**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

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| United States,<br>Appellee | Reply Brief on Behalf of Appellant |
| v. | Docket No. Army 20190525 |
| Specialist (E-4)<br>**PHILLIP E. THOMPSON, JR.,**<br>United States Army,<br>Appellant | Tried at Fort Stewart, Georgia, on 21 December 2017, 6-7 August 2018, 23 April 2019, 28 June 2019, and 30-31 July 2019, before a general court-martial convened by the Commander, Headquarters and Fort Stewart, Colonel David Robertson, Military Judge, presiding. |

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

Pursuant to Rule 18(d) of the United States Army Court of Criminal Appeals Rules of Appellate Procedure, dated 15 January 2019, appellant hereby replies to the Brief on Behalf of Appellee filed on 21 April 2021.

## SUMMARY OF REPLY

In its zeal to rescue appellant's conviction from the military judge's triple errors in (1) failing to properly define "intent" and "knowledge"; (2) adding language to the knowledge element of aiding and abetting; and (3) accepting appellant's plea even though the providence inquiry and the stipulation of fact set up matters inconsistent with the guilty plea, the government deliberately disregards the facts, the law, and the military judge's own words. No amount of rhetorical sleight of hand can salvage appellant's conviction from the wreckage of the

military judge's errors and the perpetrator's admissions. Justice compels this Honorable Court to set aside and dismiss the findings of guilty and the sentence and restore all rights, property, and privileges to appellant.

**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.**

**1. The government's premise is incorrect.**

The gravamen of the government's argument is that "appellant knew SGT [redacted] intended to murder the people in the apartment before he assisted him fulfill that very intent." (Appellee Br. at 12). This premise is incorrect. SGT [redacted] did not form the specific intent to kill PV2 [redacted] until *after* the junior Soldier called his wife a "bitch" and he did not form the specific intent to kill SPC [redacted] until *after* he realized that SPC [redacted] had witnessed PV2 [redacted] murder. (Clemency Request). The government, which included the *same trial counsel* who prosecuted appellant's case, stipulated with SGT Craig about his specific intent to kill PV2 [redacted] and SPC [redacted] and when he formed that specific intent. (Clemency Request). The trial counsel should have recognized that SGT [redacted] stipulation of fact set up matters inconsistent with their prosecution of appellant's case. Here, the government cannot bring itself to acknowledge SGT [redacted] stipulation of fact and his

admissions about his specific intent because these facts unambiguously set up matters inconsistent with appellant's plea.

**2. This Court can, and should, consider SGT [redacted] stipulation of fact.**

The government does not contest the substance of SGT [redacted] stipulation of fact. In fact, the government unconvincingly calls SGT [redacted] admissions "irrelevant" and then makes a concerted effort to ignore the admissions about when he formed the specific intent to kill PV2 [redacted] and SPC [redacted]. (Appellee Br. at 20). To salvage appellant's conviction from the blatant inconsistencies between his plea and SGT [redacted] plea, the government asserts that "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." (Appellee Br. at 19) (citing *United States v. Marsh*, 13 U.S.C.M.A. 252, 255-58 (C.M.A. 1962)).

The government's argument is unpersuasive for several reasons. First, *Marsh* is about whether the accused's guilty plea for accessory after the fact could be affirmed when the perpetrator was acquitted of larceny. *See* 13 U.S.C.M.A. 252. Here, SGT [redacted] was not acquitted of premeditated murder; he pled guilty and entered into a stipulation of fact with the government that he did not form the specific intent to kill PV2 [redacted] until after PV2 [redacted] called his wife a "bitch" and he did not form the specific intent to kill SPC [redacted] until after he realized that SPC [redacted] saw him kill PV2 [redacted]. Moreover, *Marsh* is a case about the accused's actus reus,

whereas the instant case is about appellant's and SGT [redacted] mens rea. Finally, *Marsh* does not prohibit this Court from considering SGT [redacted] stipulation of fact.

Next, the government, in its ostrich-like effort to ignore SGT [redacted] admissions about when he formed the specific intent to kill PV2 [redacted] and SPC [redacted] deliberately disregards the well-established tenet that "[i]n determining the providence of appellant's pleas, it is incontrovertible that an appellate court must consider the *entire* record in a case." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995) (emphasis added). *See United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2003); *United States v. Jordan*, 57 M.J. 236, 238-39 (C.A.A.F. 2002). As discussed in the Brief on Behalf of Appellant, the entire record includes SGT [redacted] stipulation of fact which was submitted as part of appellant's Clemency Request. (Clemency Request).

Sticking its proverbial head even deeper in the sand, the government also wholly ignores this Court's authority to take judicial notice of the record in SGT [redacted] case. Both Mil. R. Evid. 201 and case law permit this Court to take judicial notice of its own records in cases other than the one presently under consideration where there is an appropriate purpose to do so. *United States v. Leathorn*, ARMY 20190037, 2020 CCA LEXIS 340 at *14 (Army Ct. Crim. App. Dec. 11, 2020) (mem. op.) (citing *United States v. Koneski*, 4 M.J. 911, 914

(A.F.C.M.R. 1977) (citations omitted)). *See United States v. Moore*, 9 U.S.C.M.A. 284 (C.M.A. 1958); *United States v. Lovett*, 7 U.S.C.M.A. 704 (C.M.A. 1957); *United States v. Miller*, 34 M.J. 1175, 1178 (A.F.C.M.R. 1992); *United States v. Scholten*, 14 M.J. 939, 941 (A.C.M.R. 1982); *United States v. Gates*, 8 M.J. 631, 633 (A.C.M.R. 1979). Here, there is an appropriate purpose for taking judicial notice of the record in SGT [redacted] case: appellant was charged with and pled guilty to premeditated murder on a theory of vicarious liability and the record of the perpetrator contains facts that set up matters inconsistent with appellant's plea regarding the formation of the specific intent to kill the victims. Thus, contrary to the government's feeble argument, SGT [redacted] stipulation of fact is exceptionally relevant to the resolution of the assigned error.

**3. Appellant tried to talk SGT [redacted] out of committing any crime.**

Regarding appellant's actus reus, the government focuses on "a plethora of affirmative steps that appellant undertook to aid, abet, assist, and participate in SGT [redacted] scheme to kill PV2[redacted] and SPC [redacted]. (Appellee Br. at 13-14). The government deliberately disregards the affirmative steps appellant took to dissuade SGT [redacted] from committing any crimes. First, appellant lied to SGT [redacted] about how many people were inside the apartment. (R. at 358, Pros. Ex. 20). He did so to "throw [SGT [redacted]] off. . . ." (R. at 358). Next, during the seven minute and thirteen second phone call that began at 1256, appellant tried to talk SGT [redacted] out

of doing what he was about to do. (R. at 359, Pros. Ex. 20). He also begged SGT [redacted] to think about his toddler daughter. (R. at 359, Pros. Ex. 20). Appellant undertook these affirmative steps to prevent SGT [redacted] from shooting PV2 [redacted] and SPC [redacted]. In taking these affirmative steps, appellant did not share SGT [redacted] criminal purpose or design.

**4. The elements of the offense, as defined by case law, require the inclusion of the language "as something he wishes to bring about" and "consciously share in the actual perpetrator's criminal intent to be an aider and abettor" and do not include "present intent."**

Initially, it must be noted that the government deliberately disregards the fact that the defense insisted that the language "as something he or she wishes to bring about" and "the accused consciously shared SGT [redacted] knowledge of the underlying criminal act and intended to help him" be included in the proposed instructions. (App. Exs. XXXI and XXXVI).

Next, the government offers no rationale to support the military judge's 29 July 2019 decision to exclude the language "as something he wishes to bring about" and "[a]lthough the accused must consciously share in the perpetrator's criminal intent to be an aider and abettor" from Instruction 7-1-1. Instead, the government argues that this Court should consider only the text of Article 77, UCMJ, the explanation from the MCM, and the elements of the offense *as defined by case law*. (Appellee Br. at 19) (emphasis added). Appellant agrees with the government that this Court should consider the elements as defined by case law.

Indeed, this is precisely appellant's argument: case law required the military judge to include certain language and the military judge erred by failing to include this language and by adding language not required by case law. Thus, he failed to properly identify, explain, and define the elements of the offense.

In arguing that this Court should consider only the text of the offense, the explanation from the MCM, and the elements as defined by case law, the government wants this Court to affirmatively disregard the standard instructions from the Benchbook, namely 7-1-1, which provides, in relevant part:

> Any person who actually commits an offense is a principal. Anyone who knowingly and willfully aids or abets another in committing an offense is also a principal and equally guilty of the offense. An aider or abettor must knowingly and willfully participate in the commission of the crime *as something (he) (she) wishes to bring about* and must aid, encourage, or incite the person to commit the criminal act. . . .
>
> *Although the accused must consciously share in the actual perpetrator's criminal intent to be an aider or abettor*, there is no requirement that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.

Benchbook, para. 7-1-1 (emphasis added).

As discussed in the Brief on Behalf of Appellant, military judges may appropriately tailor the standard Benchbook instructions, but logic dictates that the tailored instructions must accurately reflect the law. Here, the military judge's tailored instructions did not accurately reflect the law. In other words, even if this

Court agrees with the government that it should not consider the standard instructions and should consider only the text of Article 77, UCMJ, the explanation in the MCM, and the elements as defined by case law, the explanation of the offense and case law requires the inclusion of the excised language for the proper explanation and definition of the elements.

**a. "Something he wishes to bring about"**

The government asserts that the excised language is not required, yet it approvingly cites *Rosemond v. United States*, 572 U.S. 65 (2014), which upholds Judge Learned Hand's "'canonical formulation of that needed state of mind' as 'something [an accused] wishes to bring about . . . .'" (Appellee Br. at 17-18). The government then claims that *Rosemond* "is fatal to the appellant's arguments." (Appellee Br. at 17). Under the government's logic, *Rosemond* is fatal to appellant's argument even though that decision contains the very language at issue. The government simply cannot reconcile its own arguments. *Rosemond* defines intent as "something he wishes to bring about." *Id*. at 66. *Rosemond* is not fatal to appellant's arguments; rather, it buttresses appellant's position.

The CAAF has also made clear that the accused must "participate in it as something that he wishes to bring about . . . ." *United States v. Mitchell*, 66 M.J. 176 (C.A.A.F. 2008. *See also United States v. Pritchett*, 31 M.J. 213, 217, (C.M.A. 1990); *United States v. Gosselin*, 62 M.J. 349 (C.A.A.F. 2006). Thus, the

elements *as defined by case law* require appellant's specific intent to be "something he wishes to bring about."

During the providence inquiry, appellant repeatedly stated that he hoped nobody would get hurt. (R. at 358-69). After announcing the quantum portion of the pretrial agreement, the military judge recommended that the convening authority grant clemency to appellant in the form of "meaningful reduction in his term of confinement" specifically because, inter alia, appellant "bore no ill will towards the victims and he did not wish harm upon them." (R. at 493-94). In other words, appellant did not wish to bring about PV2 [redacted] and SPC [redacted] murders.

**b. "Consciously share in the actual perpetrator's criminal intent to be an aider and abettor"**

While the government addresses the excised language "as something he wishes to bring about," the government offers no argument in support of the military judge's failure to properly instruct appellant that he must "consciously share in the actual perpetrator's criminal intent to be an aider and abettor," even though the language "[s]hare in the criminal purpose or design" appears in the explanation of the offense. MCM, pt. IV, ¶ 1.b.(2)(b)(11). The government has made clear that the words in the explanation of the offense should be considered, yet the government deliberately ignores the language of the explanation.

Moreover, the government approvingly quotes *Mitchell*, 66 M.J. at 180, for the proposition that the intent element may be satisfied, in the case of an accomplice, "by proof that the accomplice shared in the perpetrator's criminal purpose . . . ." (Appellee Br. at 15). Once again, the elements of the offense *as defined by case law* require the inclusion of this language, yet the military judge failed to include this language and failed to articulate why he excluded it.

**c. "Present intent"**

Next, in attempting to rescue appellant's conviction from the facts, the government insists that the military judge's unexplained addition of "present intent" instead of "intent" is a "red herring." (Appellee Br. at 20). Just like the military judge did not articulate why it was necessary to instruct appellant about "present intent" vice "intent," the government also fails to articulate a justification for the different language.

Words matter. The military judge cannot add a word to the instructions on the elements, not articulate his rationale for doing so, and expect the addition not to mean anything. The military judge's unexplained addition of "present" fundamentally altered the specific intent element of the offense. It is well-understood that "present" means contemporary, contemporaneous, current, and existing at that time. Thus, the military judge's use of the phrase "present intent" meant SGT [redacted] intent at distinct moments in time. Appellant never admitted to

knowing what SGT [redacted] was going to do, only to what SGT [redacted] intended to do at certain distinct moments in time. Moreover, SGT [redacted] present intent during the phone call in which appellant begged SGT [redacted] to think about his little girl and appellant tried to convince him not to commit any violence acts was different than his present intent when PV2 [redacted] opened the door with a kitchen knife. This present intent was different than SGT [redacted] present intent after PV2 [redacted] called SGT [redacted] wife a "bitch."

As stated above, the government insists that the Benchbook instructions are irrelevant and that this Court should consider only the text of Article 77, UCMJ, the explanation from the MCM, and the elements of the offense *as defined by case law*. Once again, the government agrees with appellant. Here, "present intent" does not appear in the case law regarding the knowledge element of aiding and abetting. Thus, the elements, as defined by case law, do not include "present intent" and the military judge erred in including that language.

**d. The military judge's problematic ruling**

Once again, in its ostrich-like approach to the facts of this case, the government disregards the military judge's 29 July 2019 email ruling on the excised language as if the ruling did not exist. Just as the military judge failed to articulate his rationale for excluding the aforementioned language at trial, the government fails to articulate a rationale in support of the military judge's

exclusion. Without offering any explanation, the military judge announced that he "remov[ed] the problematic 'wish to bring about' language," and, as discussed above, failed to address the language "consciously share in the actual perpetrator's criminal intent to be an aider and abettor." It seems that what was "problematic" about the language was that appellant would not be provident to this language and the military judge and the government wanted to salvage appellant's conviction from the inconvenient facts. Although the government ignores inconvenient facts, this Court cannot ignore the inconsistencies between appellant's guilty plea and the facts, pursuant to his stipulation of fact and providence inquiry and SGT [redacted] stipulation of fact.

**Conclusion**

The military judge erred in identifying, explaining, and defining the elements of aiding and abetting premeditated murder. The record, including appellant's stipulation of fact and admissions in the providence inquiry and SGT [redacted] stipulation of fact, contains factual circumstances that do not objectively support appellant's guilty plea.

Appellant's stipulation of fact and admissions, coupled with SGT [redacted] stipulation of fact, demonstrate a substantial basis in law and fact for questioning appellant's guilty plea. Accordingly, the military judge abused his discretion in accepting appellant's guilty pleas to two specifications of premediated murder.

For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss the findings and sentence and restore all rights, property, and privileges to appellant.

## PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court grant the requested relief.

[redacted]

FOR WILLIAM E. CASSARA, Esq.
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on May 11, 2021.

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