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 REPLY 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

Statements of the Case

The Government hereby incorporates the statements of the case and facts from its brief filed on 17 March 2023, in support of this appeal pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 [UCMJ].[1]

Statement of Statutory Jurisdiction

This court has jurisdiction to hear this appeal because the military judge's ruling "has limited the pool of potential evidence that would be admissible." (Appellee's Br. 3, quoting *United States v. Wuterich*, 67 M.J. 63, 73 (C.A.A.F. 2008)). The requirements for admission under Mil. R. Evid. 804(b)(6) are not foundational requirements. The military judge's ruling did not "set forth foundational criteria for . . . admissibility," but in fact "excluded specific evidence of particular statements by specific persons." *United States v. Bradford*, 68 M.J. 371, 373 (C.A.A.F. 2010). *Bradford* concerned an appeal of a military judge's

[1] In response to appellee's statements regarding pretrial confinement and a demand for speedy trial, (Appellee's Br. 1–2), the government points out that Article 62(c) states: "Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit." The government explicitly disclaims that this appeal was filed for the purpose of delay and affirms that this appeal is not frivolous and has merit. Finally, government counsel have made every effort to diligently prosecute this appeal, as required by Article 62(a)(3). For example, the government filed both its initial brief and this reply brief earlier than required by the rules of this court. *See*, A.C.C.A. R. 20(c)(1) and 15.

ruling which set forth foundational criteria for the admission of a document from a drug testing laboratory. *Id.* at 372. Critical to jurisdiction under Article 62, the judge's foundational requirements were the subject of appeal—not a ruling which prevented the admission of evidence, like in this case.

Unlike in *Bradford*, the government is not in a position where it can meet the requirements for admissibility under Mil. R. Evid. 804(b)(6) at trial. The military judge in *Bradford* explained that the document would be admitted if the government provided "the testimony of anyone involved at any stage in the testing after the initial screening." *Id.* In this case, the government cannot later present evidence at trial to meet the requirements for admissibility under Mil. R. Evid. 804(b)(6).

Appellee distorts the language from *Bradford* where the court noted the military judge's ruling did not exclude "specific evidence of particular statements by specific persons." *Bradford*, 68 M.J. at 373. The *Bradford* court was merely distinguishing its case from a Third Circuit case[2] where the court found jurisdiction to consider the government's appeal of a judge's ruling which did not preadmit certain statements, instead requiring the declarant to testify at trial. The court in *Bradford* noted the case from the Third Circuit treated the ruling as a definitive ruling that excluded evidence. *Bradford*, 68 M.J. at 371. In *Bradford,* "[b]y

[2] *United States v. Hendricks,* 395 F.3d 173 (3d Cir. 2005).

contrast, the military judge . . . has set forth foundational criteria for the admissibility of a document . . .” but did not exclude specific evidence. *Id.*

The military judge’s ruling in the instant case excluded specific evidence: the decedent victim’s statements. Of note, Article 62(e)’s liberal construction clause was not in effect at the time of *Bradford*, which requires “[t]he provisions of this article [to] be liberally construed to effect its purposes.” The Court of Appeals for the Armed Forces (CAAF) has noted that this provision is “intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.” *United States v. Badders*, 82 M.J. 299, 304 (C.A.A.F. 2022) (quoting *United States v. Wilson*, 420 U.S. 332, 337 (1975)). Indeed, it would be contrary to the purpose of Article 62, and antithetical to common sense, to not allow the government to appeal a military judge’s ruling because the ruling so expansively limited the pool of potential evidence that the government cannot identify every single item in that pool.

In any event, this court can be confident it has jurisdiction to hear an appeal of a judge’s ruling preventing admission of the decedent victim’s statements under Mil. R. Evid. 804(b)(6) because military appellate courts have already found jurisdiction under Article 62 for an appeal of this very ruling. *See United States v. Becker,* 81 M.J. 483 (C.A.A.F. 2021).

Regarding the requirement that the excluded evidence be "substantial proof of a fact material in the proceeding," the government provided myriad statements in its initial brief that clearly support the accused's motive, intent, and lack of mistake when he murdered AV. (*See, e.g.,* Appellant's Br. at 3–4) ("He's beating the shit out of me;" "he's already threaten me with a knife and a gun;" and "[he] boiled water and then told me he would pour it all over my face so no one will want me;") *and* (Appellant's Br. at 6) ("I think he's going to kill me one of these days;" "I was scared to go to my mom's because he would find us. He will kill me if he ever does;" and "he told he if the cops show up he's kill me nad took the .45 to my head").

Additionally, AV's statements on 17 September 2021, "he beat the hell out of me today . . . he punched me in thr face twice and punched my chest about 10x." (Pros. Ex. 28 for ID, pp. 11–12), and on 26 September 2021, "He's punched and hit me again laast night and just now. It hurts to even breathe." (Pros. Ex. 28 for ID, p. 48), support Specifications 1 and 2 of Charge II, respectively. As the government will be unable to prove the assault charge without these statements, they are clearly "substantial proof of a fact material in the proceeding," and thereby provide this court with jurisdiction to hear this appeal. Article 62(a)(1)(B), UCMJ.

Law & Argument

1. The government's request to remand this case is within the scope of this court's Article 62 authority and the appropriate action in this case.

The government is not "inviting this court to perform a review of the evidence as a court of first instance." (Appellee's Br. 15). In its initial brief, the government explicitly requested this court "remand this case to the military judge to make appropriate findings of fact . . . ." (Appellant's Br. 21). Unlike in *United States v. Baker*, where the CAAF reversed the lower court for making a finding of fact in an Article 62 appeal, the government is not requesting this court make any findings of fact. 70 M.J. 283, 290 (CA.A.F. 2011).

A remand is the appropriate remedy in this case. "If the 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)). The military judge abused his discretion in this case because he "fail[ed] to consider important facts." *Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021). As appellee conceded, the Supreme Court noted in *Giles v. California*[3] that prior domestic abuse "would be relevant, and may support a finding that a murder expressed the requisite intent for the exception." (Appellee's Br. 10). The military judge thus

[3] 554 U.S. 353 (2008).

abused his discretion by failing to consider evidence that supported habitual domestic abuse and violent threats.

The government is also not "presenting many of the same arguments the CAAF explicitly rejected in *Becker*."[4] (Appellee's Br. 17). First, the government did not request this court "'disregard the military judge's analysis and conduct a *Giles* analysis on a particular set of facts determined to be important' by this court." (Appellee's Br. 17) (citing *Becker*, 81 M.J. at 490). On the contrary, the government requested this court "return the case to the military judge for additional findings of fact and legal analysis." (Appellant's Br. 23). Additionally, the facts of this case are distinguishable because *Becker* did not involve allegations of death threats and an extensive history of domestic violence. While the CAAF did not find the military judge in *Becker* ignored important facts, this conclusion rested on evidence that is far from analogous to the evidence in this case. *Becker*, 81 M.J. at 490 n.3.

Like in *United States v. Solomon*, the military judge failed to reconcile evidence that supported domestic abuse with evidence that supported there had not been abuse. 72 M.J. 176, 180–81 (C.A.A.F. 2013). It is not relevant that *Solomon* was a case on direct review. (*See* Appellee's Br. 10–11). The requirement for this court to consider "the evidence in the light most favorable to appellee" is

[4] 81 M.J. 483 (C.A.A.F. 2021).

inapplicable when the military judge failed to make factual findings. (Appellee's Br. 15) (*citing United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020)). This court cannot view the evidence in the light most favorable to appellee and infer those findings, as appellee seems to tacitly request, because that would exceed the scope of its authority to "act only with respect to matters of law." *Baker,* 70 M.J. at 287.

Nor is the government solely requesting to appeal a question of fact. (*See* Appellee's Br. 6, n.5). Like in *United States v. Thompson*, the government is additionally challenging the military judge's "application of the law to his findings of fact" because he failed to apply the *Giles* framework. ARMY 20220663, 2023 CCA LEXIS 131 (Army Ct. Crim. App. 15 Mar. 2023) (summ. disp.). It has been firmly established that a remand is the appropriate remedy in an Article 62 appeal when a military judge's findings of fact are incomplete. *See Kosek*, 41 M.J. at 62 (holding "the case must be remanded to the military judge for further proceedings" because his "findings of fact and conclusions of law are incomplete and ambiguous."). Furthermore, the CAAF has found that the scope of review in Article 62 appeals is broader than a review of legal issues. *See Lincoln,* 42 M.J. at 321 (clarifying its holding in *Kosek* does not limit "the scope of review of Article 62 appeals to legal issues ruled upon by the military judge"). The authority of a court acting on an appeal filed under Article 62 includes a review of the military

judge's findings of fact, and the correct remedy when a military judge's findings of fact are incomplete—as they are here—is a remand.

2. *Giles* demonstrates that the intent element is not "tethered to the wrongful act causing the unavailability." (Appellee's Br. 13).

In the context of abusive relationships that culminate in murder, the Supreme Court in *Giles* explicitly recognized that "[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to [the forfeiture by wrongdoing] inquiry." 554 U.S. at 377. *Giles* demonstrates that if an accused commits acts of violence with the intent to "dissuade the victim from resorting to outside help," and the abuse "culminates in murder," then the victim's prior statements are "admissible under the forfeiture doctrine." *Id.* Thus, if the accused uses violence to deter the victim from resorting to outside help, which results in the victim's death, then the victim's statements are admissible under the forfeiture by wrongdoing exception—even if the accused did not intend to kill the victim.

This interpretation is consistent with the plain meaning of the Military Rule of Evidence that allows admission of a declarant's statement when "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." Mil. R. Evid. 804(b)(6). "That result" refers to "the declarant's unavailability as a witness." Therefore, if an accused acts with the intent to make a declarant unavailable as a

witness, and the victim becomes unavailable as a result of that action, Mil. R. Evid. 804(b)(6) has been satisfied. *Cf. Staub v. Proctor Hosp.,* 562 U.S. 411, 419 n.2 (2011) (stating a tortfeasor may be liable "when he intends to cause an adverse action and a different adverse action results."). As applied here, the military judge found "the preponderance of evidence establishes the Accused wrongfully caused AV's unavailability to testify at trial." (App. Ex. XXXVI). The military judge abused his discretion by failing to make findings of fact regarding whether the evidence supported "[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help." *Giles,* 554 U.S. at 377. Under *Giles,* these facts could support that the accused had the intent to make AV unavailable when he killed her.

Contrary to appellee's assertion, the government does not argue that *Giles* "mandate[s] admission under the facts of this case." (Appellee's Br. 16). The government's position has always been that the military judge failed to make relevant factual findings that *could* support admission under the forfeiture by wrongdoing exception. Because the military judge did not make these findings of fact, the government requests this court remand the case to the military judge to make those findings, and additionally provide guidance to the military judge regarding application of the domestic violence framework from *Giles.*

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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APPENDIX

United States v. Thompson

United States Army Court of Criminal Appeals

March 15, 2023, Decided

ARMY MISC 20220663

Reporter
2023 CCA LEXIS 131 *; 2023 WL 2568811

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

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Stewart. J. Harper Cook, Military Judge. Colonel Joseph M. Fairfield, Staff Judge Advocate.

United States v. Thompson, 81 M.J. 824, 2021 CCA LEXIS 660, 2021 WL 5810563 (A.C.C.A., Dec. 6, 2021)

Counsel: For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Jennifer A. Sundook, JA; Captain Timothy R. Emmons, JA (on brief).

For Appellee: Lieutenant Colonel Dale C. McFeatters, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief).

Judges: Before FLEMING, HAYES, and MORRIS, Appellate Military Judges. Judges HAYES and MORRIS concur.

Opinion by: FLEMING

Opinion

SUMMARY DISPOSITION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO *ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE*

FLEMING, Senior Judge:

In accordance with *Article 62, Uniform Code of Military Justice [UCMJ]*, the government appeals the military judge's ruling to exclude Special Agent (SA) AA's testimony, in toto, because of his exposure to appellee's immunized statement. Upon review of the entire record, we deny the government appeal, concluding the military judge did not abuse his discretion in excluding the testimony and his findings of fact are supported by the record and not clearly erroneous.

BACKGROUND

Appellee is charged at a general court-martial with two specifications of murder, three specifications of accessory after the fact to murder, one **[*2]** specification of child endangerment, and one specification of conspiracy to commit aggravated assault, in violation of *Articles 118*, *78*, *134*, and *81 UCMJ*, *10 U.S.C. §§ 918*, *878*, *934*, and *881*.

United States Army Criminal Investigation Command [CID] SA AA interviewed appellee twice in March of 2017 regarding his role in the murder of two soldiers. Appellee's two interviews, as was CID policy at the time, were not recorded. More than two years later, in June of 2019, appellee pleaded guilty under an aider and abettor theory of liability to two specifications of premeditated murder. In September of 2019, appellee conducted another interview with SA AA, this time under a grant of testimonial immunity. This September 2019 interview, occurring over the course of two days, lasted approximately "8 to 10 hours." In December of 2021, this court held appellee's plea was improvident, set aside the findings of guilty and sentence, and authorized a rehearing.[1]

The government proceeded with appellee's rehearing and interviewed SA AA in mid-November 2022. During that interview, SA AA discussed details of appellee's case that he had learned during appellee's immunized interview in September 2019. The military judge found SA AA "shared immunized information **[*3]** with the current trial team" "after the prosecution team warned

[1] *United States v. Thompson, 81 M.J. 824 (Army Ct. Crim. App. 2021)*.

him to not reveal any immunized information to them."[2] Government counsel disclosed SA AA's spillage to defense counsel. The defense then filed a motion *in limine* to exclude SA AA's testimony as being tainted by appellee's immunized interview.

On 29 November 2022, after a motion hearing, the military judge granted the defense motion *in limine* to exclude, in toto, SA AA's testimony. On 1 December 2022, the military judge granted the government's request to reconsider his ruling but, upon reconsideration, affirmed his ruling. The government filed a notice of appeal under *Article 62, UCMJ* and Rule for Courts-Martial [R.C.M.] 908.

Beyond contesting the government's substantive appeal of the ruling excluding SA AA's testimony, appellee asserts the government appeal lacks jurisdiction because: (1) the government trial counsel failed to state in his notice that the contested matter was substantial proof of a fact *material* in the proceedings; (2) the record of proceedings filed with this court included only the written verbatim transcript and not the audio recording; and (3) the government appeal challenges only a question of fact, rather than a question of law.

LAW AND DISCUSSION

[*4] *Jurisdiction*

Regarding *Article 62, UCMJ* appeals, the government may appeal a military judge's ruling "which excludes evidence that is substantial proof of a fact *material* in the proceeding." *See* *UCMJ Art. 62*. As to the timeline and procedural requirements for filing an *Article 62, UCMJ* appeal, R.C.M. 908(b)(6) requires the trial counsel to "promptly and by expeditious means" forward the appeal with "a statement of the issues being appealed" and "the record of the proceedings" or "a summary of the evidence" if the record has not been completed.

As to appellee's first two jurisdictional arguments, we find them unpersuasive. Although we are confused not only by the trial counsel, Captain CLS, omitting the word "*material*" in his notice, but also by this glaring omission escaping the attention of his technical supervisors, we determine his scrivener's error does not amount to a loss of jurisdiction.[3] Similarly, we find this court possesses jurisdiction in this case when provided with a written verbatim transcript, although *sans* audio recording, in light of the generous allowances under R.C.M. 908(b)(6) permitting a mere summary of the evidence to suffice for jurisdiction.[4] While the government's haphazard approach to the filing of this appeal is far from best practice, **[*5]** we deem their errors in this case are not jurisdictional.

When deciding appeals brought under *Article 62, UCMJ*, this court "may act only with respect to matters of law." *United States v. Baker, 70 M.J. 283, 288 (C.A.A.F. 2011)*. "On questions of fact, [this] court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record." *United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995)*. Appellee cites *United States v. Tucker, 20 M.J. 602 (N.M.C.M.R. 1985)*, for the proposition this court lacks jurisdiction because appellant only appeals a question of fact. We disagree. Appellant's *Article 62* appeal is *not* solely requesting to appeal a question of fact, but also the military judge's ruling excluding evidence based on his application of the law to his findings of fact. We note our superior court, limited by *Article 67(c)(4) UCMJ* to acting *only* with respect to matters of law, has addressed whether immunized testimony tainted the prosecution of a service member. *See e.g.* *United States v. Mapes, 59 M.J. 60, (C.A.A.F. 2003)*; *United States v. McGeeney, 44 M.J. 418, 423 (C.A.A.F. 1996)*.

We review a military judge's decision to exclude evidence for an abuse of discretion. *See* *United States v. Keefauver, 74 M.J. 230, 233 (C.A.A.F. 2015)* (citations omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of

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[2] Although we do not base any of our analysis or decision on SA AA's inappropriate disclosure, as it appears the military judge did not use this fact as a basis to exclude SA AA's testimony, we do pause to note his spillage, even in the face of the government team's warning, illustrates he could not separate the immunized and non-immunized statements in his mind.

[3] Captain CLS's notice of appeal asserted the Staff Judge Advocate, Lieutenant Colonel TS, "authorized the notice of appeal in accordance with Army Regulation 27-10."

[4] When provided with a certified written verbatim transcript, we are left to ponder what, if any, prejudice could remotely exist in omitting the audio recording forming the basis of that certified written verbatim transcript, that would prevent this court from possessing jurisdiction.

choices reasonably arising from the **[*6]** applicable facts and the law." *United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019)* (cleaned up). The abuse of discretion standard requires "more than a mere difference of opinion[;]" rather, the military judge's ruling must be "arbitrary . . . , clearly unreasonable, or clearly erroneous." *United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014)* (cleaned up).

Special Agent AA's Testimony

Appellant avers the military judge's ruling excluding the testimony of SA AA, in toto, was unsupported by the facts or clearly erroneous. We disagree. When an accused shows he has testified under a grant of immunity, the government faces "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar v. United States, 406 U.S. 441, 461-62, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)*. The government "must do more than negate the taint; it must affirmatively prove that its evidence is 'derived from a legitimate source wholly independent of the compelled testimony." *McGeeney, 44 M.J. at 423* (quoting *Kastigar, 406 U.S. at 460*). The government must show by a preponderance of the evidence that the prosecution is based on sources untainted by immunized testimony. *Id.*

In in his initial ruling, the military judge discussed SA AA's testimony where he asserted "nothing in those immunized sessions [from September 2019] 'clarified' what he then knew about the alleged murders from the accused's **[*7]** point of view, 'even a little bit.' The military judge then referenced that during later questioning SA AA "revealed that the accused had 'minimized' his involvement" in his September 2019 interview and "SA [AA] admitted that such 'minimization' by the accused made [SA AA] feel more certain that the accused's earlier version of events [from March 2017] was the true account."

Based on an analysis of this testimony, the military judge found SA AA's "absolute denial that the immunized sessions 'did not clarify anything... even a little bit' about the incident itself [was] an overstatement which detracted from his credibility on this point." The military judge found "the reverse to be true: that the immunized sessions did influence [SA AA], his knowledge of the case, and his ability to testify free from the taint of his exposure to the immunized sessions."

In next ruling on the government motion to reconsider, the military judge expounded upon his initial findings of fact regarding SA AA stating:

> Not only [has SA AA's] anticipated *testimony* been so colored, so has his subjective *belief* that the non-immunized and non-'minimized' statements are the more accurate statements of the accused. At **[*8]** some immeasurable level, his belief stands to impact the factfinder indirectly in the form of his credibility on the stand. Stated another way, SA [AA] presents as a confident witness, resolute that his testimony accurately reflects his memory. Yet, the Government has not disproven that his confident resoluteness is in any way the product of the immunized statements.[5]

As we find the military judge's finding is neither clearly erroneous nor unsupported by the evidence, and he did not abuse his discretion in excluding Special Agent AA's testimony, we will not disturb his ruling.

CONCLUSION

The government's appeal under *Article 62* is DENIED. The record of trial is returned to The Judge Advocate General.

Judges HAYES and MORRIS concur.

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[5] The military judge also addressed the government request to permit SA AA to testify on untainted matters stating "the court was prepared to proceed in this fashion at the outset of this *Kastigar* litigation. However, [SA AA's] testimony and conduct made it clear to the court that such a detailed examination would not change the result" because his testimony was so colored by his subjective belief.

CERTIFICATE OF SERVICE, U.S. v. SANTIAGO (Misc 20230094)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 12th day of April, 2023.

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