IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE'S ANSWER TO APPELLANT'S SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
	)	Crim.App. Dkt. No. 201900342
Craig R. BECKER, Lieutenant (O-3) U. S. Navy Appellant	)	USCA Dkt. No. 21-0236/NA

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Index of Brief

Page

Table of Authorities

Page

COURTS OF CRIMINAL APPEALS CASES

STATE CASES

STATUTES

REGULATIONS, RULES, OTHER SOURCES

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.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 62(a)(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(B) (2016), because the United States appealed the Military Judge's Ruling that excluded evidence that is substantial proof of material facts. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

The Convening Authority referred three Charges and an additional Charge against Appellant to a general court-martial, alleging one Specification of premeditated murder, two Specifications of assault consummated by battery, and three Specifications of conduct unbecoming an officer and a gentleman in violation of Articles 118, 128, and 134, UCMJ, 10 U.S.C. §§ 918, 928, 933 (2012).

On December 9, 2019, the Military Judge denied the United States' Motion to Admit Statements Due to Forfeiture by Wrongdoing and Waiver by Conduct, excluding multiple statements of the Victim. (Appellate Ex. LXXIX, Dec. 9,

2019.) The United States appealed the Ruling under Article 62, UCMJ. The lower court found the Military Judge abused his discretion, vacated the Ruling, and remanded for further consideration in light of its Opinion. *United States v. Becker*, 80 M.J. 563, 568–69 (N-M. Ct. Crim. App. 2020).

On August 10, 2020, the Military Judge again excluded the evidence. (Appellate Ex. LXXXIII at 4, Aug. 10, 2020.) The United States appealed the Ruling under Article 62, UCMJ. The lower court heard oral argument and again found the Military Judge abused his discretion. *United States v. Becker*, No. 201900342, 2021 CCA LEXIS 76, at *25 (N-M. Ct. Crim. App. Feb. 25, 2021). The lower court vacated the Ruling, ruled the statements "admissible under the forfeiture-by-wrongdoing exception to the Confrontation Clause and Military Rule of Evidence 804(b)(6)," and remanded to the Military Judge for further proceedings. *Id.*

Statement of Facts

A. The United States charged Appellant with conduct unbecoming, assault, and murder.

The United States charged Appellant for conduct unbecoming as well as the assault and murder of his wife (the Victim). (Charge Sheet, Jan. 29, 2019; *see also* Additional Charge Sheet, Jan. 29, 2019.)

B. The United States moved to admit hearsay statements of the Victim under the doctrine of forfeiture by wrongdoing.

Before trial, the United States moved under the doctrine of forfeiture by wrongdoing to admit statements the Victim made to law enforcement, friends, and family regarding physical and emotional abuse by Appellant, prior to the Victim's murder. (R. 161–166; Appellate Ex. XVIII.) Appellant opposed the Motion. (R. 171–75; Appellate Ex. XIX.)

1. The United States presented evidence in support of the Motion.[1]

a. The Victim made statements to a hotel desk clerk and law enforcement about Appellant assaulting her in 2013.

In 2013, Appellant assaulted the Victim at the Army Lodge in Belgium. (Government (Gov't) Exs. 4a, 8, 10.) After learning of the Victim's infidelity, Appellant assaulted the Victim by throwing her around their hotel room, climbing on top of her, and strangling her. (Gov't Exs. 4a, 10.) The Victim was able to escape the hotel room and went to the front desk, seeking assistance. (Gov't Ex. 8.) She told the hotel desk clerk Appellant assaulted her and asked him to call law enforcement. (*Id.*)

The Victim gave law enforcement a detailed oral statement about the assault. (Gov't Ex. 10.) The Victim later went to the police station and made a detailed

[1] Appellate Exhibit XVIII at 26–27 references Government Exhibits in support of the Motion. These Government Exhibits are attached to Appellate Exhibit VI.

written statement. (Gov't Ex. 4, 10.) In addition to describing the assault, the Victim said Appellant changed their bank account passwords to punish her and took both her identification and credit cards, "leaving [her] trapped and under his control." (Gov't Ex. 4a at 1–2.) The Victim explained: "These are all classic signs of domestic violence, [and] if this situation is not thoroughly investigated and resolved fully, my situation will likely become worse as a result of my reporting this incident. Please help me." (*Id.* at 2.)

The next day, the Victim and Appellant attended a crisis counseling session together. (Gov't Ex. 9.) The Victim then went to the police station to complain about law enforcement's treatment of her and Appellant, said the police "coerced" her into writing a statement, and recanted her prior statement regarding Appellant's controlling behavior. (Gov't Ex. 9.)

b. Appellant described the months following the Victim's formal report as "a living nightmare" and blamed the Victim. The Victim later recanted her allegations.

Appellant told the Victim's friend that the months following the assault and investigation were a "living nightmare," and he blamed the Victim. (Gov't Ex. 28 at 3, 7.)

Eventually, the Victim formally recanted her allegations. (Gov't Ex. 11.) She stated Appellant never strangled or hurt her and that he was actually trying to keep her from harming herself. (*Id.*) She blamed the incident on the effects of her

medication. (*Id*.) Appellant never faced criminal charges or administrative punishment. (Gov't Ex. 42.)

c. Despite her recantation, the Victim told friends about the 2013 assault and explained that she recanted out of fear.

The Victim told friends and family about the assault. (R. 21–22, 73–74; Gov't Exs. 4e, 12–14.) The Victim explained that Appellant learned she had an affair and assaulted her, which caused her to fear for her life. (R. 74; Gov't Exs. 4e, 12–14.) The Victim also shared that she recanted out of concern for Appellant's career. (R. 74; Gov't Exs. 4e, 12–14.) She told one friend that she was afraid of what Appellant might do if his career was ruined because he would have nothing to lose. (Gov't Ex. 12 at 1.)

d. After the 2013 assault, and until her death in 2015, the Victim told friends and family how Appellant was controlling and emotionally abusive.

After the 2013 assault, the Victim's marriage to Appellant suffered; she talked to friends and co-workers about Appellant's behavior, describing him as controlling and manipulative. (Gov't Exs. 4b, 4c, 4e, 12, 55.)

Appellant controlled her interactions with friends and family: he accessed the Victim's cell phone, (Gov't Exs. 4c, 4e, 14, 25 at 36–37, 47); confiscated her cell phone to prevent contact with friends and family, (R. 7–8; Gov't Exs. 4b, 4c); and limited her visits with friends, (R. 66–68; Gov't Ex. 4e).

Appellant controlled aspects of the Victim's appearance: he dictated what clothes the Victim wore, (Gov't Exs. 4e, 12), and prohibited the Victim from obtaining a tattoo, (R. 8, 13, 15, 40; Gov't Exs. 4c at 5, 36, 55).

Appellant also destroyed items of value to the Victim: he threw away curtains that the Victim had handmade, (R. 9; Gov't Ex. 4c at 6–7), and broke cosmetics she purchased, (Gov't Ex. 4e).

e. Leading up to her death, the Victim decided to divorce Appellant, began staying with her new boyfriend, and rented her own apartment.

In the months before her murder, the Victim decided to leave her husband but planned to remain in Belgium. (R. 54–55.) She was happy to be moving on and was eager to be out of Appellant's control. (Gov't Ex. 4b.)

The Victim met another man and, the week before her death, began staying with him. (Gov't Ex. 47.) Appellant described the Victim's boyfriend as "scum" and a "predator" who was "probably into drugs." (Gov't Ex. 28 at 3.) Appellant was frustrated that the Victim brought their child to the new boyfriend's home; Appellant told his girlfriend "[t]hat piece of shit [*i.e.*, the Victim] has the baby over at her boyfriend's." (R. 95.)

Weeks before her death, the Victim and Appellant signed a separation agreement. (R. 9.) The two made no final decisions on custody of their daughter and planned to "see how it goes." (R. 10.) The Separation Agreement included a

provision that, should Appellant gain custody of his sons from his prior marriage, the Victim would provide care for them should he need to travel for work. (Prosecution (Pros.) Ex. 2 at 2.)

The day of her death, the Victim signed a lease, made a down payment for her new apartment, and scheduled delivery of a washer and dryer. (Gov't Ex. 22.) She had lunch with a group of co-workers and friends; the Victim was looking forward to her new life. (Gov't Exs. 19, 55.)

f. When the Victim threatened to cause Appellant problems after an argument over her boyfriend, Appellant reported to the Belgian police that the Victim had a drinking problem, bought wine, and retrieved pills from his old office.

Shortly before her death, Appellant and the Victim disagreed about her plan to have her colleagues, including her new boyfriend, help her move out of their apartment. (Gov't Ex. 25 at 40.) During their discussion, the Victim "made [him] understand that she was going to cause [him] problems." (*Id.*)

Later, two days before the Victim's death, Appellant went to the Belgian police to report that he was concerned about the Victim because she "was inviting people he did not know into the family home" and was "drink[ing] more than normal." (Gov't Ex. 23 at 1.) When the police asked Appellant what he wanted them to do about it, "he repeated [two] or [three] times . . . that the only thing he wanted was a written record of coming to [their] office." (*Id.* at 2.)

A day or two before the Victim's death, Appellant bought a bottle of wine, (Gov't Ex. 24), and retrieved a bag of "small round pink pills" from the desk he used in his previous office, telling his colleague they were to treat his Attention Deficit Disorder, (Gov't Ex. 21).

g. The Victim's final evening with Appellant involved wine, sedatives and strange text messages, and ended with a fatal fall.

On October 8, 2015, the Victim had dinner with Appellant at their apartment and planned to stay the night there, before leaving for a trip to China the next morning. (Gov't Ex. 25 at 14.)

The United States alleges that Appellant put a sedative in the Victim's wine and pushed her through the open seventh-floor bedroom window. (Gov't Exs. 31, 32; *see also* Charge Sheet.) The forensics report showed the Victim slid down the slanted, tile roof, fell three stories onto a table, bounced over a balcony wall, and landed on the street below. (Gov't Exs. 31, 54 at 12.)

Witnesses saw her fall and heard her cry for help. (Gov't Exs. 27, 29, 54 at 12.) The Victim's fingers dug into the roof as she slid to her death, leaving marks on the tiles. (Gov't Ex. 31; *see also* Gov't Exs. 33, 35.) One witness reported that "a man had pushed his wife out the window." (Gov't Exs. 1–2.)

Belgian paramedics and police arrived at the scene and took the Victim to a local hospital. (Gov't Ex. 54.) The Victim's injuries left her unable to speak to

law enforcement or medical personnel. (*Id.*) She died at the hospital that night. (*Id.*)

Belgian police took photographs of the Beckers' apartment, where they found the Victim's cellphone next to her packed suitcase. (Gov't Ex. 33 at 3, 9.) The investigation revealed that, the evening of the Victim's death, suicidal-sounding text messages were sent from the Victim's phone to her new boyfriend, at times when Appellant was not on his own phone with his girlfriend. (R. 92–93; Gov't Ex. 47, 48.)

Appellant told law enforcement he did not know the Personal Identification Number (PIN) for the Victim's cell phone, but he guessed it correctly the next day, revealing the suicidal-sounding text messages. (R. 91–93; Gov't Ex. 25 at 38.) For years, the Victim's PIN was associated with her Swedish identity number; the Victim's father saw Appellant unlock the Victim's phone with a PIN before her death. (R. 23–24.)

Appellant later admitted that he checked the Victim's phone in the month before she died and knew her PIN, though he claimed the Victim changed the PIN after that. (Gov't Ex. 25 at 36–37.) Investigators confirmed Appellant had access to the Victim's phone before she died. (R. 91–92.)

h. Two days after the Victim's death, Appellant told the Victim's longtime friend the Victim drank too much and jumped out her bedroom window, and he recounted the "living nightmare" the Victim caused him when she reported he assaulted her in 2013.

Two days after the Victim's death, Appellant talked on the phone with the Victim's longtime friend. (Gov't. Ex. 28 at 6–8.) Appellant recounted the evening of the Victim's death, claiming she drank wine, took medicine for a headache, lamented that she still loved Appellant and wanted to make their marriage work, and let Appellant put her to bed when she was too intoxicated. (*Id.* at 6; *see also* Gov't Ex. 25 at 1–2, 13–15 (Appellant's law enforcement interrogation).) Appellant told the friend he later heard a "blood curdling scream" coming from the Victim's room and when he entered the room he saw the Victim in the window but could not reach her in time before she fell. (*Id.* at 6–7.) Appellant brought up the eight-month "living nightmare" the Victim had caused him when she reported his abuse in 2013, blaming the Victim for the risk to his career. (*Id.* at 7.) Appellant also stated he did not plan on telling his sons from his previous marriage about the Victim's death because "their mother would find out and it could affect his custody case." (*Id.*)

2. Appellant presented evidence in opposition to the Motion.

The Victim's friends testified that the separation process with Appellant was going amicably. (R. 9–10, 66–67.) One friend testified the Victim and Appellant were going to continue their joint business after the separation. (R. 10.)

C. The Military Judge denied the United States' Motion but admitted some statements of the Victim under exceptions to Mil. R. Evid. 802.

The Military Judge made a written Ruling with Findings of Fact and Conclusions of Law. (Appellate Ex. LXXIX.) The Military Judge cited *Giles v. California*, 554 U.S. 353 (2008), for the proposition that forfeiture by wrongdoing required the United States to demonstrate: (1) "the accused's actions caused the witness'[s] unavailability and [(2)] the accused's conduct was 'designed' to prevent the witness'[s] testimony." (*Id*. at 3.) The Military Judge did not make explicit findings of fact or conclusions of law regarding the first prong, but instead denied the Motion on forfeiture-by-wrongdoing grounds based on his conclusion the United States failed to carry its burden on the second prong. (*See id.* at 3–6.)

The Military Judge found "there were no active investigations and no anticipated investigations" into the Victim's statements about Appellant's ongoing physical and emotional abuse, and that the 2013 assault case was "functionally closed" three months after the assault and "formally closed" by the next summer. (Appellate Ex. LXXIX at 6.) He also found that the Victim "never articulated a

plan to report [Appellant for abuse] after they separated or upon any divorce" and that there was no indication she had a "change of heart regarding her desire to protect [Appellant's] naval career." (*Id*.)

Further, the Military Judge stated that Appellant "never raised concerns that she might file a complaint" and there was no evidence Appellant was "aware of the other allegations that [the Victim] made to friends and family regarding alleged emotional abuse." (*Id*. at 7.)

The Military Judge concluded "it was not reasonably foreseeable that [Appellant] would be investigated as a result of any prior, formal or informal allegation made by [the Victim]" or that "[the Victim] might be required to testify against him." (*Id*.) Thus, the Military Judge further explained, the preponderance of the evidence failed "to show that the accused intended to prevent [the Victim's] testimony by his conduct." (*Id.*)

The Military Judge admitted the Victim's statement to the hotel clerk and her first statement to the responding law enforcement officer as non-testimonial excited utterances. (*Id*. at 7–8.) The Military Judge found the Victim's formal statement to law enforcement inadmissible because it was testimonial hearsay not subject to any exception. (*Id*. at 8.)

The Military Judge also found the Victim's statements to friends and family about physical and emotional abuse were inadmissible hearsay under Mil. R. Evid.

801 and not subject to exceptions under Mil. R. Evid. 803 or 804, declining to address if they were also testimonial. (*Id*. at 9.)

D. On appeal by the United States under Article 62, the lower court vacated the Ruling and remanded for further proceedings.

The lower court vacated and remanded the first Ruling because its "use of the 'reasonable foreseeability' standard . . . stray[ed] too far from the intent requirement announced under *Giles*" and therefore constituted an abuse of discretion. *Becker*, 80 M.J. at 568.

E. On remand, the Military Judge again excluded the same evidence.

On remand, the Military Judge denied Trial Counsel's request for argument, accepted a supplemental Motion from the United States, and again excluded the evidence. (Appellate Ex. LXXXIII; *see also* Appellate Ex. LXXXII.)

The Military Judge "reiterate[d] . . . facts from [the] prior ruling" and "again conclude[d]" Appellant "did not believe and had no reason to believe he might be under investigation" or that the Victim "might be required to testify against him." (Appellate Ex. LXXXIII at 3–4.) The Military Judge found the evidence failed to establish Appellant "intended to prevent [the Victim] from making any testimonial statements, such as a formal report to law enforcement." (*Id.*) As in the first Ruling, the Military Judge again denied the Motion based on the United States' failure to demonstrate the requisite intent, and he did not make explicit findings of

fact or conclusions of law regarding whether Appellant caused the Victim's unavailability. (*See id.* at 3, 4 (describing first Ruling as "resolv[ing] the matter based solely upon the second *Giles* factor" and concluding same again).)

F. The lower court again vacated the Ruling, ruled the statements admissible under the forfeiture-by-wrongdoing exception, and remanded for further proceedings.

A majority of the Panel of the lower court vacated the second Ruling, finding that the Military Judge erred by failing to consider important facts weighing on Appellant's intent. *Becker*, 2021 CCA LEXIS 76, at *25; *see also id.* at *17–18 (citing *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) for proposition that abuse of discretion includes "fail[ing] to consider important facts").

The lower court found that the Military Judge's Findings of Fact were relevant and not clearly erroneous, but that from them "it is very difficult to determine, as a preliminary matter . . . whether [Appellant] killed [the Victim], let alone whether his act was intentional, and if so, to what end." *Becker*, 2021 CCA LEXIS 76 at *19–20. The lower court described significant evidence in the Record of Appellant's intent which the Military Judge neglected to consider. *Id.* at *20–21.

Based on that evidence, the lower court concluded, by a preponderance, that "(1) [Appellant] intentionally killed [the Victim], . . . (2) his actions were the result

of planning and calculation, and that (3) at least part of his intent was to prevent [the Victim] 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." *Id.* at *21–22. The lower court ruled the statements admissible under the forfeiture-by-wrongdoing exception to the Confrontation Clause and Mil. R. Evid. 804(b)(6) and remanded to the Military Judge for further proceedings. *Id.* at *25.

One judge dissented, stating he did not find the evidence supported that Appellant had a "secondary motive to prevent his wife from making future testimonial statements" and that he did not believe the Military Judge abused his discretion by not making findings on "facts that were, in context, unimportant." *Id.* at *26 (Stephens, S.J., dissenting).

Summary of Argument

Appellant argues four bases for good cause: (1) the lower court erred by finding facts outside the scope of its authority under Article 62, UCMJ; (2) the *Commisso* standard of review does not justify this fact-finding; (3) the Military Judge did not abuse his discretion; and (4) the lower court's unauthorized facts were erroneous. (*See* Appellant's Supp. Pet., Apr. 26, 2021.)

To the third basis, Appellant fails to show good cause to grant review on the merits. The lower court correctly held that the Military Judge abused his discretion

in analyzing the second *Giles* prong because he failed to consider critical evidence in the Record of Appellant's intent.

However, the United States agrees that the lower court exceeded its statutory authority under Article 62, UCMJ, by finding facts. Specifically, the lower court erred when it found that the evidence satisfied both *Giles* prongs for admissibility under the forfeiture by wrongdoing exception. But the lower court permissibly applied *Commisso* to find an abuse of discretion; it did not purport to rely on *Commisso* as authority to find facts. Finally, the United States' position that this Court should remand to the Military Judge for additional findings moots Appellant's fourth basis for good cause.

This Court should (1) grant the Petition for the limited purpose of setting aside the impermissible fact-finding, (2) deny review on the merits, without prejudice for Appellant to raise the issue in the normal course of appellate review, and (3) remand to the Military Judge for further proceedings on the Motion.

Argument

THE LOWER COURT CORRECTLY FOUND THAT THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO CONSIDER CRITICAL FACTS. HOWEVER, THE LOWER COURT ERRED WHEN IT MADE FINDINGS OF FACT ON THE ULTIMATE CONCLUSIONS *GILES* REQUIRES FOR ADMISSIBILITY. THIS COURT SHOULD GRANT THE PETITION FOR THE LIMITED PURPOSE OF SETTING ASIDE THE OFFENDING PORTIONS OF THE OPINION, DENY REVIEW ON THE MERITS, AND REMAND TO THE MILITARY JUDGE FOR FURTHER FINDINGS ON THE ADMISSIBILITY OF THE STATEMENTS.

A. For this Court to grant a petition for review, an appellant must show good cause and state with particularity the prejudicial errors.

"Review on petition for grant of review requires a showing of good cause." C.A.A.F. R. 21(a); *see also* Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016). The appellant needs a "direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to [his] substantial rights." C.A.A.F. R. 21(b)(5). Examples of good cause include when the lower court: (1) addressed unsettled law; (2) ruled in conflict with precedent; (3) adopted a law materially differently than civilian courts; (4) addressed a military custom, regulation, or statute; (5) ruled *en banc* or non-unanimously; (6) deviated from the accepted course of judicial proceedings; or (7) inadequately addressed an issue on remand.

C.A.A.F. R. 21(b)(5)(A)–(G).

To show there is no good cause to grant review on the merits, the United States first addresses Appellant's third basis for review before turning to the remaining three bases. (*See* Appellant's Supp. Pet., Apr. 26, 2021.)

B. Appellant fails to show good cause to grant review on the merits. The lower court correctly held that the Military Judge abused his discretion by failing to consider important facts.

The forfeiture by wrongdoing exception requires a military judge to find, by a preponderance of the evidence, that the defendant: (1) wrongfully caused the witness's unavailability; and (2) did so with the intent to make the witness unavailable. *See Giles*, 554 U.S. at 367–68; *see also United States v. Johnson*, 767 F.3d 815, 820–23 (9th Cir. 2014) (preponderance standard).

Under the second *Giles* prong, the defendant's intent to prevent the witness from testifying need not be his sole motivation in procuring the witness's unavailability; it is sufficient "to show the evildoer was motivated in part by a desire to silence the witness." *United States v. Jackson*, 706 F.3d 264, 269 (4th Cir. 2013) (quoting *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996)). Nor is it necessary for criminal charges to be pending for a defendant to act with the intent to silence a witness. *United States v. Burgos-Montes*, 786 F.3d 92, 115 (1st Cir. 2015) ("[*Giles*] did not announce a rule that the murder must actually follow the filing of charges."); *see also, e.g.*, *State v. McKelton*, 70 N.E.3d 508,

546 (Ohio 2016) (applying *Giles*, inferring intent without report or expected testimony).

Where, as alleged here, the declarant's unavailability is the result of a "premeditated wrongdoing [] 'committed after reflection by a cool mind'" there is "the potential for multiple motives for the same wrongful act." *Becker*, 2021 CCA LEXIS 76, at *15–16 (first citing *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.)) then citing *United States v. Davis*, 49 M.J. 79, 84 (C.A.A.F. 1998)). The lower court thus held that:

> [W]here 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.

Id. at *16; *see also Giles*, 554 U.S. at 377 (prior abusive relationship "highly relevant" to whether defendant acted with intent necessary for forfeiture by wrongdoing).

Applying this holding, the lower court correctly found that the Military Judge abused his discretion by failing to consider or reconcile evidence in the Record of Appellant's intent in the immediate circumstances surrounding the Victim's death. *Becker*, 2021 CCA LEXIS 76, at *17–25; *see also Commisso*, 76

M.J. at 323–24 (finding abuse of discretion for, inter alia, military judge's failure to consider important facts indicating member bias). As the Victim was freeing herself from Appellant's control—divorcing Appellant, dating a new man, moving into her own apartment—Appellant attempted to reassert control by disallowing the Victim's new boyfriend from helping her move out of their apartment. (Gov't. Ex. 25 at 40.) When he did this, the Victim challenged him, raising the specter that she could "cause [him] problems." (*Id.*)

This led Appellant to (1) report the Victim's excessive drinking to Belgian police, where he repeatedly insisted he wanted a "written record of coming to [their] office," (Gov't Ex. 23 at 1–2); (2) but then to buy wine on the day of the Victim's death, when he knew she was coming over for dinner (Gov't Exs. 24, 25 at 1, 29); and (3) to retrieve the "small round pink pills" from his old office, the alleged source of the sedative found in the Victim's system when she died, (Gov't Exs. 21, 32 at 6). Moreover, just two days after her death, Appellant still recalled the "living nightmare" the Victim's 2013 assault report caused him, and he was hesitant to tell his children from his previous marriage about the Victim's death, for fear of its impact on his child custody proceedings. (Gov't Ex. 28 at 7.)

The Military Judge analyzed none of the above critical facts when he determined that the preponderance of the evidence failed to show Appellant held the requisite intent. (*See* Appellate Exs. LXXIX at 3–6, LXXXIII.) While the

Military Judge referenced in passing that Appellant described the time after the Victim reported his assault in 2013 as a "living nightmare," (Appellate Ex. LXXIX at 4), he never analyzed that statement with respect to Appellant's subjective mindset in the immediate circumstances surrounding the Victim's death, (*see id.* at 6–7, Appellate Ex. LXXXIII).

Additionally, the United States' arguments that Appellant intended to silence the Victim through his (1) multiple motives, (2) reporting the Victim's drinking to the police, and (3) knowledge that civil divorce and custody proceedings were on the horizon, were all before the Military Judge on remand. (Appellate Ex. LXXXII at 4–11.) And yet, the Military Judge failed to note or consider these salient facts. (*See* Appellate Ex. LXXXIII). The lower court correctly found this was an abuse of discretion. *See Commisso*, 76 M.J. at 323–24; *see also Becker*, 2021 CCA LEXIS 76, at *23 ("[T]he focus of the assessment [of intent] is not what the declarant was doing or thinking at the time, but on the subjective intent of the wrongdoer, as evidenced by his conduct."); *United States v. Baker*, 70 M.J. 283, 293 (C.A.A.F. 2011) (Baker, J., dissenting) ("However substantial the grant of [abuse of] discretion might be, it is not a blind grant.").

Appellant does not challenge the lower court's holding that where there is evidence of a premeditated wrongdoing, "the trial court must closely examine whether multiple layers of motive and intent are at play." *Becker*, 2021 CCA

LEXIS 76, at *16; (*see* Appellant's Supp. Pet. at 20–23). Thus, the Military Judge's error lay in the evidence he *excluded* from his analysis, not what he included. *See infra* Section C.2. As such, Appellant fails to demonstrate good cause for this Court to grant review on the merits.

C. The lower court erred by making findings of fact on the ultimate determinations under *Giles* rather than remanding for a complete Ruling. Appellant has shown good cause to remedy that error, but fails to show good cause for this Court to grant review on the basis of *Commisso* or the lower court's claimed erroneous facts.

1. The lower court erred when it made findings of fact on the ultimate conclusions for both *Giles* prongs rather than reserving those determinations for the Military Judge's reconsideration on remand.

Under Article 62, UCMJ, a Court of Criminal Appeals "may act only with respect to matters of law," notwithstanding its ability, in a post-trial appeal under Article 66(c), to act with respect to both matters of law and fact. Arts. 62(b), 66(c), UCMJ, 10 U.S.C. § 862(b), 866(c) (2016). As such, in an Article 62 appeal, the lower court is "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). Further, the lower court has no authority "to find facts in addition to those found by the military judge." *Id.* Where a military judge's findings are "incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings." *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)).

In *Kosek*, this Court held that the lower court "exceeded the scope of review under Article 62 by making rulings of law on issues either not decided by the military judge or on which the military judge's rulings were ambiguous or incomplete." 41 M.J. at 64. The *Kosek* ruling lacked the "critical predicate[]" findings of fact and conclusions of law required to resolve the issue, necessitating "remand for clarification." *Id.*

Here, like *Kosek*, the lower court faced an incomplete Ruling. While the Military Judge's Ruling was incomplete on both *Giles* prongs, only the second-prong deficiency constituted an abuse of discretion (*see supra*, Section B).

The first *Giles* prong is a "critical predicate[]" to admissibility under the doctrine of forfeiture by wrongdoing. *Kosek*, 41 M.J. at 64; *see also Giles*, 554 U.S. at 367–68. Here, the Military Judge did not make prong-one findings of fact in either his original Ruling or his Ruling on remand. (*See* Appellate Exs. LXXIX, LXXXIII.) Because this predicate finding was missing from the Rulings, the appropriate remedy was remand to the Military Judge for additional findings. *See Lincoln*, 42 M.J. at 320; *Kosek*, 41 M.J. at 64. Instead, the lower court found as fact that the preponderance of the evidence satisfied the first *Giles* prong—that Appellant killed his wife, causing her unavailability. *Becker*, 2021 CCA LEXIS

76, at *21–22. The United States agrees with Appellant that this factual finding exceeded the lower court's statutory authority. (Appellant's Supp. Pet. at 15).

As to the second *Giles* prong, the Ruling was incomplete because, as the lower court correctly held, the Military Judge abused his discretion when he failed to consider critical facts relevant to Appellant's intent. *See supra* Section B. Since the Military Judge's error lay in his incomplete evaluation of the evidence of Appellant's intent, the appropriate remedy was to remand for the Military Judge to reconsider the full evidence and complete the Ruling. *Kosek*, 41 M.J. at 64. Although the lower court was within its authority to point to the significant evidence in the Record, ignored by the Military Judge, evincing Appellant's intent, *see infra* Section C.2. (discussing *Commisso* standard), the United States agrees with Appellant that the lower court erred when it found as fact that Appellant intended to prevent the Victim from reporting her prior allegations of abuse to the authorities. *Becker*, 2021 CCA LEXIS 76, at *22; (Appellant's Supp. Pet. at 15).

2. Appellant has not demonstrated good cause to grant review to examine the limits of *Commisso*: the lower court's impermissible fact-finding is separate from its permissible application of the *Commisso* standard.[2]

In *Commisso*, this Court stated that a military judge's abuse of discretion can take several forms, including a "fail[ure] to consider important facts." 76 M.J. at 321 (citations omitted). Contrary to Appellant's belief, (Appellant's Supp. Pet. at 17–18), *Commisso* is not the only case in which this Court has found that a military judge abused his discretion by failing to consider important facts. *See United States v. Ramos*, 76 M.J. 372, 377 (C.A.A.F. 2017) (finding abuse of discretion where military judge "declined to consider[] or mention" testimony critical to agents' decision not to provide appellant Article 31(b) rights); *United States v. Solomon*, 72 M.J. 176, 180–81 (C.A.A.F. 2013) (finding abuse of discretion because military judge in Mil. R. Evid. 413 ruling failed to consider or reconcile

[2] Appellant implies that by citing the *Commisso* standard the United States asked the lower court to make findings of fact. (Appellant's Supp. Pet. at 16.) In fact, the United States moved the lower court, after finding an abuse of discretion under *Commisso*, to vacate the Ruling and remand for further proceedings. (Appellant's Br. at 27, Sept. 11, 2020; Appellant's Reply at 7, Nov. 30, 2020.) The United States noted at Oral Argument that the lower court could only act with respect to matters of law, but could look to the entire Record to identify the critical facts missing from the Ruling, "for the Military Judge to consider after vacation of the Ruling and remand for further proceedings." Oral Argument at 1:06:33-1:07:18, *United States v. Becker*, 2021 CCA LEXIS 76 (N-M. Ct. Crim. App. Feb. 25, 2021) (No. 201900342), https://www.jag.navy.mil/courts/oral_arguments_2020.htm.

key facts, such as alibi evidence and prior acquittals, resulting in incomplete ruling that was "a clear abuse of judicial discretion").

In holding that the Military Judge failed to consider or reconcile important facts in his Ruling, the lower court applied the same standard this Court did in *Commisso*, pointing to salient facts in the record that demanded consideration under a proper application of the law. *Compare Becker*, 2021 CCA LEXIS 76, at *20–21, 25 (concluding Military Judge failed to consider important facts when he failed to consider evidence of Appellant's motive and intent found in immediate circumstances of Victim's death), *with Commisso*, 76 M.J. at 323–24 (noting military judge failed to consider evidence presented in appellant's motion and in testimony of member indicating member bias). *Commisso* recognizes that a military judge can abuse his discretion both in what he erroneously *includes* in his ruling as well as in what he erroneously *excludes* from it. *See Commisso*, 76 M.J. at 321 (abuse of discretion includes where military judge's findings of fact unsupported by record or when military judge fails to consider important facts).

The lower court did not err when, like *Commisso*, *Solomon*, and *Ramos*, it pointed to the evidence in the Record that the Military Judge should have considered in his Ruling under a proper application of the law. *See Becker*, 2021 CCA LEXIS 76, at *15–16, 20–21. As noted above, the United States agrees that the lower court erred by finding facts on the *Giles* prongs that should have been

reserved for the Military Judge on remand. *See supra* Section C.1. But the lower court nowhere purports to rely on *Commisso* for authority to find facts, only citing and applying its abuse of discretion standard. *See Becker*, 2021 CCA LEXIS 76, at *17–18, 25. As such, the lower court's impermissible fact-finding is separate from its permissible application of the *Commisso* standard, and Appellant has not demonstrated good cause to grant review to examine the limits of *Commisso*.

3. Appellant fails to show good cause to grant review based on his claim the lower court relied on erroneous facts.

Given the United States' position that this Court should remand for additional findings by the Military Judge, Appellant's arguments that the evidence the lower court pointed to in finding the Military Judge abused his discretion are better reserved for the Military Judge on reconsideration.

Suffice it say, the United States disagrees with Appellant's assessment of the evidence and its import to determining Appellant's intent. Argument—from both parties—regarding whether a full picture of the evidence satisfies the *Giles* test is best saved for the Military Judge on remand.

D. This Court should grant the Petition for the limited purpose of setting aside the offending portions of the lower court's Opinion, deny review on the merits, and remand to the Military Judge for further proceedings on the Motion.

1. Because the lower court's impermissible fact-finding did not otherwise affect its correct holding that the Military Judge abused his discretion, this Court can cure the error without reviewing the lower court's entire Opinion.

In *Baker*, an Article 62, UCMJ, appeal, this Court vacated the lower court's reversal of the military judge's ruling because the lower court impermissibly made a finding of fact and then relied on that fact to overturn the ruling. 70 M.J. at 290, 292.

Here, unlike *Baker*, the lower court's impermissible fact-finding did not inextricably infect its analysis. The lower court erred only in that, after determining a legal standard for intent where premeditation is involved and identifying the critical facts the Military Judge should have considered, *Becker*, 2021 CCA LEXIS 76, at *15–21, it went the extra, impermissible step of analyzing and making findings of fact on the two *Giles* prongs, *see id.* at *21–25 (from paragraph following bulletized list to decretal paragraph). *See also supra* Section C.1.; *cf. Lincoln*, 42 M.J. at 321 (finding lower court overstepped Article 62 authority when it admitted the evidence subject to corroboration, since doing so preemptively rejected other possible grounds for exclusion).

This Court can remedy the error by (1) granting the Petition for the limited purpose of setting aside the impermissible fact-finding from the lower court's Opinion, (2) denying review on the merits, without prejudice for Appellant to raise the issue in the normal course of appellate review, and (3) remanding to the Military Judge for further proceedings on the Motion. *Cf. Lincoln*, 42 M.J. at 321–22 (in decretal paragraph, setting aside lower court's impermissible order, affirming portion overturning military judge's ruling, and returning to Judge Advocate General for remand to military judge). Moreover, this remedial action corrects the lower court's error while advancing the interests of justice in bringing Appellant to trial.

2. Precedent cautions against piecemeal appellate litigation by an accused pending trial.

"[A]ppellate review should be postponed, except in *certain narrowly defined circumstances*, until after final judgment has been rendered by the trial court." *Will v. United States*, 389 U.S. 90, 96 (1967) (emphasis added) (citing *Cobbledick v. United States*, 309 U.S. 323, 326 (1940)). In *Will*, the Supreme Court recognized a "general policy against piecemeal appeals" in criminal cases. *Id*. at 96–98 (acknowledging the limited exception by the Government under 18 U.S.C. § 3731).

In *United States v. Flanagan*, 465 U.S. 259 (1984), the Supreme Court identified the policy reasons for limiting an accused's ability to appeal until final judgment on the merits: (1) "promptness in bringing a criminal case to trial;" (2) minimizing appellate court interference with trial courts; (3) society's interest in a speedy trial that exists separate from, and at times in opposition to, the interests of the accused; (4) witness memories; (5) government's ability to prove its case; and (6) risk of further misconduct by an accused. *Id.* at 264. Moreover, "in the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, 461 U.S. 1, 13 (1983).

This Court's application of "good cause" to an accused's petition for review of Article 62 appeals, in practice, generally applies these principles. The issues granted in many petitions of Article 62 opinions are case-dispositive. *See, e.g.*, *United States v. Hendrix*, 77 M.J. 454, 455 (C.A.A.F. 2018) (speedy trial remedy dismissal with prejudice); *United States v. Pugh*, 77 M.J. 1, 2 (C.A.A.F. 2017) (judge dismissed single specification after conviction for invalid general order); *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (discovery violation remedy dismissal with prejudice).

This Court can, and does, review issues raised during an Article 62 appeal later on direct review after completion of trial. *See, e.g., United States v. Cote*, 72

M.J. 41, 43 (C.A.A.F. 2013) (evidentiary issue); *United States v. Thompson*, 68 M.J. 308, 309 (C.A.A.F. 2010) (speedy trial issue).

Applying those principles here, Appellant cannot show good cause to grant review other than for the limited purpose of correcting the lower court's fact-finding. Appellant's proposed issue is not case dispositive: the Victim's statements are substantial evidence of the assault and conduct unbecoming charges; they do not relate to the murder charge. *See* (Charge Sheet); *supra* Statement of Facts Sections B.1.a.–d. Additionally, unlike *Baker*, *Lincoln*, and *Kosek*, there is no good cause for this Court to review the Opinion on its merits. *See Baker*, 70 M.J. at 292; *Lincoln*, 42 M.J. at 321; *Kosek*, 41 M.J. at 62. Because the unauthorized fact-finding did not taint the lower court's analysis, setting aside the offending portions remedies the error.

If Appellant is convicted, this Court can then review the issue on the merits. *See, e.g.*, *Cote*, 72 M.J. at 43. Granting the Petition for the limited purpose of remedying the lower court's impermissible fact-finding—while denying review, without prejudice, on the merits—fairly balances Appellant's rights with the interests of the public and the Victim in prompt and efficient administration of justice. *See Slappy*, 461 U.S. at 13.

Conclusion

The United States respectfully requests that this Court (1) grant Appellant's Petition for the limited purpose of remedying the lower court's impermissible fact-finding, (2) set aside the offending portions of the Opinion, (3) deny review on the merits, without prejudice for Appellant to raise the issue in the normal course of appellate review, and (4) return the Record to the Judge Advocate General of the Navy for remand to the Military Judge for further proceedings on the Motion.

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