underpinning Florida's mandatory reporting requirement and Florida's establishment of the reporting Hotline. His ruling discusses how *Florida's Section 39.201*, which makes disclosure of child abuse a mandatory reporting requirement for psychotherapists, exists to ensure both that investigations are initiated after reports of abuse, and that therapists do not violate their professional responsibilities to patients in cases of child abuse. The military judge noted that the rule does not detail precisely what psychotherapists must report to authorities, as the statute only requires that reporters of the information provide their name. The military judge went on to analogize this reporting requirement with Florida's "dangerous patient exception," which also permits the disclosure of confidential communications between doctor and patient. The military judge explained that, **[*8]** like that exception, the Florida statutory scheme does not require the psychotherapist to disclose *all* communications with the patient, but only those necessary to communicate abuse to authorities. He also noted that the Florida statutes limit who may access reports of abuse made to the Hotline.

Next, the military judge analogized Mil. R. Evid. 513(d)(3) to Mil. R. Evid. 513(d)(2) (another exception to the psychotherapist-patient privilege dealing with allegations of child abuse). He cited *LK v. Acosta*,[13] an Army Court of Criminal Appeals case that analyzed the drafters' intent

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[11] App. Ex. X. On appeal, Appellant suggests he was entitled to Ms. Delta's "clinical notes." Despite the difference in verbiage used, we assume that Appellant bases his alleged errors on failures to obtain the same "[e]vidence of a patient's records or communications" that the rule contemplates and were sought below. Mil. R. Evid. 513(b)(5).

[12] App. Ex. XII at 6.

behind the child-abuse exception. He noted that the purpose behind Mil. R. Evid. 513(d)(2) was not to mandate the disclosure of every alleged victim's mental health records to their alleged abuser, but rather to ensure that military commanders were appropriately informed of allegations of abuse within their commands. In concluding that the exception is limited in scope, he reasoned that reading Mil. R. Evid. 513(d)(3) to require disclosure of all communications between psychotherapist and patient any time a state had a mandatory reporting scheme in place would "obliterate" the privilege in its entirety and chill communications between psychotherapists and their patients.[14] In other words, "Florida's mandatory **[*9]** reporting laws were placed to protect alleged child abuse victims, not to thwart a child-victim's access to 'advice, diagnosis, or treatment of a mental or emotional condition.'"[15]

The military judge ultimately concluded that Ms. Golf's communications with Ms. Delta on 15 December 2016 (the date Ms. Golf initially disclosed the alleged abuse to Ms. Delta) were privileged under Mil. R. Evid. 513. Only the information reported out by Ms. Delta was excepted from the privilege. Appellant appeals this ruling, and asserts that his trial defense counsel were ineffective for not pursuing the aforementioned communications through other evidentiary rules.

II. Discussion

A. The Military Judge's Ruling Under Mil. R. Evid. 513(d)(3)

Appellant asserts that the military judge's ruling under Mil. R. Evid. 513(d)(3) was erroneous. We review a military judge's ruling on a motion to produce a psychotherapist's records for an abuse of discretion.[16] "To find an abuse of discretion requires more than a mere difference of opinion—the challenged ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[17] A military judge abuses his discretion when he (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses **[*10]** incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts.[18] We review conclusions of law de novo.[19]

We find no error in the military judge's conclusions that Ms. Golf's communications with Ms. Delta are privileged under Mil. R. Evid. 513, and that the Mil. R. Evid. 513(d)(3) exception

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[13] *76 M.J. 611 (A. Ct. Crim. App. 2017)*.

[14] App. Ex. XII at 5.

[15] *Id.* (quoting Mil. R. Evid. 513(b)(1)).

[16] *United States v. Chisum, 77 M.J. 176, 179 (C.A.A.F. 2018)*.

[17] *United States v. Jasper, 72 M.J. 276 279-80 (C.A.A.F. 2013)*.

[18] *United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017)* (citations omitted).

[19] *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)*.

applies to only the information Ms. Delta reported to Florida's Child Abuse Hotline. As the military judge recognized in his thorough, detailed ruling, Mil. R. Evid. 513 is a rule of privilege, not discovery.[20] Originating with the Supreme Court's decision in *Jaffee v. Redmond*,[21] the purpose of the rule is to protect the societal benefit of confidential mental health counseling, similar to the clergy-penitent privilege.[22] Thus, Mil. R. Evid. 513 establishes a privilege against disclosure of confidential communications made by a person who "consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition."[23]

We agree with the military judge that Ms. Golf's communications with Ms. Delta fall within the protections of the Rule.[24] We also agree with his interpretation of Mil. R. Evid. 513(d)(3), which creates an **[*11]** exception from the privilege "when federal law, state law, or service regulation imposes a duty to report information contained in a communication."[25] In interpreting statutory or other provisions of the *Manual for Courts-Martial*, "[t]he plain language will control, unless use of the plain language would lead to an absurd result." [26]

Here, the plain language of Mil. R. Evid. 513(d)(3) states there is no privilege when "information contained in a[n otherwise confidential] communication" is required to be disclosed by a state statute. Like the military judge, we conclude the plain meaning of this phrase is that the privilege is lost with respect to the "information" that is mandatorily reported (and therefore no longer confidential), not the entirety of the confidential communications leading to the report. After all, "the essential function of the privilege is to protect a confidence that, once revealed by any means, leaves the privilege with no legitimate function to perform."[27] Reading the exception in this manner also comports with the rule's requirement that

> Any production or disclosure permitted by the military judge under this rule must be *narrowly tailored* to only the specific records or communications, **[*12]** or *portions of such records or communications*, that meet the requirements for one of the enumerated exceptions to the privilege . . . and are included in the stated purpose for which the records or communications are sought . . . .[28]

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[20] *LK v. Acosta, 76 M.J. 611, 613 (ACCA 2017)*.

[21] *518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)*.

[22] *Acosta, 76 M.J. at 614* (quoting Mil. R. Evid. 513 analysis at A22-45).

[23] Mil. R. Evid. 513 (b)(1).

[24] *See* Mil. R. Evid. 513(b)(2) (defining psychotherapist as a "psychiatrist, clinical psychologist, clinical social worker, or other mental health professional").

[25] Mil. R. Evid. 513(d)(3).

[26] *United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007)* (citing *United States v. Martinelli, 62 M.J. 52, 82 n.24 (C.A.A.F. 2005)* (Crawford, J. dissenting)).

[27] Charles T. McCormick, *McCormick on Evidence*, § 93 (7th ed. 2013), *quoted in Jasper, 72 M.J. at 281*.

[28] Mil. R. Evid. 513(e)(4) (emphasis added).

Other privileges have been construed in precisely this manner—i.e., that the privilege over certain confidential information can be lost while the underlying privilege is preserved. For instance, in *United States v. Mays*, the Court of Military Appeals held that an attorney could reveal confidential communications to defend against an allegation of ineffective assistance of counsel, but that the attorney-client privilege was lost only with respect to communications relevant to defend against the allegation, not all communications between the client and the attorney.[29] In *United States v. Marrelli*, an attorney was compelled to turn over certain fraudulent checks his client had given him, as they fell outside the scope of the attorney-client privilege, but the privilege still existed regarding communications properly falling under the attorney-client privilege regarding legal services that were not in furtherance of a crime.[30] Similarly, **[*13]** in *United States v. Rhea*, the court held an attorney could disclose a calendar his client had given him (which was evidence of a crime), but not how the calendar came into his possession, which narrowly tailored the disclosure to only meet the law's requirements while still maintaining the privilege with respect with respect to the rest of the communications concerning the calendar.[31]

To read the rule otherwise would produce absurd results. There would be no way under the language of the rule to determine the parameters of the "communication" at issue: would it mean the privilege would be lost over the patient's entire privileged conversation; every privileged conversation with the same psychotherapist; only those conversations in which the abuse was discussed; any part of any conversation discussing the abuse; the statements and diagnoses the psychotherapist made in response, something in between? Thus, to interpret the rule more broadly would mean the privilege was lost over some (potentially large) amount of unrelated confidential information solely because it was conveyed during the same treatment session or to the same psychotherapist. This would result in child victims in most states **[*14]** essentially having no psychotherapist-patient privilege when seeking initial or even follow-up treatment, which would defeat the public policy purpose for which this privilege was created by *Jaffee*—encouraging mental health treatment through open, honest communications (secured by confidentiality) with mental health providers.[32]

Finally, as the military judge noted, this interpretation comports with the framework of the state statute at issue. Florida's *Section 39.201* makes disclosure of child abuse a mandatory reporting requirement for psychiatrists so as to initiate a safety assessment for alleged victims and start an investigative process. The purpose of the statute is not to mandate that psychiatrists disclose protected communications beyond what is necessary to report alleged child abuse. Thus, we share the military judge's view that "Florida's mandatory reporting laws were placed to protect alleged child abuse victims, not to thwart a child-victim's access to advice, diagnosis or treatment of a mental or emotional condition."[33] Similarly, as our sister court discussed in

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[29] *33 M.J. 455 (C.M.A. 1991)*.

[30] *4 C.M.A. 276, 15 C.M.R. 276, 281 (C.M.A. 1954)*.

[31] *33 M.J. 413, 415-19 (C.M.A. 1991)*.

[32] App. Ex. XVI.

[33] App. Ex. XII at 5; *see also* *Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* ("if the purpose of the privilege is to be served the participants in the confidential conversation must be able to predict with some degree of certainty

Acosta, dealing with the Mil. R. Evid. 513(d)(2) exception, the drafter's intent for the Mil. R. Evid. 513 exceptions was to ensure military psychotherapists could properly **[*15]** report child abuse, "not to turn over every alleged child victim's mental health records to the alleged abuser."[34]

B. Ineffective Assistance of Counsel Claim

Appellant asserts that his trial defense counsel were ineffective for failing to pursue the aforementioned communications through either Mil. R. Evid. 513(d)(2) [the "child abuse exception"] or by virtue of a constitutional right to pierce the psychotherapist-patient privilege. We review claims of ineffective assistance de novo.[35]

To determine whether counsel's representation was ineffective, we apply the two-prong test established by *Strickland v. Washington*.[36] That test places the burden on Appellant to demonstrate (1) that counsel's performance was in fact deficient, and (2) that any deficiency was prejudicial.[37] Our analysis of the first prong is guided by the maxim that the *Sixth Amendment* entitles an accused to representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms."[38] We afford deference to counsel's performance and decision-making by presuming that counsel provided the representation envisioned by the *Sixth Amendment*.[39] Because Appellant's argument stems from counsel's failure to make a motion to compel records, **[*16]** he must also show that a reasonable probability exists that any such motion would have been meritorious, meaning *successful*.[40] "Failure to raise a meritless argument does not constitute ineffective assistance."[41] As for the second prong, prejudice means that counsel's deficient performance resulted in the denial of "a fair trial, [that is] a trial whose result is unreliable."[42] In other words, we test whether there is a reasonable probability that, but for counsel's deficiencies, the result of the trial would have been different.[43]

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whether particular discussions will be protected") (quoting *Upjohn Co. v. United States, 449 U.S. 383, 393, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*).

[34] *76 M.J. at 619*.

[35] *United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)*.

[36] *466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

[37] *United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010)*; *United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005)*.

[38] *Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*; *United States v. Terlep, 57 M.J. 344, 349 (C.A.A.F. 2002)*.

[39] *United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004)*.

[40] *See United States v. Jameson, 65 M.J. 160, 163-64 (C.A.A.F. 2007)*.

[41] *United States v. Napoleon, 46 M.J. 279, 284 (C.A.A.F. 1997)* (quoting *Boag v. Raines, 769 F.2d. 1341, 1344 (9th Cir. 1985)*).

[42] *United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001)* (citation and internal quotation marks omitted).

[43] *United States v. Quick, 59 M.J. 383, 387 (C.A.A.F. 2004)*.

Appellant has not carried these burdens here.

1. A reasonable probability does not exist that a motion to compel Ms. Golf's privileged communications under Mil. R. Evid. 513(d)(2) would have been successful

The child abuse exception provides that there is no privilege under Mil. R. Evid. 513 "when the communication [between psychotherapist and patient] is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse."[44] Appellant argues that Ms. Delta's notes "were evidence of child abuse" and thus fall within this exception to the psychotherapist-patient privilege. He distinguishes the instant case from *Acosta*,[45] dealing with the same **[*17]** rule, where our sister court found that evidence establishing the *absence* of abuse was not subject to the child abuse exception. For the following reasons, Appellant's argument fails.

Appellant's threshold point that the communication or notes sought were in fact evidence of child abuse and thus subject to the exception, while reasonable, is no silver bullet for his claim. Clearly, Ms. Delta had reason to report an allegation of child abuse to authorities following her initial meeting with Ms. Golf. It thus stands to reason that they discussed *some* allegation of child abuse in that meeting.

Thus, contrary to the Government's argument, Appellant's request differs in a crucial way from the issue in *Acosta*. There, the accused sought generalized mental health records without the sort of information that Appellant had here, namely, that Ms. Golf had *some* communication with her psychotherapist discussing child abuse. The Government also suggests that when Appellant argues that trial defense counsel should have pursued potentially *exculpatory* evidence through a rule geared toward disclosing evidence of *child abuse*, Appellant's argument is "internally inconsistent."[46] However, this overlooks **[*18]** the fact that the evidence sought could plausibly be evidence both of child abuse *and* exculpatory to the extent it offered inconsistencies, or failures in memory by Ms. Golf.

But the question at issue is not whether Appellant's argument is reasonable; rather, it is whether his counsel had a reasonable *probability of success* had he brought a motion on the basis of Mil. R. Evid. 513(d)(2). We conclude the answer to this latter question is no. The exceptions to the psychotherapist-patient privilege were created to "address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security."[47] "These exceptions are intended to emphasize that commanders are to have access to all information necessary for the safety and security of military personnel, operations, installations, and equipment. Therefore, psychotherapists are to provide such information despite a claim of

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[44] Mil. R. Evid. 513(d)(2).

[45] *76 M.J. at 611*.

[46] Gov. Br. at 30.

[47] *Manual for Courts-Martial, United States* (2016 ed.), App. 22, at A22-51.

privilege."[48] As noted above, the privilege itself is based on the societal benefit of confidential counseling recognized by *Jaffee*.[49]

Similar to his argument under Mil. R. Evid. 513(d)(3), Appellant argues that by making any mention of child abuse during communications **[*19]** with a psychotherapist, a patient loses all privilege over the entirety of those communications. His reading of the rule would grant broad access to any manner of privileged communications between psychotherapists and minor patients whenever a patient makes any mention of child abuse. Given the drafter's intent behind the privilege and its exceptions, we find that this interpretation of the rule's plain language would lead to a similar absurdity as that which we identify above in discussing Mil. R. Evid. 513(d)(3).[50] We will not endorse such an interpretation for a rule whose purpose is to ensure that commanders are able to be privy to allegations of child abuse to ensure the safety of personnel, and to investigate allegations, "not to turn over every alleged child victim's mental health records to the alleged abuser."[51]

Accordingly, we do not find it reasonably probable that a motion to compel Ms. Golf's privileged communications through Mil. R. Evid. 513(d)(2) would have proven successful. Rather, we conclude the military judge would have interpreted this exception under these circumstances, as we do, to extend no farther than the Mil. R. Evid. 513(d)(2) exception—i.e., that it pierced the privilege only as to the abuse allegations reported by Ms. Delta **[*20]** to the Hot-line, to which the Defense already had access. We conclude for any further information the military judge would have determined that the Defense was in fact pursuing evidence of an absence of abuse, which our sister court in *Acosta* found, and we agree, is beyond the purview of the exception.

2. A reasonable probability does not exist that a motion to compel Ms. Golf's privileged communications under a constitutionally-based exception would have been successful

While Mil. R. Evid. 513(d) no longer contains an enumerated constitutional exception, it is axiomatic that an evidentiary rule of privilege may not infringe on the "basic constitutional rights of due process and confrontation."[52] We stated in *J.M. v. Payton-O'Brien* that "when determining whether in camera review or disclosure of privileged materials is required under Mil. R. Evid. 513, the military judge should determine whether *infringement of the privilege* is required to guarantee a meaningful opportunity to present a complete defense."[53] Appellant argues that trial defense counsel's ability to meaningfully cross-examine the Government's key witness, Ms. Golf, was unconstitutionally hampered by lack of access to her privileged communications with her psychotherapist. **[*21]** He suggests that those communications would have contained

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[48] *Id.*

[49] *Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)*.

[50] *United States v. Lewis, 65 M.J. 85 (C.A.A.F. 2007)*.

[51] *Acosta, 76 M.J. 611, 617-19 (ACCA 2017)*.

[52] *J.M. v. Payton-O'Brien, 76 M.J. 782, 788 (N-M. Ct. Crim. App. 2017)*.

[53] *Id.* (emphasis in original).

inconsistent statements by Ms. Golf, and thus afforded Appellant a more complete cross-examination.[54] However, Appellant was not deprived of his right to cross-examine Ms. Golf; rather, what is at issue here is his ability to *discover* information that may or may not have proven useful in that cross-examination. The *Sixth Amendment's* guarantees do not transform the desire to discover information into a constitutional right.[55]

In *Ritchie v. Pennsylvania*, the Supreme Court addressed whether disclosure of privileged records from Pennsylvania's Children and Youth Services—a protective service agency "charged with investigating cases of suspected mistreatment and neglect"—was required where a defendant asserted a need for the records to impeach a witness.[56] The Pennsylvania Supreme Court, interpreting *Davis v. Alaska* [57] —a case relied upon by Appellant here—answered this question in the affirmative. The United States Supreme Court disagreed, finding that "if we were to accept this broad interpretation of *Davis*, the effect would be to transform the *Confrontation Clause* into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view." **[*22]** [58] The Supreme Court added that the right to question adverse witnesses "does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."[59] Contrasting *Davis*, the Supreme Court provided that the constitutional error was not that the defendant was deprived of potentially favorable discovery, but rather that the he was "denied the right to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."[60]

While this Court has contemplated a constitutional right can nevertheless be at play with respect to the pretrial discovery of privileged mental health records,[61] we cannot find that Appellant's trial defense counsel would have been successful had he taken the constitutional approach Appellant now suggests to disclosure of Ms. Golf's privileged communications. Appellant asserts

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[54] App. Br. at 27-28.

[55] *Ritchie v. Pennsylvania, 480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)* (plurality op.) (Justices Stevens and Scalia refused to consider the merits of the case, leaving seven justices to review. Four of those seven Justices joined in Part III-A of the opinion holding that the *Confrontation Clause* is not a rule of pretrial discovery.).

[56] *Id. at 43, 52*.

[57] *415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)* (finding that preventing cross-examination of a state witness with evidence of juvenile convictions violated the *Confrontation Clause*).

[58] *Ritchie, 480 U.S. at 52*.

[59] *Id.*

[60] *Id. at 54* (citing *Davis, 415 U.S. at 318*). The *Ritchie* Court ultimately remanded the case for an in camera review of the records in dispute to determine whether they contained information that "probably would have changed the outcome of the trial." We need not take similar action here, as Appellant has failed to meet the requirements of Mil. R. Evid. 513(e)(3), discussed *infra*.

[61] *Payton-O'Brien, 76 M.J. at 788* (relying on *Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)* for the notion that a constitutional right is implicated by a refusal to compel discovery of privileged mental health records). Of course, were the Government in possession of the privileged communications, and they contained favorable or exculpatory evidence for the Defense, certain constitutional rights would come into play. *See, e.g., Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*.

that had his counsel pursued such an approach, the military judge would have at least ordered production of those communications for in camera review.[62] However, Mil. R. Evid. 513(e)(3) makes in camera review a matter of discretion for the military judge.[63] The Rule also provides **[*23]** a four-pronged test that the party moving for disclosure of the privileged communications must satisfy before in camera review is justified:

> (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
> (B) that the requested information meets one of the enumerated exceptions under [Mil. R. Evid. 513(d)];
> (C) that the information sought is not merely cumulative of other information available; and
> (D) that the [moving] party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[64]

Even setting aside (B), Appellant fails to carry his burden to satisfy all of these elements. With regard to (A), as discussed above, Appellant has not articulated a reasonable likelihood that the records of which he was deprived would yield any additional evidence, much less admissible evidence.[65] The perceived inconsistency regarding "attempted penetration" is not enough to demonstrate a reasonable likelihood that the communications sought would yield additional admissible evidence. Without more, a preponderance of the evidence does not support that trial **[*24]** defense counsel could have provided the type of specific factual basis necessary to justify in camera review.

As for (C), Appellant has not carried his burden to demonstrate that the information sought would not have been merely cumulative of other information available. Based on the information in the record, we cannot conclude that access to Ms. Golf's privilege communications was likely to reveal any additional, substantive evidence beyond that to which Appellant already had access. Thus, we find it unlikely that Appellant would have convinced the military judge that even in camera review was required under Mil. R. Evid. 513(e)(3).

3. Assuming Appellant had established ineffective assistance, he suffered no prejudice

Even assuming that his trial defense counsel's performance was deficient, the evidence before us does not support that but for counsel's deficiency, the result of the trial would have been different. Based on information turned over by the Government, the defense counsel were able to identify a possible inconsistency in Ms. Golf's recollection of events. They diligently worked to pursue further records through the most reasonable avenue, and their efforts were partially successful in that they **[*25]** resulted in Appellant's receipt of the audio recording of the

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[62] App. Br. at 25.

[63] The Rule states that the military judge *may* order in camera review of disputed privileged records, assuming the requisite elements of Mil. R. Evid. 513(e)(3) are met.

[64] Mil. R. Evid. 513(e)(3).

[65] We recognize the inherent difficulty faced by defense counsel to articulate a specific factual basis requiring disclosure of information that counsel has no access to, but in this case, counsel had access to the Hotline summary and the Hotline report audio, from which he could have articulated a specific factual basis for additional disclosures. The failure to do so suggests there would have been little merit in pursuing additional disclosures.

psychotherapist's telephonic disclosure to authorities. Armed with this information, the trial defense counsel chose not to use it in the cross-examination of Ms. Golf.[66] This suggests that the audio recording did not reveal any additional inconsistencies with which to question Ms. Golf, or to pursue additional communications between her and her psychotherapist. We find it entirely reasonable for the trial defense counsel, in possession of a statement by Ms. Golf regarding "attempted penetration," to make the strategic decision not to introduce such evidence notwithstanding its potential impeachment value. Given that the evidence sought by Appellant was speculative in nature and that in camera review (let alone disclosure) was unlikely even if they chose to pursue it as constitutionally required, we find no reasonable probability that a Defense motion in this regard would have changed the outcome at trial. Thus, we cannot find Appellant suffered prejudice as a result of any deficiency on the part of his counsel.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that **[*26]** the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[67] The findings and sentence are **AFFIRMED**.

Senior Judge GASTON and Judge HOUTZ concur.

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[66] R. at 406-53.

[67] UCMJ arts. 59, 66.

United States v. Becker

United States Navy-Marine Corps Court of Criminal Appeals

February 25, 2021, Decided

No. 201900342

Reporter
2021 CCA LEXIS 76 *; __ M.J. __; 2021 WL 733198

UNITED STATES, Appellant v. Craig R. BECKER Lieutenant (O-3), U.S. Navy, Appellee

Prior History: [*1] Appeal by the United States Pursuant to *Article 62, UCMJ*. Military Judge: Aaron C. Rugh. Arraignment 13 February 2019 before a general court-martial convened at Naval Base San Diego, California, consisting of officer members.

United States v. Becker, 80 M.J. 563, 2020 CCA LEXIS 240, 2020 WL 4250466 (N-M.C.C.A., July 24, 2020)

Core Terms

military, motive, testimonial statement, killing, wrongdoing, murder, window, important fact, planning, forfeiture, apartment, phone, unavailable, witnesses, assault, subjective intent, circumstances, reporting, allegations, authorities, spontaneous, declarant, secondary, appears, custody, scream, circumstantial evidence, wrongdoer's, testifying, boyfriend

Case Summary

Overview

HOLDINGS: [1]-Military judge's ruling that prior statements by the decedent were inadmissible under *sixth Amendment* was vacated because the service member's wrongful act was performed with an intent to prevent decedent not only from testifying at some formal proceeding, but also from reporting abuse, cooperating with law enforcement, or resorting to outside help.

Outcome
Government's appeal granted. Military judge's ruling vacated.

Counsel: For Appellant: Major Kerry E. Friedewald, USMC (argued); Lieutenant Joshua C. Fiveson, JAGC, USN (on brief); Lieutenant Clayton L. Wiggins, JAGC, USN (on brief).

For Appellee: Lieutenant Daniel O. Moore, JAGC, USN (argued); Captain Marcus N. Fulton, JAGC, USN (on brief).

Judges: Before GASTON, STEPHENS, and STEWART, Appellate Military Judges. Senior Judge GASTON delivered the opinion of the Court, in which Judge STEWART joined. Senior Judge STEPHENS filed a separate dissenting opinion. Judge STEWART concurs.

Opinion by: GASTON

Opinion

PUBLISHED OPINION OF THE COURT

GASTON, Senior Judge:

This case is before us on a second interlocutory appeal pursuant to *Article 62(a)(1)(B)*, Uniform Code of Military Justice [UCMJ], *10 U.S.C. § 862(a)(1) (B)*. Appellee is charged with assault consummated by a battery, conduct unbecoming an officer and a gentleman, and premeditated murder for allegedly strangling his wife in August 2013, physically and emotionally abusing her over the following two years, and then drugging her and causing **[*2]** her to fall from a seventh-floor apartment window to her death in October 2015.

The Government seeks to admit certain prior statements by the decedent, Mrs. Becker, under the forfeiture-by-wrongdoing exception to the *Sixth Amendment Confrontation Clause* and the hearsay rule. After two *Article 39(a)*, UCMJ, hearings, the military judge ruled some of the statements inadmissible. On the Government's first appeal, we found the judge's ruling

employed the wrong legal standard and vacated and remanded it for further consideration. *United States v. Becker, 80 M.J. 563 (N-M. Ct. Crim. App. 2020)* [*Becker I*]. On remand, after receiving additional briefing, the military judge reconsidered the evidence in light of our decision, adopted his prior findings of fact, and ruled the same statements inadmissible. The Government appeals this second ruling, which we find erroneous due to its failure to consider important facts.

I. BACKGROUND[1]

On 8 August 2013, Mrs. Becker was awakened around 2300 in a U.S. Army hotel by Appellee dragging her out of bed by the arm and shirt. The couple had just transferred to Belgium, and Appellee had been going through her laptop and became angry when he found a suggestive email between Mrs. Becker and another man. Mrs. Becker admitted having **[*3]** an affair with one of Appellee's former Navy colleagues in Virginia. The conversation became heated, turned to dissolution of the marriage, and a struggle ensued over the laptop. After grabbing and shoving her away from him repeatedly, Appellee eventually picked Mrs. Becker up, carried her to the bed, and pinned her down with his hands around her neck until she was unable to breathe.

Soon afterward, Mrs. Becker reported what happened to the hotel front desk clerk, who observed she had marks on her face and neck and appeared to have been crying. Military police were notified and interviewed both Appellee and Mrs. Becker. Appellee denied the allegations and said he had only hugged his wife tightly in order to keep her from hitting him. Mrs. Becker gave oral and written statements alleging this was not the first of the couple's physical altercations, which she said had happened four or five times previously with escalating severity. She stated that approximately six weeks prior Appellee had pushed her backwards and injured her ankle. This time, she said he tightened his hands around her neck with such force that she felt her life was in danger. She said he also took her identification **[*4]** and credit cards and changed their bank account passwords, effectively leaving her isolated and trapped.

After attending counseling with Appellee the following evening, Mrs. Becker recanted her allegations, which led to the criminal investigation and all formal action on the allegations being formally closed eight months later. Mrs. Becker nevertheless maintained to friends and family members that the allegations were true, that she had felt her life was in danger, that she had recanted only to save Appellee's military career, that she was afraid of what he would do if he lost his career, and that his controlling, abusive behavior toward her continued in the ensuing months.

In early September 2015, Appellee discovered Mrs. Becker was having another affair while he was going through the text messages on her cellular phone. He had a visceral reaction to this discovery, confronted her about it, and she admitted it. They began sleeping in separate rooms in their apartment in Mons, Belgium, and Mrs. Becker told Appellee she wanted to separate. On

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[1] As decisions on preliminary questions such as the admissibility of evidence are not bound by the rules of evidence, *see* Mil. R. Evid. 104(a), we assert no opinion about whether the facts discussed herein could be proven at trial, let alone whether the charges against Appellee could be proven beyond a reasonable doubt. We provide this factual background based on our review of the record only for purposes of assessing whether the trial court erred by failing to consider important facts in its ruling.

18 September 2015, they signed a separation agreement that would keep them somewhat connected for purposes of supporting and raising their infant **[*5]** daughter and pursuing an ongoing business venture.[2] After signing the separation agreement, Mrs. Becker began taking their daughter with her to sleep at her new boyfriend's house, further angering Appellee,[3] before eventually signing a lease for her own apartment, where she and their daughter would live apart from Appellee.

On 6 October 2015, Appellee went to a Belgian police office and reported that he was concerned about the people—including her new boyfriend—whom Mrs. Becker had invited to help her move to her new apartment. Appellee asked the police to make a written record of his visit. He later stated he went to the police because during their disagreements over who would move her things, Mrs. Becker "made [him] understand that she was going to cause [him] problems."[4] Appellee also reported that Mrs. Becker was an alcoholic, that she drank one-half to three-quarters of a bottle of wine five nights a week, and that her drinking affected her emotional state. That same day, he bought a bottle of wine for their seventh-floor apartment.

Two days later, Mrs. Becker died after falling from a window of that apartment. At around 2100 that evening, witnesses heard a woman screaming from a high **[*6]** window of an apartment building, sounding panicked and afraid. A nurse taking out the garbage saw the woman tilt backwards out of the window, strike the building as she toppled downward, and then grab the edge of a window, trying not to fall, until she was unable to hold on and fell screaming to the ground. A couple walking nearby heard the initial scream, two or three cries of "Help," and then a long scream of "Aaahh" ending in a thud. They found the woman lying on her back at the bottom of the building, arms in the air, moaning and bleeding from her head. Another bystander, a woman in her fifties, visibly shocked by what she had just witnessed, said a man had just pushed the woman out of a window.

The couple looked up and saw a man looking down from a window at the woman on the ground. After a while, the man came down speaking on the telephone. He was not crying and did not appear sad, but was nervously walking around. After he hung up his phone, the man spoke to the woman lying on the ground.

When the Belgian police arrived, they spoke to the man—Appellee. He told them his wife had jumped from her bedroom window after drinking wine and taking medicine earlier in the evening. He said **[*7]** he had put her to bed after dinner, later heard a scream while he was speaking on the phone, and entered her bedroom just as she went out the window. He took them to the seventh-floor apartment and showed them the window. Beneath it, there were long scrapes down the side of the building apparently left by Mrs. Becker's fingernails as she tried to stop her fall. The police found Mrs. Becker's cellular phone on a couch in the living room. Appellee told them he did not know its security code.

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[2] The agreement also referenced Appellee's ongoing fight to gain custody over his two sons from a prior marriage.

[3] Appellee texted a friend on 26 September 2015, "That piece of s[***] has the baby over [sic] her boyfriends." App. Ex. VI, Gov. Ex. 58 at 1.

[4] App. Ex. VI, Gov. Ex. 25 at 40.

After Mrs. Becker died from her injuries, Appellee told her father the following day that when he spoke to her as she lay on the ground, she told him, "You did this to me." During follow-up interviews with the Belgian authorities, Appellee said she told him, "I'm scared" and "I love you." Appellee denied hearing her cry, "Help," denied looking down from the window to where she fell, denied any feelings of jealousy about her being with another man, and denied ever being violent with her in the past. He said he later guessed the security code to Mrs. Becker's cellular phone and found messages sent from the phone to her new boyfriend just prior to her death. The messages stated that she saw a change **[*8]** in Appellee and still loved him, but that Appellee did not want her back because of the affair, and ended by stating, "F[***] my life."[5] A comparison with Appellee's phone records indicates the messages were sent during times when Appellee was not using his own cellular phone that evening.

A toxicological examination revealed that at the time of her death Mrs. Becker's blood alcohol content was negative, but that zolpidem and a high level of tramadol were present in her system. Tramadol is a morphine-based pain reliever that can cause sleepiness or altered consciousness. Zolpidem is a sedative, and can be prescribed in small, round, pink pills. A work colleague of Appellee's reported that a day or so before Mrs. Becker's death Appellee had picked up a small bag of small, round, pink pills from his old office.

Two days after his wife's death, Appellee spoke on the phone with one of her friends from home. He brought up things Mrs. Becker had done in the past to hurt him. One of the things he discussed was that Mrs. Becker had made his life a "living nightmare" when she told the police he was violent with her in the U.S. Army hotel in August 2013, which led to an eight-month investigation. **[*9]** He also discussed his ongoing child-custody dispute over his two sons from a former marriage, whom he had not told about Mrs. Becker's death, fearing it might get back to his ex-wife and affect his custody case.

II. Discussion

We have jurisdiction over this appeal under *Article 62(a)(1)(B)*, which authorizes the Government to appeal a ruling "which excludes evidence that is substantial proof of a fact material to the proceeding." The evidence ruled inadmissible by the military judge—Mrs. Becker's follow-up statements and formal report of abuse to military police in August 2013, her statements to friends regarding the August 2013 incident, and her statements to friends and family members regarding Appellee's alleged physical and emotional abuse between August 2013 and October 2015—meet that definition.

A. Forfeiture by Wrongdoing

The *Sixth Amendment Confrontation Clause* provides that in all criminal prosecutions, an accused shall have the right "to be confronted with the witnesses against him." Out-of-court statements that are "testimonial" are generally barred by the *Confrontation Clause* unless the declarant is unavailable to testify as a witness and the accused had a prior opportunity for cross-

[5] App. Ex. VI, Gov. Ex. 25 at 15.

examination. *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. "Testimonial" statements are, generally **[*10]** speaking, formalized statements that report allegations of past criminal conduct for potential use in future proceedings. *See Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)* (holding that statements are testimonial when circumstances objectively indicate that "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

An exception to the *Confrontation Clause*, rooted in common law, is forfeiture by wrongdoing, which holds that an accused cannot complain that his right to confront a witness is violated if his own acts, or acquiescence in some act, are what made the witness unavailable in the first place. This exception "extinguishes confrontation claims on essentially equitable grounds." *Crawford, 541 U.S. at 62*. It is woven into the constitutional fabric because its absence "would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them." *Giles v. California, 554 U.S. 353, 365, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008)*.

As the Supreme Court explained in *Giles*, the forfeiture-by-wrongdoing exception at common law permitted the introduction of statements of witnesses who were kept from testifying by the "means or procurement" or "contrivance" of the defendant. *Id. at 359-60*. In light of the definition and connotation of these terms, the Court found **[*11]** the exception was historically used where witnesses were kept away through "planning, scheming, or stratagem." *Id. at 361*. Based on case precedents and the general maxim upon which the exception is based—that a criminal defendant "should not be permitted to benefit from his own wrong"—the Court determined that "the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *Id. at 367*.

The exception thus has two components: (1) the party against whom the statement is offered wrongfully caused the declarant's unavailability as a witness; and (2) the party's conduct was intended or "designed" to produce that result. *Giles, 554 U.S. at 360-61*.[6] With respect to the second requirement, that the wrongdoing is intended or designed to cause the declarant's unavailability as a witness, a number of observations are in order.

First, the law recognizes that multiple intents or motives may be at work in a single, wrongful action. *See, e.g., United States v. Jackson, 706 F.3d 264, 269 (4th Cir. 2013)* (rejecting a narrow view of the intent requirement and noting that "the [*Giles*] Court made no mention of any requirement that the defendant's desire to silence the witness be the sole or primary motivation for his misconduct."). Consequently, as we have **[*12]** previously explained, "the conduct rendering the declarant unavailable need not have been motivated *solely* by a desire to prevent the declarant from testifying as a witness, so long as it was *a* motivation." *Becker I, 80 M.J. at 568* (emphasis in original) (citing *Jackson, 706 F.3d at 269* (finding that to allow defendants with multiple motives for their actions to murder, intimidate, or injure potential witnesses and then claim their confrontation right would impermissibly erode the rationale behind the exception)).

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[6] As the exception has also been codified as an exception to the hearsay rule, Military Rule of Evidence 804(b)(6), it applies equally to non-testimonial hearsay that is not barred by the *Confrontation Clause*. *See Becker I, 80 M.J. at 567 n.8* (collecting cases). Thus, our discussion here applies to both the constitutional and the hearsay exceptions.

Second, the intent to cause the declarant's unavailability as a witness need not be in reference to a particular criminal proceeding, or any proceeding at all for that matter. The intent could be to prevent the witness from testifying in a civil proceeding, such as a divorce or child custody hearing. *See* People v. Peterson, 2017 IL 120331, 423 Ill. Dec. 776, 106 N.E.3d 944, 963-65 (Ill. 2017) (citing *Giles, 554 U.S. at 377*). Nor must any legal proceeding, civil or criminal, be in existence at the time of the wrongdoing. *See id. at 964*; *Becker I, 80 M.J. at 568* ("[T]he doctrine applies equally to wrongdoing to prevent testimony and to wrongdoing to prevent testimonial statements, such as formal reporting to law enforcement."). There need not be a criminal investigation or charges pending or even contemplated at the time of the wrongdoing. *See Becker I, 80 M.J. at 569* (finding the exception **[*13]** applies "irrespective of whether criminal charges are reasonably foreseeable at the time of the conduct"). In the context of domestic abuse, for example, the Supreme Court has recognized that since "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, . . . 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 statements admissible under the forfeiture doctrine." *Giles, 554 U.S. at 377* (emphasis added).

Third, the wrongdoer's intent to cause the declarant's unavailability as a witness need only be subjectively held; it need not be reasonable in any objective or measurable way. Thus, the focus of the assessment is on the wrongdoer, not the declarant. Even if the declarant had no present intention of reporting abuse to the authorities or testifying at a future civil or criminal proceeding that was not then pending, but the wrongdoer's actions were nevertheless intended or designed to prevent her from doing so, this would trigger forfeiture by wrongdoing. As we stated during the Government's first appeal,

> *Giles* . **[*14]** . . envisions unconfronted, testimonial statements potentially being rendered admissible where a prior abusive relationship suggests that a wrongful act is performed with an intent to prevent the witness not only from testifying at some formal proceeding, but also from reporting abuse, cooperating with law enforcement, or resorting to outside help . . . .

Becker I, 80 M.J. at 569. To that end, it is well established that motive and intent are rarely proven by direct evidence and often "must be inferred from conduct and the surrounding circumstances." *Peterson, 106 N.E.3d at 961* (citations omitted); *see also* Rule for Courts-Martial 918(c), Discussion (defining "circumstantial evidence," from which motive and intent may be inferred, as "evidence which tends directly to prove not a fact in issue but some other fact or circumstance from which, either alone or together with other facts or circumstances, one may reasonably infer the existence or non-existence of a fact in issue.").

Finally, in assessing the wrongdoer's intent, while "[t]here is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence," *id.*, the trial court must take into account the totality of the circumstances, including not only the broader context of **[*15]** the wrongful act, but also its "immediate circumstances." *See State v. McKelton, 148 Ohio St. 3d 261, 2016-Ohio-5735, 70 N.E.3d 508, 546 (Ohio 2016)*.[7] This is particularly

[7] This rule applies irrespective of the type of case at hand. As the Supreme Court appropriately found in *Giles*, there is not "one *Confrontation Clause* (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, *Confrontation Clause* for crimes that are frequently directed against women." *Giles v. California, 554 U.S. 353, 376, 128 S. Ct.*

important where there is evidence of calculation or premeditation in the wrongful act that renders the declarant unavailable as a witness, since the forfeiture-by-wrongdoing exception's very existence is to prevent wrongdoers from benefitting from such action through planning, scheming, or stratagem. In *McKelton*, for example, where the appellant was accused of killing his girlfriend after previously assaulting her—but the prosecution's theory was that the killing of the victim "was spontaneous" and "wasn't planned"—the court found the *lack* of planning weighed against finding that the purpose behind the killing was to prevent the victim's testimony about the other offenses. *Id. at 545-46* (ultimately finding sufficient evidence of intent based on the violent history between the appellant and the victim).

In contrast to wrongdoing committed in the heat of sudden passion as a result of fear or rage, premeditated wrongdoing is "committed after reflection by a cool mind." *United States v. Hoskins, 36 M.J. 343, 346 (C.M.A. 1993)* (quoting *United States v. Viola, 26 M.J. 822, 829 (A.C.M.R. 1988)*, *aff'd*, *27 M.J. 456 (C.M.A. 1988)* (summ. disp.)). Implicit in such cool reflection is the potential for multiple motives for the same wrongful act. ***[*16]*** *See, e.g., United States v. Davis, 49 M.J. 79, 84 (C.A.A.F. 1998)* (finding evidence of "multiple motives" for the appellant's attempted premeditated murder of his wife, including pressure from his mistress to end his marriage and the alleviation of financial problems through his wife's life insurance). Hence, where there is evidence that the wrongdoing causing a declarant's unavailability as a witness was calculated or premeditated, the trial court must closely examine whether multiple layers of motive and intent are at play, to include things like keeping a witness from reporting criminal acts or other abusive behavior, cooperating with law enforcement, participating in civil or criminal proceedings, or resorting to outside help.

In laying the predicate for the forfeiture-by-wrongdoing exception, the Government's burden is to establish by a preponderance of the evidence that an accused wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness and did so intending that result. *Accord United States v. Johnson, 767 F.3d 815, 822-23 (9th Cir. 2014)* ("[I]n order to introduce evidence under the forfeiture exception, the Government must demonstrate by a preponderance of the evidence that the defendant intentionally secured the declarant's absence."); *United States v. Dinkins, 691 F.3d 358, 383 (4th Cir. 2013)*; *Perkins v. Herbert, 596 F.3d 161, 167 (2d Cir. 2010)*. *See also* **[*17]** *Fed. R. Evid. 804(b)(6)* advisory committee's note to 1997 amendment ("The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new *Rule 804(b)(6)* seeks to discourage.").

B. Analysis of the Trial Court's Ruling

In this case, Appellee is charged with premeditated murder in connection with allegedly drugging Mrs. Becker and then causing her to fall from a seventh-floor apartment window, in the context of prior acts of physical and emotional abuse. Based on an extensive record of witness testimony and documentary evidence, the Government asserts that at least part of Appellee's intent in killing Mrs. Becker was to cause her unavailability as a witness, and argues that in

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2678, 171 L. Ed. 2d 488 (2008). Whether it involves domestic violence, bank fraud, or a narcotics ring, the type of case merely helps inform what facts and circumstances must be taken into account in assessing the intent behind the wrongful act that renders the declarant unavailable as a witness.

reaching the opposite conclusion the trial court erroneously failed to consider important facts bearing on Appellee's intent.

In an interlocutory appeal under *Article 62*, we review the military judge's decision "directly" and review the evidence "in the light most favorable to the party which prevailed at trial." *United States v. Henning, 75 M.J. 187, 190-91 (C.A.A.F. 2016)* (citation and internal quotation marks omitted). We review rulings to admit or exclude evidence for an abuse of discretion. *United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)*. It is an abuse of discretion if the military judge (1) "predicates his ruling on findings of fact that are not supported by the evidence," (2) "uses incorrect legal principles," (3) "applies correct legal principles to the facts in **[*18]** a way that is clearly unreasonable," or (4) "fails to consider important facts." *United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017)* (citations omitted).

On remand from our previous decision, after receiving additional briefing from the Government, the military judge adopted his prior ruling's findings of fact, which discuss the 2013 incident at the U.S. Army hotel, Mrs. Becker's subsequent statements about Appellee's abusive and controlling conduct, Appellee's reaction to the second affair, and the Beckers' separation in the weeks leading up to Mrs. Becker's death. Regarding the more immediate circumstances of Mrs. Becker's death, the ruling provides the following facts:

> On 8 October 2015, Mrs. Becker signed a lease on an apartment for which she purchased a clothes washer and dryer. She gave the property owner a 500 Euro deposit at the same time. She then lunched with several co-workers where she appeared upbeat and talked about leaving for China the next morning on a business trip related to the joint business. Although she had been staying [with] friends on most nights, that night she returned to the apartment she shared with the accused to eat dinner and put their daughter to bed.
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> At around 2100 on 8 October 2015, witnesses heard **[*19]** a scream and saw Mrs. Becker fall from her seventh story apartment onto the ground. She was still alive as several witnesses gathered around her. The accused arrived shortly thereafter, and knelt down next to Mrs. Becker. Witnesses then observed the accused and Mrs. Becker speak to each other. The next day, the accused told [Mrs. Becker's father] that Mrs. Becker spoke to him during this exchange saying, "you did this to me." Several days later, the accused would tell authorities that Mrs. Becker instead said "I'm scared" and / or "I love you" during these last minutes.
>
> Mrs. Becker was taken to the hospital but died within an hour of falling.[8]

These facts, while all certainly relevant, reveal very little upon which to assess the determinations before us: whether Appellee wrongfully killed Mrs. Becker and whether his intent or design in doing so was, at least in part, "to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her statements admissible under the forfeiture doctrine." *Giles, 554 U.S. at 377*. From the military judge's factual findings it is very difficult to determine as a preliminary matter, one way or the other, whether **[*20]** Appellee killed Mrs. Becker, let alone whether his act was intentional, and if so, to what end.

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[8] App. Ex. LXXIX at 6.

Within the extensive record before us, there is evidence upon which to make these critical assessments. Even in the light most favorable to Appellee, who prevailed below, the evidence reveals a number of important facts that are absent from the trial court's ruling, including:

- Two days before her death, Appellee was concerned about Mrs. Becker "making problems" for him upon moving out. While informing the police of his concern, Appellee also reported the problematic effects of Mrs. Becker's alcohol consumption, yet bought a bottle of wine for their apartment that same day.
- A day or so before Mrs. Becker's death, Appellee retrieved pills from his old office matching the physical description of prescription pills containing the same sedative later found in Mrs. Becker's system.
- Just prior to Mrs. Becker's death, text messages evidencing her ostensible desire to get back together with Appellee, but being distraught about being rejected by him, were sent from Mrs. Becker's phone to her new boyfriend, at times when Appellee was not using his own phone.

- Appellee told the police he heard only **[*21]** an initial scream from Mrs. Becker's bedroom before arriving just in time to see her go out the window, whereas multiple bystanders heard Mrs. Becker repeatedly and fearfully crying for help, saw her struggling to hold onto a window ledge for a period of time before falling, and then saw him looking down from the window to where she fell, which he denied.
- Two days after Mrs. Becker's death, Appellee was still thinking and talking about the "living nightmare" she had caused when she reported he had assaulted and strangled her in the Army hotel in August 2013.
- In addition to being investigated previously for assaultive conduct toward Mrs. Becker—which he considered harmful to his career—at the time of her death Appellee had an ongoing child custody dispute over children from a previous marriage, which he feared would be negatively impacted by even the report that Mrs. Becker had committed suicide or accidentally fallen.
- Among the things Mrs. Becker revealed to friends and family members about her abusive marriage was her fear of what Appellee would do if he lost his career.

Within the broader context discussed *supra*, these more immediate circumstances of Mrs. Becker's death support **[*22]** by a preponderance of the evidence not only that (1) Appellee intentionally killed Mrs. Becker, but that (2) his actions were the result of planning and calculation, and that (3) at least part of his intent was to prevent Mrs. Becker from causing him any more problems akin to the "living nightmare" she had caused him when she reported her prior allegations of abuse to the authorities. Unlike the homicide in *McKelton*, which the prosecution viewed as spontaneous, the evidence of premeditation in this case supports that the wrongful act was motivated by more than just possible "jealousy over Mrs. Becker's relationship with another man," as the military judge found.[9] The evidence of planning and premeditation supports that in killing Mrs. Becker, Appellee was motivated not just to rid himself of any visceral feelings of jealousy upon finding her in a second affair, but by a desire to be rid of her in a complete sense, to include the incriminating detritus of his prior abusive conduct.

[9] App. Ex. LXXXIII at 2.

While we recognize that even premeditated murder can be motivated by pure jealousy, evidence that the wrongdoing rendering the declarant unavailable was committed after reflection by a cool mind dramatically **[*23]** increases the need to thoroughly examine, for purposes of forfeiture by wrongdoing, whether multiple layers of motive and intent were at play. And the focus of the assessment is not on what the declarant was doing or thinking at the time, but on the subjective intent of the wrongdoer, as evidenced by his conduct.

In this case, had the evidence suggested Appellee angrily killed Mrs. Becker close in time to when he found out about her new boyfriend, we might well agree with the trial court's conclusion that Appellee was motivated exclusively by jealousy. But Appellee had known about Mrs. Becker's new relationship for weeks by the time of her death on 8 October 2015. He had been sleeping apart from her, signed a separation agreement with her, and knew that she was spending nights at her boyfriend's house and looking for her own apartment to live in with their daughter. Yet everything appeared to be flowing amicably toward establishing separate households and living apart. So what changed in the days leading up to her death? In arguing over who could enter his house to help her move out, she said something about "causing him problems" that made him concerned enough to go to the police, **[*24]** where he reported she was an emotional drunk, yet bought wine, and then scrounged for pills apparently containing the sedative later found in her body.

Here is where, in addition to the broader context, the immediate circumstances of Mrs. Becker's death become all important to answer the question *Giles* requires: not what was the declarant's intent at the time of the wrongdoing, but what was the wrongdoer's? The Government argues that from prior experience Appellee knew one way in which Mrs. Becker could indeed cause him problems—to his career, to his ongoing child custody dispute, and to him personally—was by reporting (or re-reporting) his abusive conduct, which though she formally recanted she never stopped talking about with friends and family members. And so, in order to avoid another "living nightmare," Appellee hatched a scheme to kill Mrs. Becker, which he then carried out.

We need not determine whether based on this theory the Government can prove premeditated murder beyond a reasonable doubt at trial. That is for the fact-finder to decide. But for purposes of determining what evidence it may use in its case, we find the Government has shown by a preponderance of the evidence **[*25]** that one may reasonably infer such a design was at least part of Appellee's intent in killing Mrs. Becker.[10] We conclude that while otherwise reasonable in its approach to the evidence, in not taking into account the more immediate circumstances of Mrs. Becker's death, the trial court erred in failing to consider important facts supporting not only that Appellee intentionally killed Mrs. Becker, but the full nature of his reasons for doing so. Based on the totality of the circumstances in this case—including the above-described facts not

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[10] We respectfully disagree with our dissenting colleague that in so holding we are establishing a policy whereby criminal defendants are subject to a different *Confrontation Clause* than everyone else. Indeed, the forfeiture-by-wrongdoing exception applies equally to the Government. *Fed. R. Evid. 804(b)(6)* advisory committee's note to 1997 amendment ("The rule applies to all parties, including the government."). Nor do we agree that we have somehow established a new rule for Sailors and Marines that differs from that of our sister services, for which the dissent cites no cases from our sister service courts or the Court of Appeals for the Armed Forces and we are aware of none. Rather, the forfeiture-by-wrongdoing exception applies equally to all servicemembers, whether they commit the wrongdoing that renders declarants unavailable as witnesses or are themselves the declarants silenced by such wrongful acts.

considered by the trial court—we conclude that "[Appellee's] wrongful act [wa]s performed with an intent to prevent [Mrs. Becker] not only from testifying at some formal proceeding, but also from reporting abuse, cooperating with law enforcement, or resorting to outside help." *Becker I, 80 M.J. at 569*.

III. Conclusion

The Government's appeal is **GRANTED**. The military judge's ruling is **VACATED**, and the statements at issue are ruled admissible under the forfeiture-by-wrongdoing exception to the *Confrontation Clause* and Military Rule of Evidence 804(b)(6). The record of trial is returned to the Judge Advocate General for remand to the convening authority and delivery to the military judge for further proceedings in light of this opinion. **[*26]**

Judge STEWART concurs.

Dissent by: STEPHENS

Dissent

STEPHENS, Senior Judge (dissenting):

I am unable to join my colleagues for three reasons. First, the evidence does not demonstrate that Appellee had some secondary motive to prevent his wife from making future testimonial statements. Second, the military judge did not abuse his discretion by not making findings on facts that were, in context, unimportant. Third, the majority does precisely what the Supreme Court warned us not to do in *Giles*, which is to establish a policy where criminal defendants—in this case Marines and Sailors—would be subject to a different *Confrontation Clause* than everyone else.

Discussion

A. The Majority's Facts Are Not Evidence of Appellee's Secondary Intent to Prevent Mrs. Becker from Making Future Testimonial Statements

The majority lists various facts in concluding that Appellee *must have* had a secondary motive in mind. None of them alone is dispositive to show his specific intent to prevent Mrs. Becker from making future testimonial statements. Even considered as a totality, these items are just a list of nondispositive facts.

Two days before Mrs. Becker's death, Appellee went to the Belgian police and made an unusual pre-emptive complaint about his **[*27]** wife. He told them that he was concerned about her

friends—including her new boyfriend—who were coming to assist with her moving her things from their shared apartment. He told police he "did not want a confrontation."[1] Appellee also told the police that Mrs. Becker "made me understand that she was going to cause me problems"[2] if she was unable to have her own friends help her with the move. This is much more readily viewed as an expression that Mrs. Becker could cause Appellee social or personal problems pertaining to the move, rather than some veiled threat of re-igniting the 2013 allegation by making future testimonial statements to law enforcement.

Two days after Mrs. Becker's death, Appellee spoke with one of her friends from home. He told her that Mrs. Becker made his life a "living nightmare"[3] when she made the 2013 allegation. This statement strikes me as a candid reflection that Mrs. Becker's 2013 allegation, whether accurate or not, caused significant personal and professional problems for Appellee. Any service-member who was the subject of an allegation of spousal abuse could believe the allegations were making his life a "living nightmare." This is probably especially true **[*28]** if years-old and recanted allegations were re-ignited. A service-member would be unlikely to forget that and could have that in the back of his mind for years. But that circumstance does not rise to the level of demonstrating Appellee's subjective intent to prevent Mrs. Becker from making future testimonial statements. That circumstance could apply to every service-member who was the subject of past spousal abuse allegations.

The majority asserts that all of the above facts go to "motive, which is the heart of the matter" before this Court. The motive the majority appears to concentrate on is the motive to commit premediated murder. But the motive we are actually concerned about is a secondary motive to prevent Mrs. Becker from making future testimonial statements. In my view none of the facts, taken individually, or as a whole, show Appellee had such a secondary motive.

This should be a simple analysis where a military judge can make a finding of fact that demonstrates such an intent. It should not require layering or synthesis of different pieces of evidence. For example, in *United States v. Jackson*,[4] cited by the majority, the evidence demonstrated that the appellant orchestrated the **[*29]** murder of the decedent to prevent his future testimony in the appellant's attempted murder trial. The testimonial statements the decedent made to the police concerned a previous attempt on his life and the appellant's involvement in that attempt. The evidence showed the appellant learned the decedent was "telling everything" to the police and, in response, the appellant told his associates the decedent was "an informant trying to bring down him and his brothers" and that he "deserved" to be killed.[5]*Jackson* has clarity and quantum of evidence that far exceeds the evidence in this case.

The Government urged us to consider three civilian cases for the proposition that Appellee had a secondary motive: *State v. McKelton*,[6] a 2016 opinion from the Supreme Court of Ohio;

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[1] Appendix H, Govt. Ex. 25 at 40.

[2] *Id.*

[3] Govt. Ex. 28 at 3, 7.

[4] *706 F.3d 264 (4th Cir. 2013)*.

[5] *Id. at 266*.

People v. Kerley,[7] a 2018 opinion from a California Court of Appeal; and *McLaughlin v. Steele*,[8] a 2016 habeas petition from the Eastern District of Missouri. In my view, all of these cases undermine the Government's and the majority's position.

McKelton, cited by the majority, featured overt evidence of the appellant preventing testimonial statements about on-going domestic abuse that occurred within just three months of the conduct **[*30]** leading to unavailability. McKelton murdered his girlfriend, with the state's theory being that the killing "was spontaneous" and "wasn't planned."[9] The Supreme Court of Ohio, as the majority points out, held that "the immediate circumstances" of the victim's death did not "establish the requisite purpose that would allow the admission of testimonial statements because of forfeiture by wrongdoing."[10]

The majority contrasts the spontaneous murder in *McKelton* with the allegedly planned murder here. In *McKelton* the court was still able to find a purpose to prevent future testimonial statements, and thus forfeiture by wrongdoing, even in the absence of a pre-planned intent to murder. Following the majority's logic here, if a spontaneous killing can discern a motive to silence, then a planned one *must* also have such a motive. I disagree with this rationale in general, but specifically, the nature of the evidence in *McKelton* is in such stark contrast with the evidence here. McKelton lived with his girlfriend and her two minor nieces. McKelton had once taken a phone from one of the girls as she was trying to call 911 when he was assaulting her aunt. At a later date, he became enraged when the **[*31]** other niece called 911 and a police officer came to the house. Three months later, the girls' aunt was dead. Despite the death appearing to be a spontaneous killing, the Supreme Court of Ohio, applying *Giles* and looking at the domestic abuse circumstances generally, held that McKelton was "trying to isolate [his victim] and prevent her from talking to authorities."[11]

In *Kerley*, cited by the Government, the appellant had a long and extremely violent relationship history with his victim. This included overt warnings to her that he would kill her if she went to the police. But at the time of his victim's disappearance, Kerley was just days away from a court appearance for felony assault of his victim. Not only was the abuse contemporaneous with the wrongdoing causing the unavailability, but the victim "obviously would have been the key witness against him."[12] The same is true of *McLaughlin* and its background of contemporaneous

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[6] *148 Ohio St. 3d 261, 2016-Ohio-5735, 70 N.E.3d 508 (Ohio 2016)*.

[7] *23 Cal. App. 5th 513, 233 Cal. Rptr. 3d 135 (Cal. Ct. App. 2018)*.

[8] *173 F. Supp. 3d 855 (E.D. Mo. 2016)*.

[9] *McKelton, 70 N.E.3d at 545*.

[10] *Id. at 546*.

[11] *Id.*

[12] *Kerley, 233 Cal. Rptr.3d at 173*.

domestic abuse. McLaughlin was pending "ongoing burglary and abuse cases"[13] where his victim's testimony was crucial.

The majority's remaining facts fare no better in shedding light on Appellee's subjective intent. The Appellee obtained pills that he possibly used to **[*32]** sedate Mrs. Becker and there was a discrepancy between his statements to the police about Mrs. Becker's scream and the statements of witnesses. Neither of these facts demonstrate Appellee's secondary purpose. They merely demonstrate some design of Appellee to kill Mrs. Becker or to obfuscate his role in her death.

The majority also cites as an important fact that Appellee's ongoing child custody dispute [from a previous marriage] could be jeopardized by the fact of Mrs. Becker's suicide or death by accident. In so doing, it cites a 2017 opinion from the Supreme Court of Illinois, *People v. Peterson*,[14] that forfeiture by wrongdoing can apply if there is some civil matter in play, too. And that is true. But the facts of *Peterson* show a clear case of an appropriate application of the exception and further demonstrate a stark contrast from the majority's holding here.

Peterson was in the middle of an acrimonious divorce. He stated he was adamant that his ex-wife not receive any of his pension from the police department and they were bitterly opposed over custody of their sons. His exwife was scared for her safety and extracted a promise from her sister to look after her sons if something should **[*33]** happen to her, because she was convinced she might not make it to the hearing where she would have to testify. In addition, Peterson made statements to a friend that his ex-wife needed to be "taken care of" because "she has something on me" and offered $ 25,000 for the act.[15] Finally, Peterson, with his ex-wife "taken care of," received sole custody of the children, had to pay no alimony or child support, received the total of the proceeds of the sale of their home, obtained sole control of a business, and did not have to sever any of his pension. This is what motive and intent, "inferred from conduct and the surrounding circumstances"[16] looks like. In contrast, Appellee and Mrs. Becker's divorce was, as Mrs. Becker told her friends, "amicable."[17] They intended to continue with a joint business venture selling athletic gloves[18] and had a mutual arrangement to share custody of their baby daughter.[19]

With no evidence of any future criminal proceedings or testimony, we are left with considering whether there is any evidence of Appellee's subjective intent to prevent Mrs. Becker from making future testimonial statements. While it is true that the intent does not have to be

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[13] *McLaughlin, 173 F.Supp. 3d at 901*.

[14] *2017 IL 120331, 423 Ill. Dec. 776, 106 N.E. 3d 944 (Ill. 2017)*.

[15] *Id. at 962*.

[16] *Id. at 961* (citations omitted).

[17] R. at 66; App. Ex. LXXIX at 3-4, Military Judge's Findings of Fact and Conclusions of Law dated 9 Dec 2019 [from first Article 39(a) session] at 5.

[18] *Id.*

[19] R. at 10.

reasonable or objective, **[*34]** but merely exists in Appellee's mind, it would certainly be a factor to consider as to whether there was objective evidence outside of Appellee's subjective intent. In short, if there was some objective evidence that Mrs. Becker was intending to make future testimonial statements, this would probably assist the factfinder in discerning Appellee's subjective intent. Here, there is no objective evidence of such intent by Mrs. Becker. This does not by itself mean that Appellee did not have a subjective intent, it just means that his intent appears to drift into an unreasonable one. The majority thus engages in collecting evidence to discern Appellee's unreasonable, subjective intent to prevent Mrs. Becker from making future testimonial statements, where no evidence shows she was planning to do so in the first place.

B. The Military Judge Did Not Fail to Consider Important Facts

I believe we owe more deference to the military judge. We specifically directed the military judge to consider Appellee's subjective intent when we remanded the matter. And he concluded that the evidence failed to establish that Appellee "believed that such formal or informal reporting was going to occur, then or **[*35]** in the future."[20] The facts that the majority characterizes as "important facts" were thus in front of the military judge, twice. He is not required to make findings on every possible factoid placed in front of him. "A military judge abuses his discretion when . . . he fails to consider important facts."[21]

The question is not whether we merely disagree with the military judge's assessment of the evidence, but whether the facts identified by the majority were important enough to render a failure to make findings on them an abuse of discretion. First, these facts were in front of the military judge in the first Article 39(a) hearing on this issue. And when this Court heard the Government's first Article 62 appeal, we remanded the case because the military judge had applied a "legal principle" we held to be "incorrect"[22] [focusing on the "reasonable foreseeability" of future testimony or proceedings rather than the subjective belief and intent of Appellee to prevent future testimony or testimonial statements]. We said nothing at the time about the military judge's failure to consider important facts. Should he have considered this Court's silence on that issue to be our consent or does this **[*36]** Court have the latitude to change its reasons to find abuse of discretion upon a subsequent interlocutory appeal?

The second concern is how central these facts were, in context. An example of an important fact that a military judge overlooked is from the case cited by the majority, *United States v. Commisso*.[23] In that case, members convicted the appellant of a sexual assault contrary to his pleas. Three of the members, one lieutenant colonel and two colonels, had actually regularly attended Sexual Assault Review Board [SARB] meetings where this case had been briefed and discussed from the victim's point of view. None of them answered accurately during voir dire

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[20] App. Ex. LXXXIII, Military Judge's Findings of Fact and Conclusions of Law dated 10 Aug 2020 [from second Article 39(a) session] at 3.

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

[22] *United States v. Becker, 80 M.J. 563, 569 (N-M. Ct. Crim. App. 2020)* [*Becker I*].

[23] *76 M.J. 315*.

whether they knew anything about the case. During the trial, one of the colonels reminded the lieutenant colonel that they had heard about the appellant's case at the SARB. After the trial, at the SARB, one of the colonels recommended the briefing method be changed to allow for better objectivity in the future for court-martial members attending the SARB. At the same SARB, the colonel made negative statements about those accused of sexual assault and also of defense counsel who represent them. At a post-trial hearing, the **[*37]** military judge denied the defense motion for a mistrial due to member bias. The Court of Appeals for the Armed Forces held that he failed to consider any implied bias from the members' SARB participation, the colonel's "explicitly negative statements at the SARB regarding those who serve as defense counsel and those who are accused of sexual assault" or the "cumulative appearance" of these three members sitting on the appellant's panel.[24] These were "elephant-in-the-room" facts that were left unaddressed by the military judge.

In my view, there is no comparison of the "important facts" from *Commisso* to Appellee's case. The abuse of discretion in *Commisso* is readily apparent in a way that renders the result "arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[25] The majority's elevation of these facts—which were before the military judge both times in the same manner—to "important facts" concerning Appellee's secondary motive akin to *Commisso* makes the holding here look more like a "mere difference of opinion."[26] I believe we owe the military judge more deference and that these facts did not rise to the level of "important facts."

C. This Court Effectively Overrules *Giles v. [*38] California*

In *Giles*, the Court rejected the notion that there is "one *Confrontation Clause* (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, *Confrontation Clause* for crimes that are frequently directed against women."[27] The majority holds that Appellee, due to his meticulous planning of Mrs. Becker's murder, must have known that by doing so, she would never be able to testify, or provide future testimonial statements against him, if she were not alive. This is in accord with the dissent in *Giles*: "[u]nder the circumstances presented by this case, there is no difficulty in demonstrating the defendant's intent. This is because the defendant here knew that murdering his ex-girlfriend would keep her from testifying; and that knowledge is sufficient to show the *intent* the law ordinarily demands."[28] Lest we draw any distinction between the more spontaneous killing in *Giles* and the planned killing here, the law recognizes that motive and intent can be demonstrated in an instant and by one's actions. If the *Giles* dissent would find intent in a spontaneous killing because "any reasonable person would have known"[29] that a murder victim could not make any future

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[24] *Id. at 320*.

[25] *United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)*.

[26] *Id.*

[27] *Giles, 554 U.S. at 376*.

[28] *Id. at 385* (Breyer, J., dissenting) (emphasis in the original).

testimonial statements or **[*39]** provide testimony, then it would also find that same intent in a planned murder as well. But that is not the law and that is not the holding in *Giles*.

With respect to intent to make the victim unavailable, the distinction between this case and the underlying facts of *Giles* is one without much difference. And the fact that the dissent in *Giles*, if it were the majority opinion, would provide an easy explanation for the result in this case, leads me to believe we are wrong. The majority's collection of statements appears to me to be speculative. Evidence of intent can be "circumstantial evidence-from before or after the act."[30] And while circumstantial evidence can certainly be dispositive, there is a distinction between speculation and circumstantial evidence. Speculation is "the art of theorizing about a matter to which evidence is not sufficient for certain knowledge"[31] while circumstantial evidence is the "process of decision by which court or jury may reason from circumstances known or proved, to establish by inference the principal fact."[32] Here, I believe the circumstantial evidence is leagues apart from the proverbial wet street in the morning or the deer tracks in freshly fallen snow **[*40]** that are standard examples of circumstantial evidence.

Giles tells us that we must find evidence that the purpose of the accused's actions was, in part, to prevent future testimony or future testimonial statements. As much as one may agree with the sentiment of the dissent in *Giles* concerning the appearance of forfeiture by wrongdoing [or its lack thereof] in domestic abuse cum murder cases, the Court's holding was clear: there must be evidence that an accused intended to prevent future testimony or future testimonial statements. The forfeiture by wrongdoing "exception is not available for statements by murder victims simply because the defendant made them unavailable."[33]

Finally, the most concerning problem with the majority's holding is that Marines and Sailors who are accused of crimes will now be subject to a different *Confrontation Clause* than civilians, or even members of our sister services. There do not appear to be any cases from CAAF or our sister service courts that are directly on point to support the majority's position [or in fairness, my own]. However, the majority's position appears to contradict *Giles*, or at the very least follow the logic of its dissent. While the **[*41]** Navy and Marine Corps do not see many courts-martial for murder, when they arise they often come in the context of messy, violent, and failed romantic relationships. Evidence of any premeditation at all, or even borrowing from the dissent in *Giles*, just the simple logic that every assailant knows the dead cannot testify or provide future testimonial statements, means that any prior testimonial statements of domestic abuse, will now be available for the government to use at trial without the accused having the benefit of cross examination. Because I believe the *Confrontation Clause*, and *Giles*, requires the government to

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[29] *Giles, 554 U.S. at 386* (Breyer, J., dissenting).

[30] *United States v. Rodriguez, 79 M.J. 1, 4 (C.A.A.F. 2019)* (citing *United States v. Acevedo, 77 M.J. 185, 189 (C.A.A.F. 2018))*.

[31] *United States v. Cage, 42 M.J. 139, 145 (C.A.A.F. 1995)* (Sullivan, CJ, dissenting) (citing *Black's Law Dictionary* (6th ed. 1990).

[32] *Id.*

[33] *United States v. Burgos-Montes, 786 F.3d 92, 115 (1st Cir. 2015)* (citing *Giles, 554 U.S. at 367-77*).

present better evidence than this showing that a purpose of the wrongdoing was to prevent future testimony or future testimonial statements, I dissent.

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United States v. MacWhinnie

United States Navy-Marine Corps Court of Criminal Appeals

March 2, 2021, Decided

No. 201900243

Reporter
2021 CCA LEXIS 92 *; 2021 WL 798887

UNITED STATES, Appellee v. Sean C. MACWHINNIE, Fire Controlman Chief (E-7), U.S. Navy, Appellant

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Hayes C. Larsen (arraignment), Michael J. Luken (motions), Keaton H. Harrell (motions, trial). Sentence adjudged 26 April 2019 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of a military judge alone. Sentence approved by the convening authority: reduction to E-1, confinement for 6 months, and a dishonorable discharge.

Core Terms

images, child pornography, military, viewing, user, wrongfully, saved, knowingly, website, pornography, pinned, titles, beyond a reasonable doubt, factors, ship, sexually explicit, boards

Case Summary

Overview

HOLDINGS: [1]-Findings and sentence for wrongfully viewing child pornography were affirmed because the military judge did not err in ruling that the images and board titles from the service member's social media accounts were admissible to prove intent, knowledge, and absence of mistake or accident under Mil. R. Evid. 404(b); [2]-It was reasonable to infer that the service

member knowingly and wrongfully viewed the two images of child pornography that were found on his social media account because the Internet Security and Acceleration logs showed the service member's username accessed the social media account from the ship at the times the charged images were saved or "pinned" to his account.

Outcome
Findings and sentence affirmed.

Counsel: For Appellant: Lieutenant Clifton E. Morgan III, JAGC, USN.

For Appellee: Lieutenant Commander Jeffrey S. Marden, JAGC, USN.

Judges: Before GASTON, STEWART, and HOUTZ, Appellate Military Judges.

Opinion

PER CURIAM:

Appellant was convicted, contrary to his pleas, of violating a lawful general regulation and wrongfully viewing child pornography, in violation of *Articles 92* and *134, Uniform Code of Military Justice [UCMJ]*, *10 U.S.C. §§ 892*, *934 (2012)*, for using a shipboard computer to view pornography, including child pornography, during a deployment.

Appellant asserts two assignments of error [AOEs]: (1) the military judge abused his discretion by allowing the Government to introduce images that were not child pornography to prove intent, knowledge, and absence of mistake or accident pursuant **[*2]** to Military Rule of Evidence [Mil. R. Evid.] 404(b); and (2) the evidence is legally and factually insufficient to support Appellant's conviction for wrongfully viewing child pornography because the evidence does not show Appellant knowingly did so. We find no prejudicial error and affirm the findings and sentence.

I. Background

During his deployment serving with USS *San Antonio* (LPD 17) in September and October 2016, Appellant frequently used government computers to access the internet. The ship did not have

wireless connectivity, but Sailors were allowed to view "unblocked" websites using the ship's computers, which were accessible with a common access card and password. Websites known to contain inappropriate content, to include pornography, and considered "unsafe" were blocked; however, websites that were known to be "safe" were generally accessible and were unblocked. In order to monitor onboard computer usage, the ship assigned usernames to Sailors using their first initial and last name. Appellant's user name was "smacwhinnie," and he was the only individual onboard with the last name "MacWhinnie."

The image-sharing website "Pinterest" was considered to be a safe website platform and was unblocked **[*3]** and accessible to users on the *San Antonio* using government computers. Pinterest allows users to save, share, and search for images. A potential user can open an account by providing an email address to which it can be registered. Once the account is open, the user can look through content on the website and save or "pin" images to the user's account. Pinned images are saved on "boards" with "board titles" created and named by the user. These boards can be publically viewed or kept private. Pinterest also gives the user the option to "like" an image, which causes Pinterest to place that image in an automatically created "Your Pinterest Likes" board in the user's account.

During Appellant's deployment, Pinterest found ten images of suspected child pornography had been saved to a Pinterest account associated with Appellant's name and email address. Pinterest reported the images and information regarding their discovery to the National Center for Missing and Exploited Children [NCMEC]'s "CyberTipline," which produced a report for each of the images listing Appellant's name and email address as the account user associated with them. The internet protocol (IP) addresses associated with the **[*4]** account led back to the Norfolk Navy Internet Security and Acceleration [ISA] proxy server, which logged internet access from the *San Antonio* by user name, website accessed, and date and time of access of websites visited by its users. This evidence, in turn, connected the use of Appellant's shipboard computer account to the times during which the images of suspected child pornography were saved to his Pinterest account.

The Naval Criminal Investigative Service [NCIS] subpoenaed subscriber information from Google for the email address on the Pinterest account and confirmed it belonged to Appellant. NCIS then executed search warrants on Pinterest and in response received files containing images and "board titles" from the account, as well as another account listed under Appellant's name. These included a board entitled, "Too Young," containing images of younger-looking females in revealing clothing; a board entitled, "Yes Sir," containing images of females in revealing underwear or other clothing, with some nudity; a board entitled, "Hot Chicks," containing adult female images with partial nudity; and a board entitled, "Your Pinterest Likes," containing among other things images of adult **[*5]** pornography and some younger-looking females in revealing clothing. The files provided by Pinterest in response to the warrant did not contain any of the ten images of suspected child pornography that Pinterest had originally found and reported to NCMEC's Cyber-Tipline.

NCIS interviewed Appellant, who after waiving his Article 31(b) rights admitted that he had frequently used government computers aboard the ship to access pornography during the relevant time periods. Appellant also admitted that he had frequently accessed Pinterest through

the accounts described above and had viewed and saved (i.e., "pinned") pornography on those accounts. Appellant denied searching for or viewing child pornography.

Based on the investigation, Appellant was charged with viewing and possessing two images of child pornography from the NCMEC CyberTipline reports and misuse of a government computer. Prior to trial, the Government provided notice of its intent to introduce under Military Rule of Evidence [Mil. R. Evid.] 404(b) additional images contained in the NCMEC reports, as well as additional images and user-created board titles found in Appellant's Pinterest accounts. The additional images depicted child erotica and adult **[*6]** pornography placed on Pinterest boards created by Appellant. Some of the board titles and images contained on them, including "Hot Chicks," were made publically viewable, while other board titles and images, to include the board entitled, "Too Young," were made private. Trial defense counsel moved to exclude this evidence, but the military judge permitted the Government to introduce the additional images and board titles under Mil. R. Evid. 404(b) to prove Appellant's intent, knowledge, and absence of mistake or accident with respect to the charges of knowingly and wrongfully viewing and possessing child pornography. Appellant was convicted of knowingly and wrongfully viewing child pornography and misuse of a government computer, but acquitted of knowingly and wrongfully possessing child pornography.

II. Discussion

A. The Military Judge's Rulings Under Mil. R. Evid. 404(b)

Appellant asserts that the military judge's rulings under Mil. R. Evid. 404(b) were erroneous. We review a military judge's ruling on evidentiary rulings pursuant to Mil. R. Evid 404(b) for an abuse of discretion.[1] "To find an abuse of discretion requires more than a mere difference of opinion—the challenged ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[2] A military **[*7]** judge abuses his discretion when he (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) fails to consider important facts.[3] Conclusions of law are reviewed de novo.[4]

Mil. R. Evid. 404(b) "is a rule of inclusion" that "permits admission of relevant evidence of other crimes or acts unless the evidence tends to prove only criminal disposition."[5] Evidence offered under Mil. R. Evid. 404(b) must satisfy the three-factor test announced in *United States v.*

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[1] *United States v. Harrow, 65 M.J. 190, 199 (C.A.A.F. 2006)*.

[2] *United States v. Jasper, 72 M.J. 276 279-80 (C.A.A.F. 2013)*.

[3] *United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017)* (citations omitted).

[4] *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)*.

[5] *United States v. Browning, 54 M.J. 1, 6 (C.A.A.F. 2000)* (citations omitted).

Reynolds: (1) it must reasonably support a finding that the appellant committed prior crimes, wrongs, or acts; (2) it must be logically relevant (i.e., it must make a fact of consequence more or less probable); and (3) it must be legally relevant (i.e., its probative value must not be substantially outweighed by the danger of unfair prejudice).[6] When analyzing the last factor—legal relevance under Mil. R. Evid. 403—a military judge should consider the following non-exhaustive factors from *United States v. Wright* and *United States v. Berry*: (1) strength of the proof of the prior act, (2) probative weight of the evidence, (3) **[*8]** potential to present less prejudicial evidence, (4) possible distraction of the fact finder, (5) time needed to prove the prior conduct, (6) temporal proximity of the prior event, (7) frequency of the acts, (8) presence of any intervening circumstances, and (9) relationship between the parties.[7]

At the conclusion of the hearing on the Defense motion to exclude, the military judge determined that the Government had met its burden on all of the *Reynolds* factors and ruled the images and board titles from Appellant's Pinterest accounts were admissible to prove intent, knowledge, and absence of mistake or accident under Mil. R. Evid. 404(b). He found that, based on the subscriber information provided by Pinterest and Appellant's admissions to NCIS, the evidence reasonably supported that Appellant created the Pinterest accounts, created public and private title boards within those accounts, and pinned the images to those boards.[8] He further found the images logically relevant in that they supported the conclusion that Appellant sorted images on Pinterest to delineate between older and younger looking subjects, which bore on whether Appellant's viewing and possession of child pornography was intentional **[*9]** and knowing. Finally, the military judge properly discussed and applied the third *Reynolds* factor in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence under Mil. R. Evid 403. In doing so, the military judge found, among other things, that the probative value of the images was high toward their intended use under Mil. R. Evid. 404(b), there was no significant temporal disparity between the charged offenses and the other acts, and there was no significant contextual disparity in the pinning of the images and the viewing of child pornography.

The military judge also ruled that the five additional images from the NCMEC CyberTipline reports were admissible to prove intent, knowledge, and absence of mistake or accident under Mil. R. Evid. 404(b). With regard to the *Reynolds* factors, the military judge concluded the evidence reasonably supported that the images admitted were saved to Appellant's account by Appellant.[9] He determined the images were logically relevant in that they supported the supposition that Appellant sorted images on Pinterest to delineate between older and younger looking subjects, which bore on whether Appellant's alleged viewing and possession of child

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[6] *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)*.

[7] *United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005)* (citing *United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000))*. While the *Wright-Berry* factors were initially used to assess the legal relevance of propensity evidence offered under Mil. R. Evid. 413, our superior court has also used them to assess the legal relevance of other-acts evidence under Mil. R. Evid. 404(b). *See United States v. Barnett, 63 M.J. 388, 396 (C.A.A.F. 2006)*.

[8] R. at 151-53.

[9] In addition to the information provided by Pinterest and Google, as well as Appellant's admissions to NCIS, the ship's information systems technician testified that the only way to access the ship's computers was with a common access card and password.

pornography **[*10]** was intentional and knowing. Finally, the military judge properly applied the third *Reynolds* factor in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence under Mil. R. Evid 403. In doing so, the military judge applied the *Wright-Berry* factors and reached the same conclusions he did in the first Mil. R. Evid. 404(b) ruling.

We find the military judge's discussion of the *Reynolds* factors to be thorough and reasonable, and we agree with his conclusions, including the factors regarding legal relevance, supporting admission of the evidence. Hence, we find no abuse of discretion in his rulings.

B. Appellant's Conviction for Wrongfully Viewing Child Pornography is Legally and Factually Sufficient

Appellant argues that his conviction for wrongfully viewing child pornography is legally and factually insufficient because the evidence did not show Appellant *knowingly* viewed child pornography. To determine legal sufficiency, we review the evidence "in the light most favorable to the prosecution" and ask whether "a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[10] In conducting this analysis, we must "draw every reasonable inference **[*11]** from the evidence of record in favor of the prosecution."[11]

In testing for factual sufficiency, we "weigh[ ] the evidence in the record of trial and mak[e] allowances for not having personally observed the witnesses" in order to determine whether we, ourselves, are "convinced of the accused's guilt beyond a reasonable doubt."[12] We do not defer to the trial court's decision, but take a "fresh, impartial look at the evidence" and must "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[13]

In order to sustain the conviction for wrongfully viewing child pornography, the Government must have proven beyond a reasonable doubt that Appellant: (1) knowingly and wrongfully viewed child pornography, and (2) that under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.[14] The Manual for Courts-Martial (MCM) defines "child pornography" as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit **[*12]** conduct."[15] The MCM defines "sexually explicit conduct" as "actual or simulated: . . . lascivious exhibition of the genitals or pubic area of any person."[16] In order to prove that the accused knowingly and

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[10] *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)* (citations omitted).

[11] *United States v. Gutierrez, 74 M.J. 61 (C.A.A.F. 2015)* (quoting *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001))*.

[12] *Turner, 25 M.J. at 325*.

[13] *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F 2002)*.

[14] *Manual for Courts-Martial, United States* (2016 ed.), pt. IV, para. 68b.b.(1).

[15] *Id.* at 68b.c.(1).

wrongfully viewed child pornography the government must prove beyond a reasonable doubt that the accused was aware that the images were of minors engaged in sexually explicit conduct. An accused may not be convicted of viewing child pornography if he, "was not aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct."[17] "Awareness may be inferred from circumstantial evidence such as the name of a computer file or folder,"[18] and "[a]ny facts or circumstances that show a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness . . . ."[19]

Here, Appellant was convicted of viewing two images of child pornography. Those images were found by Pinterest on Appellant's Pinterest account, and reported to the NCMEC CyberTipline. Appellant argues that the only direct evidence connecting him to those images are the NCMEC CyberTipline reports and the ship's ISA **[*13]** logs. He also points out that Pinterest's response to the subsequent search warrant from NCIS did not yield any child pornography and there is no evidence to show Appellant searched for child pornography. In response, citing *United States v. Kearns*[20] and *United States v. King*,[21] the Government argues that the burden of proof can be and was met in this case through circumstantial evidence. In *King*, the Court affirmed the appellant's conviction because although forensic evidence could not conclusively show the appellant viewed the images in question, it "still gave rise to an inference" that he did.[22]

We find the evidence legally and factually sufficient in this case. As in *King*, the Government presented a circumstantial case that Appellant knowingly and wrongfully viewed child pornography, based on the information reported to NCMEC by Pinterest, the ISA logs, testimony from the shipboard computer technician, and Appellant's admission to NCIS that he intentionally viewed and saved pornography and images of children in their underwear in categorized folders on his Pinterest account. Most compelling is the evidence that: (1) the ISA logs show Appellant's username accessed Pinterest from the ship **[*14]** at the times the charged images were saved or "pinned" to his Pinterest account; (2) to access Pinterest from a government computer aboard the *San Antonio* required the user to use his common access card and personal identification number; and (3) to save or "pin" an image to a Pinterest account requires concerted action either to upload the image from outside Pinterest (e.g., from a personal device or another webpage) or to actively select the image from elsewhere within Pinterest and save or "re-pin" it onto the user's Pinterest account.

Based on this evidence, we find it reasonable to infer Appellant knowingly and wrongfully viewed the two images of child pornography that were found on his Pinterest account.[23] We also find

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[16] *Id.* at 68b.c.(7).

[17] *Id.* at 68b.c.(2).

[18] *Id.*

[19] *Id.* at 68b.c.(9).

[20] *73 M.J. 177 (C.A.A.F. 2014)*.

[21] *78 M.J. 218 (C.A.A.F. 2019)*.

[22] *Id. at 222*.

reasonable the military judge's finding that Appellant's conduct, which involved the misuse of a government computer aboard a deployed warship, was both prejudicial to good order and discipline and service discrediting.[24] We conclude a reasonable factfinder could have found all the essential elements of the offense beyond a reasonable doubt. Further, having reviewed the entirety of the record and after weighing the evidence anew, making allowances for not having personally **[*15]** observed the witnesses, we too are convinced beyond reasonable doubt of Appellant's guilt.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[25]

The findings and sentence are **AFFIRMED**.

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[23] The Defense's own digital forensics expert agreed that "in order to pin an image [onto an account in Pinterest], you'd have to view that image." R. at 633.

[24] *United States v. Phillips, 70 M.J. 161, 163 (C.A.A.F. 2011)* ("[P]roof of the conduct itself may be sufficient for a rational trier of fact to conclude beyond a reasonable doubt, under all the circumstances, it was of a nature to bring discredit upon the armed forces.").

[25] *UCMJ arts. 59*, *66*.