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

Docket No. ARMY 20190525

Tried at Fort Stewart, Georgia, on 21 December 2017, 6–7 August 2018, 23 April, 28 June, and 30–31 July 2019, before a general court-martial appointed by Commander, Fort Stewart, Colonel David Robertson, Military Judge, presiding.

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

Assignment of Error

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO PREMEDITATED MURDER ON AN AIDER AND ABETTOR THEORY WHERE THE RECORD DISCLOSES A SUBSTANTIAL BASIS IN LAW AND FACT FOR QUESTIONING THE PLEA.

PANEL NO. 4

Statement of the Case

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 court-martial 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).

Statement of Facts

I. Appellant assisted Sergeant [redacted] before and after Sergeant [redacted] murdered [redacted] and [redacted]

Appellant met Sergeant (SGT) [redacted] at Fort Stewart in 2017, and they became friends. (R. at 353). Sergeant [redacted] and his wife were having marital problems, "and he thought that she was cheating on him." (R. at 354). This made SGT [redacted] "very upset," and appellant "knew this because [they] talked about it." (R. at 354). Sergeant [redacted] also told appellant that he "follow[ed] or harass[ed] the guys he

[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).

thought were cheating with his wife." (R. at 354). Sergeant [redacted] asked appellant to damage his spouse's vehicle, and in January 2017, appellant deflated the tires on her vehicle. (Pros. Ex. 20, p. 2).

On 5 March 2017, SGT [redacted] told appellant to "meet up with him after church." (R. at 354). Appellant met him "at a parking lot" in Hinesville, Georgia. (R. at 355). Sergeant [redacted] drove someone else's car, "carr[ied] a balled up jacket, and he also had his Glock on his waist." (R. at 355). Sergeant [redacted] got in appellant's vehicle and "told [appellant] he had seen his wife with another man at a party the night before." (R. at 355). Sergeant [redacted] "put his Glock in his lap and he said these exact words: 'The nigga has got to go.'" (R. at 356). Appellant asked what he meant, and SGT [redacted] "said it again." (R. at 356).

Appellant "knew what Sergeant [redacted]] meant by those words, and it meant that he intended to kill the guy who slept with his wife and whoever else was with him at a [sic] time." (R. at 356). Appellant knew SGT [redacted] "intended to kill" the victims because "he said '[t]hey got to go,'" which meant "[t]hat he wanted to kill them." (R. at 364). Appellant "could tell Sergeant [redacted] was serious," because he "put his Glock on his lap, and he said those words . . . by his facial expressions and hearing it in his voice." (R. at 356). Sergeant [redacted] looked "straight at [appellant]," and "[h]e was angry and aggravated." (R. at 356). Sergeant [redacted] "tone of voice

and his body language" were different from their previous interactions, and they indicated he intended to kill the victims. (R. at 364).

Sergeant [redacted] told appellant "he had seen his wife and the man together . . . [and] he knew where the man was right now." (R. at 356). He directed appellant where to drive, and appellant followed his directions. (R. at 356). Sergeant [redacted] asked appellant to drive because SGT [redacted] had previously driven past the apartment, and [redacted] "might have caught onto him." (Pros. Ex. 20, pp. 3, 5). Sergeant [redacted] told appellant that he knew someone else was there with [redacted] because he saw "him earlier when [SGT [redacted]] had been scoping out the location." (Pros. Ex. 20, p. 5). Appellant "knew that [SGT [redacted] intended to kill both of the individuals in the apartment," yet still drove SGT [redacted] to the "home where the victims were." (R. at 365–66).

When they arrived, SGT [redacted] asked appellant "to go look around and inside the apartment to find out who was inside." (R. at 356–57). Appellant complied, and he knew he "was helping [SGT [redacted]] do what he told [appellant] about earlier, when he said they [the intended victims] have got to go." (R. at 357). He knew SGT [redacted] wanted appellant to look around "to determine how difficult it would be to carry out his intent to kill the people inside." (Pros. Ex. 20, p. 5). Sergeant [redacted] stated appellant could "get into the apartment, if [appellant] told the people in the apartment that [he] left [his] laptop there at the party the night before." (R. at 357).

Appellant walked to the apartment and encountered [redacted] outside. (R. at 357). Appellant carried out SGT [redacted] plan, followed SGT [redacted] directions, and "mumbled out the story about forgetting [his] laptop." (R. at 357). [redacted] entered the apartment, spoke to someone inside, and told appellant there was no laptop. (R. at 357). Appellant then walked back to his vehicle. (R. at 358). Appellant "told to [SGT [redacted] the details of what he saw and heard, however, he attempted to tell [SGT [redacted]] that there was only one person in the apartment." (Pros. Ex. 20, p. 6). Sergeant [redacted] "immediately knew [appellant] was not being truthful about this, and stated he knew there were two people there." (Pros. Ex. 20, p. 6).

Sergeant [redacted] then "took his balled up jacket and got out of the truck," and he asked appellant not to leave. (R. at 358). In accordance with the plan, appellant remained in his car, "waiting as a getaway driver." (R. at 358, 367; Pros. Ex. 20, pp. 7–9). Appellant waited so "that, after [SGT [redacted]] killed those individuals, [appellant] could drive him away from the scene." (R. at 367–68).

Sergeant [redacted] walked to the apartment, called appellant, and said he "was waiting for the people across the street in the church to clear out." (R. at 358–59). This phone conversation lasted around seven minutes. (Pros. Ex. 20, p. 6). Appellant stated he "tried to talk [SGT [redacted]] out of doing what he was about to do," and asked SGT [redacted] to think about his daughter. (R. at 359). After the phone call,

appellant continued to wait for SGT [redacted] in his vehicle. (R. at 359). While he waited in the vehicle, appellant "googled GameStop" because he "was trying to find the PS4 [he] wanted to purchase," and he also "texted one of [his] friends . . . that [he] went to AIT with." (R. at 359). Sergeant [redacted] called appellant a second time and told appellant to "leave and wait for him, and then come back." (R. at 359). Appellant "left the apartment complex" but remained nearby and heard a gunshot a few minutes later. (R. at 359–60).

Appellant "knew what it was right away," and he tried to call SGT [redacted]. (R. at 360). He drove back "to the apartment complex [and] look[ed] for Sergeant [redacted]," but appellant did not see him and returned to the parking lot where they first met. (R. at 360). Sergeant [redacted] also returned to the parking lot, handed appellant the Glock, and asked him "to store it at [appellant's] apartment." (R. at 360).

Appellant drove home, put the Glock away, got into a vehicle with SGT [redacted], and went with him to another soldier's house. (R. at 360). Sergeant [redacted] told appellant and the other soldier that he had "killed [redacted] and [redacted]." (R. at 360–61). After they left, SGT [redacted] "drove out to the woods" where he "got rid of his bloody clothes" and a different gun. (R. at 361).

II. Appellant's guilty plea colloquy at his court-martial.

Appellant pleaded guilty to two specifications of premeditated murder. (R. at 346). The military judge told appellant that on his "plea alone and without

receiving any evidence," the court could find him guilty. (R. at 346). Appellant understood the rights he gave up through his plea, which included "the right to a trial of the facts by [the] court." (R. at 346–47).

The military judge told appellant that if he pleaded guilty, he was admitting the elements of premeditated murder were true. (R. at 350). The military judge told appellant the elements of the offense were: (1) [redacted] and [redacted] were dead, (2) their deaths resulted from SGT [redacted] shooting them with a handgun, (3) their killings were unlawful, (4) "at the time of the killing, [appellant] knew [SGT [redacted]] had a premeditated design to kill" [redacted] and [redacted], and (5) appellant "intentionally aided and abetted [SGT [redacted]] in committing the offense of premeditated murder" of [redacted] and [redacted]. (R. at 351–52). The military judge explained "premeditated design to kill" meant "the formation of a specific intent to kill and consideration of the act intended to bring about death," and it did not have to "exist for any measurable or particular length of time." (R. at 352).

The military judge stated, "[a]n aider and abettor must knowingly and willfully participate in the commission of the crime, and must aid, encourage, or incite the person to commit the criminal act." (R. at 352). For appellant "to be liable as an aider and abettor," he "must have known Sergeant [redacted]'s present intent to kill, specifically intended to aid or abet him, and in fact, did aid and abet him." (R. at 352). The military judge stated there was "no requirement that [appellant]

agreed with or even had knowledge of the means by which Sergeant [intended to carry out the murder of [ ] and [ ].” (R. at 352–53). Appellant understood the elements and definitions provided by the military judge, and appellant believed and admitted “that the elements and definitions correctly describe[d] what [he] did.” (R. at 353).

Appellant’s “acts in aiding Sergeant [” were voluntary. (R. at 368). Appellant “knew what [SGT] intended to do,” and appellant knew his acts would help SGT fulfill that very intent. (R. at 368). Appellant pleaded guilty of his own free will and fully understood “the meaning and effect” of his plea. (R. at 381). The military judge found him provident and accepted his plea. (R. at 381).

Assignment of Error

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT’S GUILTY PLEA TO PREMEDITATED MURDER ON AN AIDER AND ABETTOR THEORY WHERE THE RECORD DISCLOSES A SUBSTANTIAL BASIS IN LAW AND FACT FOR QUESTIONING THE PLEA.

Standard of Review

“[Appellate courts] review a military judge’s acceptance of a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de

novo." *United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

Law and Argument

A military judge abuses his discretion in accepting a guilty plea when he "fails to obtain from the accused an adequate factual basis to support the plea." *Inabinette*, 66 M.J. at 322 (citation omitted). The military judge's decision to accept the plea is afforded "significant deference." *Id.* A military judge does not commit reversible error "if it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty." *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992) (citing Art. 45(a), UCMJ). A military court should not reject an appellant's guilty plea unless there is a "substantial basis" in law and fact to question the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). "The 'mere possibility' of a conflict is not sufficient to overturn a military judge's acceptance of a guilty plea." *United States v. Mitchell*, 66 M.J. 176, 178 (C.A.A.F. 2008) (citation omitted).

Appellant pleaded guilty to premeditated murder as an aider and abettor. (R. at 346). 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, UCMJ. Thus, the elements as applied to appellant are: (1)

[redacted] and [redacted] were dead, (2) their deaths resulted from SGT [redacted] shooting them with a handgun, (3) the killings were unlawful, (4) "at the time of the killing, [appellant] knew [SGT [redacted]] had a premeditated design" to kill [redacted] and [redacted], and (5) appellant "intentionally aided and abetted [SGT [redacted]] in committing the offense of premeditated murder." Articles 77 and 118, UCMJ; *Manual for Courts-Martial* (*MCM*), Pt. IV, ¶ 43.b.(1); (R. at 351–52).

The *MCM* defines "perpetrator" as "one who actually commits the offense." *MCM*, pt. IV, ¶ 1.b.(2)(a). "Other parties" are guilty of offenses "committed by the perpetrator" if they (i) "assist, encourage, advise, counsel, or command another in the commission of the offense; and (ii) [s]hare in the criminal purpose or design." *MCM*, pt. IV, ¶ 1.b.(2)(b); *see Rosemond v. United States*, 572 U.S. 65, 71 (2014) ("As at common law, a person is liable under §2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission."); *United States v. Simmons*, 63 M.J. 89, 93 (C.A.A.F. 2006) ("Article 77, UCMJ is conjunctive; it requires a finding of encouragement, for example, a result plus an intent."); *United States v. Pritchett*, 31 M.J. 213, 216–17 (C.M.A. 1990) ("*All that is necessary is to show some affirmative participation which at least encourages the principal to commit the offense in all its elements as defined by the statute.* Actual participation in the

substantive crime is not required so long as the elements of aiding and abetting are established.") (citation omitted) (emphasis in original).

"[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." *Mitchell*, 66 M.J. at 178 (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. "*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*." *Id.* at 217 (citation omitted) (emphasis in original). "When the offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must ordinarily establish that the aider or abettor had the requisite intent or state of mind *or that the accused knew that the perpetrator had the requisite intent or state of mind*. There is no requirement, however, that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent." Dep't of Army Pam. 27-9, Legal Services: Military Judges' Benchbook [Benchbook], para. 7-1 (10 September

2014) (emphasis added). "[I]ntent, like other mental states can be shown by circumstantial evidence." *United States v. Vela*, 71 M.J. 283, 286 (C.A.A.F. 2012) (citing *United States v. Davis*, 49 M.J. 79, 83 (C.A.A.F. 1998)).

Aiding and abetting is not a new theory of criminal liability, and the discussion from the 1951 *MCM* resembles the current state of the law:

> To constitute one an aider and abettor . . . there must be an intent to aid or encourage the persons who commit the crime. The aider and abettor must share the criminal intent or purpose of the perpetrator. If there is a concert of purpose to do a given criminal act, and such act is done by one of the parties, all probable results that could be expected from the act are chargeable to all parties concerned; but in order to make one liable as a principal in such a case, the offense committed must be one embraced by the common venture or an offense likely to result as a natural or probable consequence of the offense directly intended.

MCM, 1951, pt. XXVIII, ¶ 156, Discussion.

I. After appellant knew that SGT [redacted] intended to kill [redacted] and [redacted], he assisted in the murders through multiple, affirmative acts.

Here, appellant knew SGT [redacted] intended to murder the people in the apartment before he assisted him fulfill that very intent. (R. at 356–57); *see Mitchell*, 66 M.J. at 178 (noting aiding and abetting requires "guilty knowledge on the part of the accused[] [] that an offense was being committed by someone"). When SGT [redacted] got in appellant's vehicle that morning, he "told [appellant] he had seen his wife with another man at a party the night before." (R. at 355). Sergeant

[redacted] told appellant the man sleeping with his wife "has got to go," and appellant knew "it meant that he intended to kill the guy who slept with his wife and whoever else was with him at [the] time." (R. at 356, 364). Appellant "could tell Sergeant [redacted] was serious" because he "was angry and aggravated," "put his Glock on his lap, . . . said those words," and "by his facial expressions and hearing it in his voice." (R. at 356).

After appellant knew that SGT [redacted] intended to commit murder, appellant took a plethora of affirmative steps to aid, abet, assist, and participate in SGT [redacted] scheme to kill [redacted] and [redacted] *See Vela*, 71 M.J. at 286 (noting that aiding and abetting generally requires "an affirmative step on the part of the accused") (citing *United States v. Thompson*, 50 M.J. 257, 259 (C.A.A.F. 1999)). Appellant drove SGT [redacted] to the victims' apartment. (R. at 356). At the apartment complex, appellant performed reconnaissance on the victims' apartment to "look around and inside the apartment to find out who was inside." (R. at 356–57). An action directly aimed at facilitating SGT [redacted] ultimate entry and execution of [redacted] and [redacted] After he conducted reconnaissance of the apartment for SGT [redacted] appellant remained in his vehicle, "waiting as a getaway driver" while SGT [redacted] shot and killed the two victims. (R. at 358–60, 367). After the murders, appellant retrieved the recent murderer, took SGT [redacted] "Glock," and stored the presumed murder weapon at appellant's house. (R. at 360). To be sure, appellant aided SGT

[redacted] at every conceivable opportunity to ensure that his central aim to kill [redacted] and [redacted] would not be frustrated.

Any one of these acts amounted to "an affirmative step on the part of [appellant]" and proved he assisted SGT [redacted] in the commission of the offense. *See Vela*, 71 M.J. at 286–87 (holding the appellant's actions were sufficient for aiding and abetting because he "participated in the offense by setting the stage for the offense and later participating in the cover-up of the incident"); *United States v. Speer*, 40 M.J. 230, 232–34 (C.M.A. 1994) (affirming appellant's conviction "as an aider and abettor of the distribution of cocaine" where the appellant "was present during [the] drug sale, received the funds from the buyer, and verified the correct amount due with the seller," which amounted to affirmative participation in a manner intended to facilitate the commission of the crime); *Thompson*, 50 M.J. at 258–59 (finding "evidence of an affirmative act and criminal purpose or design" when the appellant "participated in getting [the victim] intoxicated," knew the perpetrator "was going to have intercourse with [the victim]," encouraged the crime "by not dissuading [the perpetrator] when he looked to appellant for approval," and gave the perpetrator a condom); *United States v. Akiti*, 701 F.3d 883, 886–87 (8th Cir. 2012) (holding the evidence was sufficient to convict the appellant of aiding and abetting an armed robbery, in part because the appellant

drove the perpetrator and dropped him off near the bank and then picked him up after the robbery).

Despite appellant's knowledge that SGT [redacted] was an angry, armed man with murder on his mind and in his heart, appellant drove SGT [redacted] to the victims' apartment, reconnoitered the apartment, and then waited as the getaway driver. (R. at 356–60, 364–67). These actions constituted active participation with full knowledge of the extent and character of the criminal scheme. *Rosemond*, 572 M.J. at 77 ("[F]or purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission."); *Mitchell*, 66 M.J. at 180 (holding the "intent element of indecent assault may be satisfied, in the case of an accomplice, by proof that the accomplice shared in the perpetrator's criminal purpose and intended to facilitate the intent of the perpetrator with respect to the commission of the offense"); *contrast Simmons*, 63 M.J. at 93. (finding "the facts on the record [did] not establish that Appellant shared [the perpetrator's] criminal intent," in part, because the appellant did not know of the perpetrator's "plan to assault [the victim] . . . nor did he provide any affirmative assistance" during the assault).

Consequently, appellant's providence inquiry showed he actively participated in SGT [redacted] criminal scheme with full knowledge of what SGT [redacted] intended to do. *Mitchell*, 66 M.J. at 178.

II. Appellant had the specific intent to facilitate SGT [redacted] crime.

There is ample evidence on the record appellant had "the specific intent to facilitate the crime by another." *Vela*, 71 M.J. at 286 (citing *United States v. Gosselin*, 62 M.J. 349, 351–52 (C.A.A.F. 2006)). Appellant knew he was helping SGT [redacted] by driving him to the apartment complex. (R. at 356). When appellant looked around the apartment complex, he knew he "was helping [SGT [redacted]] do what he told [appellant] about earlier, when he said they [the intended victims] have got to go." (R. at 357). Appellant told the military judge "I knew what [SGT [redacted]] intended to do, and I knew I would help him, but I also hoped nobody would get hurt." (R. at 368). The military judge confirmed that appellant "had no ill will or malice towards those two individuals," but clarified that "as [appellant] w[as] aiding [SGT [redacted]]," appellant was "intending to aid him." (R. at 368–69). Although he "hope[d] that no one would get killed," appellant was not under duress when he intentionally aided SGT [redacted]. (R. at 369–71). Consequently, appellant had the specific intent necessary for the offense of aiding and abetting.

Appellant argues the military judge excluded two definitions from the providence inquiry: that an accused must "participate in the act as 'something he wishes to bring about' and that the accused has a 'conscious sharing of criminal intent.'" (Appellant's Br. 34). Appellant asserts that "[w]ithout these necessary instructions, the military judge found appellant provident to committing

premeditated murder without appellant's premeditation or any other form of specific intent to harm another." (Appellant's Br. 34). Appellant asserts that "[b]ecause the 'wish' language is part of the necessary definitions and instructions for aiding and abetting and appellant did not wish to bring about [redacted] and [redacted] murders, then appellant was not provident to premeditated murder." (Appellant's Br. 40). However, the United States Supreme Court's 2014 holding in *Rosemond v. United States* is fatal to appellant's arguments.

In *Rosemond*, the appellant participated in "a drug deal gone bad" where a member of his group fired a gun at the would-be purchaser. 572 U.S. at 67. He was charged with aiding and abetting "using a gun in connection with a drug trafficking crime" under 18 U.S.C. §2.[2] *Id.* at 67–68. Rosemond averred that he never had a gun and argued he "could be found guilty of aiding or abetting a §924(c) violation only if he 'intentionally took some action to facilitate or encourage the use of the firearm.'" *Id.* at 68–69. When the Court analyzed the requisite mental state for aiding and abetting, it noted Judge Learned Hand's

[2] Military courts have recognized the correlation between the federal aiding and abetting statute,18 U.S.C. § 2, and Article 77, UCMJ. *See Pritchett*, 31 M.J. at 217 (citing to case law from federal circuits interpreting "the similarly worded 18 USC § 2"); *Speer*, 40 M.J. at 233 (stating Article 77, UCMJ, "is similar to the Federal civilian aiding-and-abetting statute-- 18 USC § 2"); *United States v. Marsh*, 13 U.S.C.M.A. 252, 255, 32 C.M.R. 252, 255 (C.M.A. 1962) ("Article 77, 10 U.S.C. § 877, was based by the drafters of the Code upon the comparable provisions of Title 18, [U.S.C.] §§ 2 and 3").

"canonical formulation of that needed state of mind" as "something [an accused] wishes to bring about," and it held that an accused has the requisite state of mind for aiding and abetting when he "actively participates in a criminal scheme knowing its extent and character." *Id.* at 76–77.

Further, the Court expressly rejected the argument that an accused who knowingly aids in an armed robbery but does not personally want a gun to be used should be liable for a lesser form of theft. *Id.* at 79–80. The Court stated an appellant's personal feelings about the shared criminal enterprise *do not matter*: "[t]he law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding." *Id.* at 79–80. "Whatever his original misgivings, he has the requisite intent to aid and abet *bank* robbery; after all, he put aside those doubts and knowingly took part in that more dangerous crime. The same is true of an accomplice who knowingly joins in an armed drug transaction—regardless whether he was formerly indifferent or even resistant to using firearms." *Id.* at 79 (emphasis in original).

Here, appellant satisfied the specific intent element because he knew SGT [redacted] intended to murder the victims, and he still decided to assist him in that venture. *See Rosemond*, 572 U.S. at 78 ("When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with

his role in the venture that shows his intent to aid an *armed* offense.") (emphasis in original). Additionally, while appellant's statements that he "hoped nobody would be hurt" and "didn't desire for them to be killed," (R. at 368–69), show that he may have felt "a sense of foreboding" about what SGT [redacted] was about to do, the Supreme Court held that his foreboding is irrelevant to whether he had the requisite intent for aiding and abetting. *Id.* at 79–80. Further, the phrase appellant asserts the military judge erred by excluding, "wishes to bring about," is not contained in the text of Article 77, UCMJ, the explanation from the *MCM*, or the elements as defined by case law. *See* Article 77, UCMJ; *MCM*, pt. IV, ¶ 1.b.(2)(b); *Vela*, 71 M.J. at 286. Therefore, this court should apply the Supreme Court's rationale from *Rosemond* and find the military judge did not abuse his discretion in accepting appellant's plea.

Appellant also cites to the stipulation of fact from SGT [redacted] court-martial as support for setting aside appellant's plea. (Appellant Br. 44). However, military and civilian courts have long held that the results of a perpetrator's trial are not dispositive as to the sufficiency of an aider and abettor's case. *See Marsh*, 13 U.S.C.M.A. at 255–58 (holding an accessory after the fact "may be punished . . . without regard to the separate conviction or acquittal of the principal offender"); *Standefer v. United States*, 447 U.S. 10, 13, 20 (1980) (holding that "[w]ith the enactment of [18 U.S.C. §2], all participants in conduct violating a federal criminal

statute . . . are punishable for their criminal conduct; the fate of other participants is irrelevant").

Appellant asserts SGT [redacted] admissions from his court-martial "contradicted and set up matters inconsistent with appellant's guilty plea." (Appellant's Br. 44–46). This is similar to *Standefer*, where the appellant argued "the Government should be barred from relitigating" issues that arose in the earlier trial of the named principal. 447 U.S. at 14, 21–22. The Supreme Court rejected this argument and held "[w]hile symmetry of results may be intellectually satisfying, it is not required." *Id.* at 25. The appellant "received a fair trial at which the Government bore the burden of proving beyond a reasonable doubt that [the named principal committed the offense charged] and that petitioner aided and abetted him in that venture. He was entitled to no less -- and to no more." *Id.* at 26. The same is true here. Appellant knowingly and voluntarily pleaded guilty. (R. at 346–47, 381). Given appellant's sworn testimony, SGT [redacted] admissions at his trial are irrelevant.

Finally, appellant argues the military judge's use of the term "present intent" was problematic because "appellant never admitted to knowing what SGT [redacted] was going to do, only to what SGT [redacted] intended to do at certain distinct periods of time." (Appellant's Br. 35). This is a red herring, as appellant knew SGT [redacted] intended to kill the victims from the point SGT [redacted] first got in his car, but he still helped SGT [redacted] throughout the commission of the offense. (R. at 356–57). The

Supreme Court offered "[a] final, metaphorical way of" illustrating appellant's guilt in this case:

> By virtue of §924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course is to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened stakes when he decided to stay in the game.

Rosemond, 572 U.S. at 80. Simply put, once appellant saw that SGT [redacted] upped the ante when he got into the car with a firearm and said the other man "has got to go," (R. at 356, 364), appellant "knew the heightened stakes when he decided to stay in the game." *Id.* Consequently, he had "the specific intent to facilitate the crime by another." *Vela*, 71 M.J. at 286 (citation omitted).

III. Even if this court determines the military judge's definitions of the offense was incorrect, it should still affirm the findings because appellant's testimony established all elements of the offense.

Even assuming this court finds the military judge did not adequately explain the requirements related to appellant's intent, the providence inquiry provides sufficient facts to establish appellant's guilt. In *United States v. Crouch*, our superior court rejected the appellant's argument "that the military judge's failure to specifically inquire about his intent require[d] reversal." 11 M.J. 128, 129 (C.M.A. 1981). The court has "always rejected such a structured, formulistic interpretation

of *United States v. Care* . . . [r]ather, the Court has examined the entire inquiry to ascertain if the appellant was adequately advised." *Id.* at 129–30 (citations omitted). The court held while it would have been "appropriate for the trial judge to have explicitly advised the accused that, to be an aider and abettor, he had to intend to aid the criminal venture of the principals . . . in light of the appellant's admissions of fact, the scope of the *Care* inquiry was not fatally deficient." *Id.* Similarly, as detailed throughout this brief, appellant clearly admitted facts supporting all elements of the offense. Therefore, even if this court finds the military judge should have conducted additional inquiry on appellant's intent, there is an adequate factual basis to accept appellant's plea.

IV. If appellant wished to challenge "the legal basis for the charge, he could have done so through a motion to dismiss or a plea of not guilty at trial."

"By pleading guilty, an accused does more than admit that he did the various acts alleged in a specification; 'he is admitting guilt of a substantive crime.'" *United States v. Clark*, ARMY 20140252, 2016 CCA LEXIS 363, at *5 (Army Ct. Crim. App. 31 May 2016) (mem. op) (citation omitted). In exchange for the benefit of a confinement limitation, appellant pleaded guilty to the specifications at issue. (R. at 346; App. Ex. LIII). Appellant now attempts to retract his unconditional guilty plea, despite the military judge informing him that through his plea he waived "the right to a trial of the facts by [the trial] court." (R. at 346–47).

Appellant understood the rights he gave up through his plea. (R. at 346–47). Consequently, this court should view his subsequent challenges with skepticism. *See United States v. Erickson*, 61 M.J. 230, 233 (C.A.A.F. 2005) (holding the appellant "provided no information on appeal that would undermine the validity of his acknowledgement at trial" regarding the basis for accepting his guilty plea, and that "[i]f he wished to challenge the legal basis for the charge, he could have done so through a motion to dismiss or a plea of not guilty at trial").

"With the full benefit of hindsight, it is often possible to find less-than-perfect execution in a guilty plea—questions the military judge could have explored to exhaustion, or facts that might have been developed more thoroughly in the adversarial process of a contested trial." *United States v. Laughrey*, ARMY 20160146, 2018 CCA LEXIS 323, at *19–20 (mem. op. on remand) (Army Ct. Crim. App. 2 Jul. 2018). While "a more probing inquiry . . . might have resulted in a record 'free even of arguable error,'" this case "shows why the law gives substantial deference to the military judge in guilty plea cases." 2018 CCA LEXIS 323, at *20 (citation omitted).

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence as approved by the convening authority.

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CERTIFICATE OF SERVICE

UNITED STATES v. PHILLIP E. THOMPSON, JR., ARMY 20190525

I hereby certify that a copy of the foregoing was sent via electronic submission to Mr. William Cassara, civilian appellate defense counsel, at [redacted] and the Defense Appellate Division, at [redacted] on the 21st day of April, 2021.

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