UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ,[1] WALKER, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist PHILLIP E. THOMPSON, JR.
United States Army, Appellant

ARMY 20190525

Headquarters, Fort Stewart
David H. Robertson, Military Judge
Colonel Michael D. Mierau, Jr., Staff Judge Advocate

For Appellant: Major Kyle C. Sprague, JA.; William E. Cassara, Esquire (on brief and reply brief)

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Craig Schapira, JA; Lieutenant Colonel Wayne H. Williams, JA; Captain Christopher K. Wills, JA (on brief).

6 December 2021

OPINION OF THE COURT

ALDYKIEWICZ, Senior Judge:

"*Actus non facit reum, nisi mens sit rea*, 'the act alone does not amount to guilt; it must be accompanied by a guilty mind.'" *United States v. Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995).

A basic tenet of American jurisprudence is that every crime is comprised of two parts, the *actus reus* and the *mens rea*.[2] The former, the "wrongful deed" and

[1] Senior Judge Aldykiewicz decided this case while on active duty.

[2] The exceptions to this general rule are strict liability offenses, offenses where "action alone is enough to warrant a conviction, with no need to prove a mental

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the latter, the "guilty mind." "Criminal liability is normally based upon the concurrence of two factors, an evil-meaning mind and an evil-doing hand . . . ." *United States v. Bailey*, 444 U.S. 394, 402 (1980) (cleaned up). "That a crime is comprised of both an actus reus and a mens rea necessarily means both components must exist at the time an offense is committed if the offense is to amount to a crime at all." *United States v. Rodriguez*, 79 M.J. 1, 3 (C.A.A.F. 2019). "[T]he unremarkable notion that a crime must consist of both a mens rea and an actus reus is deeply rooted in American jurisprudence . . . ." *Id.*at 4. Whether convicted via a contested proceeding or by a plea of guilt, the above is unchanged.

In March of 2017, appellant drove his friend, Sergeant (SGT) Craig to an apartment where SGT Craig proceeded to execute two soldiers, Private (PV2) MJ (Victim 1) and Specialist (SPC) MB (Victim 2), shooting each twice and stabbing the former in the neck. Knowing of SGT Craig's intent to kill, appellant assisted SGT Craig by: driving SGT Craig to the apartment; conducting a reconnaissance of the apartment prior to SGT Craig's entry to confirm the number of people inside; waiting for SGT Craig so he could drive SGT Craig away from the area after the killings; driving SGT Craig from the area following the killings; and, retaining possession of and hiding one of SGT Craig's weapons. Notwithstanding the pairs efforts to destroy evidence and keep their respective roles in the killings secret, both were quickly identified by authorities.

After being charged by military authorities for his role in the murders, appellant pleaded guilty as a principal, under an aider and abettor theory of liability, to two specifications of premeditated murder.[3] During his guilty plea, appellant

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state." *Strict-Liability Crime*, Black's Law Dictionary (11th cd. 2019). Strict liability offenses, however, are generally disfavored in the law. *See United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016). "'While strict-liability offenses are not unknown to the criminal law . . . the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status.'" *Id.* (quoting *United States v. United States Gypsum* Co., 438 U.S. 422, 437–38 (1978) (citations omitted)).

[3] Appellant was charged with one specification of conspiracy to commit premeditated murder and two specifications, as a principal under an aider and abettor theory, of premediated murder under Articles 81 and 118, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 918 [UCMJ]. In accordance with his pretrial agreement, appellant pleaded guilty to the two specifications of premeditated murder. The conspiracy specification was dismissed. The military judge sentenced appellant to a dishonorable discharge and confinement for life with the possibility of

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admitted to every act that assisted SGT Craig in the killings, assistance provided with clear knowledge of SGT Craig's intent to kill the apartment's occupants. However, appellant also stated that he "bore no ill will towards the victims" and "did not wish harm upon them," undisputed facts that the military judge echoed in his post-sentencing clemency recommendation to the convening authority.

Appellant now asserts the military judge abused his discretion by accepting his plea of guilty, arguing that the record discloses a substantial basis in law and fact for questioning the plea. We agree. To quote *Bailey*, appellant's guilty plea admitted to an "evil-doing hand" but not an "evil-meaning mind." Stated another way, appellant's plea established the *actus reus* but not the requisite *mens rea* necessary for a conviction as a principal to premeditated murder under an aider and abettor theory.

BACKGROUND

A. Facts and Circumstances Surrounding the Double Homicides

Appellant and SGT Craig, a soldier in appellant's unit, were friends. During their friendship, SGT Craig began to have marital problems with his wife, Specialist (SPC) MC, with whom SGT Craig had a daughter. Eventually the two separated.

During this separation, SGT Craig suspected his wife was "cheating" on him. Sergeant Craig began following and harassing his wife as well as men he believed to be sexually involved with her. On one occasion, SGT Craig requested appellant deflate his wife's tires, a request appellant complied with. Sergeant Craig's harassing behavior eventually resulted in the issuance of a military protective order (MPO), an MPO that prevented SGT Craig from interacting with his wife. In response and in violation of the MPO, Sergeant Craig began using appellant as an intermediary to communicate with his wife.

In early 2017, SGT Craig suspected his wife was romantically involved with Victim 1. On Saturday, 4 March 2017, SGT Craig's wife and Victim 1 attended a party at Victim 2's apartment. During this time, SGT Craig, while at an apartment nearby, had various friends spy on his wife at the party so they could report back to him on who she was with and what she was doing.

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parole. The pretrial agreement capped confinement at forty years and, at action, the convening authority approved thirty-five years.

At 0200, SGT Craig's wife and Victim 1 left the party, in separate vehicles, and headed to her residence. Sergeant Craig followed them. Once at the residence, SGT Craig snuck around the residence until he could see his wife and Victim 1 through a window. Unaware of his presence, SGT Craig witnessed his wife and Victim 1 cuddling together on a couch.

Later that same morning, now Sunday, SGT Craig asked one of his friends if he could borrow his car, a red Infinity coupe, so that he could see his daughter without anyone knowing he would be violating his MPO. Sergeant Craig's friend agreed, giving SGT Craig the keys to the vehicle. Returning to his wife's residence, SGT Craig waited for Victim 1 to leave after which SGT Craig followed him back to Victim 2's apartment where SGT Craig remained, outside the apartment, for approximately 30 minutes before leaving.

While SGT Craig stalked Victim 1, appellant was at church with his wife and four-month old boy, unaware of the previous night's events to include the party or SGT Craig's actions that morning. During the church service, appellant missed a call from SGT Craig. As the service was ending, SGT Craig called appellant a second time, a call appellant answered. Sergeant Craig told appellant to meet him after church.

After the service ended, appellant drove home with his wife and son. Appellant dropped his wife off at home but kept his son, who had fallen asleep in appellant's truck, with him so as not to disturb his sleep. After telling his wife he would be back soon, appellant drove to meet SGT Craig. They met in a library parking lot. Upon appellant's arrival, SGT Craig, carrying a dark colored jacket, approached appellant's truck. Appellant noticed SGT Craig was not driving his car but rather a red Infinity coupe belonging to SGT Craig's friend. Appellant also noticed that SGT Craig had his Glock handgun in his waist. Sergeant Craig got into appellant's truck and told appellant that he saw his wife with another man the previous night. Appellant noticed SGT Craig was aggravated. Appellant asked SGT Craig if he took pictures that SGT Craig could use for his divorce. After responding he was not concerned about that, SGT Craig brandished his firearm by removing it from his waistband, placed the gun on his lap, and told appellant that "these niggas got to go." When appellant asked SGT Craig what he meant by that, SGT Craig simply repeated himself, again saying "these niggas got to go." Appellant interpreted this to mean that SGT Craig intended to kill whoever was involved with his wife and whoever else was with him at the time.

Telling appellant that he knew where the man involved with his wife was, SGT Craig instructed appellant to drive out of the library parking lot and "take a left." Appellant complied, doing as SGT Craig directed, deciding to "to play it cool to not upset [SGT Craig] anymore." In so doing, he believed he "would keep [himself] and [his son] safe."

Once they arrived in a parking lot near Victim 2's residence, appellant and SGT Craig sat in the truck for about ten minutes. Sergeant Craig then instructed appellant to conduct a reconnaissance of the apartment so he, SGT Craig, could know how many people were inside. Sergeant Craig told appellant he could get inside the apartment by pretending to have left his laptop at the party the night before. Doing as SGT Craig instructed, appellant proceeded to the apartment and spoke with Victim 1 outside the apartment entrance. After checking with Victim 2, who was inside the apartment, Victim 1 informed appellant his laptop was not inside. Thanking Victim 1, appellant walked over to and attempted to enter a nearby church "to try and figure out what to do." Finding the church locked, appellant returned to his truck where SGT Craig was waiting with appellant's son.

Once inside the truck, appellant lied to SGT Craig, telling him there was only one person in the apartment, a lie intended "to throw [SGT Craig] off." Sergeant Craig, however, did not believe appellant, knowing that earlier that morning there were two men inside the apartment. After informing appellant that one of the men inside had been with his wife the night before, SGT Craig balled up his jacket and exited the truck. Sergeant Craig directed appellant not to leave and appellant complied.

Sitting on the stairwell by Victim 2's apartment, SGT Craig called appellant and told him he could not stop thinking about what happened between Victim 1 and his wife. In response, appellant attempted to talk SGT Craig "out of doing what he was about to do," telling him to think about his daughter. Sergeant Craig responded "with a long period of silence." Once the call ended, appellant remained in the truck with his son. As appellant waited, he began searching online for a Playstation 4 gaming console that he wanted to purchase. Appellant also texted a friend. A little while later, SGT Craig called appellant and instructed appellant to leave the immediate area but wait for him and return when he, SGT Craig, was ready to be picked up. Again complying with SGT Craig's direction, appellant left and parked at a nearby church. Roughly twenty minutes later, appellant heard a gunshot. Appellant tried to call SGT Craig; SGT Craig did not answer.

Unable to make telephonic contact with SGT Craig, appellant drove back to Victim 2's apartment to look for SGT Craig, eventually finding SGT Craig in the library parking lot where they first parked. Upon making contact, SGT Craig handed appellant his Glock and told appellant to store it at appellant's residence. The two then departed the area for appellant's home, appellant in his truck with his son and SGT Craig in the borrowed Infinity. After dropping off his son and securing the handgun inside his residence, SGT Craig told appellant to get inside the borrowed Infinity. Appellant complied and SGT Craig drove appellant to his friend's house, the friend who had earlier loaned him the Infinity. Once inside, SGT Craig admitted to appellant, the Infinity owner, and another that he shot and killed Victim 1 and Victim 2. Sergeant Craig also admitted to stabbing Victim 1. Appellant remained

quiet as SGT Craig described the murders, after which SGT Craig told appellant it was time to go.

Although appellant asked SGT Craig to drive him home, SGT Craig, now driving his own vehicle, drove appellant out to the woods where SGT Craig got out of the car with another gun. When he returned, SGT Craig had disposed of the gun as well as his bloody clothes, asking appellant to come back in a few days and "burn" the clothes. Appellant, however, avoided the request by saying he was busy. After leaving the woods, SGT Craig took appellant home, telling him not to tell anyone about the double murders.

Later that evening, Victim 1's and Victim 2's bodies were discovered inside Victim 2's apartment by officers of the Hinesville Georgia Police Department (HPD). Both soldiers were in the middle of the apartment living room, each one having been shot twice. In addition to being shot, Victim 1 had a kitchen knife stuck in his neck.

After SGT Craig became a suspect, agents from the Criminal Investigative Command (CID) and the HPD questioned appellant, who gave three statements about his involvement, each statement progressively more detailed than the one prior. Cooperating with law enforcement, appellant eventually led the authorities to the murder weapon, the weapon SGT Craig previously discarded in the woods.

Based on his actions, and the assistance provided SGT Craig, appellant was eventually charged with conspiracy to commit premeditated murder and premediated murder.[4]

B. Appellant's Providence Inquiry

During appellant's guilty plea, the military judge informed appellant of the following elements for Specification 1 of Charge I, the premeditated murder of Victim 1:

> One, that [Victim 1] is dead; Two, that his death resulted from [SGT Craig] shooting him with a handgun on or about 5 March 2017, at or near Hinesville, Georgia; Three, that the killing of [Victim 1] was unlawful; Four, that at the time of the killing, you knew [SGT Craig] had a premeditated design to kill [Victim 1]; and Five, that you

[4] *See* footnote 2 *supra*.

> intentionally aided and abetted [SGT Craig] of committing the offense of premeditated murder of [Victim 1].

The military judge then read off the same elements for Specification 2, of Charge I, the premeditated murder of Victim 2, the only difference being the named victim (i.e., Victim 2 in place of Victim 1).

After reading appellant the definition of premeditated design to kill, the military judge addressed vicarious liability (i.e., criminal liability as an aider and abettor), informing appellant of the following:

> 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 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.

The military judge then explained how appellant could be liable under an aider and abettor theory:

> Under the facts of this case, for you to be liable as an aider and abettor, you must have known Sergeant Craig's present intent to kill, specifically intended to aid or abet him, and in fact, did aid or abet him. Now, there is no requirement that you agreed with or even had knowledge of the means by which Sergeant Craig intended to carry out the murder of [Victim 2] and [Victim 1].

During the providence inquiry, appellant explained to the military judge that when SGT Craig put his Glock on his lap and said "niggas got to go" he "knew what Sergeant Craig 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 the time." Appellant also said when he was scoping out the apartment, he knew he "was helping him do what he told me about earlier, when he said they have got to go." Appellant also explained, "I didn't know the people inside, and *I didn't want anything bad to happen to them.*" (emphasis added). Appellant stated he tried to lie to SGT Craig about how many people were in the apartment "to throw him off" and "tried to talk him out of doing what he was about to do, and I told him he had to think about . . . his daughter."

Appellant explained that he aided and abetted SGT Craig in carrying out his plan to kill Victim 1 and Victim 2 by driving to the parking lot and the apartment,

going to the apartment and seeing who was inside, and waiting for him after the shooting.

Further into the providence inquiry, the military judge and appellant had the following colloquy:

> MJ: And, at the time you did each of those acts, did you intend for them to aid Sergeant Craig at his request?
>
> Appellant: I knew what he intended to do, and I knew I would help him, but I also hoped nobody would get hurt.
>
> MJ: So, you had no ill will or malice towards those two individuals.
>
> Appellant: No, sir.
>
> MJ: *And you didn't desire for them to be killed.*
>
> Appellant: *No, sir.*
>
> MJ: But as you were doing each one of those acts that Sergeant Craig was asking you to do, at that time, did you intend to help him?
>
> Appellant: I knew what he intended to do. And I knew what I was doing with some of them. About, like I said, I hoped nobody would be hurt.
>
> MJ: *So, it was your overall hope that no one would get killed from your assistance to specialist—or, Sergeant Craig. Is that correct?*
>
> Appellant: *Correct.*
>
> MJ: But as you were aiding him, were you intending to aid him?
>
> Appellant: Yes, Sir.

(emphasis added).

C. The Military Judge's Post-Sentencing Clemency Recommendation

After reviewing the quantum portion of the pretrial agreement, where the convening authority agreed to disapprove any adjudged confinement in excess of forty years, the military judge announced:

> Now, having reviewed all the relevant evidence in this case, this court recommends the convening authority grant clemency to the accused in the form of meaningful reduction in his term of confinement. The court bases this recommendation on the following primary factors: First, [appellant] was not the perpetrator of the murders. *He bore no ill will towards the victims and he did not wish harm upon them . . . .*

(emphasis added).

LAW AND DISCUSSION

We conclude the military judge abused his discretion by failing to inform appellant of the correct elements necessary for guilt as an aider and abettor of premeditated murder and for failing to resolve matters inconsistent with a provident plea to the same.

A. Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion, whereas questions of law arising from the plea are reviewed de novo. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

"[I]n reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea." *Inabinette*, 66 M.J. at 322 (internal quotations and citation omitted).

Guilty pleas "must be analyzed in terms of providence of the plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). "The factual predicate [of a guilty plea] is sufficiently established if 'the factual circumstances as revealed by the accused himself objectively support that plea . . . .'" *Id.* (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A.

1980)). "A guilty plea is provident if the facts elicited make out each element of the charged offense." *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007) (citations omitted).

> [F]ailure to define correctly a legal concept or explain each and every element of the charged offense to the accused in a clear and precise manner is not 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.

Murphy, 74 M.J. at 308 (cleaned up). In assessing the providence of the plea, courts look to the entire record. *United States v. Gosselin*, 62 M.J. 349, 354 (C.A.A.F. 2006).

B. Military Judge's Guilty Plea Obligation

A military judge's obligation during a guilty plea is to properly advise an accused on the law regarding those offenses to which he is pleading guilty and obtain, from the accused, facts that support the plea.

> When an accused enters a plea of guilty, the military judge must explain to the accused the elements of the offense, elicit from the accused the factual basis of the offense, and insure that the accused fully understands the nature of the offense to which he has pled guilty. In determining whether a plea of guilty is provident, a structured formalistic procedure is not required. The entire inquiry must be examined to ascertain if an accused was adequately advised.

United States v. Silver, 35 M.J. 834, 835 (A.C.M.R. 1992) (citations omitted).

> [T]he record . . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.

United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247 (1969) (citations omitted). When the accused raises a matter inconsistent with the plea, such as the

making of a statement negating the *mens rea* required for guilt, the military judge must either resolve the inconsistency or reject the plea. *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014) (citations omitted).

The aforementioned ensures the accused understands the basis of his or her guilt and is pleading guilty because he or she is, in fact, guilty. A military judge's obligation does not, however, extend to assisting an accused make it through his or her guilty plea.

> "The spectacle, where both counsel take hold of appellant's arms while the judge grabs the ankles and together they drag appellant across the providence finish line, is not only troublesome, but, . . . in the end, futile."

United States v. Le, 59 M.J 859, 864 (Army Ct. Crim. App. 2004) (quoting *United States v. Pecard*, ARMY 9701940, 2000 CCA LEXIS 381, at *14 (Army Ct. Crim. App. 7 Dec. 2000)).

C. Principal Liability as an Aider and Abettor Under Article 77, UCMJ

Article 77, UCMJ, provides that "[a]ny person punishable under this chapter who—(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission . . . is a principal." In *United States v. Jackson*, the Court of Military Appeals, the predecessor to the Court of Appeals for the Armed Forces, noted, "The law of aider and abettor is not a dragnet theory of complicity. . . . The law requires concert of purpose or the aiding or encouraging of the perpetrator of the offense and a conscious sharing of his criminal intent." 6 U.S.C.M.A. 193, 201–02, 19 C.M.R. 319, 327–28 (1955) (citations omitted).[5] *See also*, *United States v. Pritchett*, 31 M.J 213 (C.M.A. 1990) (conviction as an aider and abettor to spouse's marijuana possession and distribution legally sufficient where Pritchett shared in wife's criminal intent).

In *Nye & Nissen v. United States*, the Supreme Court made clear that the *mens rea* for criminal liability as a principal under an aider and abettor theory is one of shared intent. 336 U.S. 613 (1949). "In order to aid and abet another to commit a crime it is necessary that a defendant '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.'" *Id.* at 619 (quoting L. Hand, J., in *United*

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[5] Article 77, UCMJ in effect at the time of *Jackson* (i.e., as found in the 1951 Manual for Courts-Martial) is identical in substance as that in effect at the time of appellant's court-martial (i.e., as found in the 2016 Manual for Courts-Martial).

States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)). The Supreme Court reaffirmed its adherence to Judge Learned Hand's concept of shared intent in *Rosemond v. United States*, referring to Judge Hand's formulation, quoted above, as a "canonical formulation of that needed state of mind [; a formulation] later appropriated by this Court." 572 U.S. 65, 76 (2014).

Rosemond was charged with and convicted of use of a firearm during a federal drug-trafficking crime in violation of 18 U.S.C. § 924(c) and, in the alternative, with aiding and abetting the same under 18 U.S.C. § 2. The District Court instruction allowed for conviction, as an aider and abettor, if Rosemond participated in a drug trafficking crime and knew an accomplice used a weapon. The instruction did not, however, specify when that knowledge had to be acquired; acquisition before or after participation in the crime was irrelevant.[6] On appeal, the Tenth Circuit found the timing of this knowledge irrelevant to liability as an aider and abettor; the Supreme Court disagreed. The Court found that when Rosemond became aware that an accomplice had a weapon was directly related to whether Rosemond had the requisite *mens rea* (i.e., shared intent) for guilt as an aider and abettor. In remanding the case, the Court noted:

> Our holding is grounded in the distinctive intent standard for aiding and abetting someone else's act—in the words of Judge Hand, that a defendant must not just "in some sort associate himself with the venture" (as seems to be good enough for the dissent), but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." For the reasons just given, we think that intent standard cannot be satisfied if a defendant charged with aiding and abetting a §924(c)

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[6] The jurors were instructed as follows:

> As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:
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> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.

United States v. Rosemond, 695 F.3d 1151, 1154 (10th Cir. 2012).

> offense learns of a gun only after he can realistically walk away—*i.e.*, when he has no opportunity to decide whether "he wishes to bring about" (or make succeed) an *armed* drug transaction, rather than a simple drug crime. And because a defendant's prior knowledge is part of the intent required to aid and abet a §924(c) offense, the burden to prove it resides with the Government.

Rosemond 572 U.S. at 81 n.10.

Federal Circuit Court jurisprudence addressing aider and abettor liability under 18 U.S.C. § 2, a statute similarly worded to 10 U.S.C. § 877,[7] while non-binding is informative, revealing uniform acceptance of Judge Hand's "canonical formulation of that needed state of mind" (i.e., shared intent) for principal liability as an aider and abettor. *See generally*, *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 588 (1st Cir. 2015) (One unaware that victim is underage cannot aid and abet in the production of child pornography because he "cannot 'wish . . . to bring about' such criminal conduct and 'seek . . . to make it succeed.'"); *United States v. Scotti*, 47 F.3d 1237, 1245 (2d Cir. 1995) (aiding and abetting requires a finding of specific intent or purpose to bring about the crime); *United States v. Centeno*, 793 F.3d 378, 387 (3d Cir. 2015); *United States v. Horton*, 921 F.2d 540, 543 (4th Cir. 1990); *United States v. Hemmingson*, 157 F.3d 347, 355 (5th Cir. 1998); *United States v. Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995) ("[S]pecific criminal intent is an element of the offense of aiding and abetting." An aider and abettor "must know the general nature and scope of the gambling enterprise and have the intent to make the illegal enterprise succeed. . . .") (cleaned up); *United States v. Pino-Perez*, 870 F.2d 1230,

[7] A side-by-side comparison of 10 U.S.C. § 877 and 18 U.S.C. § 2 follows:

10 U.S.C. § 877	18 U.S.C. § 2
§ 877. Art. 77. Principals Any person punishable under this chapter [10 U.S.C. §§ 801 et seq.] who— (1) commits an offense punishable by this chapter [10 U.S.C. §§ 801 et seq.], or aids, abets, counsels, commands, or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter [10 U.S.C. §§ 801 et seq.]; is a principal.	§ 2. Principals (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

1235 (7th Cir. 1989); *United States v. Brown*, 929 F.3d 1030, 1039 (8th Cir. 2019); *United States v. Sineneng-Smith*, 910 F.3d 461, 481–482 (9th Cir. 2018) ("[E]lements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense."); *United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013) (For liability as an aider and abettor, "'defendant must share in the intent to commit the underlying offense.'") (citation omitted); *United States v. Collins*, 779 F.2d 1520, 1528–29 (11th Cir. 1986); *United States v. Harris*, 491 F.3d 440, 453 (D.C. Cir. 2007).

The common thread in the above noted Circuit Court opinions, beyond reliance upon Judge Hand's *Peoni* language, is that the aider and abettor participates in the crime because he "wishes to bring it about," wanting it "to succeed." In other words—the aider and abettor shares the perpetrator's intent vis-a-vis the crime at issue.[8]

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[8] A review of Circuit Court of Appeals' model criminal jury instructions reveals that jurors are instructed, consistent with Judge Hand's *Peoni* decision, that principal liability as an aider and abettor requires shared intent. *See e.g.*, Court of Appeals for the Third Circuit Model Criminal Jury Instruction § 7.02 (2018) ("The government must prove beyond a reasonable doubt that (name) in some way participated in the offense committed by (name of alleged principal) as something (name of defendant) wished to bring about and to make succeed."); Court of Appeals for the Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 2.04 (2019) (accomplice liability requires, inter alia, that the defendant "associated with thc criminal venture;" "'To associate with the criminal venture' means that the defendant shared the criminal intent of the principal."); Court of Appeals for the Sixth Circuit Pattern Criminal Jury Instructions § 4.01 (2019) ("What the government must prove is that the defendant did something to help [or encourage] the crime with the intent that the crime be committed."); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 5.01 (2020) ("In order to have aided and abetted the commission of a crime a person must [, before or at the time the crime was committed,]: . . . [(4) have [intended] [known] (insert mental state required by principal offense).]"; Court of Appeals for the Ninth Circuit Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit § 5.1 (2021) ("The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit [specify crime charged]."); Court of Appeals for the Tenth Circuit Criminal Pattern Jury Instructions § 2.06 (2021) ("Second: the defendant intentionally associated

(continued . . .)

D. The Intent Element for Premeditated Murder Under an Aider and Abettor Theory of Criminal Liability

Premeditated murder under Article 118, UCMJ, requires "[t]hat, at the time of the killing, the accused had a premeditated design to kill." *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], pt. IV, ¶ 43.b.(1)(d). Premeditated murder is defined as "murder committed after the formation of a specific intent to kill someone and consideration of the act intended." *MCM*, pt. IV, ¶ 43.c.(2)(a). "The existence of premeditation may be inferred from the circumstances." *Id.*

The government charged appellant with premeditated murder under the theory that he aided and abetted SGT Craig in murdering Victim 1 and Victim 2. The pertinent Benchbook instruction for aiding and abetting reads:

> 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.

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himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him."); Court of Appeals for the Eleventh Circuit Pattern Jury Instructions, Criminal Cases § S7 (2021) ("A Defendant 'aids and abets' a person if the Defendant intentionally joins with the person to commit a crime."); Court of Appeals for the District of Columbia Circuit, D.C. Official Code § 22-1805 (2021) ("To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed.").

Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 7-1-1 (10 Sep. 2014) [Benchbook] (emphasis added).

The aforementioned instruction is rooted in Judge Hand's oft quoted *Peoni* decision where, in addressing criminal liability as an aider or abettor, Judge Hand, noted:

> It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he 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. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it.

United States v. Peoni, 100 F.2d at 402.[9]

Rather than conducting a providence inquiry using the standard Benchbook instruction found at para. 7-1-1 and quoted *supra*, one which, as written, captures the specific intent required to find a principal liable as an aider and abettor, the military judge chose to edit out "*as something (he) (she) wishes to bring about*" and "*[a]lthough the accused must consciously share in the actual perpetrator's criminal intent to be an aider or abettor*" from the inquiry. Benchbook, para. 7-1-1 (emphasis added).[10] Why the military judge edited the instruction and failed to

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[9] The "definitions" Judge Hand references in his opinion are those attaching criminal liability, as a principal, to those assisting another in the commission of the crime. Terms triggering criminal liability as a principal include: aid, abet, assist, procure, command, counsel, advise, induce, hire, incite, set on, stir up, plot, assent, consent, and, encourage. *Peoni*, 100 F.2d at 402–03.

[10] In its pleadings before this court, appellate defense counsel argued the military judge erred during his providence inquiry because: "a. The military judge improperly excluded necessary language about the specific intent element of aiding and abetting," and "b. The military judge improperly added language regarding the knowledge element of aiding and abetting." Regarding b., appellate defense counsel argued error lies in the military judge's advice to appellant that he "must have known [SGT Craig's] *present* intent to kill." (emphasis added). As noted in the body of the opinion, the military judge provided no rationale for deleting the shared intent necessary for principal liability as an aider and abettor. Similarly, the record

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advise appellant in accordance with the standard instruction, thus deleting any *mens rea* requirement for the plea to offense (i.e., premeditated murder), is unexplained in the record before us. Regardless of the military judge's rationale, deletion of the aforementioned was error.[11] As our superior court has explained, aiding and abetting requires "the accused in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, [and] that he seek by his action to make it succeed." *United States v. Mitchell*, 66 M.J. 176, 178 (C.A.A.F. 2008) (quoting *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A. 1990)) (cleaned up).

Removal of the cited language prevented appellant from being properly informed that, to be provident for the offense of premeditated murder, he needed to have the specific intent to kill Victim 1 and Victim 2. *See United States v. Richards*, 56 M.J. 282, 285 (C.A.A.F. 2002) (appellant guilty of manslaughter as an aider and abettor because he possessed the required intent that the victim suffer great bodily harm); *Cf. United States v. Foushee*, 13 M.J. 833, 836 (A.C.M.R. 1982) (no culpability as an aider and abettor of assault with intent to commit murder where the accused's intent was limited to assault and battery); *United States v. Hofbauer*, 2 M.J. 922, 926 (A.C.M.R. 1976) (accused not culpable as an aider and abettor of aggravated assault where his intent was limited to assault and battery). In other words, to be guilty as an aider and abettor, appellant had to intend to assist SGT

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is devoid of any explanation as to why the military judge provided a temporal component for the perpetrator's, SGT Craig's, intent to kill. Finding error in the military judge's omission of and/or failure to find the intent necessary for a guilty finding to premeditated murder under an aider and abettor theory of liability, that is, a shared intent to kill, we need not and do not reach appellant's other stated rationale for setting aside his plea, to wit, that the "military judge improperly added language regarding the knowledge element of aiding and abetting."

[11] We note that Benchbook instruction para. 7-1 states, "[w]hen 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 state of mind or *that the accused knew that the perpetrator had the requisite intent or state of mind*." Benchbook, para. 7-1 (emphasis added). This instruction, if relied upon alone without further context and without regard to the more specific instruction found at para. 7-1-1, suggests that an aider and abettor can be guilty as a principal, without regard to the aider and abettor's state of mind, by simply rendering assistance when he or she knows the perpetrator's state of mind. This is an incorrect statement of the law.

Craig in the killings of Victim 1 and Victim 2 with the specific intent that they be killed (i.e., "participate in it as in something that he wishes to bring about").

Although tailoring the Benchbook instructions is permissible, such as when evolving case law requires it, we must caution those who choose to deviate from it unwittingly. Over 20 years ago this court noted:

> Because the standard Benchbook instructions are based on a careful analysis of current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record.

United States v. Rush, 51 M.J 605, 609 (Army Ct. Crim. App. 1999). More recently, this court noted, while "not a source of law," the Benchbook "represents a snapshot of the prevailing understanding of the law, among the trial judiciary, as it relates to trial procedure" and military judges are "usually well-advised to follow the standard instructions in the Benchbook . . . ." *United States v. Cornelison*, 78 M.J. 739, 745–46 (Army Ct. Crim. App. 2019) ("[M]ere deviation from the Benchbook does not *necessarily* constitute legal error.") (emphasis added).

The military judge's decision to conduct his providence inquiry of appellant using the modified Benchbook instruction in this case was detrimental for two reasons: (1) the scope of the inquiry did not cover the required specific intent as an aider and abettor for premeditated murder; and (2) the military judge failed to explain to appellant a required element of the offense to which he was pleading guilty, calling into question whether appellant's pleas of guilty were knowing and voluntary. *See United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003); *Mitchell*, 66 M.J. at 177. For reasons discussed below, we find the military judge failed to elicit facts during the providence inquiry sufficient to make out the intent requirement for the premeditated murder charge (i.e., Specifications 1 and 2 of Charge I).

E. Improvident Plea

When examining the facts elicited during the providence inquiry and the stipulation of fact, we find appellant consistent in his claim that he bore "no ill will or malice" toward Victim 1 and Victim 2, he "didn't desire for them to be killed," and that he "hoped nobody would be hurt." The factual circumstances revealed by appellant fail to objectively support his plea of guilty, as one cannot both desire the victims not be killed or hurt while also possessing the specific intent to unlawfully kill the same with premeditation. Harboring such a duality is paradoxical and cannot be reconciled.

Having edited Benchbook instruction para. 7-1-1 as previously noted, a glaring inconsistency was neither recognized nor resolved by the military judge prior to acceptance of appellant's guilty plea. Rather, the military judge simply confirmed that appellant lacked the requisite *mens rea* necessary for criminal liability as an aider and abettor to premeditated murder. In recommending that the convening authority grant appellant clemency, the military judge noted that appellant "bore no ill will towards the victims" and "did not wish harm upon them." Had the appellant made such a statement during his unsworn statement on sentencing, for example, we would question why the military judge failed to reopen the providence inquiry to reconcile the apparent conflict with the required *mens rea* for the offense at issue. *See, e.g.*, *United States v. Gallion*, 36 M.J. 950, 952 (A.C.M.R. 1993) (military judge required to reopen providence inquiry when accused disavowed entrapment defense during providence inquiry but raised same in his presentencing unsworn statement); *United States v. Brooks*, 26 M.J. 930, 932 (A.C.M.R. 1988) (military judge erred by failing to reopen providence inquiry following accused's unsworn statement raising potential entrapment defense).

In the case at bar, the military judge himself is stating, albeit for the convening authority, that an essential element has not been met. In short the providence inquiry establishes appellant had the specific intent to assist SGT Craig but lacked any intent to harm, let alone kill, anyone. That alone is sufficient for us to find a substantial basis to question appellant's guilty plea.

For the foregoing reasons we conclude appellant's guilty plea to be improvident and find the military judge abused his discretion by accepting appellant's guilty plea to premeditated murder.

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing may be ordered by the same or different convening authority.

Judge WALKER and Judge PARKER concur.

FOR THE COURT:

JOHN P. TAITT
Clerk of Court