IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY 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.

Law and Argument

At Sergeant [SGT] Craig's request, appellant drove SGT Craig to Specialist [redacted] apartment and knocked on the door, and after the door opened, SGT Craig came in, confronted Specialist [redacted] and fatally shot both him and the apartment's

second occupant, Private [redacted]. The military judge found appellant guilty of involuntary manslaughter on an aiding and abetting theory of liability. But his special findings were erroneous on two grounds. *First*, the military judge found that appellant knew only that SGT Craig was going to "confront and *probably* kill" the victims and made no other finding as to a crime appellant intended to facilitate. *Second*, the conviction for involuntary manslaughter by culpable negligence is irreconcilable with aiding and abetting liability because the criminal conduct forming the basis of this offense was appellant's own conduct.

A. The special findings are deficient because the military judge found that appellant knew only that SGT Craig was going to "confront and probably kill" the victims and made no other finding as to a crime appellant intended to facilitate.

1. "Probably kill" is insufficient knowledge of a crime for aiding and abetting liability.

"[A] person aids and abets a crime . . . when he intends to facilitate that offense's commission" and participates in the criminal venture "with *full* knowledge of the circumstances constituting the charged offense." *Rosemond v. United States*, 572 U.S. 65, 76-77 (2014) (emphasis added). The military judge's finding that appellant knew only that SGT Craig would "probably kill" the victims falls short of the requisite knowledge needed for aiding and abetting liability.

The government contends that the military judge's finding is sufficient "for a crime that was likely to result as a natural and probable consequence." (Gov't Br.

21). The government likens this to "the bank robber who may not know with certainty that his partner intends to murder the teller during the course of the robbery, [but] is still responsible for the murderous actions of his partner during this joint venture." (Gov't Br. 21).

The government is mistaken for two reasons. One, the government's view is contrary to precedent. As Judge Hand observed in *United States v. Peoni*, "definitions [of accomplice liability] have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct[.]" 100 F.2d 401, 402 (2d Cir. 1938). And as this court observed in its earlier opinion in this very case, *Peoni* is "the canonical formulation of th[e] needed state of mind," *United States v. Thompson*, 81 M.J. 824, 831 (A. Ct. Crim. App. 2021) (citing *Rosemond*, 572 U.S. at 76), and the Benchbook instruction on aiding and abetting liability "is rooted in Judge Hand's oft quoted *Peoni* decision[.]" *Id*. at 833. Importantly, *Peoni* rejects "willful blindness" as sufficient knowledge, *see* Wayne R. Lafave, Criminal Law, §13.2(d), p. 716 (5th ed. 2010), and appellant's alleged act of "turning a blind eye" was precisely the government's argument at trial for liability as an aider and abettor. (R. at 1301).

Two, while it is true that the military follows the natural and probable consequences doctrine for aiding and abetting, the government misses the critical point that the doctrine holds an accused accountable for the reasonably foreseeable

consequences "of the crimes he intended to aid and abet." *Alfred v. Garland*, 64 F.4th 1025, 1039 (9th Cir. 2023). Thus, even under the natural and foreseeable consequences doctrine, "[a] specific mens rea is still necessary for the initial offense, [just] not for the offenses that foreseeably follow." *Id*.

The government's own example illustrates this point. An accused who aids and abets a bank robbery may be guilty of the "murderous actions" of his confederate who personally undertakes the robbery, but to be guilty, the government must still prove that the accused had full knowledge of the robbery and specific intent to facilitate the robbery. Keeping with this example, what the government seeks to do instead is to find the accused guilty as an accomplice because he believed his confederate may "probably kill" someone inside the store without a finding that the accused knew of the robbery or facilitated it with specific intent.

2. The military judge made no other finding as to an offense appellant intended to facilitate.

What then was the offense that appellant intended to facilitate with full knowledge of its circumstances? The military judge makes no other findings as to an offense. This is fatal to the government's case. *See United States v. Vela*, 71 M.J. 283, 287 (C.A.A.F. 2012) ("specific intent to facilitate [a] crime by another" and "guilty knowledge" are necessary elements of aiding and abetting).

The government now argues on appeal that the offenses of assault and housebreaking can be considered. (Gov. Br. 16, 23). This court should reject the government's late hour rescue attempt for three reasons.

First, this court "cannot affirm on a theory of liability not presented to the trier of fact." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *Chiarella v. United States,* 445 U.S. 222, 236-37 (1980)). Neither assault nor housebreaking were presented at trial as the theory underlying involuntary manslaughter. With respect to assault, the government abandoned this theory.[1] With respect to housebreaking, this theory is contrived by the government on appeal and the record is devoid of any discussion of this offense.

Second, due process requires the factfinder to find the necessary elements beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993)

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[1] More than a year before trial, the government filed a memorandum predicating involuntary manslaughter on a theory that at the time of the murders, appellant was "participating in the commission of the offense of aggravated assault directly affecting the person." (App. Ex. XXIV, p. 18). But once trial arrived, the government changed its theory, filing a bench brief that predicated involuntary manslaughter on a culpable negligence theory that made absolutely no mention of assault. (App. Ex. LXI, p. 5). Asked to clarify its position, the government responded: "[T]he theory was that [appellant's] assistance constituted culpable negligence. That's the theory under [Article] 119(2)." (R. at 1261). The government confirmed it was "standing by [its] bench brief," (R. at 1261), and ultimately argued that "turning a blind eye" to the information he had amounted to "culpable negligence." (R. at 1301). This is a wholly distinct theory from intending to commit an assault or other offense against a person that results in death. *Compare* Article 119(b)(1) *with* Article 119(b)(2).

(citing *In re Winship*, 397 U.S. 358, 364 (1970)). This includes whether an aider and abettor has the specific intent to facilitate a crime and guilty knowledge. *See Vela*, 71 M.J. at 287; *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005). Consequently, a *new* finding on appeal from this court would violate due process.

Third, a finding that appellant specifically intended to facilitate a crime would be inconsistent with the military judge's finding that appellant's assistance constituted culpable negligence. If appellant's "assistance" constituted negligence, then he presumably did not intend to facilitate any offense, including, as the government now suggests, aggravated assault. Notably, this reasoning aligns with appellant's acquittal of conspiracy to commit aggravated assault where the overt act in the conspiracy was the same "assistance given" to aid and abet the murders. (R. at 1301-02).

In sum, the special findings do not indicate what crime appellant intended to facilitate with full knowledge of its circumstances. That appellant knew that SGT Craig would "probably kill" the victims is insufficient. To hold otherwise is to say that one can recklessly aid and abet.

B. The conviction for involuntary manslaughter by culpable negligence is irreconcilable with aiding and abetting liability.

Under aiding and abetting liability, the perpetrator's acts "become those of the aider and abettor as a matter of law." *In re Watt*, 829 F.3d 1287, 1289-90 (11th Cir. 2016). In other words, an aider and abettor "step[s] into the [perpetrator's]

shoes." *United States v. Delpit*, 94 F.3d 1134, 1152 (8th Cir. 1996). Thus, "aiding and abetting a crime has the exact same elements as the principal offense." *United States v. Ali*, 991 F. 3d 561, 574 (4th Cir. 2021); *see also* Dep't Army Pam. 27-9, Legal Services: Military Judges' Benchbook, Ch. 3, para. 3-1-1(f) (29 Feb. 2020).

Here, however, the military judge found that it was *appellant's* culpable negligence that formed the underlying conduct for involuntary manslaughter, and it was *his* culpable negligence that proximately caused the victims' deaths. This is wholly distinct from aiding and abetting. *See United States v. Brown*, 22 M.J. 448, 450 (C.M.A. 1986); Lafave, §13.2(f), p. 716 (criminal negligence is a separate basis from aiding and abetting).

According to the government, "[a]ppellant seems to misunderstand the differing theories of culpability under Article 77." (Gov't Br. 18). Referencing the parties' final pleadings on the matter at trial, the government suggests that, in any event, "the military judge seemed to adopt findings that comported with both parties' understanding of the law." (Gov't Br. 20 n.8).

However, it is the government that is conflating theories of liability. To illustrate this point, consider the facts in *United States v. Brown*. 22 M.J. at 449. Brown gave his car keys to an intoxicated driver who then struck and killed a pedestrian. *Id.* at 449. The driver was guilty of involuntary manslaughter, and Brown could have been guilty of involuntary manslaughter under different

theories. One *potential* theory was aiding and abetting. Under this theory, Brown must have specifically intended to facilitate the commission of an offense—e.g., the culpably negligent act *of the driver* in operating the vehicle—with full knowledge that the driver is intoxicated. Importantly, the elements of the offense for aiding and abetting for Brown would have been the same as the elements for the driver—the negligent act in operating the vehicle. *See United States v. Cottier*, 908 F.3d 1141, 1147 (8th Cir. 2018) ("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"). A second (and separate) theory of liability could be predicated on Brown's own culpable negligence in providing the keys. *See* Lafave, §13.2(f) at 716. Indeed, this is the theory on which the CMA ultimately affirmed *Brown*, specifically distinguishing it from aiding and abetting. *Brown*, 22 M.J. at 450 ("it is unnecessary to base appellant's liability upon his role in aiding [the driver's] culpable negligence" as Brown's conduct "was itself culpably negligent" and "a proximate cause of the death and injury.").

The military judge conflated these theories. He convicted appellant as the perpetrator[2] of the involuntary manslaughter offense (the second theory in the

[2] To clarify, the term "perpetrator" refers to the individual who actually commits the crime, i.e., the individual whose conduct forms the *actus reus* of the crime. For the premeditated murder offense, that individual was SGT Craig; however, for the involuntary manslaughter offense, that individual was appellant because it was his

Brown example), but as an aider and abettor (the first theory in the *Brown* example). The government presented only an aiding and abetting theory of liability. [3] The military judge convicted only on an aiding and abetting theory. This court's sufficiency review is cabined to an aiding and abetting theory of liability. *See United States v. Frampton*, 382 F.3d 213, 224 (2d Cir. 2004). But appellant was not an aider and abettor for the involuntary manslaughter offense.

The government is also incorrect to say that this "comported with" appellant's understanding of the law. The government's final bench brief, filed days before opening statements, identified appellant's assistance as the culpable negligence for the involuntary manslaughter, which was a material change from how the government previously noticed its theory. *See* n.1, *supra*. Conversely, and consistent with *Brown*, the defense's bench brief identified SGT Craig's shooting as the act that amounted to culpable negligence. In an Article 39(a)

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conduct, not SGT Craig's, that constituted the *actus reus* of the offense, and it was this conduct that proximately caused the victims' deaths.

[3] According to the government, it did not disclaim other theories other than aiding and abetting. (Gov't Br. 20). However, from the start, the government only pursued aiding and abetting as its theory of liability. (App. Exs. XXIV and LXI). Even in its final bench brief identifying culpable negligence as the theory for involuntary manslaughter, the government stated it was under an aiding and abetting theory. (App. Ex. LXI). When defense informed the parties that it believed the government was attempting to prove something different than aiding and abetting and that appellant was only ever on notice of aiding and abetting, the government confirmed it was "standing by its bench brief" and confirmed involuntary manslaughter was a lesser include offense under an aiding and abetting theory of liability. (R. at 1264).

session just before findings, the defense rightly complained the government was seemingly pursuing a theory of liability with appellant as the perpetrator of the involuntary manslaughter charge, a theory for which it never had notice. The special findings ultimately aligned with the government's faulty position, not the defense's. How then can the government now say the findings comported with appellant's understanding of the law or that appellant was on adequate notice?

C. Conclusion.

For these reasons, this court should set aside the findings of guilty and the sentence and dismiss the involuntary manslaughter specifications and the charge. Further, because the special findings cabin this court's factual and legal sufficiency review to an aiding and abetting theory only, *see Frampton*, 382 F.3d at 224, and because this court cannot contradict the essential findings of the military judge, the dismissal must be with prejudice.

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

Law and Argument

A. The government's inconsistent theories violated appellant's due process rights.

The government stipulated *as fact* at SGT Craig's guilty plea that SGT Craig's statement, "they've got to go," or words to that effect, meant only that the victims "needed to stop sleeping with his wife." The government further stipulated

that appellant did not know whether SGT Craig would kill the victims and that SGT Craig did not form his intent to do so until he reached the apartment *after* appellant's alleged assistance. But at appellant's trial, the very same prosecutor's office argued something wholly different: SGT Craig's statement, "they've got to go," could only mean that SGT Craig intended to kill the victims; appellant understood the statement's meaning and knew SGT Craig intended to kill the victims; and appellant willfully assisted SGT Craig in executing his intent. These inconsistent factual theories violated due process. *See Smith v. Groose*, 205 F.3d 1045, 1050-51 (8th Cir. 2000).

The government asserts there was no due process violation because the facts, motives, and theories of liability were the same in each trial, (Gov't Br. 29), and, in any event, guilty pleas are "inherently different." (Gov't Br. 29, 31). Alternatively, the government argues there is no prejudice because the military judge nonetheless knew the non-admitted information, appellant was still able to argue the inferences, and the military judge was ultimately not persuaded by the government's theory in appellant's case. (Gov't Br. 31-33). The government is wrong as to both error and prejudice.

1. The government's contention that the facts and theories of liability were identical in each trial has no merit.

As an initial matter, the government fails to address appellant's complete argument, focusing its response only on SGT Craig's "singular statement." (Gov't

Br. 30). As presented in appellant's brief, the government's inconsistency on the meaning of "they've got to go" is but one of several inconsistencies culminating in a due process violation.

Considering the *entire* stipulation in the proceedings against SGT Craig, the government is mistaken that the facts were the same. For example, in SGT Craig's proceedings, the government stipulated that appellant was not in the apartment when the murders occurred. (App. Ex. XVII(b)). Conversely, in appellant's trial, the government introduced, and principally relied on, appellant's third statement to law enforcement placing appellant in the apartment during the murders. Additionally, and importantly, SGT Craig's stipulation revealed the pertinent details about what occurred in his exchange with the victims when he entered the apartment, showing his intent to kill was not formed until that specific point. (App. Ex. XVII(b)). These facts never made it into appellant's trial as the government opposed their admission.

Critically, the theories of liability were also not the same. The government stipulated in SGT Craig's proceedings that appellant did not know what SGT Craig was going to do and that SGT Craig himself had not formed any intent to kill until immediately before the shootings (and *after* appellant's alleged assistance). Thus, while the government did not explicitly disavow any liability for appellant in SGT Craig's stipulation, these facts, which the government concedes "mitigated SGT

Craig's culpability," (Gov't Br. 31), implicitly negated appellant's culpability as an aider and abettor and co-conspirator.

Accordingly, the government's attempt to distinguish *Groose* to support its contention necessarily fails. Like in *Groose*, "what the State claimed to be true in [SGT Craig's] case, it rejected in [appellant's.]" *Groose*, 205 F.3d at 1050. Moreover, and like in *Groose*, what SGT Craig intended, when he intended it, and what appellant knew of SGT Craig's intent "was the heart of the prosecutorial inconsistency that allowed the [government] to convict [appellant]." *Id*. at 1050-51. And finally, similar to *Groose*, the inconsistencies were never presented to the factfinder. *Id*. at 1051. Indeed, they were kept out consistent with the government's objection. "The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to . . . the search for truth." *Id*. at 1051.

2. The government's argument that the nature of a guilty plea permits inconsistent theories is without support.

As for its second point, the government offers no authority to support its bald assertion that a due process violation did not occur because the inconsistent theories involved a guilty plea, which is "inherently different." (Gov't Br. 29, 31). Indeed, the Supreme Court's decision in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), suggests otherwise. *Stumpf* concerned inconsistent theories involving a guilty plea, *id*. at 186-87, and although the Court ultimately rejected Stumpf's due process

challenge for inconsistent theories, it did so, not because guilty pleas are "inherently different," but rather because the inconsistencies "relate[d] entirely to the prosecutor's arguments about which of the two men, Wesley or Stumpf, shot Mrs. Stout . . . [and] the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder." *Id*. at 187. *Stumpf* also left open the possibility of a due process violation with respect to Stumpf's sentence, despite the "inherent difference" of his guilty plea. *Id*. at 187.

3. The government's arguments as to prejudice are unpersuasive.

The government submits three arguments why there is no prejudice, and all fail to demonstrate the government has met its burden.

First, the government argues that the military judge knew of the inconsistencies, albeit, not as the factfinder. To the extent the government suggests the military judge considered these statements, that would be improper. *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005) ("a court-martial must reach a decision based only on the facts in evidence."). As the government notes in the immediately preceding sentence, the military judge is presumed to follow the law. (Gov't Br. 31).

Second, the government claims that appellant was still able to argue the inference as to what SGT Craig meant when he said, "they've got to go," and that appellant was only deprived of impeaching the government. (Gov't Br. 32).

However, this incorrectly frames the question. The prejudice here is not what appellant's case would have been had the stipulation been admitted, but what would the outcome have been absent the presentation of inconsistent theories. *See Groose*, 205 F.3d at 1052 (framing prejudice as determining whether the outcome would have been different "once the State's use of inherently contradictorily theories is removed"). This goes to all core inconsistencies between appellant's case and SGT Craig's—that is, when SGT Craig formed his intent and what appellant knew of SGT Craig's intent.

Third, the government suggests that the military judge did not find the government's arguments dispositive because appellant was found not guilty of premeditated murder and the military judge's findings fail to mention SGT Craig's statement, "they've got to go." Yet there can be little doubt that the government's argument repeatedly referencing "they've got to go" and its purported murderous intent contributed in some way to the military judge's findings that appellant knew that SGT Craig would "probably kill" the victims *and* his findings that there was no mistake of fact. There also can be little doubt that the absence of SGT Craig's statement as not having formed an intent to kill until reaching the apartment *after* appellant's assistance also directly contributed to the conviction as it would be difficult to convict someone for aiding and abetting a crime before the perpetrator even knows of it himself.

Additionally, the government cannot prove this was harmless beyond a reasonable doubt as to appellant's sentence. *Stumpf*, 545 U.S. at 178.

B. In the alternative, the military judge should have admitted the stipulation of fact to permit defense to present the inconsistent theories.

The government argues it was not error to deny the admission of SGT Craig's stipulation, suggesting that its admission would be a trial within a trial. (Gov. Br. 34). Yet, the government never shows its homework on why this stipulation would be any more of a "trial within a trial" than if it was a confession in a sworn statement given to law enforcement.

The remaining grounds the government argues for inadmissibility pertain to appellant's own stipulation of fact rather than SGT Craig's stipulation. Specifically, the government fails to address why SGT Craig's statement is inadmissible on the theory of statement against interest or statement by party opponent.

There is prejudice.[4] Admission of the stipulation would have "dramatically complicated, contradicted, and impeached the government's prosecution of [appellant,]" (Clemency Matters), and just like a confession of a co-accused that mitigates one's culpability, admission of the stipulation would have had significant

[4] The government does not argue prejudice, and this court should, therefore, consider any argument waived. *See United States v. Hornick*, 815 F.2d 1156, 1159 (7th Cir. 1987) (discussing that arguments not raised in briefs are considered waived).

and corroborative impact on defense's theory of the case. Moreover, because the stipulation corroborated earlier accounts of appellant, the defense would not have chosen to adopt appellant's final (and more damning) statement as true, but instead attacked its veracity. (Clemency Matters).

For these reasons, this court should nonetheless set aside the findings and sentence.

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

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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 29 August 2024.

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