IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Specialist (E-4) **PHILLIP E. THOMPSON, JR.,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE (RETRIAL)** Docket No. ARMY 20190525 Combined rehearing tried at Fort Stewart, Georgia on 13 April 2022, 26 May 2022, 26 August 2022, 28 November 2022, and 7–14 August 2023, before a general court-martial convened by Commander, Fort Stewart, Colonel Harper J. Cook, Military Judge, presiding.

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

Assignment of Error I[1]

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

Assignment of Error II

WHETHER THE INCONSISTENT THEORIES BY THE GOVERNMENT WARRANT REVERSAL.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

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Statement of the Case

At appellant's first trial on 30–31 July 2019, a military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of two specifications of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 [UCMJ].[1] (R. at 382). The military judge sentenced appellant to a dishonorable discharge and confinement for life with eligibility for parole. (R. at 492). In accordance with the pretrial agreement and based on appellant's clemency request, the convening authority only approved the dishonorable discharge and confinement for thirty-five years. (Action). The convening authority credited appellant with 126 days of confinement credit. (Action).

On 6 December 2021, this court set aside the findings and sentence and authorized a rehearing. (App. Ex. III). On 7–14 August 2023, appellant was retried at a combined rehearing at Fort Stewart, Georgia. (R. at 727). A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of involuntary manslaughter, in violation of Article 119, UCMJ,

[1] The military judge granted the government's motion "to withdraw and dismiss Charge II and its Specification in accordance with the pretrial agreement." (R. at 382).

10 U.S.C. § 919.[2] (R. at 1364). The military judge sentenced appellant to a dishonorable discharge and eight years of confinement. (R. at 1517). On 21 November 2023, the convening authority approved the sentence and credited appellant with 1,004 days of confinement. (Action). On 14 December 2023, the military judge entered judgment. (Judgment).

Statement of Facts

On 5 March 2017, Sergeant [SGT] SC, with the assistance of appellant, murdered Specialist [SPC] [redacted] and Private [PVT] [redacted]. (R. at 1364–65). On 4 March 2017, SGT SC saw his wife "hugging up" with SPC [redacted] at a party at SPC [redacted]'s home. (R. at 883; Pros. Ex. 84, p. 1). Sergeant SC and his wife, JC, were undergoing a tenuous separation/divorce at this time. (R. at 834, 837). Appellant was acutely aware of this tension as he was friends with SGT SC and would occasionally act as an intermediary between SGT SC and Ms. JC. (R. at 837).

1. Appellant's written sworn statement.

On 16–17 March 2017, Agent DD with the Criminal Investigation Division [CID] interviewed appellant and after multiple minimizations and denials, appellant ultimately provided Agent DD with the following account. (R. at 1007, 1012–1048). On 5 March 2017, appellant took a call from SGT SC while he was

[2] Appellant was charged with premeditated murder as an aider and abettor, but convicted of involuntary manslaughter as a lesser included offense. (Charge Sheet).

attending church with his wife and children. (Pros. Ex. 84, p. 1). Sergeant SC "want[ed] appellant to come meet [him]" after he left church. (Pros. Ex. 84, p. 1). Appellant agreed and brought along his six-month-old son to meet SGT SC at an undisclosed location. (Pros. Ex. 84, p. 1). Rather than texting appellant an address, SGT SC verbally described to appellant where he was located. (Pros. Ex. 84, p. 1). When appellant arrived to meet SGT SC, he found him standing outside a friend's red Infiniti with a jacket tucked under his arm. (Pros. Ex. 84, p. 1). Sergeant SC got in appellant's truck and "begins talking about seeing his wife hugged up with some [person] on the couch." (Pros. Ex. 84, p. 1).

Appellant asked SGT SC if he tried "to take pictures, so he would have proof 'cause he was supposed to be getting a divorce." (Pros. Ex. 84, p. 1). Sergeant SC said he was not worried about the divorce. (Pros. Ex. 84, p. 1). Sergeant SC told appellant, "they 'got to go' referring to the dude who was with his wife." (Pros. Ex. 84, p. 1). Sergeant SC "pulled out his 'glock' from his waist and placed it on his lap and he was like drive over there." (Pros. Ex. 84, p. 1). Appellant did as SGT SC asked. (Pros. Ex. 84, p. 1). Sergeant SC then told appellant "he wants [appellant] to go see if the back door to the apartment they were in was unlocked, and if it was, [appellant] should go in and ask them if [he] left a laptop" there the night before. (Pros. Ex. 84, p. 1). Appellant, again, did just as he was asked. (Pros. Ex. 84, p. 1).

Once appellant was inside the apartment and the door was unlocked, SGT SC entered the apartment and confronted SPC [redacted]. (Pros. Ex. 84, p. 1). Sergeant SC, after a brief encounter with SPC [redacted], raised the firearm, which was wrapped in a jacket, and shot SPC [redacted] in the chest. (Pros. Ex. 84, p. 1). Sergeant SC approached SPC [redacted] after he stumbled backwards and was gasping for air, stood over him, and said "mhmm mhmmm I got you I got you" before firing another shot at SPC [redacted]. (Pros. Ex. 84, p. 1–2). Specialist [redacted]'s friend, PVT [redacted], was in another room peeking out through the doorway. (Pros. Ex. 84, p. 2). Private [redacted] attempted to run out the front door, but SGT SC turned around and shot him in the jaw. (Pros. Ex. 84, p. 2). Sergeant SC then dropped the firearm and grabbed PVT [redacted] in a choke hold and flung him away from the front door and down on the ground. (Pros. Ex. 84, p. 2). Sergeant SC told appellant to leave but not to tell anybody about this because this could be his boy. (Pros. Ex. 84, p. 2). Appellant heard PVT [redacted] begging for his life as he left the apartment. (Pros. Ex. 84, p. 2).

Appellant did not immediately leave the area. (Pros. Ex. 84, p. 2). He did not return to his vehicle and check on his infant son who was alone in his vehicle. (Pros. Ex. 84, p. 2). Instead, he walked across the street to the church, paused outside briefly, and then returned to his truck once SGT SC had also returned to his truck. (Pros. Ex. 84, p. 2). Sergeant SC asked appellant if he was good, to which appellant replied that he was, but he claimed this was a lie. (Pros. Ex. 84, p. 2).

Sergeant SC then left appellant again to return to the apartment complex. (Pros. Ex. 84, p. 2). Sergeant SC told appellant not to leave, and appellant complied. (Pros. Ex. 84, p. 2). Some time passed before SGT SC called appellant and said that he was waiting for the church goers to clear out and hung up. (Pros. Ex. 84, p. 2). More time passed before SGT SC walked back up to the truck and told appellant to go down the road and then come back. (Pros. Ex. 84, p. 2). Appellant, again, did as he was asked. (Pros. Ex. 84, p. 2).

Sergeant SC eventually reapproached appellant's vehicle and said, "yo we got to go." (Pros. Ex. 84, p. 2). Appellant alleged at this point he confronted SGT SC and stated, "what do you mean 'we' in this there is no 'we' in this." (Pros. Ex. 84, p. 2). Immediately after this alleged confrontation, SGT SC handed appellant "the glock and told [him] to put it back in his case at [appellant's] home. (Pros. Ex. 84, p. 2). Sergeant SC then got back into the red Infiniti and followed appellant to his home. (Pros. Ex. 84, p. 2). Appellant took the weapon into his home along with his son and told his wife he was going back out with SGT SC. (Pros. Ex. 84, p. 2). Appellant at this point was physically separated from SGT SC, had the weapon that SGT SC was carrying, had removed his son from the vehicle, and was safely in his home, but still left and accompanied SGT SC in the aftermath of the murders. (Pros. Ex. 84, p. 2).

Appellant and SGT SC went to their friend's house, Mr. RN. (Pros. Ex. 84, p. 2). Sergeant SC told Mr. RN and his cousin about the murders. (Pros. Ex. 84, p. 2). Appellant claims that he thought SGT SC was then going to take him home, but instead took him to the location where SGT SC was going to dispose of an additional firearm (the ".380") and his clothing that was used in the murders. (Pros. Ex. 84, p. 3).

2. Appellant's prior accounts of the murders.

Prior to providing Agent DD with the above written sworn statement, appellant also provided Agent DD with three different versions of events minimizing his culpability. (R. at 1018, 1035, 1041). Each time appellant was confronted with a falsehood, he would provide more details further inculpating himself in the murders. (R. at 1018, 1035, 1041). Appellant initially stated he never entered the victim's apartment and never got out of the vehicle. (R. at 1017).

During his second version of what occurred and prior to admitting that he was in the apartment with SGT SC for the murders, appellant claimed that he did go into the apartment, but returned to the vehicle prior to SGT SC entering the apartment and murdering the two victims. (R. at 1021–23). During this moment, prior to SGT SC entering the apartment and murdering the victims, but after appellant had allegedly entered the apartment to scope out the area, is when appellant alleged that SGT SC said, "he was just going to talk to the men." (R. at

1023). However, once appellant provided a more accurate account of events he was unable to explain where or when this exchange took place. (R. at 1213–14). During the fourth version of events, appellant admits that he did not return to the vehicle prior to the murders. (R. at 1041). Appellant does not include this alleged statement from SGT SC in his final account or his written sworn statement to Mr. DD. (R. at 1041–48; Pros. Ex. 84).

3. The military judge's special findings.

The military judge found that SGT SC committed premeditated murder upon both PVT [redacted] and SPC [redacted]. (R. at 1365–66). The military judge further found that appellant was "vicariously liable as a principle to the unlawful killings of both [victims]." (R. at 1367). The special findings made clear that this was under an aiding or abetting theory. (R. at 1367). To support his findings, the military judge found that appellant knowingly and willfully committed the following actions: 1) driving SGT SC to the victim's apartment; 2) checking whether the apartment door was unlocked; 3) knocking on the apartment door or ringing the bell; 4) gaining access to the apartment by lying to PVT [redacted]; and 5) staying inside the apartment until SGT SC arrived. (R. at 1368).

The military judge, 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, 19 C.M.R. 319 (1955), found that "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." (R. at 1368). Stating it another way, an "aider or abettor 'may be guilty in a different degree from the active perpetrator, each to be held to account according to the turpitude of his own motive.'" (R. at 1368) (citing *Jackson*, 6 U.S.C.M.A. at 203).

Although the government did not prove that appellant "shared [SGT SC's] premeditated design to kill, intent to kill, or intent to inflict great bodily harm . . . the government did prove . . . that [appellant's] knowing and willful assistance to [SGT SC] amounted to culpable negligence, which was a proximate cause of the deaths of both [victims]." (R. at 1369). The military judge found that the government "*also proved* beyond a doubt the following ten things:" 1) appellant knowingly and willfully assisted SGT SC; 2) appellant knew that SGT SC intended to confront and probably kill both victims; 3) appellant knew SGT SC had the motive to confront and probably kill them; 4) appellant knew SGT SC had a weapon with which he could confront and probably kill them; and 5) under the circumstances, their deaths were a foreseeable result of appellant's assistance; 6) appellant's knowing and willful actions facilitated SGT SC's opportunity; 7) appellant's actions amounted to culpable negligence—negligent acts accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to both victims; 8) appellant's culpable negligence was the proximate cause of the

deaths of both victims; 9) appellant did not mistakenly believe that SGT SC "just wanted to talk to [the victims]" or that SGT SC wanted to enter the home for an innocent purpose,[3] but even if this were the case, the government proved that any such mistake of fact was unreasonable under the circumstances; and 10) appellant's knowing and willful assistance was not under duress. (R. at 1369–71). For those reasons, the military judge found appellant guilty of involuntary manslaughter. (R. at 1371).

Assignment of Error I

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

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Summary of Argument

The military judge relied on established precedent, statute, and persuasive statutory analysis when he found that appellant was guilty of involuntary manslaughter. Involuntary manslaughter is a lesser included offense of

[3] Appellant suggests that the military judge's ruling was erroneous because he found appellant's mistake of fact was unreasonable. (Appellant's Br. 12). However, the military judge explicitly found that appellant did not mistakenly believe SGT SC wanted to enter the home for an innocent purpose, and therefore was not an honest or reasonable belief.

premeditated murder. Once appellant aided SGT SC with his premeditated design to murder the victims, he is viewed as a principle under the eyes of the law. Article 77, UCMJ, removes any distinction between SGT SC's actions and appellant's actions for purposes of criminal liability when they share a common criminal purpose. However, an accused may be guilty of aiding and abetting to a lesser degree than the perpetrator depending on each person's state of mind.

Here, appellant knowingly and willfully aided SGT SC with a premeditated design to unlawfully gain entry to the victims' apartment. He did so with the knowledge that SGT SC was going to confront the victims with a firearm. He further knew that SGT SC had the intent and means to kill the victims, and that he would "probably" do so. Although appellant may not have specifically intended or desired either victim's murder, his facilitation of SGT SC's plan constituted culpable negligence. That is, armed with the knowledge of SGT SC's means and proclivity, he acted with culpable disregard for the foreseeable results of his actions—the brutal murder of both victims.

Law and Argument

1. Article 77 eliminates the distinction between a perpetrator and aider.

A person who unlawfully kills a human being when he has a premeditated design to kill is guilty of murder. Article 118, UCMJ. Any person who aids or abets the commission of an offense punishable by the UCMJ "is a principal."

Article 77, MCM, Pt. IV-2.[4] "Article 77 does not define an offense" but rather "eliminates the common law distinctions between principal in the first degree ("perpetrator"); [and] principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is, present at the scene of the crime—commonly known as an aider and abettor)." *Id.* at (b)(1).

"[A]iding and abetting requires proof of the following: (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." *United States v. Mitchell*, 66 M.J. 176, 178 (C.A.A.F. 2008) (citation and internal quotation marks omitted). "The law requires that it be established that there is a concert of purpose or the aiding or encouraging of the commission of the criminal act and a conscious sharing of the criminal intent." *Pritchett*, 31 M.J. at 216. However, as discussed below, the law does not require the perpetrator and the aider to have the same intent. *See United States v. Jackson*, 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); *United States v. Foushee*, 13 M.J. 833, 835 (A.C.M.R. 1982); Article 77(b)(4), UCMJ; *see also United States v. Rios*, 2006 CCA LEXIS 433, *7

[4] All references to the Articles or Manual for Courts-Martial are referring to the 2016 version of these statutes and publications.

(Army Ct. Crim. App. 29 Sep. 2006); *United States v. Simmons*, 63 M.J. 89, 93–94 (C.A.A.F. 2003).

2. An aider may have a state of mind less culpable than the perpetrator.

"A person may be an aider and abettor to a lesser degree than his co-actors if he did not share the required criminal intent or purpose of his co-actors."[5] The drafters of Article 77 contemplated such a scenario where an aider or abettor's "intent differ[ed] from the perpetrator's." Article 77(b)(4–5), MCM, part IV-1. When the accused had a state of mind less culpable than the perpetrator, the accused "may be guilty of a . . . less serious offense than that committed by the perpetrator." *Id.* "What is required on the part of the aider is 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." *United States v. Pritchett*, 31 M.J. 213, 217 (1990) (citation omitted). His intent for the crime to succeed may be a different or lesser offense than the gravamen of the one the perpetrator ultimately committed. *Supra*, at n.5.

This point is best illustrated in *United States v. Jackson*. In *Jackson*, the appellant and his co-accused were separately convicted of voluntary and

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[5] *United States v. Rios*, 2006 CCA LEXIS 433, *7 (Army Ct. Crim. App. 29 Sep. 2006) (citing *United States v. Simmons*, 63 M.J. 89, 93–94 (C.A.A.F. 2003); *see also United States v. Jackson*, 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); *United States v. Foushee*, 13 M.J. 833, 835 (A.C.M.R. 1982); Article 77(b)(4), UCMJ.

involuntary manslaughter, respectively. *Jackson*, 6 U.S.C.M.A. at 196. The appellant, Jackson, was convicted at a contested trial under a theory that he aided and abetted the perpetrator in an assault and battery foreseeably resulting in the death of the victim. *Id.* The relevant facts of that case are as follows: On a dark and foggy night, the appellant and his co-accused, who were stationed in Germany, came across two German nationals—a man and a woman. *Id*. The man muttered something in German as he passed the two soldiers. *Id.* Both appellant and his co-accused agreed it was likely a derogatory statement. *Id.* at 197. The two men chased down the couple. *Id.* The appellant tackled the man while his co-accused (the perpetrator) pulled out his knife and stabbed the man during the assault. *Id.* at 200. The appellant contested his conviction for voluntary manslaughter on appeal on two grounds: the evidence was insufficient to establish the elements of murder and the military judge failed to instruct the panel on the lesser included offense of involuntary manslaughter. *Id.* at 201, 203.

The CMA found that based on the facts of the appellant's case "the court-martial could reasonably infer a predetermined criminal design to inflict harm." *Id.* at 202. Moreover, that "it would not be unreasonable to conclude therefrom that [the appellant] had expected [the perpetrator] to use a knife if the need arose." *Id.* The appellant was aware the perpetrator was armed with a knife and of his proclivity to fool with his knife. *Id.* The Court pointed out that "participation in a

fight by one who knows his associate and ally is armed and likely to kill constitutes evidence of aiding and abetting sufficient to justify submitting the case to the jury." *Id.* (internal citations omitted). The Court of Military Appeals ultimately concluded that because violence would "naturally flow" from both the appellant's and his co-accused's actions, "[a] homicide resulting from an assault under such circumstances is sufficient to support a conviction for murder." *Id.* at 202–03. This is analogous to what occurred in appellant's case.

3. The victims' deaths were a natural and probable consequence of the criminal venture.

The aider and abettor may also be convicted of crimes committed by the perpetrator "if such crimes are likely to result as a natural and probable consequence of the criminal venture or design." Article 77(b)(5), MCM, part IV-1; *United States v. Richards*, 2000 CCA LEXIS 430, at *10–11 (Army Ct. Crim. App. 15 Sep. 2000), *aff'd*, 56 M.J. 282 (C.A.A.F. 2002). This point is illustrated in *Richards*, where appellant and several co-accused engaged in the assault of the victim. 2000 CCA LEXIS 430 at *6. Appellant, once the victim was knocked to the ground, joined his co-actors in kicking the victim with shod feet. *Id*. One of the co-accused stabbed the victim in the chest resulting in his death. *Id.* at *7. Although appellant was unaware that one of his co-accused had or used a knife, this court found that the stalking and physical assault of the victim was sufficient to prove beyond a reasonable doubt that the crime of voluntary manslaughter was

"likely to result as a natural and probable consequence of the criminal venture or design." 2000 CCA LEXIS at *10–11. The CAAF agreed and affirmed. 56 M.J. at 286. This principle of liability is also illustrated in the MCM: "the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of murder." Article 77(b)(5), MCM, part IV-1. Again, as outlined below, this is perfectly analogous to appellant's case.

4. The military judge's special findings are legally sufficient.

The military judge found that the government proved beyond a reasonable doubt that SGT SC murdered PVT [redacted] and SPC [redacted] with premeditation. (R. at 1365–66). The military judge specified that appellant was vicariously liable as a principle to the unlawful killings (but to a lesser degree) of both victims under an aiding and abetting theory of liability.[6] (R. at 1367). To support his findings, the military judge relied on several of appellant's affirmative acts that demonstrated "sufficient knowledge and participation to indicate that [appellant] knowingly and willfully participated in the offense in a manner that indicated [appellant] intended to make it succeed . . . ." (R. at 1368); *United States v. Davis*, 44 M.J. 13, 18

[6] This finding directly contradicts appellant's conclusion that appellant was convicted as the perpetrator and that "no act of SGT [SC] was imputed to appellant to convict him." (Appellant's Br. 10). In fact, every act of SGT SC was expressly imputed to appellant. (R. at 1365–66).

(C.A.A.F. 1996) (quoting *Pritchett*, 31 M.J. at 217); *United States v. Void*, 17 M.J. 740, 743 (A.C.M.R. 1983).

Under a legal sufficiency analysis, this court is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). However, even if this court were to assume appellant only believed that SGT SC was going to unlawfully enter the victim's home to assault the victims with a deadly weapon, this is sufficient to establish the elements of aiding and abetting a violent criminal venture (e.g., housebreaking, in violation of Article 130, UCMJ, or assault with a deadly weapon in violation of Article 128, UCMJ). As the Court stated in *Jackson*, "A homicide resulting from an assault under such circumstances is sufficient to support a conviction for murder." *Jackson*, 6 U.S.C.M.A. at 203. Appellant's knowledge that SGT SC had the motive, means, and intent to "probably kill" the victims is sufficient evidence for any rational factfinder to find appellant guilty of involuntary manslaughter under a foreseeable consequence theory of liability. (R. at 1369); *see Jackson*, 6 U.S.C.M.A. at 202–03. In other words, the evidence and findings of the military judge were legally sufficient to show that appellant assisted SGT SC with a "criminal venture or design" likely to result in the victims' deaths. Article 77(b)(5), MCM, part IV-1; *see also Richards*, 2000 CCA LEXIS 430 at *11.

Analogous to *Richards*, the military judge expressly found both that appellant's actions provided aid to SGT SC *and* that the murder of the victims was a foreseeable consequence of his actions. *Compare Richards*, 2000 CCA LEXIS 430 at *11 ("Under either theory of criminal responsibility, i.e. aiding and abetting the perpetrator of an offense, or crimes resulting from the natural and probable consequences of a criminal venture, we find that the record contains legally and factually sufficient evidence to support appellant's conviction for voluntary manslaughter.") *with* (R. at 1369) (finding that appellant knowingly and willfully assisted SGT SC when he knew SGT SC had the motive and means to confront and probably kill the victims).

Because there is no requirement that appellant share the same intent as the perpetrator, his finding that an aider may be guilty to a lesser degree than the perpetrator is legally sound. (R. at 1368). Here, the military judge found that although appellant specifically intended to assist SGT SC in confronting the victims with a deadly weapon and knew SGT SC would probably kill them, appellant's intentions fell short of a premeditated desire to kill or inflict great bodily harm. (R. at 1369). Rather, the military judge found that appellant's knowledge and intent reflected culpable disregard for the "foreseeable consequences to others" and that his knowing and willful assistance in the criminal

venture was the proximate cause of the murders. (R. at 1369); Article 119(c)(2)(a)(i), MCM, Pt. IV-63.

5. Appellant was properly on notice of a lesser included offense.

Involuntary manslaughter by culpable negligence is a lesser included offense of premeditated murder. *Richards*, 56 M.J. at 286; *United States v. Wilson*, 26 M.J. 10, 13 (1988). The only differing element being the *mens rea*: "That this act or omission of the accused constituted culpable negligence . . . ." *Compare* Article 118, UCMJ and MCM, Pt. IV, ¶ 43.b.(1), *with* Article 119, UCMJ and MCM, Pt. IV, ¶ 44.b.(2). "The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be tried." *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F 2010). It is a longstanding principle of criminal justice that a "lesser included offense meets this notice requirement if it is a subset of the greater offense alleged." *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016) (quoting *Jones*, 68 M.J. at 468) (citations omitted).

Both at trial, and now on appeal, appellant asserted that he was not on notice of the lesser included offense of involuntary manslaughter. (R. at 1261–64; Appellant's Br. 10). Appellant seems to misunderstand the differing theories of culpability under Article 77. (Appellant's Br. 10). Appellant suggests that he cannot be guilty of involuntary manslaughter as an aider and abettor and therefore

can only be guilty of involuntary manslaughter as a "perpetrator." (R. at 1261–64; Appellant's Br. 10). The military judge considered this argument and properly rejected it. (R. at 1264). The perpetrator, for purposes of this fact pattern, is the one who wielded and used the weapon. *Compare* Article 77(b)(2) *with* (b)(5); *e.g. Richards*, 56 M.J. at 285 (identifying the perpetrator as the one wielding the knife); *Jackson*, 6 U.S.C.M.A. at 201–02 (identifying the perpetrator as the actor of the substantive offense). Additionally, there is no difference in culpability under the eyes of the law between the perpetrator and the aider because both are principals to the crime. *Richards*, 2000 CCA LEXIS 430 at *8–9.

Appellant could have committed involuntary manslaughter as the *perpetrator* by recklessly shooting the firearm himself and unintentionally killing an innocent bystander. Perhaps, had the government changed course midtrial and suggested as much this would pose an issue, but that is not what happened.[7] Rather, appellant was found guilty as a *principal* for intentionally aiding SGT SC's criminal venture. (R. at 1369). Sergeant SC's criminal design constituted premeditated murder, whereas appellant's assistance to SGT SC constituted culpable negligence. (R. at 1365, 1369). This theory of liability is expressly contemplated under Article 77(b)(5) and has been endorsed by this court and the

[7] *But see Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005) (finding that alternate theories presented by the government as to who the shooter was in separate co-accused trials did not constitute a Due Process violation).

CAAF. *Richards*, 2000 CCA LEXIS 430, at *11, *aff'd*, 56 M.J. 282 (C.A.A.F. 2002). Therefore, appellant's argument regarding a lack of notice was adequately addressed at trial and is without merit.[8] (App. Ex. LXI, p. 5; LXIII, p. 3; R. at 1252–55).

6. Appellant's legal sufficiency arguments are unsupported.

Appellant argues that his conviction is legally insufficient because 1) his intent did not overlap with SGT SC's intent; and 2) aiding and abetting requires a specific intent to bring about the crime of premeditated murder. (Appellant's Br. 11). This conclusion is unsupported by the evidence, statute, or case law. First, this argument suggests that appellant and his co-accused must share the same intentions—there is no authority for this proposition. Rather, the law says just the opposite. Although there is a requirement that the appellant 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," *Pritchett*, 31 M.J. at 217, this does not mean that both accused intended the same result from their joint criminal venture. *See Richards*, 56 M.J. at 286. Additionally, this theory of liability necessarily includes "crimes that are likely to

[8] In a footnote, appellant asserts that the government "specifically disclaimed this theory at trial" without any cite to the record. (Appellant's Br. 10–11, n.3). However, the government's review of the record suggests the opposite. (R. at 1263). Additionally, the military judge seemed to adopt findings that comported with both parties' understanding of the law. (App. Ex. LXI, p. 5; LXIII, p. 3).

result as a natural and probable consequence of the criminal venture or design." Article 77(b)(5), MCM, part IV-1. Notably, this is the same state of mind required for involuntary manslaughter.

Here, even if appellant only knew that SGT SC was "probably" going to murder the victims, this is sufficient knowledge to aid and abet SGT SC and make appellant responsible for a crime that was "likely to result as a natural and probable consequence." Article 77(b)(5), MCM, part IV-1. The military judge found that SGT SC had a premeditated design to kill SPC [redacted] and PVT [redacted]. (R. at 1365). He found that appellant knew SGT SC had the *motive* to kill, he knew he had the *means* to kill, and he knowingly and willingly facilitated the *opportunity* to kill at SGT SC's explicit request. (R. at 1367–68). In other words, appellant's intent did overlap with SGT SC, albeit to lesser degrees of culpability. Analogous to the bank robber who may not know with certainty that his partner intends to murder the teller during the course of a robbery, appellant is still responsible for the murderous actions of his partner during this joint venture. Article 77(b)(5), MCM, part IV-1.

Appellant's argument that he must have shared the specific intent to murder both victims is misguided. (Appellant's Br. 11). Appellant only must have a specific intent to assist the perpetrator with a criminal venture in which the likely result is the death of the victims. *Jackson*, 6 U.S.C.M.A. at 203 (finding that

although the appellant was willing to join his co-accused in the assault, it is reasonable he did not intend either of them to use a knife, and thus his criminal intent "was no greater than that of manslaughter").[9] This point is further illustrated in *Jackson* when the CMA specifically found the military judge erred by not instructing the panel on the possibility of involuntary manslaughter.[10] The relevance of this case is emphasized as the military judge expressly relied on *Jackson* when making his findings. (R. at 1368).

The military judge's finding is well-founded in both statute and case law. Despite appellant's knowledge that SGT SC was an angry, armed man with murder on his mind, appellant drove SGT SC to the victims' apartment, gained access under false pretenses, witnessed the murders, and then waited as the getaway driver. (Pros. Ex. 84; R. at 1368–69). An accused can have a specific intent to aid

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[9] Appellant seeks to distinguish his case from *Jackson* by concluding that the two co-accused in *Jackson* shared a common intent to assault the victims and he and his co-accused shared no such intent. (Appellant's Br. 11). This conclusion is unsupported by the evidence or the military judge's findings. *Infra* at n.10. The military judge expressly found that appellant knowingly and willfully aided SGT SC in confronting the victims with a firearm with the knowledge that SGT SC would "probably kill them." (R. at 1369).

[10] *Id.*; *see also Richards*, 56 M.J. at 286 (finding that the appellant's willing participation in an assault was sufficient basis to find he aided and abetted voluntary manslaughter and that the military judge did not err by failing to instruct for involuntary manslaughter because the evidence did not reasonably raise such an instruction); *Rios*, 2006 CCA LEXIS 433, at *7–10 (reversing appellant's conviction for premeditated murder under an aider and abettor theory where the military judge failed to instruct the panel on the lesser included offense of assault with a dangerous weapon).

and abet a general intent crime. *Foushee*, 13 M.J. at 835–36 (finding that although the appellant was not an aider and abettor of assault with intent to commit murder he was guilty to a lesser degree where his intent was limited to assault and battery); *United States v. Hofbauer*, 2 M.J. 922, 926 (1976) (finding that the appellant was not aider and abettor of aggravated assault where his intent was limited to assault and battery). Rather, the specific intent requirement is only that the accused had "the specific intent to facilitate the commission of *a crime* by another," not necessarily the *specific* crime that the perpetrator was ultimately guilty of. *Mitchell*, 66 M.J. at 178.

Here, the military judge laid out a long list of factors and actions that demonstrated appellant's knowledge and participation in a plan that resulted in the murder of two victims. (R. at 1369–71). Appellant's knowledge of SGT SC's intent reflected a specific intent to, at the very least, commit assault with a dangerous weapon and housebreaking. (R. at 1369). Appellant's willful assistance—even if he did not share the premeditated design to kill—was a culpable act resulting in the foreseeable death of both victims. The fact that involuntary manslaughter is a valid lesser included offense of premeditated murder and fits squarely within the exceptions contemplated in the MCM and the case law further illustrates this point. *Supra*, at n.5 (App. Ex. LXI, p. 5; LXIII, p. 3); Article 77(b)(4–5), MCM, part IV-1.

In sum, the military judge's reliance on *Foushee*, 13 M.J. at 835 and *Jackson*, 6 U.S.C.M.A. at 203, to find that "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" is legally sufficient and should be affirmed. (R. at 1368).

Assignment of Error II

WHETHER THE INCONSISTENT THEORIES BY THE GOVERNMENT WARRANT REVERSAL.

Standard of Review

"Where [an] error is constitutional, . . . the government must show that the error was harmless beyond a reasonable doubt to obviate a finding of prejudice." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). This is a question of law, which this court reviews de novo. *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) (citing *United States v. Tearman*, 72 M.J. 54, 62 (C.A.A.F. 2013)).

This court reviews a military judge's decision to admit evidence for abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "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 choices reasonably

arising from the applicable facts and the law." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013) (citations omitted).

Additional Facts

At appellant's trial, defense counsel moved to compel the testimony of the lead prosecutor from SGT SC's guilty plea. (App. Ex. XV). The purpose was to impeach the government by using statements from SGT SC's stipulation of fact to show that the appellant did not know with certainty that SGT SC intended to murder the victims. (App. Ex. XV, p. 3). Specifically, that SGT SC's use of the term "they got to go" did not necessarily mean he was going to kill the victims—or at least that appellant had an honest belief that he may not kill the victims. (App. Ex. XV, p. 3). The relevant statements from the stipulation to appellant's case were as follows:

> [Sergeant SC] told [appellant] that he saw his wife [] with another man last night at the party. [Appellant] asked [SGT SC] if he got any pictures of the event for proof to use during their impending divorce. [Sergeant SC] responded that he was not worried about that and then pulled out his Glock 9 MM set it on his lap and said "These n***as got to go" or words to that effect. [Appellant] asked [SGT SC] what he meant, [SGT SC] repeated, "These n***as got to go" or words to that effect. [Sergeant SC] meant that these men needed to stop sleeping with his wife . . . . When [SGT SC] entered the truck, he was serious, annoyed, and angry. [Appellant] noticed the Accused demeanor: [Appellant] knew that [SGT SC] was serious but was not certain what the Accused intended to do, in fact 50 percent of him believed that he was just going to talk to or confront [the victim] and 50 percent of him thought he might kill [the victim]. Sergeant SC does not have personal knowledge of what [appellant] thought, but after reviewing [appellant's] statements and post-immunity interviews with the

> government investigators and defense counsel, he agrees that this is what he thought and has no reason to dispute his belief.

(App. Ex. XVII(b), p. 7).

The military judge was briefed and received argument from both parties regarding this issue. (R. at 562–82; App. Ex. XV, XX). The military judge made a preliminary ruling that the stipulations of fact from either appellant's or SGT SC's prior trials were inadmissible. (R. at 582). The military judge did not produce a written order or findings for this preliminary ruling and invited defense counsel to reraise the issue during trial if they saw fit. (R. at 582). During the motion hearing argument, the military judge highlighted the following issues: a guilty plea is qualitatively different than a contested trial (R. at 565); there was no military case law upholding the admission of stipulation of fact from a guilty plea in a rehearing (R. at 567); presenting a portion of a plea agreement to the panel members was problematic in that it opened doors to potentially prejudicial evidence (R. at 568); and MRE 410 was potentially being used as a "shield and a sword," which presented issues of fairness. (R. at 569–70).

Law and Argument

"The [Supreme Court] has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." *Bradshaw v. Stumpf*, 545 U.S. 175, 190 (2005) (Thomas, J., Scalia, J.,

concurring).[11] In *Stumpf*, the Supreme Court *disagreed* that the prosecution's use of inconsistent theories as to the identity of the shooter violated due process and required the invalidation of the appellant's guilty plea. *Id.* at 187–88. The Court reasoned that "the precise identity of the triggerman was immaterial to [the petitioner's] conviction for aggravated murder." *Id*. at 187.[12]

1. The government did not violate appellant's right to Due Process.

Appellant argues that the government "knew there was another meaning of 'they've got to go' because they stipulated that SGT [SC's] statement intended to convey only that 'these men needed to stop sleeping with his wife.'" (Appellant's Br. 13). Further, that the government's closing statements arguing that appellant knew this meant SGT SC wanted to kill the victims or at the very least was culpable negligence constituted a Due Process violation. (Appellant's Br. 13–14). Trial counsel's argument did not constitute a Due Process violation because a

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[11] Neither this court, nor the Court of Appeals for the Armed Forces [CAAF] has ever held that the prosecution's presentation of inconsistent theories constituted a due process violation. *United States v. Turner*, 2018 CCA LEXIS 593, *15–16 (Army Ct. Crim. App. 30 Nov. 2018).

[12] The majority's opinion did observe, however, that the "use of allegedly inconsistent theories may have a more direct effect on [the petitioner's] sentence . . . for it [wa]s at least arguable that the sentencing panel's conclusion about [his] principal role in the offense was material to its sentencing determination." *Id*. The Court remanded, however, for a further determination of the impact on the petitioner's sentence, "express[ing] no opinion [in the majority portion of the opinion] on whether the prosecutor's action amounted to a due process violation, or whether any such violation would have been prejudicial." *Id.* Here, the issue is far less critical than the identity of the triggerman.

stipulation of fact at a guilty plea is inherently different than closing arguments at a contested trial. Even if this argument was inconsistent with the stipulation of fact, the argument was a rational inference from the evidence, was not the core of the government's case, and did not otherwise rise to the level that would trigger a Due Process violation.

In *United States v. Turner*, this court analyzed a similar issue and found that highlighting different evidence to support varying degrees of culpability for two co-conspirators did not equate with violating the appellant's constitutional right. 2018 CCA LEXIS 593 at *19 (Army Ct. Crim. App. 30 Nov. 2018), *aff'd*, 79 M.J. 401 (C.A.A.F. 2020) (affirming on other grounds). In *Turner*, the appellant argued that "at his trial he was portrayed as a coldblooded killer, while at his wife's [co-conspirator's] trial he was portrayed as just a 'naïve pawn.'" *Id.* at *14. This court found that "[a]lthough the closing arguments by the same prosecutor in appellant's and his spouse's cases highlighted different evidence supporting their degrees of culpability, 'this does not equate with presenting inconsistent theories in violation of petitioner's constitutional right.'" *Id.* at 19 (quoting *Williams v. Belleque*, 2018 U.S. Dist. LEXIS 136034, *68–83 (D. Or. 2018)).

The *Turner* court effectively compiled a series of Federal cases that "have addressed the right and left limits of when the prosecution's conflicting theories of

liability violate due process."[13] In its research, this court found that "[m]ost courts hold that a due process violation will only be found when the inconsistency exists at 'the core' of the prosecution's case." *Sifrit v. Nero*, 2014 U.S. Dist. LEXIS 145759 at *80 (D. Md. 2014). This was not the case here. Unlike *Thompson* and *Groose*, the underlying facts that were admitted in trial were the same; the identity of the perpetrator remained unchanged; and the motives and theories of liability remained the same. *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997); *Smith v. Groose*, 205 F.3d 1045, 1053–54 (8th Cir. 2000). This was not a case where the prosecution unjustly hid or manipulated evidence. *Id.* The government merely made the argument about the most likely and reasonable interpretation of the evidence: when SGT SC asked appellant to take him to his ex-wife's lover's home; told him he was not worried about the divorce proceeding; told him "they got to go"; showed him a gun with a makeshift silencer; and devised a plan to gain unlawful entry to the home, he was not doing so because he just wanted to talk.

[13] 2018 CCA LEXIS 593 at *15; *e.g., Thompson*, 120 F.3d at 1058 (finding a due process violation where a prosecutor argued different motives, theories, and facts for each defendant to secure convictions at each trial); *Groose*, 205 F.3d at 1053–54 (finding a due process violation where prosecution used "inconsistent, irreconcilable" theories about the identity of the perpetrator to secure convictions against two defendants in different trials for the same offenses); *Johnson v. Horel*, 2010 U.S. Dist. LEXIS 125005 at *43–49 (N.D. Cal. 2010) (finding no due process violation because prosecutor's statements and arguments are inadmissible).

The government argued, as any reasonable prosecutor would, that this was all clear evidence of a premeditated design to kill. (R. at 1283).

As stated, there were a number of factors that the government presented and argued to show that appellant had culpable knowledge of SGT SC's malintent beyond this one statement. (R. at 1283). This singular statement was in no way "the core" of the government's case. *Nero*, 2014 U.S. Dist. LEXIS 145759 at *80. The military judge listed several factors that he relied upon to find that appellant knowingly and willfully participated in the crime. (R. at 1368). Of those factors, appellant's interpretation of "they got to go," was not one. (R. at 1368). This was not a case where the identity of the shooter was at issue, but rather two differing interpretations of a single statement that each party argued in closing statements. (R. at 1283, 1320–21). Relevant to this case and as this court found in *Turner*, "[d]iscrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts." 2018 CCA LEXIS 593 at 15 (quoting *Nero*, 2014 U.S. Dist. LEXIS 145759 at *82).

"[I]t is not unusual that evidence is somewhat different at each trial of co-conspirators." *Turner*, 2018 CCA LEXIS 593 at 18; *see also Loi Van Nguyen v. Lindsey*, 232 F.3d 1236, 1240 (9th Cir. 2000). This is especially true when one case was a guilty plea and the other a contested trial. Just as this court found in

Turner, in appellant's contested trial, the government was focused on *appellant's* state of mind. 2018 CCA LEXIS 593 at *18. In SGT SC's guilty plea, the government was focused on ensuring that the parties could agree on facts while maintaining SGT SC's providence to premeditated murder. (App. Ex. XX). The military judge recognized this distinction. (R. at 565). The government stipulated to some facts that were favorable to SGT SC and minimized his malfeasance for sentencing purposes. (App. Ex. XVII(b)). This is wholly different than a contest where the government puts on evidence and makes argument. (R. at 565); *Nguyen*, 232 F.3d at 1240 ("What is received in evidence by stipulation in one trial might draw vigorous objection in another."). In other words, the "prosecution did not present fundamentally inconsistent theories," and therefore appellant's right to Due Process was not violated. *Turner*, 2018 CCA LEXIS 593 at 19.

2. Assuming error, it was harmless beyond a reasonable doubt.

Even assuming the prosecution's argument rose to a violation of Due Process, any such error was harmless beyond a reasonable doubt. This case was tried before a military judge alone who is "presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). The military judge was aware of SGT SC's case and the differing interpretations of the statement. (App. Ex. XVII(b)). The underlying

evidence was presented to the military judge, albeit not in his role as factfinder, but rather as a gatekeeper.[14] (App. Ex. XVII(b)).

Unlike cases in which the manipulation of evidence constituted a Due Process violation, here the same underlying evidence was presented to the factfinder through the words of appellant. The only difference being that in SGT SC's trial—a guilty plea—the government stipulated to a more favorable interpretation that mitigated SGT SC's culpability; whereas in appellant's trial, the government argued that the statements clearly conveyed to appellant SGT SC's intent to kill. (App. Ex. XVII(b), pp. 7–8; R. at 1276). Additionally, counsel's argument is not evidence and was a fair and rationale interpretation of the evidence. Thus, it could not constitute the egregious miscarriage of justice that was noted in cases such as *Groose*. 205 F.3d at 1053–54. Importantly, trial defense counsel still was able to make the exact argument that appellant now claims was so crucial to his case. (R. at 1320–21). Arguably, the only thing appellant was deprived of doing was "impeaching" the government by showing that there was another reasonable interpretation of the statement—a fact readily available to the military judge. But as the military judge pointed out, a stipulation

[14] Appellant suggests that if this evidence was admissible they would have chosen a different forum. (Appellant's Br. 16). Considering this evidence would have opened the door to a variety of other statements made by SGT SC and appellant from each of their prior guilty pleas, any potential prejudice is highly speculative. *Infra* at pt. 3.

of fact is qualitatively different than a theory of liability introduced at trial, which is a concept well-recognized in this body of law. *Nguyen*, 232 F.3d at 1240.

Most importantly, the military judge clearly did not find the trial counsel's argument dispositive considering he only found appellant knew SGT SC would "probably kill [the victims]." (R. at 1369). This is also clear considering the military judge found appellant guilty of a lesser included offense of culpable negligence, rather than premeditation (R. at 1364), and did not expressly cite this statement in his special findings. (R. at 1369–71). Ultimately, the military judge seemingly adopted trial defense counsel's interpretation of "they got to go"—that it did not necessarily convey with clarity that SGT SC definitely intended to kill the victims. (R. at 1320–21, 1369). For these reasons, any alleged error was harmless beyond a reasonable doubt.

3. The military judge did not abuse his discretion by denying the defense's motion regarding the preliminary admissibility of the stipulation of fact.

"The admissibility of evidence is dependent upon the evidence being both logically relevant (Mil. R. Evid 401 and 402) and legally relevant (Mil. R. Evid. 403)." *United States v. Olson*, 2021 CCA LEXIS 160 at *22 (Army Ct. Crim. App. 1 Apr. 2021) (citing *United States v. Bailey*, 55 M.J. 38, 40 (C.A.A.F. 2001)). Even if evidence is relevant, the military judge will not abuse his discretion by excluding evidence if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the members, undue delay,

wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. Military Rule of Evidence [MRE] 403 addresses "prejudice to the integrity of the trial process, not prejudice to a particular party or witness." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

The military judge had well-founded concerns that the introduction of the stipulation of fact from a separate trial's guilty plea carried risks under MRE 403. (R. at 568). Not only did introducing this evidence potentially open the door to relitigating SGT SC and appellant's prior trials, but they also raised concerns under other rules of the MCM. For example, Rule for Courts-Martial 705(d)(4)(e) prohibits introducing evidence to members that "an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith. . . ." The rules of evidence prohibit the government from introducing "any statement made during plea discussions with the . . . trial counsel or other counsel for the government if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea." Mil. R. Evid. 410.

The military judge recognized these dynamics, to include: the potential for a trial within a trial and the introduction of evidence that would otherwise be in violation of these rules. (R. at 568–72) ("MJ: So how does this work, though? I think – are you using 410 as both a shield and a sword?"). Trial defense counsel

tried to avoid this argument claiming that the rules "were designed to protect the accused." (R. at 572). However, the CAAF has expressly rejected such an argument finding that a "limitation on comments cannot be used by the defense as both a shield and a sword." *United States v. Lewis*, 69 M.J. 379, 384 (C.A.A.F. 2011) (citing *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). In sum, the military judge could not have abused his discretion by refusing to allow either party to open the door to a trove of evidence that was otherwise inadmissible and prejudicial under the rules.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

[redacted]
ANTHONY J. SCARPATI
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]
RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

[redacted]
CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division

CERTIFICATE OF SERVICE, U.S. v. THOMPOSN (20190525)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] ***@mail.mil*** on the 15th day of August, 2024.

[redacted]
DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
[redacted]@mail.mil