

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

BRIEF ON BEHALF OF APPELLEE

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 Commander, Fort Campbell, Colonel T.L. Rogers, military judge, presiding.

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

Assignment of Error

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.

Statement of the Case

On 28 September 2021, appellee, Sergeant First Class (SFC) Joseph A. Santiago, was placed in pretrial confinement. (App. Ex. I). On 13 June 2022, the convening authority referred 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 [UCMJ], 10 U.S.C. §§ 918, 919a, 928, against appellee to a general court-martial. (Charge Sheet).

On 28 January 2023, the military judge sustained a defense objection to statements of the alleged victim. (R. at 174). On the same date, the military judge issued a written ruling with his findings of fact and conclusions of law. (App. Ex. XXXVI). On 30 January 2023, the military judge issued an amendment to his prior ruling. (App. Ex. XLVIII).

On 30 January 2023, the government filed a notice of appeal pursuant to Rule for Courts-Martial [R.C.M.] 908. (App. Ex. XXXVII). On 31 January 2023, appellee demanded speedy trial under the provisions of the Sixth Amendment. (App. Ex. XXXVIII). On 27 February 2023, the government filed the record of proceedings for appeal under Article 62, UCMJ. (Filing of Record of Trial). On 2 March 2023, this court docketed this case. (Referral Letter). On 17 March 2023, the government filed its appeal and brief in support of its appeal. (Gov't Br.).

Statement of Statutory Jurisdiction

“Government appeals in criminal cases are disfavored and may only be brought pursuant to statutory authorization.” *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017). This court reviews “any such authorization against the edict that military courts, as Article I courts, are courts of special jurisdiction and their authority is conferred by statute.” *Id.* (citing *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013)). In an appeal under Article 62, UCMJ, “[t]he burden is on the government to prove jurisdiction by a

preponderance of the evidence.” *United States v. Wolpert*, 75 M.J. 777, 779 (Army Ct. Crim. App. 2016).

Article 62(a)(1)(B), UCMJ only authorizes the government to appeal “[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.” In order to have jurisdiction under this provision, the government appeal must satisfy two jurisdictional prongs: “(1) a ruling excluding evidence, and (2) the evidence excluded must be substantial proof of a fact material in the proceeding.” *Jacobsen*, 77 M.J. at 85-86. Even under a liberal construction of Article 62, UCMJ, “the jurisdictional threshold would still need to be satisfied.” *Id.* at 87.

The government failed to establish the first jurisdictional prong. To determine whether a ruling excludes evidence, “the pertinent inquiry is not whether the court has issued a ruling on admissibility, but instead whether the ruling at issue in substance or in form has limited the pool of potential evidence that would be admissible.” *United States v. Wuterich*, 67 M.J. 63, 73 (C.A.A.F. 2008) (citation and quotation marks omitted). Evidence is not excluded where the ruling sets “forth foundational criteria for the admissibility of a document, but has not excluded specific evidence of particular statements by specific persons.” *United States v. Bradford*, 68 M.J. 371, 373 (C.A.A.F. 2010).

This appeal arises from a government request for a pretrial admissibility ruling on only the grounds of hearsay and confrontation under Military Rules of Evidence [Mil. R. Evid.] 804(b)(6) for “all previous statements by [REDACTED] (App. Ex. XXXII, p.1).¹ In ruling on this motion, the military judge set forth the correct foundational criteria for admissibility under Mil. R. Evid. 804(b)(6). (App. Ex. XXXVI, p.3-7). While the military judge sustained a defense objection related to a particular person, the ruling did not pertain to particular statements. The government declined to identify which statements it wanted the military judge to consider, instead requesting a non-specific, pretrial blanket determination for any prior statement that *may* exist. Accordingly, the military judge’s ruling does not exclude “*specific evidence of particular statements* by specific persons.” *Bradford*, 68 M.J. at 373 (emphasis added).

The broad scope of the government’s pretrial motion and military judge’s corresponding ruling is also fatal to the second jurisdictional prong. The government fails its burden to identify which particular statements are subject to this appeal, instead only vaguely asserting that the statements are direct evidence

¹ Prior to filing its bench brief, the government was unclear whether it was requesting a ruling based on all statements of the alleged victim, or only those covered by the Mil. R. Evid. 404(b) ruling. (R. at 152-54). The parties agreed the government would identify the parameters of its request in its bench brief. (R. at 155-56).

of the two assault specifications and motive, intent, and lack of mistake evidence of the murder specification. (Gov't Br. at 3).²

In order for this court to assess whether the purportedly excluded evidence is substantial proof of a fact material in the proceedings, it must first know which discrete statements are under consideration. *See United States v. Eruaga*, ARMY 20220643, 2023 CCA LEXIS 130 (Army Ct. Crim. App. 13 Mar. 2023) (mem. op.)³ (determining specific evidence of consciousness of guilty and lack of credibility was not substantial proof of a material fact in the context of that case). “All statements” of the alleged victim, made throughout her entire lifetime to myriad audiences, are certainly not *all* substantial proof of facts material to this case. Even if some specific statements could meet the threshold, such a determination would not then confer jurisdiction to all other statements. *See United States v. Hamby*, 2018 CCA LEXIS 411, slip op. at 9-11 (N.M. Ct. Crim. App. 28 Aug. 2018)⁴ (parsing jurisdiction in an Article 62 appeal between

² The page numbers displayed on the government brief do not align with the actual order of the pages. References to the government brief refer to the actual page in order, not the page number written on the document.

³ <https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/793>

⁴ <https://www.jag.navy.mil/courts/documents/archive/2018/HAMBY201800056-UNPUB.pdf>

evidence that met the jurisdictional requirements and evidence that did not);

United States v. Kokuev, 77 M.J. 531, 536 (N.M. Ct. Crim. App. 2017) (same).⁵

Statement of Facts

Appellee incorporates the facts as found by the military judge. (App. Ex. XXXVI). As addressed below, the government failed to prove any findings are unsupported by the record or are clearly erroneous.

Standard of Review

This court reviews a military judge’s ruling to admit or exclude evidence for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017) (citation omitted). The abuse of discretion standard calls “for more than a difference of opinion. The challenged action must be ‘arbitrary, fanciful, clearly erroneous, or clearly unreasonable.’” *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011). “Even if another court may have drawn other findings based on the evidence, the military judge’s decision cannot be reversed based on a mere

⁵ While recognizing this court’s recent decision in *United States v. Thompson*, ARMY 20220663, 2023 CCA LEXIS 131 (Army Ct. Crim. App. 15 Mar. 2023) (summ. disp.), appellee submits the government’s failure to seek review or relief of a matter of law is fatal to this court’s jurisdiction. The government requests this court set aside the military judge’s ruling based on an alleged issue in the completeness of his findings of fact. Its requested remedy is additional fact finding. The issue presented is a matter of fact, outside this court’s limited authority to act. Article 62(b), UCMJ.

difference of opinion or an impermissible reinterpretation of the facts by appellate courts.” *Id.* at 292.

In an Article 62 appeal, this court “reviews the evidence in the light most favorable to the [accused]. On matters of fact with respect to appeals under Article 62, UCMJ, [this court is] bound by the military judge’s factual determinations unless they are unsupported by the record or clearly erroneous.” *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (citations omitted).

Law and Argument

The military judge did not abuse his discretion in sustaining the defense objection to the government’s pretrial motion. The government’s issue presented addresses only one question: whether the military judge abused his discretion in not making certain findings of fact. (Gov’t Br. at 1). The brief in support of the appeal more expansively alleges four issues:

- 1) The military judge erred in failing to make factual findings regarding alleged prior abuse and threats;
- 2) The military judge erred by narrowing the definition of “unavailable”;
- 3) The military judge erred in his intent analysis; and
- 4) The military judge erred in his totality of the circumstances analysis by placing disproportionate weight on certain factors and ignoring others.

This court should deny the appeal because the government fails its burden to prove the military judge abused his discretion. The government's arguments are flawed in that they assert fact finding requirements that do not exist, materially deviate from the arguments presented at trial, and wholly ignore the applicable standard for reviewing facts on an interlocutory appeal.

A. The military judge did not err in not making certain findings of fact.

The government argues the military judge erred by failing to “make factual findings regarding whether the accused *actually* abused and threatened [REDACTED] (Gov't Br. at 13-14). The government's claim rests on the incorrect premise that *Giles v. California*, 554 U.S. 353 (2008) requires the trial judge render findings on incidents of prior abuse or threats when analyzing the forfeiture by wrongdoing exception. Neither Mil. R. Evid. 804(b)(6) nor *Giles* imposes such a requirement.

The military judge correctly articulated the standard under Mil. R. Evid. 804(b)(6): “(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.” (App. Ex. XXXVI, p.4 (citing *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021))).

In sustaining the defense objection, the military judge considered “all evidence submitted in support of all motions thus far filed in this court-martial,” which includes the material underlying the alleged prior abuse and threats. (App. Ex. XXXVI, p.5). After considering this evidence, the military judge rendered findings that the alleged victim herself made allegations of abuse and threats against appellee. (App. Ex. XXXVI, p.2-3).

In *Giles*, the Supreme Court expressly rejected a special test for the forfeiture exception in domestic violence cases. 554 U.S. at 376 (“Domestic violence is an intolerable offense that legislatures may choose to combat through many means--from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State’s arsenal.”). The Supreme Court further elaborated:

The domestic-violence context is, however, relevant for a separate reason. 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. 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. This is not, as the dissent charges . . . nothing more than “knowledge-based intent.”

Id. at 377 (emphasis added).

Nowhere in this text does the Supreme Court impose a requirement to make additional findings of fact or special treatment in cases involving allegations of domestic violence. Rather, the Supreme Court is merely noting that such *evidence* would be relevant, and *may* support a finding that a murder expressed the requisite intent for the exception. The government allegation of error by the military judge ignores 1) that the military judge did consider all of the *evidence* pertaining to the alleged prior abuse and threats and 2) such evidence *may*, but need not always, support such a finding of intent. In the present case, the military judge clearly considered the evidence presented of prior abuse and threats. Nonetheless, the military judge was not bound to render a finding on the ultimate issue of whether or not the abuse factually occurred. Further, and especially examining the evidence in the light most favorable to appellee, the military judge was not bound to find that such evidence supported a finding that the alleged murder expressed the intent to prevent such alleged abuse from being reported.

The government’s reliance on *United States v. Solomon*, 72 M.J. 176 (C.A.A.F. 2013), an appeal on direct review, is also unavailing. (Gov’t Br. at 14). The Court of Appeals for the Armed Forces [CAAF] found a military judge clearly

erred in making “unexplained and unreconciled leaps from the evidence” where he found Solomon committed alleged crimes while the uncontroverted evidence placed Solomon in police custody at the time of the allegations. Such an example in a direct appeal case is inapposite to the present case, where this court is reviewing the evidence in the light most favorable to appellee to ascertain whether the military judge’s findings on appellee’s intent was unsupported by the record or clearly erroneous. The government’s assertion of missing findings of fact does not make out such an error.

B. The military judge did not narrow the definition of “unavailable.”

The government argues the military judge clearly erred in finding “[c]onsciousness would prove to be the opposite of being unavailable.” (Gov’t Br. at 15). The government relies on its misinterpretation of *Giles*, addressed above. Critically, the government again ignores that its citation to *Giles* is referencing the context “[w]here such an abusive relationship culminates in murder.” 554 U.S. at 377. Under this framework, the Supreme Court is addressing how evidence of prior abuse or threats may be circumstantial evidence of intent to make someone unavailable where the person is unavailable on account of being deceased.

The government further contends Mil. R. Evid. 804(a) supports other forms of unavailability when an individual is conscious. This is true, but not at issue in this present appeal. The government at trial requested the military judge find the

alleged victim to be unavailable based solely upon the events of 27 September 2021. (App. Ex. XXXII, p.7-9). Specifically, the government argued:

Once [REDACTED] was unconscious, she never regained consciousness and died because of her injuries suffered either immediately before becoming unconscious or while she was unconscious. (Prosecution Exhibit 18 for Identification). Because the Accused's internet searches indicate [REDACTED] was "hit in the chest," there was no other adult in the house at the time, and the Accused left his unconscious wife without assistance for an hour and twenty minutes, the preponderance of evidence indicates the Accused was the cause of [REDACTED] injuries and thus the cause of her unavailability.

(App. Ex. XXXII, p.9).

The government only requested, and in accordance the military judge only found, unavailability under Mil. R. Evid. 804(a) based upon injuries resulting in her unconsciousness and death. Since the military judge was not presented with other theories of unavailability, he could not abuse his discretion by only finding unavailability in line with what the government requested at trial.

Moreover, even if the government had requested the military judge find the alleged victim was unavailable under other sections of Mil. R. Evid. 804(a), the military judge did not abuse his discretion by only finding her unavailable as a result of her injuries on 27 September 2021. There is no evidence to base a finding of fact under Mil. R. Evid. 804(a) that the alleged victim, prior to being deceased, was exempted from testifying, refused to testify, testified to not remembering, or could not testify because of an earlier infirmity. To the extent this court could

infer any such evidence, when examining such evidence in the light most favorable to appellee, it certainly cannot find the military judge clearly erred in not finding such unavailability.⁶

The government's allegation of error on the definition of unavailability also overlooks that under Mil. R. Evid. 804(b)(6), the intent element is tethered to the wrongful act causing the unavailability: "offered against a party that wrongfully caused . . . the declarant's unavailability as a witness, and *did so* intending that result." Mil. R. Evid. 804(6) (emphasis added). The unavailability at issue being her injuries causing her unconsciousness and death, the military judge did not clearly err to find appellee's attempts to restore her consciousness to be contrary to an intent to cause such unavailability.

⁶ The Supreme Court of Utah articulated the distinction between the ease of assessing unavailability of a deceased individual and the complexity of a living individual:

[F]orfeiture only applies when the state has shown that the witness, whose out-of court statements are at issue, is unavailable at the defendant's criminal trial. Witness unavailability is an easy question to answer when the declarant is deceased because the witness can never be made available regardless of the efforts of the prosecution or the court. . . . It is more difficult to evaluate the availability of a witness who has indicated unwillingness to testify prior to trial. Such a witness could conceivably have a change of heart and opt to testify despite earlier pronouncements to the contrary.

State v. Poole, 232 P.3d 519, 527 (Utah 2010) (internal citations omitted).

C. The military judge did not err in his intent analysis.

The government argues the military judge erred in concluding appellee “had no intent to make [the alleged victim] unavailable at the moment he struck her,” because he attempted to revive her. (Gov’t Br. at 17). The government reiterates its same misguided reliance on *Giles*, suggesting how the military judge *could* have resolved the evidence. The government posits different theories that the evidence could have supported, but it ignores that the evidence is reviewed in the light most favorable to appellee and fails to explain how the military judge’s findings are either unsupported by the record or clearly erroneous. While the military judge *may* have found differently, he was not compelled to do so based on the record. *See People v. Burns*, 832 N.W.2d 738, 745 (Mich. 2013) (Finding evidence of defendant’s criminal act contemporaneous with instruction to child victim “not to tell” and threat that she would “get in trouble” does not *compel* finding of requisite intent to cause unavailability).

In *Baker*, the CAAF acknowledged the standard of review was “critical to the outcome” of that government appeal. 70 M.J. at 287. In an appeal under Article 62, UCMJ, a Court of Criminal Appeals “may act only with respect to matters of law.” *Id.* at 287-88. (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). “When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court’s

findings, but whether those findings are ‘fairly supported by the record.’” 70 M.J. at 288 (citing *Gore*, 60 M.J. at 185). In concluding this court erred in finding the military judge abused his discretion, the CAAF determined this court relied on its own impermissible finding of fact. 70 M.J. at 290. The CAAF counseled “the military judge’s decision cannot be reversed based on a mere difference of opinion or an impermissible interpretation of the facts by appellate courts.” *Id.* at 292.

The question before this court is not whether it, or another military judge, would have decided the question differently, but rather whether, considering the evidence in the light most favorable to appellee, the “military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (citing *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)).

The government is merely inviting this court to perform a review of the evidence as a court of first instance. Such suggestion is inappropriate for a government interlocutory appeal.

D. The military judge did not err in his totality of the circumstances analysis.

The government argues the military judge erred in his totality of the circumstances analysis by placing disproportionate weight on certain factors and ignoring others. (Gov’t Br. at 20). The government rehashes the same flawed assertions from the preceding sections. The government’s reliance on *United*

States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996), a pre-*Giles* decision, is a misplaced restatement of its earlier argument on alternative theories of unavailability. (Gov't Br. at 20). The government also continues to propound its incorrect view of *Giles* as mandating admission under the facts of this case. (Gov't Br. at 22).

Additionally, the government presents distinctions from *United States v. Becker*, but such assertions do not reveal an abuse of discretion by the military judge here. In *Becker*, a government interlocutory appeal, the CAAF addressed for the first time the forfeiture by wrongdoing exception, as codified for hearsay in Mil. R. Evid. 804(b)(6) and established for confrontation in *Giles*. As in appellee's case, the issue under review was the military judge's finding that the government failed its burden of proof under the second element of the exception. 81 M.J. at 489. The facts also similarly addressed the exclusion of statements of the accused's spouse, where Becker caused injuries to his spouse resulting in her death, amid the backdrop of prior allegations of physical abuse and isolation, which she reported then recanted to law enforcement, but separately maintained as true in communication with friends and family. *Id.* at 485-86. Based on the circumstantial evidence available, the CAAF held the military judge did not abuse his discretion, because he "simply was not persuaded that the record supported a

ruling stripping Appellant of his right to confrontation regarding Mrs. [REDACTED] statements.” *Id.* at 490.

The government here is presenting many of the same arguments the CAAF explicitly rejected in *Becker*. The government similarly requests this court strip appellee of his confrontation right based upon circumstantial evidence of intent. The government is asking this court to “disregard the military judge’s analysis and conduct a *Giles* analysis on a particular set of facts determined to be important” to this court. *Id.* The government is requesting this court speculate the alleged victim “would have been called to render testimony against” appellee, even though the military judge aptly found “[t]he Court received no credible information that the Accused became aware of [REDACTED] plans to leave him prior to 27 September 2021. The Court also received no credible information that there were ongoing court cases, criminal investigations, or formal abuse complaints regarding the Accused pending as of 27 September 2021.” *Id.* at 489; (App. Ex. XXXVI, p.6). Additionally, the CAAF rejected comparisons to *Solomon* and *United States v. Commisso*, 76 M.J. 315 (C.A.A.F. 2017) for the proposition that the military judge ignored important facts. *Becker*, 81 M.J. at 490 n.3.

The military judge made thorough findings of fact and conclusions of law supported by his consideration of all the evidence and based on an application of the correct legal principles, including *Becker* and *Giles*, to the statements of the

alleged victim. The military judge's finding that the government failed to establish its burden of proving appellee possessed the requisite intent at the time he caused her unavailability was well within the ambit of his discretion. (App. Ex. XXXVI, p.6). Further, his reliance on evidence of appellee trying to awaken the alleged victim reasonably supports that he lacked such intent. (App. Ex. XXXVI, p.6-7).

In its varied requests to have this court supplant the proper findings of the military judge with an improper *de novo* review of the evidence, the government echoes its fundamentally flawed premise that the hearsay statements of the alleged victim herself are such powerful circumstantial evidence they outweigh the appropriate light and discretion with which this court must review them. The use of the alleged victim's statement to bootstrap their own admission, while authorized under Mil. R. Evid. 104, exposes the inherent unreliability of such evidence, which appellee would not be capable of confronting through cross-examination. Until the enactment of Federal Rules of Evidence 104(a), on which Mil. R. Evid. 104 is patterned, the Supreme Court did not condone the use of hearsay evidence to bootstrap its own admissibility in the context of co-conspirator statements.⁷ *Glasser v. United States*, 315 U.S. 60, 74-75 (1942); *Bourjaily v.*

⁷ The state of Utah has explicitly prohibited bootstrapping in evidence under the forfeiture by wrongdoing exception:

This is one of those instances that demands that we disregard 104(a)'s general rule. The application of forfeiture by wrongdoing acts to

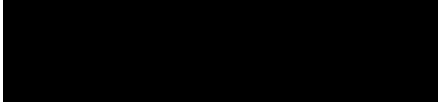
United States, 483 U.S. 171, 181 (1987). While the Supreme Court has since disclaimed a *per se* exclusion bar on using hearsay for such purpose, it still carries a rebuttable presumption of unreliability. *Bourjaily*, 483 at 179. The government's insistence that this court afford talismanic weight to statements of an unavailable alleged victim is unwarranted and insufficient to circumvent the military judge's properly exercised discretion.

abrogate a significant constitutional protection. We do not believe that it should be easily forfeited and thus we require the district courts of this state to apply the rules of evidence, including the rules controlling the admission of hearsay evidence, when they consider whether a criminal defendant has forfeited the right to confrontation.


Poole, 232 P.3d at 527.

Conclusion


Wherefore, appellee requests that this honorable court deny the government's appeal.




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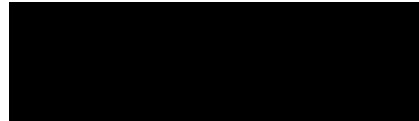
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 6 April 2023.



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