IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **PHILLIP E. THOMPSON, JR.** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20190525 USCA Dkt. No. 25-0254/AR

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Table of Contents

Table of Authorities

STATUTES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES / COURT OF MILITARY APPEALS

OTHER FEDERAL CASES

STATE CASES

SERVICE COURTS OF CRIMINAL APPEALS

MANUAL FOR COURTS-MARTIAL

SERVICE REGULATIONS

OTHER SOURCES

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

Issues Presented

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

II. WHETHER THE INCONSISTENT THEORIES BY THE GOVERNMENT WARRANT REVERSAL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this matter under Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On July 30-31, 2019, Specialist [SPC] Phillip E. Thompson, Jr. [Appellant], was tried at Fort Stewart, Georgia, before a military judge sitting as a general court-martial. Consistent with his pleas, the military judge convicted Appellant of two specifications of premeditated murder, in violation of Article 118, UCMJ, 10 U.S.C. § 918 (2012). (R. at 382). The military judge sentenced Appellant to a dishonorable discharge and the mandatory minimum sentence of confinement for life with eligibility for parole. (R. at 492). Pursuant to a pretrial agreement, the convening authority agreed to disapprove any adjudged confinement in excess of forty years. (App. Ex. LIII).

On April 24, 2020, the convening authority approved only so much of the sentence as provided for a dishonorable discharge and confinement for thirty-five years. (Action). The convening authority credited Appellant with 126 days of confinement against the sentence. (Promulgating Order).

On December 6, 2021, the Army Court set aside the findings and the sentence and authorized a rehearing. (Appendix A).

On August 7-14, 2023, Appellant was retried at a combined rehearing at Fort Stewart, Georgia, before a military judge sitting as a general court-martial. Contrary to his pleas, Appellant was convicted of two specifications of involuntary manslaughter, in violation of Article 119, UCMJ, 10 U.S.C. § 919. (R. at 1364).

The military judge sentenced Appellant to a dishonorable discharge and eight years confinement. (R. at 1517; Statement of Trial Results [STR]). On November 21, 2023, the convening authority approved the sentence and credited Appellant with 1,004 days of confinement against the sentence. (Action). On December 14, 2023, the military judge entered Judgment. (Judgment).

On June 30, 2025, the Army Court affirmed the findings and sentence. (Appendix B).

On August 28, 2025, Appellant filed a timely petition with this Court. Appellant herein files his Supplement.[1]

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

Statement of Facts

On March 5th, 2017, Private Second Class [PV2] MJ and SPC MB were shot dead. There was no dispute they were killed by Sergeant [SGT] Shaquille Craig, a friend of Appellant, who later pled guilty to the murders. The question in this case was whether Appellant's involvement made him criminally liable for the deaths as an aider and abettor.

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant personally requests this Court also consider the matters contained in Appendix C to this Supplement.

A. The offense.

On the morning of March 5th, SGT Craig called Appellant while Appellant and his family were at church and asked Appellant to meet him in a parking lot across from a college. (R. at 1012). Appellant had no clue what SGT Craig wanted. When Appellant arrived in the parking lot later that morning still in his church clothes and with his infant son, (R. at 1325), SGT Craig got into Appellant's truck and confided to him that he caught PV2 MJ "hugging up" with his wife. (R. at 1012). At some point in the conversation, SGT Craig stated, "these n[-----] got to go," and placed a pistol in his lap. (Pros. Ex. 84). However, SGT Craig assured Appellant "he was just going to go talk to the men." (R. at 1023). The gun was only for self-defense. (R. at 996). Indeed, as the Government stipulated in SGT Craig's court-martial, SGT Craig had no intent at that time to harm either PV2 MJ or SPC MB and his statement was only intended to convey that PV2 MJ "needed to stop sleeping with his wife." (App. Ex. XXII(b))

Appellant drove SGT Craig down the road to SPC MB's apartment where PV2 MJ was visiting and parked his truck in the rear lot. (Pros. Ex. 84). Sergeant Craig then asked Appellant to knock on the apartment door with a story that he had left his laptop there at the party the night before. (R. at 1021; Pros. Ex. 84). Appellant did so. Private MJ answered the door. Appellant asked about his "laptop" and was invited inside. (Pros. Ex. 84). Moments later, SGT Craig came

in the apartment and confronted PV2 MJ. (Pros. Ex. 84). A heated exchange occurred, (Pros. Ex. 84), ending in SGT Craig fatally shooting PV2 MJ because, according to SGT Craig, PV2 MJ reportedly "got hostile and reached for something." (R. at 996). Specialist MB, who was in the back of the apartment, attempted to flee but was shot by SGT Craig, (Pros. Ex. 84), who, by then, had committed to leaving "no loose ends." (R. at 996). Sergeant Craig then turned to a stunned Appellant, gun in hand, and ordered Appellant to leave and not say a word "cause this could be [your] boy," a reference to Appellant's infant son. (Pros. Ex. 84).

Appellant hurried out and tried to process what had just happened. He wasn't alright. (Pros. Ex. 84). He was "thinking how do I tell somebody, do I tell, and if I tell what happens to my son." (Pros. Ex. 84).

B. The Government's aiding and abetting theory of liability.

The Government charged Appellant with the premediated murder of PV2 MJ and SPC MB. (Charge Sheet). Specifically, Specification 1 of Charge I alleged that Appellant "did . . . on or about 5 March 2017, with premeditation, murder PV2 [MJ] by means of shooting him with a handgun." (Charge Sheet) (emphasis added). Specification 2 alleged the very same for SPC MB. (Charge Sheet). The Government's theory of liability for the charge rested exclusively on aiding and abetting. (R. at 1247).

Prior to trial, the Government noticed involuntary manslaughter as a lesser included offense [LIO] that, like the greater offense of murder, was predicated solely on aiding and abetting. In a memorandum of law, the Government identified involuntary manslaughter under Article 119(b)(2) as the LIO, theorizing that even if Appellant did not intend to kill PV2 MJ and SPC MB, he intended to commit an offense directly against the victims that resulted in their deaths. (App. Ex. XXIV). The offense of involuntary manslaughter "require[d]" this intent. (App. Ex. XXIV). This ostensibly remained the Government's theory until the day of trial more than a year later.

On the eve of trial, the Government submitted a "Bench Brief" that significantly altered its notice of the LIO. Specifically, the brief swapped subsection (b)(2) of Article 119 for culpable negligence under subsection (b)(1). (R. at App. Ex. LXI).

But despite the abrupt change, aiding and abetting remained the Government's theory of liability. (App. Ex. LXI). The Government's brief not only discussed the LIO in the context of aiding and abetting, but the Government proposed that it was required to prove, as an element of the LIO, that the deaths were caused *by the acts of SGT Craig.* (App. Ex. LXI). When defense later sought clarification on whether the Government was pursuing perpetrator liability for the LIO, for which the defense insisted was never noticed, (R. at 1260-61), the

Government doubled down on aiding and abetting. (R. at 1264). The Government stood by its brief, (R. at 1261), and explicitly confirmed to the military judge that culpable negligence was its theory with Appellant "as an aider and abettor." (R. at 1264).

C. The special findings.

Although Appellant did not object to the consideration of involuntary manslaughter as a LIO under an aiding and abetting theory of liability, defense "diverg[ed] in significant respects" from the Government on the elements. (R. at 1250). According to the Government, Appellant could be guilty of involuntary manslaughter as an aider and abettor of premediated murder if his assistance amounted to culpable negligence. (App. Ex. LXI). To the Government, this result was in accordance with *United States v. Jackson*, 19 C.M.R. 319 (C.M.A. 1955), that an aider and abettor need not have the same *mens rea* as the perpetrator. For the defense, the LIO of Article 119(b)(2) was appropriate only if SGT Craig's acts amounted to culpable negligence that proximately caused the deaths *and* if Appellant had intentionally aided and abetted SGT Craig's culpably negligent acts. (App. Ex. LXVI).

Just prior to closing arguments, the parties submitted their positions to the military judge in an Article 39(a), UCMJ, hearing. Observing aiding and abetting liability was "a very tricky subject to get your head around," (R. at 1256), the

military judge admitted he was "hav[ing] to wrestle with [the] concept expressed in *Jackson* in 1955 . . . [where] abettors may be guilty in a different degree from the principal, each to be held to account according to the turpitude of his own motive." (R. at 1255). But instead of ruling on the elements of the LIO then and there, he decided to resolve any issues with special findings.

The special findings, however, left more questions than they resolved. With respect to the LIO—the only offense for which Appellant was found guilty, the military judge found Appellant aided and abetted SGT Craig's premeditated murders with culpable negligence. (R. at 1367). Notably, the special finding as to Appellant's knowledge of the murders was only that Appellant knew SGT Craig would "probably" commit the murders, and the acts supporting the manslaughter charge all concerned the acts of Appellant. (R. at 1367). To this point, the military judge found that it was "[Appellant's] culpably negligent acts [that] were the proximate cause of the deaths of both [PV2 MJ and SPC MB]"— an element of the offense neither party argued nor identified. (R. at 1369).

D. The Army Court decision.

Recognizing aider and abettor liability "may not be a perfect fit," (Appendix B), the Army Court determined the military judge found Appellant guilty as the perpetrator. Yet, it concluded that there was no error in affirming this theory because it found the Government noticed perpetrator liability by informing defense

of its intent to argue Appellant's culpable negligence "through its various bench briefs." *United States v. Thompson*, ARMY 20190525, 2025 CCA LEXIS 303, *20 (Army Ct. Crim. App. Jun. 30, 2025).

Affirming on the basis of perpetrator liability, the Army Court further determined there was no longer any need to address whether the findings satisfied the heightened *mens rea* of aiding and abetting because the Government "was not required to prove a more culpable *mens rea* [than culpable negligence] to prove the offense [of involuntary manslaughter]." *Id*. at *26. Thus, whether the special findings that convicted Appellant explicitly as an aider and abettor actually satisfied the requirements of aiding and abetting was immaterial to the court.

Reasons to Grant

This case cries out for this Court's intervention. The Government prosecuted Appellant as an aider and abettor for the LIO of involuntary manslaughter. The military judge convicted Appellant as an aider and abettor of the LIO. But the Army Court, seeing that aiding and abetting liability "may not be a perfect fit," (Appendix B), affirmed the conviction for the LIO on the basis Appellant was the perpetrator.

This was error for two reasons. First, the Government prosecuted Appellant *solely* under an aiding and abetting theory, cabining the Army Court's review to that theory. The Army Court's decision to affirm on a theory other than aiding and

abetting liability was a violation of precedent. Second, irrespective of whether the Government presented alternative theories, the military judge explicitly found Appellant guilty as an aider and abettor in his special findings, likewise cabining the Army Court's review. Yet, the Army Court chose to analyze what it believed the military judge "in essence" meant over the explicit language of his findings, violating Appellant's Sixth Amendment trial rights.

Ultimately, the Army Court's erroneous decision evaded the dispositive question in this case: are the special findings as to aiding and abetting liability legally sufficient? The answer is "no." The notion of culpable negligence cannot be squared with the *mens rea* requirements of aiding and abetting liability. This Court should grant review, answer the dispositive question in the negative, and provide Appellant with warranted relief.

A. The Army Court committed clear error in its decision to affirm on a basis other than aiding and abetting liability.

1. <u>The Army Court was bound by aiding and abetting liability as the only theory presented to the factfinder.</u>

The Government's *sole* theory of liability for the LIO was aiding and abetting. The Army Court's review was cabined to this theory. And its decision to affirm on the basis of perpetrator liability violated longstanding precedent prohibiting an appellate court from affirming on a theory not presented to the

factfinder. *See United States v. Ober*, 66 M.J. 393, 404 (C.A.A.F. 2008) (citing *Chiarella v. United States*, 445 U.S. 222, 236 (1980)).

The Army Court's cursory finding that the Government noticed perpetrator liability by informing defense of its intent to argue Appellant's culpable negligence cannot withstand scrutiny. The Government said nothing of culpable negligence until the day of trial. In its brief the Government presented Article 119 (b)(1) as an LIO, discussing the offense in the context of aiding and abetting, consistent with how the Government previously noticed subsection (b)(2), which was similarly under an aiding and abetting theory of liability. Moreover, the elements for Article 119(b)(1) the Government proposed in its brief omitted any requirement for it to prove that *Appellant's acts* proximately caused the deaths, an element necessary to convict Appellant as the perpetrator. To the contrary, its proposed elements identified *SGT Craig's acts* as the cause of the death. And if any ambiguity remained concerning the Government's intent from its brief, it was put to bed when the Government later confirmed on the record that culpable negligence was with Appellant "as an aider and abettor" for the LIO in response to defense's concerns of perpetrator liability.

The Government's argument on appeal is likewise telling of its intent. In its brief to the Army Court, the Government not only argued, as it did at trial, that aiding and abetting liability was the proper theory to convict Appellant of culpable

negligence under Article 119(b)(2), it outright *rejected* the notion that Appellant was the perpetrator of the LIO. The first time the Government had any idea it presented a perpetrator liability to the factfinder was when government counsel read the Army Court's decision.

2. <u>The Army Court was bound to aiding and abetting liability due to the military judge's special findings.</u>

Even assuming the Government had noticed perpetrator liability—and even if the military judge had, "in essence," found Appellant guilty as the perpetrator, the military judge explicitly identified aiding and abetting as the theory on which he premised Appellant's guilt. A reviewing court cannot, as the Army Court did here, disregard that critical fact. Indeed, the military judge's identification of aiding and abetting as the theory bound the Army Court, irrespective of what was presented.

Such a conclusion is consistent with federal precedent. In *United States v. Gonzales*, for example, the Fifth Circuit reversed a conviction where the lower court ignored the theory of liability the jury selected. 841 F. 3d 339, 350-51 (5th Cir. 2016). There, the Government prosecuted several defendants, including Gonzales, for murder. With respect to Gonzales, the Government never strayed from its theory that Gonzalez was liable as a co-conspirator. *Id*. at 342-45. However, when special interrogatories were submitted to the jury asking them to identify the specific theories of liability for each of the defendants, the jury

selected "personal liability" for Gonzales. *Id*. at 344. While the district court determined this finding was "inconsequential," *id.* at 344, the Fifth Circuit reversed. *Id*. at 350.

In reversing, the Fifth Circuit stated, "We cannot ignore the special interrogatory answer of 'personal liability' and pretend that the jury based its finding of guilt on [co-conspirator] theory for which the jury did not check the box." *Id*. at 349. The court reasoned that such a finding "would affront the right to a jury if a court were to replace a jury's answer to special interrogatories with its view of how the case should have been decided." *Id*. at 350. Because there was insufficient evidence to find Gonzales guilty under "personal liability," the court overturned the conviction. Other circuits are in accord. *See e.g.*, *United States v. Frampton,* 381 F. 3d 213, 224 (2d Cir. 2004).

Importantly, *Gonzalez* rejected the Government's argument that the jury may have determined "personal liability" meant co-conspirator liability. *Gonzales*, 841 F.3d at 350. Under the circumstances, the court concluded that the jury realized a finding of personal liability "rejected" co-conspirator liability. *Id*.

This same logic applies here. The military judge, as factfinder, selected aiding and abetting as the theory of liability. As the Government put it, "The special findings made clear that this was under an aiding and abetting theory." (Gov. Br. at 7). Like in *Gonzales*, it would be an affront to Appellant's Sixth Amendment

trial rights to act as if the military judge selected perpetrator liability, especially considering that, as in *Gonzales,* Appellant could not have been both the perpetrator and an aider and abettor simultaneously.

B. The special findings are legally insufficient.

Whether because the Government only presented an aiding and abetting theory or because the military judge explicitly identified aiding and abetting as the theory of liability, the result is the same: the reviewing court is confined to aiding and abetting liability. In this case, it was an understatement for the Army Court to say that aiding and abetting was "not a perfect fit." The special findings on aiding and abetting are legally deficient for at least three reasons.

First, under both military and federal civilian law, to aid or abet "requires . . . specific intent or purpose to bring about the crime." *United States v. Scotti*, 47 F.3d 1237, 1245 (2d Cir. 1995); *United States v. Ve1a*, 71 M.J. 283, 286 (C.A.A.F. 2012); *see also Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (an aider and abettor must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."); *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985) (noting that following *Nye*, "it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating 18 U.S.C. § 2"), *superseded on other grounds by statute*, 18 U.S.C. §

3663A(c)(3)(B). Here, however, the military judge made no finding as to which crime Appellant was intending to facilitate. This alone was fatal.

Second, an aider or abettor must have "guilty knowledge." *Ve1a*, 71 M.J. at 286. This means *full* knowledge of the entire charged crime. *Rosemond v. United States*, 572 U.S. 65, 79 (2014); *see also United States v. Thompson*, 81 M.J. 824, 833 (Army Crim. Ct. App. 2021) ("anyone who *knowingly* and *willfully* participates in the commission of *the* crime is a principal.") (quoting Dep't Army Pam. 27-9: Legal Services, Military Judges' Benchbook, para. 7-1-1 (10 Sep. 2014) (emphasis added).

Here, however, the military judge found that Appellant only knew Craig would "probably" commit murder. As Judge Hand observed in *United States v. Peoni*, "definitions [of accomplice liability] have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct[.]" 100 F.2d 401, 402 (2d Cir. 1938). And as the Army Court observed in its earlier opinion in this very case, *Peoni* is "the canonical formulation of th[e] needed state of mind." *Thompson*, 81 M.J at 831 (citing *Rosemond,* 572 U.S. at 76). The Benchbook instruction on aiding and abetting liability "is rooted in Judge Hand's oft quoted Peoni decision[.]" *Id.* at 833. Importantly, *Peoni* rejects "willful blindness" as sufficient knowledge, *see* Wayne R. Lafave, Criminal Law, §13.2(d), p. 716 (5th ed. 2010), and Appellant's alleged act of "turning a blind eye" was

precisely the Government's argument at trial for liability as an aider and abettor. (R. at 1301; *see also* "knowledge cannot be mere knowledge of a likelihood [of the perpetrator's crime]." *United States v. Medina-Roman*, 376 F.3d 1, 5-6 (1st Cir. 2004) (emphasis added).

Third, the elements of the offense as found by the military judge are irreconcilable with aiding and abetting. Under aiding and abetting liability, the perpetrator's acts "become those of the aider and abettor as a matter of law." *In re Watt*, 829 F.3d 1287, 1289-90 (11th Cir. 2016). In other words, an aider and abettor "step[s] into the [perpetrator's] shoes." *United States v. Delpit*, 94 F.3d 1134, 1152 (8th Cir. 1996). Thus, "aiding and abetting a crime has the exact same elements as the principal offense." *United States v. Ali*, 991 F. 3d 561, 574 (4th Cir. 2021); *see also* Dep't Army Pam. 27-9, Legal Services: Military Judges' Benchbook, Ch. 3, para. 3-1-1(f) (29 Feb. 2020). Here, however, it was Appellant's acts, not SGT Craig's, that formed the basis of the actus reus.

In short, the Army Court committed error in its review of Appellant's case to the prejudice of Appellant. This Court should grant review and provide relief.

II. WHETHER THE INCONSISTENT THEORIES BY THE GOVERNMENT WARRANT REVERSAL.

Statement of Facts

The crucial fact in the Government's case was SGT Craig's statement, "they got to go." The Government argued—*repeatedly*—there was "no other way" to

interpret his statement "but to understand Sergeant Craig wants to kill this guy." (R. at 1283, 1286, 1300). As the Government contended, "[Appellant] hears what Sergeant Craig is going to do. He says, 'yes, I will help you.'" (R. at 1287). The Government later returned to this refrain, declaring, "there could *absolutely* be no other expectation of what was going to happen in that apartment." (R. at 1299). That is, "Sergeant Craig said he wanted to kill Private [MJ]." (R. at 1300). "It would be absolutely insane for you to get that information . . . and bring him to the location . . . that's premeditation," but at "the very, very, very least, that's culpable negligence." (R. at 1301).

On rebuttal, the Government once again returned to SGT Craig's statement:

> The other thing the defense repeated over and over is that we don't know what Sergeant Craig meant when he said, 'They've got to go.' [. . .] Kind of a tough argument to take in at this point after we've seen the video—the— the pictures of Private [MJ], after we've seen the pictures of Specialist [MB]. If at this point the defense doesn't understand that Sergeant Craig was serious when he said, "They've got to go," *I don't know what will get them there, other than seeing more pictures of the dead bodies of these two Soldier*s.

(R. at 1350).

But all that time, the prosecution *knew* there was another meaning of "they've got to go" because that same office stipulated as fact to what it meant in SGT Craig's trial two years earlier. Specifically, as part of SGT Craig's guilty plea, the government stipulated that SGT Craig's statement intended to convey only that "these men needed to stop sleeping with this wife." (App. Ex. XVII(b) at

7). This, of course, is, in part, what Appellant's trial defense put forth that the Government so adamantly rejected. (R. at 1322, 1350).

The Government further stipulated in Craig's case to two other critical points: (1) Appellant "was not certain what [SGT Craig] intended to do," (App. Ex. XVII(b) at 8), and that it was just as likely SGT Craig would only talk to PV2 MJ as it was that he *might* harm him; and (2) SGT Craig had no intent to kill until he entered the apartment and saw PV2 MJ holding a weapon, all *after* Appellant's alleged assistance. (App. Ex. VII(b) at 10).

Aware of the stipulation, Appellant moved to compel and admit. (App. Ex. XV). The military judge, however, denied the motion, reasoning that a guilty plea is "qualitatively different than a contest" and that the Government "never put on evidence." (R. at 565). The Government remained free to argue inconsistent theories.

In its decision, the Army Court first concluded that there was no evidentiary error, though it failed to cite authority. With respect to due process, the Army Court doubted there was any inconsistency in Government theories, and it found that even if there were, the inconsistencies went to a "reasonable inference drawn from SGT Craig's statement." Such a reasonable inference was not prejudicial.

Reasons to Grant

A. This case presents the opportunity to address inconsistent theories as a due process violation.

In *Bradshaw v. Stumpf*, the Supreme Court addressed whether the prosecution may use inconsistent theories when it prosecutes co-accused. 545 U.S. 175, 187 (2005). There, the Government argued inconsistent theories as to who, *Stumpf* or his co-accused, shot the victim. *Id*. However, because under state law the identity of the triggerman was immaterial for guilt, the Court saw no error on the merits but remanded to determine the effect on sentencing. *Id.*

In *United States v. Turner*, the Army Court confronted a similar issue. ARMY 20160131, 2018 CCA LEXIS 593, *16-20 (Army Ct. Crim. App. 30 Nov. 2018). Similar to *Bradshaw*, Turner was equally as culpable as his co-accused, notwithstanding diverging theories. *Id*. at *20. The Army Court denied relief. *Id*. at *20.

But as *Turner* recognized, other courts have found due process violations. *Id*. at *15. For example, the Eight Circuit in *Smith v. Groose* found a due process violation where the government relied on a witness' statement to convict one accused and then used a different (and contradictory) statement from the same witness to convict a co-accused. 205 F.3d 1045, 100-52 (8th Cir. 2000). "In short, what the State claimed to be true in Smith's case, it rejected in [the other] case, and vice versa." *Id*. at 1050. These tactics, *Groose* determined, represented

"foul blows," holding that such "inherently factual contradictory theories violates the principles of due process" and rendered the convictions "infirm." *Id*. at 1052; *see also Bankhead v. State*, 182 S.W.3d 253, 258 (E.D. Mo. 2006) (finding due process violation where the prosecutor informed the trial court in a guilty plea that the accused was the only accomplice to a murder, only to later convict Bankhead of being the sole accomplice).

The case offers the ideal vehicle to address inconsistent theories. Similar to *Groose*, the inconsistent theories here represent a due process violation. Just as in *Groose*, and unlike in *Turner*, "what the [Government] claimed to be true in [SGT Craig's] case, it rejected in [Appellant's] case." *Groose*, 205 F.3d at 1050. Here, the Government represented to a court that a certain version of facts was true to convict SGT Craig, and later reversed course to convict Appellant.

The Army Court's conclusion that the only inconsistency to be drawn was a reasonable inference from SGT Craig's statement was clearly erroneous. The Government was not only inconsistent with what the inference could be, but it was also entirely inconsistent with what SGT Craig actually meant *and* when SGT Craig formed his intent, all of which were critical to the outcome. Indeed, the military judge rejected the argument that Appellant's interpretation was reasonable, but even the Army Court agreed that the Government's inconsistency injected an "additional *reasonable* inference."

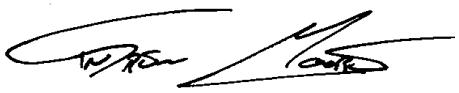
B. Alternatively, this case presents the opportunity to decide whether defense may admit a stipulation in a co-accused guilty plea.

The admissibility of a co-accused stipulation appears to be an open question of law in military jurisprudence. Drawing from federal courts, the stipulation from SGT Craig's guilty plea could have been admissible as a party opponent with respect to the United States, *see United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978), or as a statement against interests with respect to SGT Craig. *See, e.g., United States v. Aguilar*, 295 F.3d 1018, 1020-23 (9th Cir. 2002). As defense laid out in its clemency matters, the stipulation would have "dramatically complicated, contradicted, and impeached the Government's prosecution of [Appellant]." (Clemency Matters). It would have also impacted his forum selection. (Clemency Matters).

The Army Court engaged with none of these arguments and simply dismissed them out of hand. Guidance from this Court is needed.

Conclusion

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



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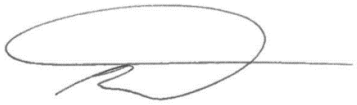

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Appendix A: Army Court Decision

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ,[1] WALKER, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist PHILLIP E. THOMPSON, JR.
United States Army, Appellant

ARMY 20190525

Headquarters, Fort Stewart
David H. Robertson, Military Judge
Colonel Michael D. Mierau, Jr., Staff Judge Advocate

For Appellant: Major Kyle C. Sprague, JA.; William E. Cassara, Esquire (on brief and reply brief)

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Craig Schapira, JA; Lieutenant Colonel Wayne H. Williams, JA; Captain Christopher K. Wills, JA (on brief).

6 December 2021

OPINION OF THE COURT

ALDYKIEWICZ, Senior Judge:

"*Actus non facit reum, nisi mens sit rea*, 'the act alone does not amount to guilt; it must be accompanied by a guilty mind.'" *United States v. Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995).

A basic tenet of American jurisprudence is that every crime is comprised of two parts, the *actus reus* and the *mens rea*.[2] The former, the "wrongful deed" and

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[1] Senior Judge Aldykiewicz decided this case while on active duty.

[2] The exceptions to this general rule are strict liability offenses, offenses where "action alone is enough to warrant a conviction, with no need to prove a mental

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the latter, the "guilty mind." "Criminal liability is normally based upon the concurrence of two factors, an evil-meaning mind and an evil-doing hand . . . ." *United States v. Bailey*, 444 U.S. 394, 402 (1980) (cleaned up). "That a crime is comprised of both an actus reus and a mens rea necessarily means both components must exist at the time an offense is committed if the offense is to amount to a crime at all." *United States v. Rodriguez*, 79 M.J. 1, 3 (C.A.A.F. 2019). "[T]he unremarkable notion that a crime must consist of both a mens rea and an actus reus is deeply rooted in American jurisprudence . . . ." *Id.*at 4. Whether convicted via a contested proceeding or by a plea of guilt, the above is unchanged.

In March of 2017, appellant drove his friend, Sergeant (SGT) Craig to an apartment where SGT Craig proceeded to execute two soldiers, Private (PV2) [redacted] (Victim 1) and Specialist (SPC) [redacted] (Victim 2), shooting each twice and stabbing the former in the neck. Knowing of SGT Craig's intent to kill, appellant assisted SGT Craig by: driving SGT Craig to the apartment; conducting a reconnaissance of the apartment prior to SGT Craig's entry to confirm the number of people inside; waiting for SGT Craig so he could drive SGT Craig away from the area after the killings; driving SGT Craig from the area following the killings; and, retaining possession of and hiding one of SGT Craig's weapons. Notwithstanding the pairs efforts to destroy evidence and keep their respective roles in the killings secret, both were quickly identified by authorities.

After being charged by military authorities for his role in the murders, appellant pleaded guilty as a principal, under an aider and abettor theory of liability, to two specifications of premeditated murder.[3] During his guilty plea, appellant

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state." *Strict-Liability Crime*, Black's Law Dictionary (11th ed. 2019). Strict liability offenses, however, are generally disfavored in the law. *See United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016). "'While strict-liability offenses are not unknown to the criminal law . . . the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status.'" *Id.* (quoting *United States v. United States Gypsum* Co., 438 U.S. 422, 437–38 (1978) (citations omitted)).

[3] Appellant was charged with one specification of conspiracy to commit premeditated murder and two specifications, as a principal under an aider and abettor theory, of premediated murder under Articles 81 and 118, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 918 [UCMJ]. In accordance with his pretrial agreement, appellant pleaded guilty to the two specifications of premeditated murder. The conspiracy specification was dismissed. The military judge sentenced appellant to a dishonorable discharge and confinement for life with the possibility of

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admitted to every act that assisted SGT Craig in the killings, assistance provided with clear knowledge of SGT Craig's intent to kill the apartment's occupants. However, appellant also stated that he "bore no ill will towards the victims" and "did not wish harm upon them," undisputed facts that the military judge echoed in his post-sentencing clemency recommendation to the convening authority.

Appellant now asserts the military judge abused his discretion by accepting his plea of guilty, arguing that the record discloses a substantial basis in law and fact for questioning the plea. We agree. To quote *Bailey*, appellant's guilty plea admitted to an "evil-doing hand" but not an "evil-meaning mind." Stated another way, appellant's plea established the *actus reus* but not the requisite *mens rea* necessary for a conviction as a principal to premeditated murder under an aider and abettor theory.

BACKGROUND

A. Facts and Circumstances Surrounding the Double Homicides

Appellant and SGT Craig, a soldier in appellant's unit, were friends. During their friendship, SGT Craig began to have marital problems with his wife, Specialist (SPC) [redacted] with whom SGT Craig had a daughter. Eventually the two separated.

During this separation, SGT Craig suspected his wife was "cheating" on him. Sergeant Craig began following and harassing his wife as well as men he believed to be sexually involved with her. On one occasion, SGT Craig requested appellant deflate his wife's tires, a request appellant complied with. Sergeant Craig's harassing behavior eventually resulted in the issuance of a military protective order (MPO), an MPO that prevented SGT Craig from interacting with his wife. In response and in violation of the MPO, Sergeant Craig began using appellant as an intermediary to communicate with his wife.

In early 2017, SGT Craig suspected his wife was romantically involved with Victim 1. On Saturday, 4 March 2017, SGT Craig's wife and Victim 1 attended a party at Victim 2's apartment. During this time, SGT Craig, while at an apartment nearby, had various friends spy on his wife at the party so they could report back to him on who she was with and what she was doing.

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parole. The pretrial agreement capped confinement at forty years and, at action, the convening authority approved thirty-five years.

At 0200, SGT Craig's wife and Victim 1 left the party, in separate vehicles, and headed to her residence. Sergeant Craig followed them. Once at the residence, SGT Craig snuck around the residence until he could see his wife and Victim 1 through a window. Unaware of his presence, SGT Craig witnessed his wife and Victim 1 cuddling together on a couch.

Later that same morning, now Sunday, SGT Craig asked one of his friends if he could borrow his car, a red Infinity coupe, so that he could see his daughter without anyone knowing he would be violating his MPO. Sergeant Craig's friend agreed, giving SGT Craig the keys to the vehicle. Returning to his wife's residence, SGT Craig waited for Victim 1 to leave after which SGT Craig followed him back to Victim 2's apartment where SGT Craig remained, outside the apartment, for approximately 30 minutes before leaving.

While SGT Craig stalked Victim 1, appellant was at church with his wife and four-month old boy, unaware of the previous night's events to include the party or SGT Craig's actions that morning. During the church service, appellant missed a call from SGT Craig. As the service was ending, SGT Craig called appellant a second time, a call appellant answered. Sergeant Craig told appellant to meet him after church.

After the service ended, appellant drove home with his wife and son. Appellant dropped his wife off at home but kept his son, who had fallen asleep in appellant's truck, with him so as not to disturb his sleep. After telling his wife he would be back soon, appellant drove to meet SGT Craig. They met in a library parking lot. Upon appellant's arrival, SGT Craig, carrying a dark colored jacket, approached appellant's truck. Appellant noticed SGT Craig was not driving his car but rather a red Infinity coupe belonging to SGT Craig's friend. Appellant also noticed that SGT Craig had his Glock handgun in his waist. Sergeant Craig got into appellant's truck and told appellant that he saw his wife with another man the previous night. Appellant noticed SGT Craig was aggravated. Appellant asked SGT Craig if he took pictures that SGT Craig could use for his divorce. After responding he was not concerned about that, SGT Craig brandished his firearm by removing it from his waistband, placed the gun on his lap, and told appellant that "these niggas got to go." When appellant asked SGT Craig what he meant by that, SGT Craig simply repeated himself, again saying "these niggas got to go." Appellant interpreted this to mean that SGT Craig intended to kill whoever was involved with his wife and whoever else was with him at the time.

Telling appellant that he knew where the man involved with his wife was, SGT Craig instructed appellant to drive out of the library parking lot and "take a left." Appellant complied, doing as SGT Craig directed, deciding to "to play it cool to not upset [SGT Craig] anymore." In so doing, he believed he "would keep [himself] and [his son] safe."

Once they arrived in a parking lot near Victim 2's residence, appellant and SGT Craig sat in the truck for about ten minutes. Sergeant Craig then instructed appellant to conduct a reconnaissance of the apartment so he, SGT Craig, could know how many people were inside. Sergeant Craig told appellant he could get inside the apartment by pretending to have left his laptop at the party the night before. Doing as SGT Craig instructed, appellant proceeded to the apartment and spoke with Victim 1 outside the apartment entrance. After checking with Victim 2, who was inside the apartment, Victim 1 informed appellant his laptop was not inside. Thanking Victim 1, appellant walked over to and attempted to enter a nearby church "to try and figure out what to do." Finding the church locked, appellant returned to his truck where SGT Craig was waiting with appellant's son.

Once inside the truck, appellant lied to SGT Craig, telling him there was only one person in the apartment, a lie intended "to throw [SGT Craig] off." Sergeant Craig, however, did not believe appellant, knowing that earlier that morning there were two men inside the apartment. After informing appellant that one of the men inside had been with his wife the night before, SGT Craig balled up his jacket and exited the truck. Sergeant Craig directed appellant not to leave and appellant complied.

Sitting on the stairwell by Victim 2's apartment, SGT Craig called appellant and told him he could not stop thinking about what happened between Victim 1 and his wife. In response, appellant attempted to talk SGT Craig "out of doing what he was about to do," telling him to think about his daughter. Sergeant Craig responded "with a long period of silence." Once the call ended, appellant remained in the truck with his son. As appellant waited, he began searching online for a Playstation 4 gaming console that he wanted to purchase. Appellant also texted a friend. A little while later, SGT Craig called appellant and instructed appellant to leave the immediate area but wait for him and return when he, SGT Craig, was ready to be picked up. Again complying with SGT Craig's direction, appellant left and parked at a nearby church. Roughly twenty minutes later, appellant heard a gunshot. Appellant tried to call SGT Craig; SGT Craig did not answer.

Unable to make telephonic contact with SGT Craig, appellant drove back to Victim 2's apartment to look for SGT Craig, eventually finding SGT Craig in the library parking lot where they first parked. Upon making contact, SGT Craig handed appellant his Glock and told appellant to store it at appellant's residence. The two then departed the area for appellant's home, appellant in his truck with his son and SGT Craig in the borrowed Infinity. After dropping off his son and securing the handgun inside his residence, SGT Craig told appellant to get inside the borrowed Infinity. Appellant complied and SGT Craig drove appellant to his friend's house, the friend who had earlier loaned him the Infinity. Once inside, SGT Craig admitted to appellant, the Infinity owner, and another that he shot and killed Victim 1 and Victim 2. Sergeant Craig also admitted to stabbing Victim 1. Appellant remained

quiet as SGT Craig described the murders, after which SGT Craig told appellant it was time to go.

Although appellant asked SGT Craig to drive him home, SGT Craig, now driving his own vehicle, drove appellant out to the woods where SGT Craig got out of the car with another gun. When he returned, SGT Craig had disposed of the gun as well as his bloody clothes, asking appellant to come back in a few days and "burn" the clothes. Appellant, however, avoided the request by saying he was busy. After leaving the woods, SGT Craig took appellant home, telling him not to tell anyone about the double murders.

Later that evening, Victim 1's and Victim 2's bodies were discovered inside Victim 2's apartment by officers of the Hinesville Georgia Police Department (HPD). Both soldiers were in the middle of the apartment living room, each one having been shot twice. In addition to being shot, Victim 1 had a kitchen knife stuck in his neck.

After SGT Craig became a suspect, agents from the Criminal Investigative Command (CID) and the HPD questioned appellant, who gave three statements about his involvement, each statement progressively more detailed than the one prior. Cooperating with law enforcement, appellant eventually led the authorities to the murder weapon, the weapon SGT Craig previously discarded in the woods.

Based on his actions, and the assistance provided SGT Craig, appellant was eventually charged with conspiracy to commit premeditated murder and premediated murder.[4]

B. Appellant's Providence Inquiry

During appellant's guilty plea, the military judge informed appellant of the following elements for Specification 1 of Charge I, the premeditated murder of Victim 1:

> One, that [Victim 1] is dead; Two, that his death resulted from [SGT Craig] shooting him with a handgun on or about 5 March 2017, at or near Hinesville, Georgia; Three, that the killing of [Victim 1] was unlawful; Four, that at the time of the killing, you knew [SGT Craig] had a premeditated design to kill [Victim 1]; and Five, that you

[4] *See* footnote 2 *supra*.

> intentionally aided and abetted [SGT Craig] of committing the offense of premeditated murder of [Victim 1].

The military judge then read off the same elements for Specification 2, of Charge I, the premeditated murder of Victim 2, the only difference being the named victim (i.e., Victim 2 in place of Victim 1).

After reading appellant the definition of premeditated design to kill, the military judge addressed vicarious liability (i.e., criminal liability as an aider and abettor), informing appellant of the following:

> Any person who actually commits an offense is a principal. Anyone who knowingly and willfully aids or abets another in committing an offense is also a principal, and equally guilty of the offense. An aider and abettor must knowingly and willfully participate in the commission of the crime, and must aid, encourage, or incite the person to commit the criminal act.

The military judge then explained how appellant could be liable under an aider and abettor theory:

> Under the facts of this case, for you to be liable as an aider and abettor, you must have known Sergeant Craig's present intent to kill, specifically intended to aid or abet him, and in fact, did aid or abet him. Now, there is no requirement that you agreed with or even had knowledge of the means by which Sergeant Craig intended to carry out the murder of [Victim 2] and [Victim 1].

During the providence inquiry, appellant explained to the military judge that when SGT Craig put his Glock on his lap and said "niggas got to go" he "knew what Sergeant Craig meant by those words, and it meant that he intended to kill the guy who slept with his wife and whoever else was with him at the time." Appellant also said when he was scoping out the apartment, he knew he "was helping him do what he told me about earlier, when he said they have got to go." Appellant also explained, "I didn't know the people inside, and *I didn't want anything bad to happen to them*." (emphasis added). Appellant stated he tried to lie to SGT Craig about how many people were in the apartment "to throw him off" and "tried to talk him out of doing what he was about to do, and I told him he had to think about . . . his daughter."

Appellant explained that he aided and abetted SGT Craig in carrying out his plan to kill Victim 1 and Victim 2 by driving to the parking lot and the apartment,

going to the apartment and seeing who was inside, and waiting for him after the shooting.

Further into the providence inquiry, the military judge and appellant had the following colloquy:

> MJ: And, at the time you did each of those acts, did you intend for them to aid Sergeant Craig at his request?
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> Appellant: I knew what he intended to do, and I knew I would help him, but I also hoped nobody would get hurt.
>
> MJ: So, you had no ill will or malice towards those two individuals.
>
> Appellant: No, sir.
>
> MJ: *And you didn't desire for them to be killed.*
>
> Appellant: *No, sir.*
>
> MJ: But as you were doing each one of those acts that Sergeant Craig was asking you to do, at that time, did you intend to help him?
>
> Appellant: I knew what he intended to do. And I knew what I was doing with some of them. About, like I said, I hoped nobody would be hurt.
>
> MJ: *So, it was your overall hope that no one would get killed from your assistance to specialist—or, Sergeant Craig. Is that correct?*
>
> Appellant: *Correct.*
>
> MJ: But as you were aiding him, were you intending to aid him?
>
> Appellant: Yes, Sir.

(emphasis added).

C. The Military Judge's Post-Sentencing Clemency Recommendation

After reviewing the quantum portion of the pretrial agreement, where the convening authority agreed to disapprove any adjudged confinement in excess of forty years, the military judge announced:

> Now, having reviewed all the relevant evidence in this case, this court recommends the convening authority grant clemency to the accused in the form of meaningful reduction in his term of confinement. The court bases this recommendation on the following primary factors: First, [appellant] was not the perpetrator of the murders. *He bore no ill will towards the victims and he did not wish harm upon them* . . . .

(emphasis added).

LAW AND DISCUSSION

We conclude the military judge abused his discretion by failing to inform appellant of the correct elements necessary for guilt as an aider and abettor of premeditated murder and for failing to resolve matters inconsistent with a provident plea to the same.

A. Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion, whereas questions of law arising from the plea are reviewed de novo. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

"[I]n reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea." *Inabinette*, 66 M.J. at 322 (internal quotations and citation omitted).

Guilty pleas "must be analyzed in terms of providence of the plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). "The factual predicate [of a guilty plea] is sufficiently established if 'the factual circumstances as revealed by the accused himself objectively support that plea . . . .'" *Id.* (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A.

1980)). "A guilty plea is provident if the facts elicited make out each element of the charged offense." *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007) (citations omitted).

> [F]ailure to define correctly a legal concept or explain each and every element of the charged offense to the accused in a clear and precise manner is not reversible error if it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty.

Murphy, 74 M.J. at 308 (cleaned up). In assessing the providence of the plea, courts look to the entire record. *United States v. Gosselin*, 62 M.J. 349, 354 (C.A.A.F. 2006).

B. Military Judge's Guilty Plea Obligation

A military judge's obligation during a guilty plea is to properly advise an accused on the law regarding those offenses to which he is pleading guilty and obtain, from the accused, facts that support the plea.

> When an accused enters a plea of guilty, the military judge must explain to the accused the elements of the offense, elicit from the accused the factual basis of the offense, and insure that the accused fully understands the nature of the offense to which he has pled guilty. In determining whether a plea of guilty is provident, a structured formalistic procedure is not required. The entire inquiry must be examined to ascertain if an accused was adequately advised.

United States v. Silver, 35 M.J. 834, 835 (A.C.M.R. 1992) (citations omitted).

> [T]he record . . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.

United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247 (1969) (citations omitted). When the accused raises a matter inconsistent with the plea, such as the

making of a statement negating the *mens rea* required for guilt, the military judge must either resolve the inconsistency or reject the plea. *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014) (citations omitted).

The aforementioned ensures the accused understands the basis of his or her guilt and is pleading guilty because he or she is, in fact, guilty. A military judge's obligation does not, however, extend to assisting an accused make it through his or her guilty plea.

> "The spectacle, where both counsel take hold of appellant's arms while the judge grabs the ankles and together they drag appellant across the providence finish line, is not only troublesome, but, . . . in the end, futile."

United States v. Le, 59 M.J 859, 864 (Army Ct. Crim. App. 2004) (quoting *United States v. Pecard*, ARMY 9701940, 2000 CCA LEXIS 381, at *14 (Army Ct. Crim. App. 7 Dec. 2000)).

C. Principal Liability as an Aider and Abettor Under Article 77, UCMJ

Article 77, UCMJ, provides that "[a]ny person punishable under this chapter who—(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission . . . is a principal." In *United States v. Jackson*, the Court of Military Appeals, the predecessor to the Court of Appeals for the Armed Forces, noted, "The law of aider and abettor is not a dragnet theory of complicity. . . . The law requires concert of purpose or the aiding or encouraging of the perpetrator of the offense and a conscious sharing of his criminal intent." 6 U.S.C.M.A. 193, 201–02, 19 C.M.R. 319, 327–28 (1955) (citations omitted).[5] *See also*, *United States v. Pritchett*, 31 M.J 213 (C.M.A. 1990) (conviction as an aider and abettor to spouse's marijuana possession and distribution legally sufficient where Pritchett shared in wife's criminal intent).

In *Nye & Nissen v. United States*, the Supreme Court made clear that the *mens rea* for criminal liability as a principal under an aider and abettor theory is one of shared intent. 336 U.S. 613 (1949). "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Id.* at 619 (quoting L. Hand, J., in *United*

[5] Article 77, UCMJ in effect at the time of *Jackson* (i.e., as found in the 1951 Manual for Courts-Martial) is identical in substance as that in effect at the time of appellant's court-martial (i.e., as found in the 2016 Manual for Courts-Martial).

States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)). The Supreme Court reaffirmed its adherence to Judge Learned Hand's concept of shared intent in *Rosemond v. United States*, referring to Judge Hand's formulation, quoted above, as a "canonical formulation of that needed state of mind [; a formulation] later appropriated by this Court." 572 U.S. 65, 76 (2014).

Rosemond was charged with and convicted of use of a firearm during a federal drug-trafficking crime in violation of 18 U.S.C. § 924(c) and, in the alternative, with aiding and abetting the same under 18 U.S.C. § 2. The District Court instruction allowed for conviction, as an aider and abettor, if Rosemond participated in a drug trafficking crime and knew an accomplice used a weapon. The instruction did not, however, specify when that knowledge had to be acquired; acquisition before or after participation in the crime was irrelevant.[6] On appeal, the Tenth Circuit found the timing of this knowledge irrelevant to liability as an aider and abettor; the Supreme Court disagreed. The Court found that when Rosemond became aware that an accomplice had a weapon was directly related to whether Rosemond had the requisite *mens rea* (i.e., shared intent) for guilt as an aider and abettor. In remanding the case, the Court noted:

> Our holding is grounded in the distinctive intent standard for aiding and abetting someone else's act—in the words of Judge Hand, that a defendant must not just "in some sort associate himself with the venture" (as seems to be good enough for the dissent), but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." For the reasons just given, we think that intent standard cannot be satisfied if a defendant charged with aiding and abetting a §924(c)

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[6] The jurors were instructed as follows:

> As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:
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> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.

United States v. Rosemond, 695 F.3d 1151, 1154 (10th Cir. 2012).

> offense learns of a gun only after he can realistically walk away—*i.e.*, when he has no opportunity to decide whether "he wishes to bring about" (or make succeed) an *armed* drug transaction, rather than a simple drug crime. And because a defendant's prior knowledge is part of the intent required to aid and abet a §924(c) offense, the burden to prove it resides with the Government.

Rosemond 572 U.S. at 81 n.10.

Federal Circuit Court jurisprudence addressing aider and abettor liability under 18 U.S.C. § 2, a statute similarly worded to 10 U.S.C. § 877,[7] while non-binding is informative, revealing uniform acceptance of Judge Hand's "canonical formulation of that needed state of mind" (i.e., shared intent) for principal liability as an aider and abettor. *See generally*, U*nited States v. Encarnacion-Ruiz*, 787 F.3d 581, 588 (1st Cir. 2015) (One unaware that victim is underage cannot aid and abet in the production of child pornography because he "cannot 'wish . . . to bring about' such criminal conduct and 'seek . . . to make it succeed.'"); *United States v. Scotti*, 47 F.3d 1237, 1245 (2d Cir. 1995) (aiding and abetting requires a finding of specific intent or purpose to bring about the crime); *United States v. Centeno*, 793 F.3d 378, 387 (3d Cir. 2015); *United States v. Horton*, 921 F.2d 540, 543 (4th Cir. 1990); *United States v. Hemmingson*, 157 F.3d 347, 355 (5th Cir. 1998); *United States v. Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995) ("[S]pecific criminal intent is an element of the offense of aiding and abetting." An aider and abettor "must know the general nature and scope of the gambling enterprise and have the intent to make the illegal enterprise succeed. . . .") (cleaned up); *United States v. Pino-Perez*, 870 F.2d 1230,

[7] A side-by-side comparison of 10 U.S.C. § 877 and 18 U.S.C. § 2 follows:

10 U.S.C. § 877	18 U.S.C. § 2
§ 877. Art. 77. Principals Any person punishable under this chapter [10 U.S.C. §§ 801 et seq.] who— (1) commits an offense punishable by this chapter [10 U.S.C. §§ 801 et seq.], or aids, abets, counsels, commands, or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter [10 U.S.C. §§ 801 et seq.]; is a principal.	§ 2. Principals (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

1235 (7th Cir. 1989); *United States v. Brown*, 929 F.3d 1030, 1039 (8th Cir. 2019); *United States v. Sineneng-Smith*, 910 F.3d 461, 481–482 (9th Cir. 2018) ("[E]lements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense."); *United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013) (For liability as an aider and abettor, "'defendant must share in the intent to commit the underlying offense.'") (citation omitted); *United States v. Collins*, 779 F.2d 1520, 1528–29 (11th Cir. 1986); *United States v. Harris*, 491 F.3d 440, 453 (D.C. Cir. 2007).

The common thread in the above noted Circuit Court opinions, beyond reliance upon Judge Hand's *Peoni* language, is that the aider and abettor participates in the crime because he "wishes to bring it about," wanting it "to succeed." In other words—the aider and abettor shares the perpetrator's intent vis-a-vis the crime at issue.[8]

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[8] A review of Circuit Court of Appeals' model criminal jury instructions reveals that jurors are instructed, consistent with Judge Hand's *Peoni* decision, that principal liability as an aider and abettor requires shared intent. *See e.g.*, Court of Appeals for the Third Circuit Model Criminal Jury Instruction § 7.02 (2018) ("The government must prove beyond a reasonable doubt that (name) in some way participated in the offense committed by (name of alleged principal) as something (name of defendant) wished to bring about and to make succeed."); Court of Appeals for the Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 2.04 (2019) (accomplice liability requires, inter alia, that the defendant "associated with the criminal venture;" "'To associate with the criminal venture' means that the defendant shared the criminal intent of the principal."); Court of Appeals for the Sixth Circuit Pattern Criminal Jury Instructions § 4.01 (2019) ("What the government must prove is that the defendant did something to help [or encourage] the crime with the intent that the crime be committed."); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 5.01 (2020) ("In order to have aided and abetted the commission of a crime a person must [, before or at the time the crime was committed,]: . . . [(4) have [intended] [known] (insert mental state required by principal offense).]"; Court of Appeals for the Ninth Circuit Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit § 5.1 (2021) ("The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit [specify crime charged]."); Court of Appeals for the Tenth Circuit Criminal Pattern Jury Instructions § 2.06 (2021) ("Second: the defendant intentionally associated

(continued . . .)

D. The Intent Element for Premeditated Murder Under an Aider and Abettor Theory of Criminal Liability

Premeditated murder under Article 118, UCMJ, requires "[t]hat, at the time of the killing, the accused had a premeditated design to kill." *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], pt. IV, ¶ 43.b.(1)(d). Premeditated murder is defined as "murder committed after the formation of a specific intent to kill someone and consideration of the act intended." *MCM*, pt. IV, ¶ 43.c.(2)(a). "The existence of premeditation may be inferred from the circumstances." *Id.*

The government charged appellant with premeditated murder under the theory that he aided and abetted SGT Craig in murdering Victim 1 and Victim 2. The pertinent Benchbook instruction for aiding and abetting reads:

> Any person who actually commits an offense is a principal. Anyone who knowingly and willfully aids or abets another in committing an offense is also a principal and equally guilty of the offense. An aider or abettor must knowingly and willfully participate in the commission of the crime *as something (he) (she) wishes to bring about* and must, aid, encourage, or incite the person to commit the criminal act. . . . *Although the accused must consciously share in the actual perpetrator's criminal intent to be an aider or abettor*, there is no requirement that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.

(. . . continued)
himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him."); Court of Appeals for the Eleventh Circuit Pattern Jury Instructions, Criminal Cases § S7 (2021) ("A Defendant 'aids and abets' a person if the Defendant intentionally joins with the person to commit a crime."); Court of Appeals for the District of Columbia Circuit, D.C. Official Code § 22-1805 (2021) ("To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed.").

Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 7-1-1 (10 Sep. 2014) [Benchbook] (emphasis added).

The aforementioned instruction is rooted in Judge Hand's oft quoted *Peoni* decision where, in addressing criminal liability as an aider or abettor, Judge Hand, noted:

> It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it.

United States v. Peoni, 100 F.2d at 402.[9]

Rather than conducting a providence inquiry using the standard Benchbook instruction found at para. 7-1-1 and quoted *supra*, one which, as written, captures the specific intent required to find a principal liable as an aider and abettor, the military judge chose to edit out "*as something (he) (she) wishes to bring about*" and "*[a]lthough the accused must consciously share in the actual perpetrator's criminal intent to be an aider or abettor*" from the inquiry. Benchbook, para. 7-1-1 (emphasis added).[10] Why the military judge edited the instruction and failed to

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[9] The "definitions" Judge Hand references in his opinion are those attaching criminal liability, as a principal, to those assisting another in the commission of the crime. Terms triggering criminal liability as a principal include: aid, abet, assist, procure, command, counsel, advise, induce, hire, incite, set on, stir up, plot, assent, consent, and, encourage. *Peoni*, 100 F.2d at 402–03.

[10] In its pleadings before this court, appellate defense counsel argued the military judge erred during his providence inquiry because: "a. The military judge improperly excluded necessary language about the specific intent element of aiding and abetting," and "b. The military judge improperly added language regarding the knowledge element of aiding and abetting." Regarding b., appellate defense counsel argued error lies in the military judge's advice to appellant that he "must have known [SGT Craig's] *present* intent to kill." (emphasis added). As noted in the body of the opinion, the military judge provided no rationale for deleting the shared intent necessary for principal liability as an aider and abettor. Similarly, the record

(continued . . .)

advise appellant in accordance with the standard instruction, thus deleting any *mens rea* requirement for the plea to offense (i.e., premeditated murder), is unexplained in the record before us. Regardless of the military judge's rationale, deletion of the aforementioned was error.[11] As our superior court has explained, aiding and abetting requires "the accused in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, [and] that he seek by his action to make it succeed." *United States v. Mitchell*, 66 M.J. 176, 178 (C.A.A.F. 2008) (quoting *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A. 1990)) (cleaned up).

Removal of the cited language prevented appellant from being properly informed that, to be provident for the offense of premeditated murder, he needed to have the specific intent to kill Victim 1 and Victim 2. *See United States v. Richards*, 56 M.J. 282, 285 (C.A.A.F. 2002) (appellant guilty of manslaughter as an aider and abettor because he possessed the required intent that the victim suffer great bodily harm); *Cf. United States v. Foushee*, 13 M.J. 833, 836 (A.C.M.R. 1982) (no culpability as an aider and abettor of assault with intent to commit murder where the accused's intent was limited to assault and battery); *United States v. Hofbauer*, 2 M.J. 922, 926 (A.C.M.R. 1976) (accused not culpable as an aider and abettor of aggravated assault where his intent was limited to assault and battery). In other words, to be guilty as an aider and abettor, appellant had to intend to assist SGT

(. . . continued)
is devoid of any explanation as to why the military judge provided a temporal component for the perpetrator's, SGT Craig's, intent to kill. Finding error in the military judge's omission of and/or failure to find the intent necessary for a guilty finding to premeditated murder under an aider and abettor theory of liability, that is, a shared intent to kill, we need not and do not reach appellant's other stated rationale for setting aside his plea, to wit, that the "military judge improperly added language regarding the knowledge element of aiding and abetting."

[11] We note that Benchbook instruction para. 7-1 states, "[w]hen the offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must ordinarily establish that the aider or abettor had the requisite state of mind or *that the accused knew that the perpetrator had the requisite intent or state of mind*." Benchbook, para. 7-1 (emphasis added). This instruction, if relied upon alone without further context and without regard to the more specific instruction found at para. 7-1-1, suggests that an aider and abettor can be guilty as a principal, without regard to the aider and abettor's state of mind, by simply rendering assistance when he or she knows the perpetrator's state of mind. This is an incorrect statement of the law.

Craig in the killings of Victim 1 and Victim 2 with the specific intent that they be killed (i.e., "participate in it as in something that he wishes to bring about").

Although tailoring the Benchbook instructions is permissible, such as when evolving case law requires it, we must caution those who choose to deviate from it unwittingly. Over 20 years ago this court noted:

> Because the standard Benchbook instructions are based on a careful analysis of current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record.

United States v. Rush, 51 M.J 605, 609 (Army Ct. Crim. App. 1999). More recently, this court noted, while "not a source of law," the Benchbook "represents a snapshot of the prevailing understanding of the law, among the trial judiciary, as it relates to trial procedure" and military judges are "usually well-advised to follow the standard instructions in the Benchbook . . . ." *United States v. Cornelison*, 78 M.J. 739, 745–46 (Army Ct. Crim. App. 2019) ("[M]ere deviation from the Benchbook does not *necessarily* constitute legal error.") (emphasis added).

The military judge's decision to conduct his providence inquiry of appellant using the modified Benchbook instruction in this case was detrimental for two reasons: (1) the scope of the inquiry did not cover the required specific intent as an aider and abettor for premeditated murder; and (2) the military judge failed to explain to appellant a required element of the offense to which he was pleading guilty, calling into question whether appellant's pleas of guilty were knowing and voluntary. *See United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003); *Mitchell*, 66 M.J. at 177. For reasons discussed below, we find the military judge failed to elicit facts during the providence inquiry sufficient to make out the intent requirement for the premeditated murder charge (i.e., Specifications 1 and 2 of Charge I).

E. Improvident Plea

When examining the facts elicited during the providence inquiry and the stipulation of fact, we find appellant consistent in his claim that he bore "no ill will or malice" toward Victim 1 and Victim 2, he "didn't desire for them to be killed," and that he "hoped nobody would be hurt." The factual circumstances revealed by appellant fail to objectively support his plea of guilty, as one cannot both desire the victims not be killed or hurt while also possessing the specific intent to unlawfully kill the same with premeditation. Harboring such a duality is paradoxical and cannot be reconciled.

Having edited Benchbook instruction para. 7-1-1 as previously noted, a glaring inconsistency was neither recognized nor resolved by the military judge prior to acceptance of appellant's guilty plea. Rather, the military judge simply confirmed that appellant lacked the requisite *mens rea* necessary for criminal liability as an aider and abettor to premeditated murder. In recommending that the convening authority grant appellant clemency, the military judge noted that appellant "bore no ill will towards the victims" and "did not wish harm upon them." Had the appellant made such a statement during his unsworn statement on sentencing, for example, we would question why the military judge failed to reopen the providence inquiry to reconcile the apparent conflict with the required *mens rea* for the offense at issue. *See, e.g.*, *United States v. Gallion*, 36 M.J. 950, 952 (A.C.M.R. 1993) (military judge required to reopen providence inquiry when accused disavowed entrapment defense during providence inquiry but raised same in his presentencing unsworn statement); *United States v. Brooks*, 26 M.J. 930, 932 (A.C.M.R. 1988) (military judge erred by failing to reopen providence inquiry following accused's unsworn statement raising potential entrapment defense).

In the case at bar, the military judge himself is stating, albeit for the convening authority, that an essential element has not been met. In short the providence inquiry establishes appellant had the specific intent to assist SGT Craig but lacked any intent to harm, let alone kill, anyone. That alone is sufficient for us to find a substantial basis to question appellant's guilty plea.

For the foregoing reasons we conclude appellant's guilty plea to be improvident and find the military judge abused his discretion by accepting appellant's guilty plea to premeditated murder.

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing may be ordered by the same or different convening authority.

Judge WALKER and Judge PARKER concur.

FOR THE COURT:

[redacted]

JOHN P. TAITT
Clerk of Court

Appendix B: Army Court Decision on Rehearing

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
POND, EWING,[1] and JUETTEN
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist PHILLIP E. THOMPSON, JR.
United States Army, Appellant

ARMY 20190525

Headquarters, Fort Stewart
David H. Robertson, Military Judge (trial)
J. Harper Cook, Military Judge (rehearing)
Colonel Michael D. Mierau, Jr., Staff Judge Advocate (trial)
Colonel Joseph M. Fairfield, Staff Judge Advocate (rehearing)

For Appellant: Major Robert W. Rodriguez, JA (argued);[2] Colonel Philip M. Staten, JA; Major Bryan A. Osterhage, JA (on brief); Colonel Philip M. Staten, JA; Major Bryan A. Osterhage, JA; Major Robert W. Rodriguez, JA (on reply brief).

For Appellee: Captain Anthony J. Scarpati, JA (argued); Major Chase C. Cleveland, JA; Colonel Richard E. Gorini, JA; Captain Anthony J. Scarpati, JA (on brief).

30 June 2025

MEMORANDUM OPINION ON FURTHER REVIEW

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

POND, Chief Judge:

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[1] Judge EWING took final action in this case while on active duty.

[2] We heard oral argument in this case on 26 September 2024 at University at Buffalo School of Law as a part of "Project Outreach," a public awareness program demonstrating the operation of the military justice system.

In the early afternoon of Sunday, 5 March 2017, Sergeant (SGT) Shaquille Craig murdered two fellow Soldiers, Private Second Class (PV2) [redacted] and Specialist (SPC) [redacted] in an apartment in Hinesville, Georgia. Appellant assisted SGT Craig in gaining access to the apartment and was later convicted, contrary to his pleas, of two specifications of involuntary manslaughter. Appellant raises two issues before this court. First, whether the military judge's special findings warrant reversal of appellant's convictions? Second, whether the government's use of inconsistent theories at appellant's and SGT Craig's courts-martial also warrants reversal? For reasons discussed below, we answer both of these questions in the negative and affirm the findings and sentence.[3]

BACKGROUND

A. Procedural History

This is not the first time appellant's case has been before this court on appeal. Appellant was first convicted, pursuant to his pleas, of two specifications of premeditated murder in violation of Article 118, UCMJ, predicated on an aider and abettor theory of liability.[4] *United States v. Thompson*, 81 M.J. 824, 826 (Army Ct. Crim. App. 2021). He was sentenced to a dishonorable discharge and confinement for life without the possibility of parole; the convening authority approved only so much of the sentence as provided for Dishonorable Discharge and 35 years of confinement. During his first appeal, appellant asserted the military judge abused his discretion by accepting appellant's plea to premeditated murder. During the providence inquiry, the military judge failed to advise appellant of the specific intent required, and appellant made statements that he "did not wish harm upon" the victims, "didn't desire for them to be killed," and "hoped nobody would be hurt." *Id.* This court concluded that while the providence inquiry established appellant had the specific intent to assist SGT Craig, appellant's plea was improvident because it failed to establish that appellant possessed the requisite mens rea: the specific intent to unlawfully kill with premeditation. *Id.* at 830 (stating "one cannot both desire the victims not to be killed or hurt while also possessing the specific intent to unlawfully kill the same with premeditation"). Consequently, this court set aside the finding and sentence and authorized a rehearing. *Id.* at 836.

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[3] We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982) and determine they merit neither discussion nor relief.

[4] Specifications 1 and 2 of Charge I read as follows: "In that SPC Phillip E. Thompson, U.S. Army, did, at or near Hinesville, GA, on or about 5 March 2017, with premeditation, murder [the victim] by means of shooting him with a handgun."

The government subsequently re-referred the two specifications of premeditated murder to court-martial. But this time, at the rehearing, appellant pleaded not guilty to the charged offenses. A military judge, sitting as a general court-martial, acquitted appellant of the greater offense of premeditated murder but convicted appellant, contrary to his pleas, of two specifications of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 919, and sentenced him to a Dishonorable Discharge and eight years of confinement.[5] The convening authority approved the sentence and, except for the Dishonorable Discharge, ordered it executed, and credited appellant with 1,004 days of confinement towards the sentence to confinement. Appellant now contends his convictions should be reversed.

B. The Murders

On 5 March 2017, appellant was attending Sunday church service with his family when he received a phone call from his friend, SGT Shaquille Craig. SGT Craig had seen his estranged wife the night before at a party with another man, PV2 [redacted] SGT Craig asked appellant to meet him at a parking lot next to a library, just down the street from the apartment to where he had followed PV2 MJ earlier that day. Appellant told his wife he would not be very long and drove to meet SGT Craig with his infant son in the back seat. When appellant arrived at the parking lot, SGT Craig climbed inside appellant's truck and said he had seen his wife "hugged up" with another man. SGT Craig then said "these n[***] got to go" and pulled a Glock handgun from his waistband.

SGT Craig told appellant to drive to the apartment down the street where he had spotted PV2 [redacted] earlier that day and to "go see if the back door . . . was unlocked, and if it was [appellant] should go in and ask them if [appellant] left a laptop" during a party the night before. Appellant did as SGT Craig requested but discovering the back door was locked, knocked and rang the doorbell. PV2 [redacted], the first victim, opened the back door slightly and asked appellant to come around to the front door, which he did and was invited inside. PV2 [redacted], wearing white pants and a blue-flowered shirt, asked appellant if he had been there at the party the night before, whether the party was any good, and whether appellant left anything. Appellant murmured that he had left his laptop. PV2 [redacted] walked towards the kitchen, texting, then turned to the back of the apartment to speak to SPC [redacted], who lived there.

[5] The military judge also acquitted appellant of three additional charges including three specifications of accessory after the fact, one specification of child endangerment, and one specification of conspiracy, in violation of Articles 78, 81, and 134, UCMJ, 10 U.S.C. §§ 878, 881, 934.

As PV2 [redacted] turned back around towards appellant, SGT Craig walked in through the front door, carrying a jacket. Upon seeing PV2 [redacted] SGT Craig asked him if he knew who he was. PV2 [redacted] responded, that he did not. SGT Craig told PV2 [redacted] "you was with my wife." When PV2 [redacted] responded "I wasn't with that bitch," SGT Craig lifted up the jacket and shot PV2 [redacted] in the chest.[6] As PV2 [redacted] fell to the floor and gasped for breath, SGT Craig walked over to him and stated, "mhmm mhmm I got you I got you fuck n[***]" before shooting PV2 [redacted] again.

Hearing the shots, SPC [redacted] who was in a bedroom in the back of the apartment, attempted to flee past SGT Craig, who turned around and fired off another shot, hitting SPC [redacted] in the jaw. Despite being shot, SPC [redacted] managed to continue running. But before SPC [redacted] could make it out of the front door, SGT Craig grabbed him in a chokehold and flung him away from the door and onto the floor next to PV2 [redacted]'s body. SGT Craig then shot SPC [redacted] a second time. Appellant stated he watched SGT Craig walk into the kitchen and retrieve a knife, then SGT Craig looked at appellant and told him to leave and "don't tell nobody cause this could be [your] boy." Police would later discover the bodies with a knife protruding from PV2 [redacted]'s neck.

After SGT Craig shot both men, appellant left the apartment and walked over to a church across the street, where service was still being conducted. Appellant stated he grabbed a door to the church but found it locked. When he returned to his truck, SGT Craig was sitting inside and asked where appellant had gone. SGT Craig then asked appellant multiple times if he was "good" and told him to be calm. He then began bragging about what he had done. SGT Craig told appellant not to leave and walked back towards the apartment. SGT Craig then called appellant's cell phone to say he was waiting for people at the church across the street to "clear out." Eventually, both appellant and SGT Craig returned to the library parking lot, where SGT Craig had left a red Infiniti car he had borrowed from another soldier, SPC [redacted]

SGT Craig handed appellant his Glock and instructed him to put it back in SGT Craig's case at appellant's home. Appellant drove away with SGT Craig following appellant's truck in the red Infiniti. Upon arriving home, appellant took his son and SGT Craig's Glock out of his truck and carried them inside. Appellant then got into the red Infiniti with SGT Craig.

SGT Craig drove them to SPC [redacted]'s apartment to return the red Infiniti. Once there, and in the presence of appellant and SPC [redacted]'s roommate, Mr. [redacted] SGT Craig

[6] The pistol used in the shootings was a .380 Jimenez Arms pistol, which SGT Craig was also carrying at the time, not the Glock handgun he showed to appellant earlier in appellant's truck.

told SPC [redacted] about killing PV2 [redacted] and SPC [redacted]. While there, SGT Craig changed clothes and placed the clothes he was wearing into a bag. SPC [redacted] asked to keep SGT Craig's shoes, which had a nickel-sized bloodstain. SGT Craig agreed.

SGT Craig and appellant then drove to an isolated location where SGT Craig disposed of the murder weapon and the clothes he had been wearing. Appellant later confessed and showed law enforcement where the clothing and weapon were disposed of, ultimately leading to the seizure of the murder weapon.

C. Rehearing

A year before appellant's rehearing commenced, the government provided draft instructions with proposed elements for the offense of premeditated murder under an aider and abettor theory and for the lesser included offense of involuntary manslaughter.[7]

Two days before trial, the government amended its proposed elements for involuntary manslaughter as follows:

> (1) That [victim] is dead;
>
> (2) That [victim's] death resulted from the act of SGT Craig;
>
> (3) That the killing of [victim] by SGT Craig was unlawful;
>
> (4) That the accused assisted SGT Craig; and

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[7] At the time of the offense, involuntary manslaughter was an enumerated lesser included offense of premeditated murder. *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], Appendix 12, Section A-3. The elements of involuntary manslaughter as prescribed by the President are as follows:

> (a) That a certain named or described person is dead;
> (b) That the death resulted from the act or omission of the accused;
> (c) That the killing was unlawful; and
> (d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, forcible sodomy, rape, robbery, or aggravated arson.

MCM, pt. IV, ¶44.

(5) That the accused's assistance constituted culpable negligence.

After the close of evidence, defense filed a brief with its own proposed elements for the military judge's consideration. In particular, the defense requested the following elements for involuntary manslaughter, with the dissimilarity that SGT Craig's actions, rather than appellant's actions, were culpably negligent:

(1) That [victim] is dead;

(2) That his death resulted from the act of SGT Shaquille Craig in shooting him with a handgun on or about 5 March 2017 at or near Hinesville, GA;

(3) That this act amounted to culpable negligence;

(4) That the killing of [victim] by SGT Shaquille Craig was unlawful; and

(5) That [appellant] aided and abetted SGT Shaquille Craig to commit the offense of involuntary manslaughter by _____.[8]

After receiving both briefs, the military judge then discussed with the parties the appropriate elements for the charged and lesser included offenses under an aider and abettor theory of liability under Article 77, UCMJ. The defense acknowledged that appellant may be found guilty of a lesser included offense to premeditated murder if appellant's mental state was less criminal than that of SGT Craig.

MJ: So, could the government prove premeditated murder on Craig's behalf, but the accused be only guilty of the lesser-included offense of – well, three of them . . . [Article] 118(2), unpremeditated murder, [Article] 118(3), depraved heart murder or [Article] 119(2), involuntary manslaughter.

ADC: Your Honor, as an aider and abettor, I think you could. . . .I think it's pretty clear on that point.

[8] The defense also asked the military judge to consider ignorance or mistake when specific intent or actual knowledge is at issue, for both premeditated murder and the lesser included offense of involuntary manslaughter.

....

MJ: The government in this trial could prove beyond a reasonable doubt that Craig [did] with premeditation, murder [PV2 [redacted] and [SPC [redacted], but that if the accused didn't share that – that intent, the accused could be found of a lesser-included offense, specifically – those three I just laid out.

ADC: Yes, Your Honor. And to be very clear, as an aider and abettor.

MJ: As an aider and abettor.

ADC: Yes, Your Honor.

Upon reviewing the government's proposed closing argument presentation, the defense objected for lack of notice of the government's intent to pursue a perpetrator liability theory for involuntary manslaughter under Article 119(2). In response, the government confirmed they would argue, as outlined in the government's bench brief, that appellant's assistance to SGT Craig constituted culpable negligence. After further discussion with defense, the military judge said, "I don't see daylight between your two arguments," but allowed the defense to re-raise the issue during closing.

After deliberations, the military judge acquitted appellant of premeditated murder but found appellant guilty of involuntary manslaughter. The military judge then provided special findings which included the following:

> Anyone who knowingly and willfully aids or abets another in committing an offense is also a principal and is equally guilty of the offense. *An aider and abettor must knowingly and willfully participate in the commission of the crime as something he wishes to bring about and seek by his action to make succeed.* He must also aid, encourage, incite the person to commit the criminal act. Presence at the scene of the crime is not enough, nor is failure to prevent the commission of an offense. There must be an intent to aid or encourage the person who commits the crime. Although *the accused must consciously share in Sergeant Craig's criminal intent to be an aider or abettor*, there is no requirement that the accused agree with, or even have knowledge of the means

> by which Sergeant Craig was to carry out that criminal intent.

The military judge determined the evidence established beyond a reasonable doubt that appellant "aided and abetted Sergeant Craig to commit the unlawful killings" and that he did so by "knowingly and willfully" doing the following five things, at Sergeant Craig's request:

> (1) He drove Sergeant Craig to [SPC [redacted]'s] apartment;
>
> (2) He checked whether the door of apartment was locked;
>
> (3) He knocked on the apartment door and/or rang the doorbell;
>
> (4) He gained access to the apartment by lying to [PV2 [redacted]; specifically that he was present at the party the night before and that he left a laptop there, which assertions were totally false;
>
> (5) He stayed inside the apartment until Sergeant Craig arrived.

In his special findings, the military judge stated under the law of principals, "a person may be an aider and abettor to a lesser degree than the active perpetrator if he did not share the required criminal intent or purpose of the active perpetrator," citing *United States v. Foushee*, 13 M.J. 833, 835 (A.C.M.R. 1982) and *United States v. Jackson*, 6 U.S.C.M.A. 193 (1955). Applying that legal principle, the military judge found the government failed to prove:

> that Specialist Thompson shared Sergeant Craig's premeditated design to kill, intent to kill, or intent to inflect great bodily harm upon [the victims]. However, the government did prove by legal and competent evidence, beyond a reasonable doubt, that Specialist Thompson's knowing and willful assistance to Sergeant Craig amounted to culpable negligence, which was a proximate cause of the deaths of both [victims]. Specifically, the government also proved beyond a doubt the following ten things:
>
> (1) That Specialist Thompson knowingly and willfully assisted Sergeant Craig;

(2) That Specialist Thompson then knew that Sergeant Craig intended to confront and probably kill [PV2 [redacted]] and the friend who was helping him;

(3) That Specialist Thompson then knew Sergeant Craig had the motive to confront and probably kill them;

(4) That Specialist Thompson then knew Sergeant Craig had a weapon with which he could confront and probably kill them;

(5) That under these circumstances, their deaths were the foreseeable result of Specialist Thompson's assistance to Sergeant Craig;

(6) That Specialist Thompson's knowing and willful actions facilitated Sergeant Craig's opportunity to kill these two Soldiers;

(7) That Specialist Thompson's actions amounted to culpable negligence. . .

(8) That Specialist Thompson's culpably negligent acts were a proximate cause of the deaths of both [PV2 [redacted] and SPC [redacted]] . . .

(9) That Specialist Thompson did not mistakenly believe that Sergeant Craig "just wanted to talk with them" or that he desired entry into the home for an innocent purpose. And if he did, the Government proved beyond a reasonable doubt that any such mistake of fact was unreasonable under the circumstances; and

(10) The Government also disproved beyond a reasonable doubt that Specialist Thompson provided knowing and willful assistance to Sergeant Craig under duress. . . .

Appellant now argues his convictions warrant reversal because the military judge's special findings convicted him as a perpetrator of involuntary manslaughter, a theory not presented at trial, rather than under a theory of aiding and abetting involuntary manslaughter. Moreover, appellant argues that the military judge's special finding that appellant knew Sergeant Craig would *probably* kill is

insufficient to satisfy the knowledge required for an aider and abettor theory of liability. Appellant also argues that because aiding and abetting requires specific intent, appellant's mistake of fact needed only to be honest, rather than both honest and reasonable. As discussed below, we disagree.

LAW AND DISCUSSION

A. The Military Judge's Special Findings

1. Standard of Review

We analogize special findings in a bench trial to instructions in a trial before members. *United States v. Falin*, 43 C.M.R. 702, 704 (A.C.M.R. 1972). This court "adopt[ed] the standards applied to appellate review of special findings under Fed.R.Crim.P. 23(c), for appellate review of special findings under R.C.M. 918(b)." *United States v. Truss*, 70 M.J. 545, 547 (Army Ct. Crim. App. 2011) (citation omitted). That is, "[s]pecial findings for an ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error." *Id.*

We review legal and factual sufficiency under Article 66, UCMJ.[9] "The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). "The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

2. Article 77, UCMJ – Theories of Criminal Liability

"Article 77 does not define an offense" but simply clarifies "that a person need not personally perform the acts necessary to constitute an offense to be guilty of it," a legal principle found at common law. *Manual for Courts-Martial, United States* (2016 ed) [*MCM*], pt. IV, ¶1(b)(1). The statutory language of Article 77 provides:

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[9] Article 66, UCMJ, has been amended to modify the statutory standard for factual sufficiency review. Fiscal Year 2021 National Defense Authorization Act (NDAA), P.L. 116-283, 1 January 2021. Because appellant's offenses occurred prior to 1 January 2019, we review under the previous version of Article 66, UCMJ. *See Manual for Courts-Martial, United States* (2016 ed) [*MCM*].

> Any person punishable under this chapter who –
>
> (1) Commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) Causes an act to be done which if directly performed by him would be punishable by this chapter;
>
> is a principal.

10 U.S.C. § 877.

The statute eliminated common law distinctions between a principal in the first degree (the perpetrator or actual offender who committed the crime); a principal in the second degree (someone who aids or abets, counsels, commands, or encourages the commission of the crime, while present, or constructively present); and an accessory after the fact (someone who was not present but provides assistance after, knowing a crime has been committed). *Manual for Courts-Martial, United States* (2016 ed) [*MCM*], pt. IV, ¶1(b)(1); *see also* 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 13.1 at 442 (2018). While the common law distinctions have been erased in the statute, the *MCM*'s explanation to Article 77 uses "perpetrator" and "other party" to help clarify the necessary mens rea to be guilty as a principal, which is often an area of confusion. *MCM*, pt. IV, ¶1(b)(2),(4)-(6); *see e.g., Thompson*, 81 M.J. 824; LaFave, *supra*, at 466 ("Considerable confusion exists as to what the accomplice's mental state must be in order to hold him accountable for an offense committed by another.").

In our previous decision in this case, this court discussed in great detail principal liability as an aider and abettor under Article 77, UCMJ. *Thompson*, 81 M.J. at 831-833. And as this court discussed, "criminal liability as a principal under an aider and abettor theory is one of shared intent." *Id.* (citing *Nye & Nissen v. United States,* 336 U.S. 613, 620 (1949)). That is, to be guilty of an offense committed by a perpetrator, the other party must have an actus reus (e.g., doing something to aid the crime) *and* share in the criminal purpose or design. *Rosemond v. United States*, 572 U.S. 65, 66 (2014) (determining a person must not merely associate himself with the crime but "participate in it as something that he wishes to bring about" under the parallel federal statute) (internal quotations and citation omitted); *United States v. Jackson*, 6 USCMA 193, 19 CMR 319 (CMA 1955) (to be an aider and abettor "requires concert of purpose . . .a conscious sharing of [the perpetrator's] criminal intent."); *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A. 1990) (the aider must have "sufficient knowledge and participation to indicate that he knowingly and willfully participated in the offense in a manner that indicated he intended to make it succeed")(citation omitted). Thus, it is not

sufficient that an appellant intentionally took certain actions which may have later aided the perpetrator, if the appellant did not intend his acts to have the effect of aiding the crime. LaFave, *supra*, at 469.

As the military judge referenced in his special findings, our superior court in *Jackson* further determined that a lack of shared intent does not absolve the other party of criminal liability: "the aider and abettor may be guilty in a different degree from the principal, each to be held to account according to the turpitude of his own motive." 6 USCMA at 203 (citation and internal quotation omitted)(finding error where appellant was convicted of aiding and abetting murder, not to instruct on the lesser included offense of involuntary manslaughter); *see also United States v. Foushee*, 13 M.J. 833, 836 (ACMR 1982) ("a person may be an aider and abettor to a lesser degree than the principal if he did not share the required criminal intent or purpose of the active perpetrator"). Thus, "it is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator." *MCM,* pt. IV, ¶1(b)(4).

Courts have applied this legal principle in affirming a lesser included offense to the one with which appellant is charged with aiding and abetting. *See e.g., United States v. Richards*, 56 M.J. 282, 286 (C.A.A.F. 2002) (affirming appellant's conviction for voluntary manslaughter, under an aider and abettor theory, as a lesser included offense to unpremeditated murder); *United States v. Hofbauer*, 2 M.J. 922 (A.C.M.R. 1976) (affirming only aiding and abetting assault and battery where evidence failed to show appellant shared intent to commit aggravated assault).

3. Discussion

Here, appellant does not contest his level of mens rea nor that involuntary manslaughter is a lesser included offense of premeditated murder. Rather, appellant argues he was convicted under a theory not presented at trial. That is, the military judge's special findings–in stating appellant's culpably negligent acts were the proximate cause of the death of the victims–reflect appellant was convicted as a perpetrator, i.e., the one who committed the offense of involuntary manslaughter rather than as an "other party" being criminally liable for aiding and abetting SGT Craig's crime. Consequently, appellant argues his convictions should be set aside. We disagree.

The CAAF has held, "[a]n appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented at trial." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *Chiarella v. United States,* 445 U.S. 222, 236-37 (1980)). Here, however, the theory of appellant's criminal liability was the same for the charged offense (premeditated murder) as it was for the lesser included offenses (voluntary and involuntary manslaughter): (1) that appellant drove

Sergeant Craig to the victim's apartment, (2) checked whether the door was locked, (3) knocked on the apartment door and rang the doorbell, (4) gained access to the apartment by falsely stating he had left a laptop there at the party the night before, and (5) remained until Sergeant Craig walked into the apartment and began shooting the victims. The only difference between the offenses was appellant's state of mind in committing these acts.

The government notified defense through its various bench briefs that, in the alternative to premeditated murder, the government intended to argue appellant's actions, and not Sergeant Craig's, constituted culpable negligence under involuntary manslaughter. The defense did not object to the consideration of the lesser included offense; to the contrary, the defense specifically requested the military judge consider the lesser included offense of involuntary manslaughter during his deliberations. The defense just disagreed on whose actions must be culpably negligent, arguing to find appellant guilty of involuntary manslaughter, SGT Craig's act of shooting the victims must have been culpably negligent. Yet, from the charge sheet to the evidence presented at trial, the government's theory was never that SGT Craig's shooting of the two victims was anything but an act committed with the specific intent to kill.

We find the military judge's special findings are clearly supported by the record. We also find that appellant was convicted of involuntary manslaughter as a perpetrator rather than as an aider and abettor to that offense. That is, while appellant provided assistance to SGT Craig, appellant's assistance, in and of itself, constituted a crime under the UCMJ without the need for vicarious liability as an aider and abettor. While the special findings refer to appellant's knowing and willful assistance to SGT Craig, that knowledge and willfulness refers to appellant's actions. In other words, appellant actions were neither inadvertent nor involuntary. But it does not extend to the requisite mens rea for the offense. By finding appellant's actions were culpably negligent and that those culpably negligent acts were a proximate cause of the victims' deaths, the factfinder, in essence, found that appellant was the one who actually committed the offense of involuntary manslaughter. We disagree with appellant that this was error warranting reversal.

We recognize that the law of aider and abettor, as reiterated by the military judge in the special findings, may not be a perfect fit for involuntary manslaughter by culpable negligence under Article 119, UCMJ. Specifically, the statement of law that an "aider and abettor must knowingly and willfully participate in the commission of the crime *as something he wishes to bring about and seek by his action to make succeed.*" (emphasis added). This statement recites Judge Learned Hand's "oft-quoted" "canonical formulation" from *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) which was later appropriated by the Supreme Court in analyzing aider and abettor liability in *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949) and echoed in later military court decisions. *Rosemond*, 572 U.S. at 76-77;

see e.g., United States v. Pritchett, 31 M.J. 213, 217 (C.M.A. 1990).[10] In *Rosemond*, the Supreme Court stated this intent requirement is met "when a person actively participates in a criminal venture with full knowledge of the circumstances" of the crime. *Id.* at 77.

Yet, the mens rea required for involuntary manslaughter is only culpable negligence–defined as "a culpable disregard for the foreseeable consequences to others"–a mens rea less than knowledge and specific intent. *MCM*, pt. IV, ¶44.c.(2)(a) (2016 ed.). So, it seems questionable "that a servicemember can be convicted of aiding and abetting a crime that is predicated on negligence." *United States v. Brown*, 22 M.J. 448, 451 (C.M.A. 1986) (Everett, C.J., concurring).[11] If aiding and abetting requires a shared purpose, then how is a person whose mens rea is less than knowledge capable of sharing in another person's purpose or intent?

In *Brown*, the appellant was charged with murder after he allowed another Soldier, who was drunk, to operate his car on the German public highways, resulting in the death of a 15-year-old boy. *Id.* at 449. The appellant, however, pleaded guilty and was convicted of the lesser offense of involuntary manslaughter. *Id.* On appeal, he argued his plea was improvident because he could not be held liable as an

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[10] In *Pritchett*, our superior court outlined the elements of aiding and abetting as follows:

> (1) The *specific intent* to facilitate the commission of a crime by another;
> (2) Guilty *knowledge* on the part of the accused;
> (3) That an offense was being committed by someone; and
> (4) That the accused assisted or participated in the commission of the offense.

31 M.J. at 217 (internal citations omitted) (emphasis added).

[11] As discussed further below, in *Brown,* both the perpetrator and the appellant were culpably negligent. *Brown*, 22 M.J. 448, 451 (C.M.A. 1986). In his concurring opinion, Chief Judge Everett stated, "it is hard to convict someone on a premise that he shared a purpose with another person who had no purpose but was only culpably negligent." *Brown*, 22 M.J. at 451. In contrast, in appellant's case, the actions of SGT Craig (the perpetrator) were not culpably negligent but intentional. But the issue remains the same as in *Brown* because of appellant's mens rea of culpable negligence. It is hard to convict someone on a premise he shared a purpose with the perpetrator if he did not have full knowledge of the perpetrator's intent but was only culpably negligent.

aider and abettor to the other Soldier's culpably negligent actions because there was no sharing of criminal purpose. *Id.* at 449. The court decided it "need not decide in this case whether liability can be based on aiding and abetting a negligent act" though noting several jurisdictions have sustained convictions of involuntary manslaughter as an aider and abettor. *Id.* at n.*. Rather, it sustained Brown's convictions on his own culpably negligent act in turning his car over to someone who was intoxicated, finding the providence inquiry was sufficient where appellant admitted he was culpably negligent and that his conduct was a proximate cause of the death. *Id.*

There is an important distinction between appellant's case and *Brown*. And that is, unlike in *Brown*, the government did not argue that SGT Craig was culpably negligent in killing PV2 [redacted] and SPC [redacted]–to the contrary, and as discussed, the evidence presented at appellant's trial was that the killing was intentional. Thus, unlike in *Brown*, the issue before us is not whether appellant can aid and abet another person's culpably negligent acts. The question as presented by the special findings is whether appellant can be convicted as a perpetrator for his own culpably negligent acts as a lesser included offense of aiding and abetting a specific intent crime. Our sister service court of criminal appeals answered that question in the affirmative in *United States v. Rowden*, 1994 CCA LEXIS 100 (A.F. Ct. Crim. App. 1994). There, appellant unsuccessfully challenged his conviction of involuntary manslaughter where the original charge was for aiding and abetting murder by providing the perpetrator a loaded firearm. Sergeant Rowden argued that "the findings of guilt by culpable negligence . . . created a fatal variance which misled defense in their preparation." *Id.* at *3. The court disagreed, reasoning that whether the charge was murder or involuntary manslaughter, the wrongful act of providing the loaded firearm was the same. *Id.* at *6. As in this case, "the difference between the offenses is one of intent." *Id.*[12] We find *Rowden* persuasive.

We also note that the definition of principal under Article 77, UCMJ, encapsulates both a person who commits an offense and a person who aids and abets an offense. Thus, whether appellant was convicted as an aider and abettor or the perpetrator–both are treated as principals under the law.[13] Thus, it would appear

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[12] In *Rowden*, the military judge "specifically instructed the members that the aiding and abetting theory did not apply to the lesser-included offense of involuntary manslaughter." 1994 CCA LEXIS 100. We find that would have been the appropriate instruction here.

[13] We also note that "Under the common law rules of pleading, it was not necessary for the defendant to be charged specifically as a principal in the first degree or

(continued . . .)

appellant's argument is a distinction without a difference. We conclude, that under these certain circumstances, appellant can be convicted to a lesser degree as a perpetrator although charged with aiding and abetting a greater offense.

For all these reasons, we are unpersuaded that the military judge's findings warrant reversal of appellant's convictions. Consequently, appellant's additional arguments on this issue also fail. They are premised upon a theory that if convicted as an aider and abettor, appellant must have had knowledge of SGT Craig's action or specific intent. But as discussed, the mens rea required for involuntary manslaughter is culpable negligence and the government was not required to prove a more culpable mens rea to meet the elements of that offense.

The military judge's special findings addressed all elements necessary for the convictions. Further, given the evidence presented at trial, the military judge properly found appellant's culpably negligent acts were a proximate cause of the deaths of the two victims. Thus, we conclude the evidence is legally and factually sufficient to support appellant's conviction of involuntary manslaughter.

B. Inconsistent Theories

1. Additional Facts and Background

Appellant's second assignment of error is that his convictions warrant reversal because the government argued inconsistent theories at his and SGT Craig's respective courts-martial. Before appellant's trial, SGT Craig pleaded guilty to the murders of PV2 [redacted] and SPC [redacted]. As part of the plea agreement, the government, the defense, and SGT Craig entered into a stipulation of fact agreeing that SGT Craig's comment "these n[***] got to go" meant "these men needed to stop sleeping with his wife." The stipulation further provided that appellant "was not certain what [SGT Craig] intended to do, in fact 50 percent of him believed that he was just going to talk to or confront [PV2 [redacted]] and 50 percent of him thought he might kill [PV2 [redacted]]."

At appellant's rehearing, the defense moved to compel the production of witnesses who would authenticate portions or the entirety of the stipulations of fact from SGT Craig's trial, as well as appellant's previous trial, which the defense intended to introduce at appellant's rehearing. The government opposed. After discussing defense's motion with the parties during an Article 39(a) session, the

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(. . . continued)
principal in the second degree; a general allegation that the defendant was a principal would suffice." LaFave, *supra*, § 13.1(d)(2) at 449.

military judge made a preliminary ruling of inadmissibility for the stipulations of fact and denied the motion to compel witnesses. During closing arguments, the government argued that SGT Craig:

> Takes out a Glock, puts it on his lap, says "They've got to go." What other way – what other way is there to interpret this? What other ways is there to interpret that? But to realize, to understand Sergeant Craig wants to kill this guy. The accused doesn't say there's a different way. . . It's obvious he knew.

On appeal, appellant contends the government violated his due process rights by arguing a theory–that appellant *knew* SGT Craig intended to kill the victims when he said "these n[***] got to go"–which was inconsistent with the government's theory during SGT Craig's guilty plea–that SGT Craig only meant the men needed to stop sleeping with his wife and that appellant was *uncertain* what SGT Craig intended to do. Appellant also argues the military judge erred in ruling SGT Craig's stipulation of fact was inadmissible at appellant's trial. We disagree on both counts.

2. Law and Discussion

This court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *United States v. Frost,* 79 M.J. 104, 109 (C.A.A.F. 2019)). To be admissible, evidence must be logically and legally relevant and not otherwise be excluded for prejudice, confusion, waste of time, or other reasons. Military Rules of Evidence [Mil. R. Evid.] 401, 402, 403. Here, the military judge's discussion with counsel during the Article 39(a) illustrated the questionable relevancy of a stipulation of fact entered into as part of a plea agreement in a co-accused's case during appellant's separate proceeding. The military judge also expressed concerns about the use of the stipulations not only by the defense but also the government. In ruling the stipulation of fact was inadmissible, we find no abuse of discretion.

This Court previously addressed inconsistent theories in *United States v. Turner*, 2018 CCA LEXIS 592 (Army Ct. Crim. App. 30 Nov. 2018), in which the court noted while the Supreme Court and other federal appeals and district courts have addressed the right and left limits of when the government's conflicting theories violate due process, it appeared to be "an issue of first impression for military courts." *Id.* at *15 (citing in part *Bradshaw v. Stumpf,* 545 U.S. 175 (2005); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997); *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000)). In reviewing those opinions, the *Turner* court stated, "Most courts hold that a due process violation will only be found when the inconsistency exists at 'the core' of the prosecution's case." *Id.* (quoting *Sifrit v. Nero*, 2014 U.S. Dist. LEXIS 145759 at *80 (D. Md. 2014). "Discrepancies based on rational

inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts." *Id.* (internal quotations omitted).

First, it is unclear whether a stipulation of fact entered into by both parties and the accused constitutes a government theory at trial. As an agreement between opposing parties, stipulations of fact often include concessions by both sides about what the facts of the case are, rather than representing one party's theory of the case. Second, even if it qualified as a government theory, the two interpretations of SGT Craig's statements are not entirely inconsistent. That is, a statement to the effect of "They've got to go" could reasonably be interpreted to mean that these men needed to stop sleeping with SGT Craig's wife but also mean SGT Craig intended to stop the men from sleeping with his wife by killing them. That is reflected in SGT Craig's stipulation of fact that "50 percent of [appellant] believed that [SGT Craig] was just going to talk to or confront [PV2 [redacted]] and 50 percent of him thought he might kill [PV2 [redacted]]."

Even if there is an inconsistency, appellant's argument hinges on a difference in interpretation of an underlying fact that remained the same from SGT Craig's guilty plea to appellant's contested court-martial–that is, SGT Craig told appellant, "these n[***] got to go." The government's theory that SGT Craig told appellant this remained the same in both trials, as did the core of the government's case. The defense does not argue that there were inconsistent theories about who killed the victims, or what SGT Craig said to appellant, or that appellant assisted SGT Craig. Thus, the only inconsistency, if one exists, is an additional reasonable inference drawn from SGT Craig's statement.

Finally, even were this court to be convinced the government violated appellant's due process rights, any violation was harmless beyond a reasonable doubt. The military judge's special findings made unequivocally clear that he rejected the government's argument that appellant could only interpret SGT Craig's words to mean he intended to kill the victims. Therefore, any inconsistent theories in this case had no bearing on the ultimate convictions.

CONCLUSION

The findings and sentence are AFFIRMED.[14]

[14] The Judgement of the Court, dated 13 December 2023, is amended to reflect "20190525" as the "ACCA Case Number."

Judge EWING and Judge JUETTEN concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

Appendix C: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the Appellant, through appellate defense counsel, personally requests that this court consider the following matters:

1. The conviction is legally and factually insufficient. This is especially so with respect to SPC MB.

2. The acquittal with respect to the child endangerment and the involuntary manslaughter represent inconsistent verdicts.

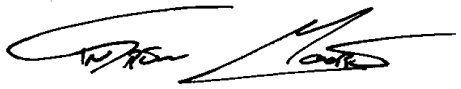
3. Specifications 1 and 2 of Charge I are an unreasonable multiplication of charges.

4. There is post-trial delay.

Certificate of Compliance with Rules 21 and 37

1. This Supplement to Appellant's Petition complies with the type-volume limitation of Rule 21(b) because it contains 5,078 words.

2. This Supplement to Appellant's Petition complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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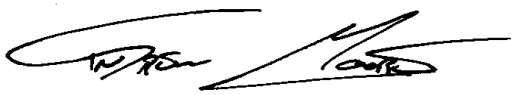
Certificate of Filing and Service

I certify that a copy of the foregoing in the case of *United States v. Thompson*, Crim. App. Dkt. No. 20190525, USCA Dkt. No. 25-0254/AR was electronically filed with the Court and Government Appellate Division on October 28, 2025.



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