IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellant v. Sergeant First Class (E-7) **JOSEPH A. SANTIAGO** United States Army, Appellee	) GOVERNMENT APPEAL AND) BRIEF IN SUPPORT PURSUANT) TO ARTICLE 62, UCMJ)) **Docket No. ARMY MISC 20230094**)) Tried at Fort Campbell, Kentucky on) 14 July and 26 October 2022 and 25–) 28 January 2023 before a general) court-martial, convened by the) Commander, Fort Campbell, Colonel) Travis Rogers, military judge,) presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO FIND PRIOR DOMESTIC VIOLENCE AND THREATS AS EVIDENCE OF INTENT TO MAKE THE VICTIM UNAVAILABLE WHEN HE DENIED ADMISSION OF THE DECEDENT VICTIM'S STATEMENTS UNDER THE FORFEITURE BY WRONGDOING HEARSAY EXCEPTION.

Panel No. 2

Statement of the Case

Appellee is charged with one specification of murder, one specification of injury of an unborn child, and two specifications of assault in violation of Articles 118, 119a and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 919a, 928 [UCMJ]. On 28 January 2023, the military judge sustained appellee's objection to admission of all the decedent victim's statements under the forfeiture by wrongdoing exception[1] to the hearsay rule, finding the government did not carry its burden to show the accused acted with the intent to make the victim unavailable as a witness when he fatally struck her. (App. Ex. XXXVI). On 30 January 2023, the government filed a notice of appeal under R.C.M. 908. (App. Ex. XXXVII).

Statement of Statutory Jurisdiction

The United States may file an interlocutory appeal of "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Art. 62(a)(1)(B), UCMJ. The test is "whether the military judge's ruling directly limited the pool of potential evidence that would be admissible at the court-martial." *United States v. Wuterich*, 67 M.J. 63, 75–76 (C.A.A.F. 2008). Here, the military judge sustained an objection to admission of the decedent victim's statements, which prevents the government from proving the two assault

[1] Mil. R. Evid. 804(b)(6), Statement Offered against a Party that Wrongfully Caused the Declarant's Unavailability.

specifications (Specifications 1 and 2 of Charge III) and presenting evidence of the accused's motive and intent to murder the victim.

The victim's statements are substantial proof of a material fact because they are necessary to prove the two specifications of the assault charge and they provide crucial evidence of the accused's motive, intent, and lack of mistake when he murdered her.[2] Given the liberal construction of Article 62, UCMJ, this court has jurisdiction over this appeal because the exclusion of this evidence prevents the government from introducing "substantial proof" of "fact[s] material in the proceeding." Art. 62(a)(1)(B), UCMJ; *see also* Art. 62(e) ("[t]he provisions of this section shall be liberally construed to effect its purposes"); *United States v. Badders*, 82 M.J. 299, 304 (C.A.A.F. 2022) (noting "Article 62, UCMJ, was patterned after its federal civilian counterpart—the Criminal Appeals Act, 18 U.S.C. § 3731," which "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit") (*quoting United States v. Wilson*, 420 U.S. 332, 337 (1975)).

[2] The military judge ruled the victim's prior allegations of abuse against the accused generally admissible under Mil. R. Evid. 404(b). (R. at 92).

Statement of Facts

A. History of Domestic Violence and Isolation.

AV was appellee's spouse and was between seven and eight months pregnant at the time of her death. (App. Ex. XLV, p. 2). In the months prior to her death, she disclosed to her family and friends that the accused habitually beat her. Her messages paint a picture of the harrowing abuse she experienced and her desperation to leave safely with her children.

In September 2021, the same month that the accused killed her, AV told her friend, SB:

> He is beating the shit out of me. I have bruises all over. I'm just so scared to call the cops and then they let him tight back in. My son notices what is going on and I'm just so worried about them and me.

(Pros. Ex. 29 for ID, p. 6).[3] AV pleaded with her friend not to call the police: "But he's already threaten me with a knife and a gun so please don't call." (Pros. Ex. 29 for ID, p. 3).

She recounted even more horrific abuse to another friend, DF. Also in September 2021, she told him how the accused hit her with a broom and then threatened to "drown me, revive me and drown me again." (Pros. Ex. 28 for ID, p. 11). She described another incident where "he beat the hell out of me" and "boiled

[3] AV's quotes are transcribed exactly as they appear in her original messages.

water and then told me he would pour it all over my face so no one will want me." (Pros. Ex. 28 for ID, pp. 11–12). She further disclosed:

> He just told me the only reason he isnt putting a hole in my head if because my daughter is here. he punched me in thr face twice and punched my chest about 10x. i cant even tough my face and i cant hear without a muffle sound.

(Pros. Ex. 28 for ID, pp. 11–12). On 26 September 2021, the day before the accused beat her to death, she told DF: "He's punched and hit me again laast night and just now. It hurts to even breathe." (Pros. Ex. 28 for ID, p. 48).

In addition to describing the abuse she suffered, she shared photos of her injuries with her mother, DF, and SB. She sent photos showing two black eyes to her mother in August, (Pros. Ex. 27 for ID, pp. 13–15), and the same photos to DF in September. (Pros. Ex. 28 for ID, p. 9). She sent several more photos of bruises on her chest, arms, feet, legs, and face to SB. (*See*, Pros. Ex. 25 for ID).

Due to the accused's constant beatings and death threats, AV was too afraid to report the abuse. She explained to her mother: "im just scared to call and they not make him leave and stay away because that wrath would probably be my last." (Pros. Ex. 27 for ID, p. 4). On occasion, she would ask her friends to anonymously call the authorities. In May 2021, she told her mother she planned to call "Emily" and ask her to call the military police (MPs). (Pros. Ex. 27 for ID, p. 4). In September 2021, she also asked DF to call the MPs and ask them to conduct a welfare check on her. (Pros. Ex. 28 for ID, p. 10). She additionally sent a

message to SB describing an incident where a neighbor called the MPs because she had not been outside in two weeks in an effort to hide bruises from others. (Pros. Ex. 29 for ID, p. 4).

AV was too afraid to tell the truth to the authorities on the multiple times they checked on her. She told DF, "CPS has already been called on him twice, but I've always lied to cover for him. The last words they said to me were 'good luck [redacted] becayse they knew." (Pros Ex. 28 for ID, p. 37). She similarly told SB, "I'm so afraid they let him rgiht back in. He's had CPS called on him three times, but I've lied for every time." (Pros. Ex. 29 for ID, p. 5).

Instead of reporting the abuse, she formed a plan to leave with her two children and stay with DF. In March 2021, she told DF that leaving safely with her children is a priority, but because her mother is sick, she did not know where to go. (Pros. Ex. 28 for ID pp. 1–2). In addition to losing her mother as a resource, AV disclosed feeling trapped because she did not have her own phone, bank account, debit card, or car. (Pros. Ex. 27 for ID, p. 10; Pros. Ex. 28 for ID, p. 14).

DF told her that he was buying a new house soon and she and her children could come live with him. (Pros. Ex. 28 for ID, p. 3). Over the summer of 2021, DF and AV discussed a plan for her to move in with him. In September 2021, DF told AV that he would be closing on his house in two weeks. (Pros. Ex. 28 for ID,

p. 15). On 21 September 2021, AV told DF, "[the accused] leaves for a school in carolina in 2 weeks so it's my perfect time to get out!" (Pros. Ex. 28 for ID, p. 29).

In the weeks leading up to her death, AV often expressed fear to DF that the accused would kill her. On 15 September 2021, she told him, "I'm really lost. I think he's going to kill me one of these days." (Pros. Ex. 28 for ID, p. 8). Regarding their plan to live together, she said, "I feel a lot better knowing I can take my kids to a safe space. I was scared to go to my mom's because he would find us. He will kill me if he ever does." (Pros. Ex. 28 for ID, p. 19). Four days before the accused beat her to death, she lamented to DF that she "cannot do this anymore." (Pros. Ex. 28 for ID, p. 34). She went on, "He's already grabbed [my son] up and I almost lost it then, but he told he if the cops show up he's kill me nad took the .45 to my head. I was terrified." (Pros. Ex. 28 for ID, p. 35).

The accused was scheduled to leave for school on 7 October 2021. (Pros. Ex. 29 for ID, p. 2). AV did not live long enough to execute her plan to flee.

B. The accused's domestic violence culminated in AV's murder.[4]

On 27 September 2021, the accused arrived home at 1634. At 1811, the accused conducted numerous internet searches for ways to awaken someone who is unconscious and unresponsive due to being hit hard in the chest. At 1931 that

[4] All references in this section are to the military judge's findings of fact in App. Ex. XXXVI, unless otherwise stated.

night, he brought his two children across the street and asked his neighbors to watch them. One of his neighbors sensed appellee's distress and repeatedly asked him what happened. Appellee eventually admitted something was wrong with AV.

The neighbor accompanied the accused to his home and found AV in an unconscious state. While appellee had made some attempts to revive AV, he did not call 911 until his neighbor discovered AV and directed him to do so.

AV never regained consciousness. On 3 October 2021, AV died from the multiple blunt force injuries she sustained on 27 September 2021, including a fractured sternum. An emergency cesarean delivery was performed, and her baby survived. (App. Ex. XI-A, p. 25).

C. The military judge sustained the defense's objection to admission of AV's statements.

On 28 January 2023, the military judge sustained the defense objection to admission of AV's statements under Mil. R. Evid. 804(b)(6). (R. at 160). The military judge provided a written ruling where he found the government proved by a preponderance of the evidence that the accused caused AV's unavailability, but that "the preponderance of evidence does not establish that the Accused caused AV's unavailability *with the intent* to make her unavailable to be a witness against him." (App. Ex. XXXVI, pp. 5–6) (emphasis in original).

The military judge found the accused attempted to make AV conscious once she was unconscious, and "[c]onsciousness would prove to be the opposite of

unavailable." (App. Ex. XXXVI, p. 6). Additionally, the military judge noted that there was no evidence supporting that the accused learned of AV's plan to leave him, and there was no evidence of ongoing court cases or criminal cases pending against the accused. (App. Ex. XXXVI, p. 6).

The military judge made findings of fact that AV told her friends and family the accused threatened to kill her on multiple occasions if she reported his abuse to law enforcement. (App. Ex. XXXVI, p. 3). Further, he found that AV shared photos of her two black eyes and claimed they were caused by the accused's abuse. (App. Ex. XXXVI, p. 3). The military judge also found that AV was in a car accident close in time to sharing photos of her black eyes, and the accused claimed her black eyes were caused by the car accident. (App. Ex. XXXVI, p. 3–4). Additionally, the military judge found that AV did not disclose abuse to the military police when in the presence of the accused. (App. Ex. XXXVI, p. 4). However, the military judge did not reconcile conflicting evidence regarding the source of AV's injuries and did not make a finding of fact regarding whether the accused in fact abused and threatened AV prior to her death. As a result, he did not consider abuse and threats in his analysis of whether the accused had the intent to make AV unavailable as a witness against him.

Standard of Review

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). "It is an abuse of discretion if the military judge: (1) predicates his ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) fails to consider important facts." *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (internal quotations omitted).

Law

As a general rule, an out-of-court statement offered for the truth of the matter asserted is inadmissible hearsay. Mil. R. Evid. 802. However, there are numerous exceptions to the hearsay rule. *See generally*, Mil. R. Evid. 803, 804. One exception is "forfeiture by wrongdoing," which is codified in Mil. R. Evid. 804(b)(6). The rule allows admission of an unavailable declarant's statements "offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result." *Id.* The advisory committee for Fed. R. Evid. 804(b)(6) noted the rule was meant to be a "prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice." *United States v. Marchesano*, 67 M.J. 535, 542 (Army Ct. Crim. App. 2008).

The standard for admitting evidence under MRE 804(b)(6) is a preponderance of the evidence. *Id.* at 544. To establish that a declarant's statements qualify for the exception, "(1) the party against whom the statement is offered must have wrongfully caused the declarant's unavailability as a witness, and (2) the party caused the witness's unavailability with the intent to make that witness unavailable, i.e., that the accused intended their conduct to prevent the witness from testifying against them in court." *Becker*, 81 M.J. at 489.

Federal courts "have sought to effect the purpose of the forfeiture-by-wrongdoing exception by construing broadly the elements required for its application." *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005) *cert. denied*, 546 U.S. 912 (2005). An intent to cause a declarant to be unavailable "need not be motivated solely by the desire to prevent the declarant's would-be testimony, rather, only that it was a motivating factor in [his] decision to take such an action." *Becker*, 81 M.J. at 489 (citing *United States v. Jackson*, 706 F.3d 264, 269 (4th Cir. 2013)). Furthermore, the forfeiture by wrongdoing exception applies even to "situations where there was [no] ongoing proceeding in which the declarant was scheduled to testify." *United States v. Miller*, 116 F.3d 641, 688 (2nd Cir. 1997). As the Second Circuit explained in *United States v. Dhinsa*, "[t]he application of [the forfeiture rule] under these circumstances is both logical and fair since a contrary rule 'would serve as a prod to the unscrupulous to accelerate the timetable

and murder suspected snitches sooner rather than later.'" 243 F.3d 635, 652 (2nd Cir. 2001) (quoting *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996)).

Death is not the only way a declarant may be unavailable such that his or her statements are admissible under Mil. R. Evid. 804(b)(6). A declarant is also considered unavailable under this rule if she exercises a claim of privilege, refuses to testify, has a lack of memory, is infirm, or cannot be compelled to attend by process. Mil. R. Evid. 804(a).

In *Giles v. California*[5], the Supreme Court recognized that the forfeiture by wrongdoing exception could apply in domestic violence relationships that culminate in murder when the dynamics of the relationship demonstrate the accused's intent to isolate the victim and prevent her from seeking help—thereby effectuating her unavailability to testify against him. 554 U.S. 353, 377 (2008). Specifically, the Court said:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an

[5] In *Giles,* Court found the accused's right to confrontation was violated where a rule of evidence allowed the forfeiture by wrongdoing exception to apply whenever the defendant intentionally made the victim unavailable—regardless of whether there was an intent to prevent the witness's testimony. *Giles*, *554* U.S. at 353. However, the Court clarified that statements made by a domestic violence victim "to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment" would not be testimonial statements, and therefore not barred from admission under the Confrontation Clause. *Id.* at 376.

> abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution --rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Id. The Court of Appeals for the Armed Forces (CAAF) has referenced this domestic violence framework when considering a party's intent to cause a declarant's unavailability. *See United States v. Becker*, 81 M.J. 483, 489 n.2 (C.A.A.F. 2021) (citing *Giles*, 554 U.S. at 377).

Argument

1. The military judge abused his discretion by failing to make factual findings regarding the alleged prior abuse and threats.

The military judge did not make adequate factual findings regarding the months of abuse and death threats AV claimed she experienced at the hands of the accused, reflected in the messages she sent to her mother, DF, and SB. (Pros. Exs. for ID 27, 28, & 29). Instead, the military judge found: AV took pictures of herself with black eyes close in time to a car accident; AV sent these photos to her mother, DF, and SB and alleged they resulted from abuse from the accused; a neighbor expressed concern AV was being abused; the accused told the neighbor AV's black eyes were from a car accident; the military police conducted a welfare check

on AV with the accused present and AV did not disclose abuse; AV told her mother, "[d]on't call the cops, he told me not even a judge will keep him from killing me if I try to take the kids;" and AV told DF, "[the accused] has threatened to kill me and make my kids orphans if the cops show up," and "[h]e told me if the cops show up he'll kill me and took the .45 to my head." (App. Ex. XXXVI pp. 2–3). However, the military judge did not make factual findings regarding whether the accused *actually* abused and threatened AV.

By failing to find whether abuse and threats occurred, the military judge failed to reconcile key facts and thereby abused his discretion. In *United States v. Solomon*, CAAF found the military judge abused his discretion in his Mil. R. Evid. 413 analysis because he did not reconcile evidence that the accused committed a sexual offense with evidence that the accused was in police custody at the same time as the alleged sexual offense. 72 M.J. 176, 180–81 (C.A.A.F. 2013). Likewise, here, the military judge did not reconcile evidence supporting abuse with evidence indicating AV's injuries resulted from a car accident.

Whether the accused abused and threatened AV is critical to the analysis of whether the accused had the intent to make AV unavailable under *Giles.* 554 U.S. at 377 (finding that "[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry"). Oddly enough, the military judge appeared to recognize the relevancy of earlier

abuse and threats because he referenced the *Giles* framework for domestic violence in his "LAW" section. (App. Ex. XXXVI, pp. 4–5). However, he failed to make findings of fact regarding the alleged prior abuse and death threats, and accordingly failed to apply the domestic violence framework in his analysis of whether the accused intended to make AV unavailable. The military judge thus "use[d] incorrect legal principles" and "fail[ed] to consider important facts" in his analysis of the accused's intent. *Becker*, 81 M.J. at 489.

Considering the Supreme Court's domestic violence framework in *Giles* and the evidence of relentless violence and death threats AV experienced—which is corroborated by photographs and messages to three different individuals—the preponderance of the evidence supports a finding that the accused had the intent "to prevent testimony to police officers or cooperation in criminal prosecutions" when he beat her to death. *Giles*, 554 U.S. at 377. The military judge erred by omitting these crucial facts and legal support from his analysis. The military judge further erred in his analysis when he failed to recognize that an individual may have the intent to make someone unavailable in a way other than death.

2. The military judge abused his discretion by narrowing the definition of unavailable.

The military judge erroneously concluded, "[c]onsciousness would prove to be the opposite of being unavailable." (App. Ex. XXXVI, p. 6). This is a clearly erroneous finding of fact. As discussed above, the Supreme Court recognized in

Giles that an "intent to isolate the victim and to stop her from reporting abuse to the authorities" would be evidence of an intent to make her unavailable. *Giles*, 554 U.S. at 377. Furthermore, Mil. R. Evid. 804 explicitly recognizes a person may be unavailable if he or she exercises a claim of privilege, refuses to testify, has a lack of memory, is infirm, or cannot be compelled to attend by process. Mil. R. Evid. 804(a). In all of these scenarios, the individual may be conscious.

United States v. Montague from the Tenth Circuit is instructive of when an individual's statements were admissible under the forfeiture by wrongdoing exception when the domestic violence victim was very much conscious and able to testify. 421 F.3d 1099, (10th Cir. 2005). In *Montague*, the accused's wife refused to testify and invoked her marital privilege. *Id.* at 1103. The court allowed admission of her statements under the forfeiture by wrongdoing exception, referencing "the history of domestic violence" between the accused and his wife. *Id*. The lower court found,

> [T]he government has shown, by a preponderance of the evidence, that the defendant engaged in wrongdoing, that that wrongdoing was at least partially intended to procure the declarant, his wife's, unavailability and that it was procured since she did exercise her marital privilege not to testify against him.

Id. Likewise, had AV survived the accused's brutal attack on 27 September, but refused to report him out of fear he would kill her—as had been her habit the duration of their violent relationship—her prior statements could be admissible

under the forfeiture by wrongdoing exception. As the Supreme Court explained, an intent "to dissuade a victim from resorting to outside help" would demonstrate an intent to make the victim unavailable. *Giles,* 554 U.S. at 377. The military judge erred by myopically concluding the accused could not have an intent to make AV unavailable because he did not have an intent to kill her when he struck the fatal blow. Furthermore, the judge's conclusion that "permanent unconsciousness was not the Accused's intent," is based on flawed logic and ignores critical facts. (App. Ex. XXXVI).

3. The military judge erred in his intent analysis.

The military judge concluded that because the accused attempted to revive AV at some point after she lost consciousness, he had no intent to make her unavailable at the moment he struck her. (App. Ex. XXXVI, pp. 6–7). This analysis is logically flawed and unsupported by the law for several reasons.

First, an intent to cause a declarant to be unavailable "need not be motivated solely by the desire to prevent the declarant's would-be testimony, rather, only that it was a motivating factor in [his] decision to take such an action." *Becker*, 81 M.J. at 489. The military judge never considered that the accused had the intent to prevent AV from reporting him when he struck her—which would be consistent with his attempts to revive her. While there may be myriad reasons why the accused habitually beat AV—jealousy, rage, hatred, etc.—AV's messages reveal

that he also had the intent to intimidate her into silence: he frequently threatened to kill her if she ever reported him to authorities. (*See, e.g.,* Pros. Ex. 29 for ID, p. 3; Pros. Ex. 28 for ID, pp. 11–12, 35). Additionally, the accused's reticence to call 911 indicates his primary concern was preventing an investigation and ensuing criminal proceeding.

Furthermore, *Giles* supports that when the accused has the intent to make the victim unavailable by intimidation through violence and another unavailability results—i.e., death—the declarant's statements may still be admissible under the forfeiture by wrongdoing exception. As the Supreme Court said,

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution --rendering her prior statements admissible under the forfeiture doctrine.

Giles, 554 U.S. at 377. The accused's abusive relationship—which demonstrated an intent to isolate her and dissuade her from resorting to outside help—culminated in AV's murder. Under *Giles,* her statements would be highly relevant under the forfeiture by wrongdoing exception analysis—regardless of whether the accused attempted to revive her after she lost consciousness.

Furthermore, the military judge erred by only considering the accused's actions after he fatally struck AV. (App. Ex. XXXVI). He concluded that because the accused attempted to make AV regain consciousness, "it can be presumed permanent unconsciousness was not his intent when acting." (App. Ex. XXXVI). Certainly, an individual's actions after an event can be circumstantial evidence of that individual's intent during the event. However, the military judge erred by failing to consider the accused's actions before he killed AV—i.e., the multiple times he threatened to kill her—as evidence of intent. His numerous death threats are evidence that the accused had the intent to kill AV at the time he beat her to death. The military judge erred by failing to even consider these death threats in his analysis of whether the accused had the intent to make AV unavailable.

Additionally, the military judge erred by concluding that "permanent unconsciousness was not the Accused's intent" because he attempted to revive her. (Ap. Ex. XXXVI). The military judge failed to consider that the accused could have had the intent to kill AV—and then once confronted with the horrific result of his actions, felt regret or fear of the consequences, and tried to undo what he had done. Put simply, just because evidence suggests that the accused had a certain intent after committing an action, does not mean he had the same intent during his commission of that action. Ultimately, not only did the judge give

disproportionate weight to the accused's actions after he killed AV, he did not consider the accused's pattern of domestic violence leading up to AV's murder.

The violent nature of the accused's and AV's relationship support findings both that the accused had the intent to make AV unavailable 1) by killing her, and 2) by placing her in a state of fear so she would not report him. The military judge erred by failing to consider the prior domestic violence and death threats as evidence of intent. The military judge further erred by placing inordinate weight on the fact that there were no ongoing proceedings at the time of AV's death.

4. The military judge erred in his totality of the circumstances analysis by placing disproportionate weight on certain factors and ignoring others.

A criminal proceeding is not required for the forfeiture by wrongdoing exception to apply. *See, e.g., Houlihan*, 92 F.3d at 1279 (holding "we can discern no principled reason why the waiver-by-misconduct doctrine should not apply with equal force if a defendant intentionally silences a *potential* witness") (emphasis original). The *Houlihan* court further explained, "when a defendant murders such a witness (or procures his demise) in order to prevent him from assisting an ongoing criminal investigation, he is denying the government the benefit of the witness's live testimony at a future trial." *Id.* Likewise, here, the accused threatened and beat AV to prevent her from reporting his abuse, and thus denied the government the benefit of her testimony at a potential domestic violence trial against the accused.

The facts of this case are starkly distinguishable from *United States v. Becker*, where the CAAF found the judge did not abuse his discretion when he denied admission under the forfeiture by wrongdoing exception, in part, because there were no ongoing proceedings. 81 M.J. 483 (C.A.A.F. 2021). In *Becker*, the victim reported the appellant assaulted her on one occasion, two years before he ultimately killed her. *Id*. at 485. The appellant and victim had divorced in the interim two years and were apparently on good terms, until the appellant "had a visceral reaction when he learned Mrs. Becker had a new boyfriend," and threw her out of a window. *Id*. Thus, in *Becker,* there was no evidence that the accused threatened the victim if she reported him to law enforcement, nor was the abuse as pervasive and continuous as the abuse the accused inflicted on AV.

Unlike in *Becker,* the constant threats and violence support that the accused had the intent to prevent AV from reporting to law enforcement. Furthermore, while the judge was unconvinced that Mrs. Becker "would have been called to render testimony against Appellant in any future proceedings due to her recantation and refusal to cooperate with law enforcement," a critical distinction here is that the accused *caused* AV to refuse to cooperate with law enforcement. *Id.* at 489. As AV explained, due to the constant beatings and death threats, she did not report the accused's abuse and lied to the authorities out of fear. (Pros. Ex. 29 for ID., pp. 3, 5, 6; Pros. Ex. 27 for ID., p. 4; Pros Ex. 28 for ID., p. 37). The accused's

method of violent intimidation to prevent AV from reporting is "abhorrent behavior which strikes at the heart of the system of justice," and is exactly the type of conduct the forfeiture by wrongdoing rule is meant to address. *Marchesano*, 67 M.J. at 542.

The Supreme Court in *Giles* specifically recognized that when an abusive relationship culminates in murder, prior acts of domestic violence are highly relevant because they may show the accused's intent to stop the victim from reporting abuse to the authorities, "rendering her prior statements admissible under the forfeiture doctrine." 554 U.S. at 377. The facts of this case fall squarely within the paradigm of domestic violence envisioned by *Giles*, which would allow admission of the decedent victim's statements under the forfeiture by wrongdoing exception. The military judge abused his discretion when he failed to make findings of fact regarding the prior domestic abuse and failed to apply the domestic violence framework from *Giles* to these facts.

5. This court should remand this case to the military judge to make appropriate findings of fact and apply the correct legal framework under *Giles.*

The CAAF has stated that a military judge's abuse of discretion can take several forms, including a "fail[ure] to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted); *see also United States v. Ramos*, 76 M.J. 372, 377 (C.A.A.F. 2017) (finding abuse of discretion

where military judge "declined to consider[] or mention" testimony critical to agents' decision not to provide appellant Article 31(b) rights) and *Solomon*, 72 M.J. at 180–81 (finding abuse of discretion because military judge in Mil. R. Evid. 413 ruling failed to consider or reconcile key facts, such as alibi evidence and prior acquittals, resulting in incomplete ruling that was "a clear abuse of judicial discretion"). Where a military judge's findings are "incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (*quoting United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994)).

In this case, the military judge failed to make adequate factual findings regarding the accused's prior domestic abuse and threats of violence. Although the military judge made three findings of fact that AV told other individuals that the accused threatened to kill her if she reported his abuse, he made no findings of fact regarding whether the preponderance of the evidence supported that the accused *in fact* threatened and abused her. (App. Ex. XXXVI). He furthermore failed to reconcile evidence that suggested that AV's injuries were caused by a car accident and not by abuse.

These findings of fact—whether the accused actually abused and threatened to kill AV—are critical to the forfeiture by wrongdoing analysis under the domestic violence framework outlined in *Giles*. Not only did the military judge

abuse his discretion by failing to make these findings of fact, he also "use[d] incorrect legal principles" by failing to apply the *Giles* framework, which recognizes that prior domestic abuse and threats are highly relevant to the analysis of whether there was an intent to make someone unavailable to testify. 554 U.S. at 377.

Conclusion

WHEREFORE, the United States respectfully requests this honorable court grant its appeal, vacate the military judge's ruling, and return the case to the military judge for additional findings of fact and legal analysis.

[redacted]

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I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] 17th day of March, 2023.

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