

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20190525

Specialist (E-4)

PHILLIP E. THOMPSON, JR.

United States Army

Appellant

Tried at Fort Stewart, Georgia, on 21 December 2017, 6-7 August 2018, 23 April 2019, 28 June 2019 & 30-31 July 2019, before a general court-martial convened by the Commander, Headquarters and Fort Stewart, Colonel David Robertson, Military Judge, presiding. Combined rehearing tried at Fort Stewart, Georgia on 7-14 August 2023, before a general court-martial appointed by Commander, Headquarters, Fort Stewart, Colonel Harper J. Cook, military judge, presiding.

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

I.

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

II.

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

Statement of the Case¹

On 21 December 2017, 6-7 August 2018, 23 April 2019, 28 June 2019, and 30-31 July 2019, Specialist [SPC] Phillip E. Thompson, Jr., [appellant] was tried at Fort Stewart, Georgia, before a military judge sitting as a general court-martial. Consistent with his pleas, appellant was convicted of two specifications of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 918 (2012). (R. at 382). The military judge sentenced appellant to a dishonorable discharge and the mandatory minimum sentence of confinement for life with eligibility for parole. (R. at 492). Pursuant to the 5 June 2019 pretrial agreement, the convening authority agreed to disapprove any adjudged confinement in excess of forty years. (App. Ex. LIII). On 24 April 2020, the convening authority approved only so much of the sentence as provides for a dishonorable discharge and confinement for thirty-five years. (Action). The convening authority credited appellant with 126 days of confinement against the sentence to confinement. (Promulgating Order).

On 6 December 2021, this court set aside the findings and the sentence and authorized a rehearing.

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, through appellate defense counsel, personally requests this court consider the matters in the Appendix.

On 7-14 August 2023, appellant was retried at a combined rehearing at Fort Stewart, Georgia, before a military judge sitting as a general court-martial. Contrary to his pleas, appellant was convicted of two specifications of involuntary manslaughter, in violation of Article 119 of the UCMJ; 10 U.S.C. § 919. (R. at 1364). The military judge sentenced appellant to a dishonorable discharge and eight years confinement. (R. at 1517). On 21 November 2023, the convening authority approved the sentence and credited appellant with 1,004 days of confinement against the sentence to confinement. (Action). On 14 December 2023, the military judge entered judgment. (EoJ).

Statement of Facts

On 5 March 2017, Private Second Class (PV2) [REDACTED] and SPC [REDACTED] were shot dead. There was no dispute they were killed by Sergeant (SGT) Shaquille Craig, a friend of appellant, who later pled guilty to the murders. The dispute in this trial was whether appellant's involvement made him criminally culpable for their tragic deaths.

On the morning of March 5th, SGT Craig called appellant while appellant and his family were at church and asked appellant to meet him in a parking lot across from Armstrong College. (R. at 1012). Appellant had no clue what SGT Craig wanted. When appellant arrived in the parking lot later that morning still in his church clothes and with his infant son, [REDACTED], (R. at 1325), SGT Craig got

into appellant's truck and began confiding to appellant how he caught a guy, PV2 [REDACTED], "hugging up" with his wife. (R. at 1012). At some point, he uttered, "they got to go," and placed a Glock on his lap. (Pros. Ex. 84). But SGT Craig later assured appellant: "he was just going to go talk to the men." (R. at 1023). The gun was only for self-defense. (R. at 996).

Appellant drove them down the road to SPC [REDACTED] apartment where PV2 [REDACTED] was at and parked his truck in the rear lot. (Pros. Ex. 84). Sergeant Craig then asked appellant to knock on the apartment door and tell them he had left his laptop there at the party the night before. (R. at 1021; Pros. Ex. 84). Private [REDACTED] answered the door; appellant asked about his "laptop" and was invited inside. (Pros. Ex. 84). Moments later, SGT Craig came in and confronted PV2 [REDACTED]. (Pros. Ex. 84). A heated exchange briefly ensued, (Pros. Ex. 84), ending in PV2 [REDACTED] being fatally shot by SGT Craig when PV2 [REDACTED] reportedly "got hostile and reached for something." (R. at 996). Specialist [REDACTED], who was in the back of the apartment, emerged and attempted to flee but was shot by SGT Craig in the process, (Pros. Ex. 84), who by then had committed to leaving "no loose ends." (R. at 996). Sergeant Craig then turned to a stunned appellant, weapon in hand, and ordered appellant to leave and not say a word "cause this could be [your] boy," a reference to [REDACTED]. (Pros. Ex. 84).

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

**I.
WHETHER THE SPECIAL FINDINGS WARRANT
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Additional Facts

The government charged appellant with premeditated murder, (Charge Sheet), and it pursued only one theory of liability: aiding and abetting SGT Craig in the murders. (R. at 774, 1247-48, 1261). The government confirmed this was also the only theory as to any lesser included offense [LIO].² (1247-48, 1261, 1263-64; App. Ex. LXI).

Prior to the parties' arguments, the court discussed "instructions" for aiding and abetting. (R. at 1250-60). The parties "diverg[ed] in significant respects" as to the elements, (R. at 1250), and the military judge was "hav[ing] to wrestle with [the] concept expressed in *Jackson* in 1955 . . . [where] abettors may be guilty in a different degree from the principal, each to be held to account according to the turpitude of his own motive." (R. at 1255). The military judge admitted that it was

² The defense counsel alerted the military judge that it was never on notice of appellant as a perpetrator and was willing to articulate prejudice if necessary. (R. at 1261).

“a very tricky subject to get your head around.” (R. at 1256). He resolved to fix any remaining issues with special findings. (R. at 1260).

The findings, however, left more questions than it resolved. The military judge determined appellant aided and abetted the murders with culpable negligence and was guilty of involuntary manslaughter. (R. at 1367). Yet, his finding as to knowledge was only that appellant knew SGT Craig would *probably* commit the murders, and acts supporting the manslaughter charge all concerned the culpably negligent acts of appellant. (R. at 1367).

Defense counsel had warned the court of its concern that appellant would be found guilty as a perpetrator rather than as an aider and abettor, (R. at 1261), but the military judge “[didn’t] see the daylight between [defense’s] two arguments.”

Standard of Review

“Special findings are to a bench trial as instructions are to a trial before members.” *United States v. Falin*, 43 C.M.R. 702, 704 (A.C.M.R. 1972).

However, “[s]pecial findings on an ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt.” *United States v. Jones*, ACM 37122, 2009 CCA LEXIS 134, at *7 (A.F. Ct. Crim. App. 19 Apr. 2009).

Military courts review the substance of a military judge’s instruction de novo.

United States v. Smith, 50 M.J. 451, 455 (C.A.A.F. 1999). Similarly, military

courts review the legal sufficiency of an ultimate finding of guilt de novo. *United*

States v. Grant, 82 M.J. 814, 818 (Army Ct. Crim. App. 2022) (citing *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

Law

Article 77, UCMJ, provides that any person who “aids, abets, counsels, commands, or procures [a crime’s] commission . . . is a principal.” Similarly, 18 U.S.C. § 2, the federal statute on which Article 77 is based, *see* Manual for Courts-Martial [MCM], App’x 23, A23-1 (2016 ed.), similarly provides “whoever . . . aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” “The acts of the principal become those of the aider and abettor as a matter of law.” *In re Watt*, 829 F.3d 1287, 1289-90 (11th Cir. 2016). Thus, “[t]o be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense.” *United States v. Cottier*, 908 F.3d 1141, 1147 (8th Cir. 2018) (citations omitted).

Under military and federal civilian law alike, to aid or abet “requires . . . specific intent or purpose to bring about the crime.” *United States v. Scotti*, 47 F.3d 1237, 1245 (2d Cir. 1995); *United States v. Vela*, 71 M.J. 283, 286 (C.A.A.F. 2012); *see also Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (an aider and abettor must “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.”); *United States v. Fountain*, 768 F.2d 790, 798 (7th

Cir. 1985) (noting that following *Nye*, “it came to be generally accepted that the aider and abettor must share the principal’s purpose in order to be guilty of violating 18 U.S.C. § 2”), *superseded on other grounds by statute*, 18 U.S.C. § 3663A(c)(3)(B).

Additionally, an aider or abettor must have “guilty knowledge.” *Vela*, 71 M.J. at 286. This means *full* knowledge of the entire charged crime. *Rosemond v. United States*, 572 U.S. 65, 79 (2014); *see also United States v. Thompson*, 81 M.J. 824, 833 (Army Crim. Ct. App. 2021) (“anyone who *knowingly* and *willfully* participates in the commission of *the* crime is a principal.”) (quoting Army Reg. 27-9: Legal Services, Military Judges’ Benchbook, para. 7-1-1 (10 Sep. 2014) (emphasis added)).

In many jurisdictions, an aider or abettor’s knowledge must be actual. *See e.g., United States v. Dinkane*, 17 F.3d 1192, 1195 (9th Cir. 1995) (finding reversible error where jury was not instructed to find that Dinkane “actually knew” of the armed robbery); *In Re C.B.C.B.*, 866 S.E.2d, 434, 442 (N.C. 2021) (finding no prejudice from an erroneous instruction where evidence showed accomplice’s “actual knowledge” of the homicide). This is true in both criminal and civil contexts. *See Marion v. Bryn Mawr Trust Co.*, 288 A.3d 76, 90 (Pen. 2023) (noting the “veritable mountain of case law mandating actual knowledge” in civil aiding and abetting cases); *see also Twitter, Inc. v. Taamneh*, 598 U.S. 471, 488

(2023) (“[a]iding and abetting is an ancient criminal law doctrine that has substantially influenced its analog in tort”) (quotations and citations omitted).

Other courts, while not requiring actual knowledge *per se*, do require knowledge amounting to a “practical certainty,” which “calls for proof verging on actual knowledge.” *United States v. Spinney*, 65 F.3d 231, 238 (1st Cir. 1995). Thus, “knowledge cannot be mere knowledge of a likelihood [of the perpetrator’s crime].” *United States v. Medina-Roman*, 376 F.3d 1, 5-6 (1st Cir. 2004) (emphasis added). This approach “puts the accomplice on a level with the [perpetrator].” *United States v. Powell*, 929 F.2d 724, 727 (D.C. Cir. 1991); *see also Counterman v. Colorado*, 143 S. Ct. 2106, 2117 (2023) (“A person acts knowingly when he is aware that a result is *practically certain to follow*.”) (emphasis added).

On this point, the Court of Appeals for the Armed Forces [CAAF] has required “sufficient knowledge” to show an accused “knowingly” participated in the crime. *United States v. Davis*, 44 M.J. 13, 18 (C.A.A.F. 1995). While the CAAF has yet to precisely define “sufficient knowledge,” its decisions have not suggested anything short of actual knowledge or “practical certainty.” *Cf. United States v. Pritchett*, 31 M.J. 213, 218 (C.M.A. 1990) (finding “sufficient knowledge” where the evidence “reflect[ed] appellant’s complete understanding and awareness of his wife’s criminal venture.”); *United States v. Thompson*, 50

M.J. 257, 259 (C.A.A.F. 1999) (holding there was sufficient evidence demonstrating appellant *knew* of the offense).

Argument

A. Appellant was convicted on a theory not presented.

The government presented an aider and abettor theory, but the special findings convicted appellant as the perpetrator. Appellant's assistance served as the *actus reus* for his *own* offense. That no act of SGT Craig was imputed to appellant to convict him underscores this point. *Cottier*, 908 F.3d at 1147 ("To be guilty of aiding and abetting *is to be guilty as if one were a principal of the underlying offense*. Aiding and abetting is not a separate crime") (emphasis added).

United States v. Brown is illustrative. There, the Court of Military Appeals [CMA] confronted the question of whether permitting an intoxicated driver to operate a vehicle constituted aiding and abetting the driver. 22 M.J. 448, 450 (C.M.A. 1986). Importantly, the CMA declined to answer the question because it didn't need to. *Id.* Brown's act of turning over the car was, itself, culpably negligent. The same result appears to have occurred here, albeit erroneously.³

³ Without expressing any opinion as to outcome, appellant could have been prosecuted under a culpable negligence theory. See *United States v. Rowden*, ACM 30481, 1994 CCA LEXIS, at *7 (A.F. Ct. Crim. App. 25 Oct. 1994) (affirming Rowden's conviction for involuntary manslaughter where the military judge instructed the panel that aiding and abetting applied solely to the murder charge *and not to his culpable negligence in the manslaughter*). However, the government

Jackson does not compel a different conclusion. There, the CMA reversed a conviction where the law officer failed to instruct on the LIO of manslaughter because there was a “reasonable alternative that *Jackson was willing to join the [perpetrator] in an assault*, but he did not contemplate or intend that either of them should use a knife.” 6 U.S.C.M.A. 193, 203, 19 C.M.R. 319, 329 (1955) (emphasis added). *Jackson*, thus, is distinguished in one critical aspect: Jackson’s intent overlapped with the perpetrator’s as to the assault, *see United States v. Walker*, 99 F.3d 439, 442 (D.C. Cir. 1996), and Jackson was, therefore, guilty of the assault *as if he carried it out personally*. The same cannot be said here.

The conclusion that appellant was convicted as a perpetrator is further underscored by the dissonance between the military judge’s finding of culpable negligence and the essential requirement that an aider or abettor knowingly and willfully act “with the specific intent or purpose to bring about the crime.” *Vela*, 71 M.J. at 286; *see also Nye*, 336 U.S. at 619.

B. Even assuming he was convicted under aiding and abetting, the findings were still deficient.

The special findings still failed in two other respects. First, the finding that appellant knew SPC Craig would *probably* kill is not sufficient. “Probably” can mean what is “more likely than not.” *CSX Transp., Inc. v. McBride*, 564 U.S. 685,

specifically disclaimed this theory, and defense was never on notice of this theory. This court, therefore, cannot affirm on this theory.

705 (2011); *Sawyer v. Whitley*, 505 U.S. 333, 366 (1992) (Blackmun, J., concurring). Such a finding necessarily falls short of the knowledge required for an aider and abettor. *Rosemond*, 572 U.S. 79; *Medina-Roman*, 376 F.3d at 5-6; *Powell*, 929 F.2d at 727.

Second, because aiding and abetting requires “specific intent,” *Vela*, 71 M.J. at 286, appellant’s mistake of fact needed only to be honest. *United States v. Rich*, 79 M.J. 572, 591 (Army Ct. Crim. App. 2019). The military judge’s finding that appellant’s mistake was not reasonable is, therefore, erroneous.

For these reasons, appellant’s conviction must be set aside.

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

Additional Facts

The crucial fact in the government’s case was SGT Craig’s statement, “they got to go.” The government argued—*repeatedly*—there was “no other way” to interpret his statement “but to understand Sergeant Craig wants to kill this guy.” (R. at 1283, 1286, 1300). As the government contended, “[appellant] hears what Sergeant Craig is going to do. He says, ‘yes, I will help you.’” (R. at 1287). The government later returned to this refrain, declaring, “there could *absolutely* be no other expectation of what was going to happen in that apartment.” (R. at 1299). That is, “Sergeant Craig said he wanted to kill Private [REDACTED].” (R. at 1300). “It

would be absolutely insane for you to get that information . . . and bring him to the location . . . that's premeditation," but at "the very, very, very least, that's culpable negligence." (R. at 1301).

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

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

(R. at 1350).

But all that time, the prosecution *knew* there was another meaning of "they've got to go" because that same office stipulated as fact to what it meant in SGT Craig's trial two years earlier. Specifically, as part of SGT Craig's guilty plea, the government stipulated that SGT Craig's statement intended to convey only that "these men needed to stop sleeping with this wife." (App. Ex. XVII(b)). This, of course, is, in part, what appellant's trial defense put forth that the government so adamantly rejected. (R. at 1322, 1350).

The government further stipulated to two other critical points: (1) appellant "was not certain what [SGT Craig] intended to do," (App. Ex. XVII(b)), and that it was just as likely SGT Craig would only talk to PVE [REDACTED] as it was that he *might*

harm him; and (2) SGT Craig had no intent to kill until he entered the apartment and saw PV2 [REDACTED] holding a weapon, all *after* appellant's alleged assistance. (App. Ex. VII(b)).

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

Law and Argument

A. The inconsistent theories resulted in a due process violation.

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

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

But as *Turner* recognized, other courts have found due process violations. *Id.* at *15. For example, the Eight Circuit in *Smith v. Goose* found a due process violation where the government relied on a witness' statement to convict one accused and then used a different (and contradictory) statement from the same witness to convict a co-accused. 205 F.3d 1045, 100-52 (8th Cir. 2000). "In short, what the State claimed to be true in Smith's case, it rejected in [the other] case, and vice versa." *Id.* at 1050. These tactics, *Goose* determined, represented "foul blows," holding that such "inherently factual contradictory theories violates the principles of due process" and rendered the convictions "infirm." *Id.* at 1052; *see also Bankhead v. State*, 182 S.W.3d 253, 258 (E.D. Mo. 2006) (finding due process violation where the prosecutor informed the trial court in a guilty plea of the accused was the only accomplice to a murder, only to later convict Bankhead of being the sole accomplice).

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

Under the stipulation, appellant would have been likely acquitted. Indeed, to find appellant guilty under SGT Craig's stipulation, he would have had to aided a

crime before it existed. Such a result smacks of fundamental unfairness. After all, “[i]t is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Such error warrants reversal. *Groose*, 205 F.3d at 1054.

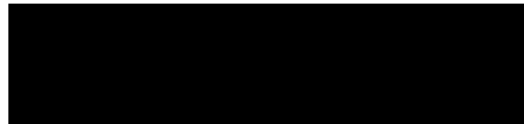
B. Alternatively, the military judge’s error in not admitting evidence of the stipulation likewise establishes prejudice and warrants reversal.

The military judge’s decision not to admit the stipulation was error. The stipulation from SGT Craig’s guilty plea could have been admissible as a party opponent with respect to the United States, *see United States v. Morgan*, 581 F.2d 933, 936, n. 10 (D.C. Cir. 1978), or as a statement against interests with respect to SGT Craig. *See, e.g., United States v. Aguilar*, 295 F.3d 1018, 1020-23 (9th Cir.).

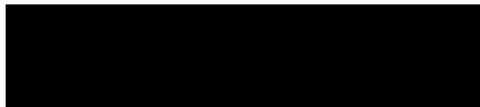
As defense laid out in its clemency matters, the stipulation would have “dramatically complicated, contradicted, and impeached the Government’s prosecution of [appellant].” (Clemency Matters). It would have also impacted his forum selection. (Clemency Matters).

WHEREFORE, appellate defense counsel respectfully requests that this court grant the appropriate relief.

Panel No. 4



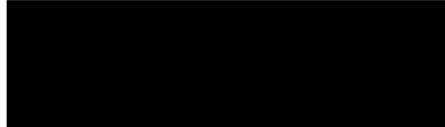
BRYAN A. OSTERHAGE
Major, Judge Advocate
Appellate Defense Attorney
Defense Appellate Division



PHILIP M. STATEN
Colonel, Judge Advocate
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 28 May, 2024.



BRYAN A. OSTERHAGE
Major, Judge Advocate
Appellate Defense Attorney
Defense Appellate Division