IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**APPELLEE SPECIFIED ISSUE BRIEF**
v.	Docket No. ARMY 20210638
Private (E-1) **LUKE A. WATKINS,** United States Army, Appellant	Tried at Fort Hood,[1] Texas, on 12 August, 27 September, 30 November, and 1–3 December 2021, before a general court-martial convened by Commander, III Corps, Lieutenant Colonel Tiffany Pond, 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 HER DISCRETION IN DENYING THE DEFENSE MOTION FOR EXPERT ASSISTANCE IN THE FIELD OF FORENSIC PSYCHOLOGY?

Statement of the Case

On 30 November and 1–3 December 2021, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of four specifications of insubordinate conduct toward a noncommissioned officer (NCO) and one specification of communicating a threat, in violation of Articles 91 and

[1] At the time of trial, the installation was still called Fort Hood. On 9 May 2023, the name officially changed to Fort Cavazos.

115, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 891, 915 (2018).[2] (R. at 692; Charge Sheet). The military judge sentenced appellant to confinement for 140 days and a bad-conduct discharge. (R. at 714–15). The military judge credited appellant with 150 days of pretrial confinement credit. (R. at 715). On 15 December 2021, the convening authority took no action on the adjudged sentence. (Action). On 3 January 2022, the military judge entered judgment. (Judgment).

On 25 July 2022, this Court docketed appellant's case. (Referral and Designation of Counsel). Appellant and appellee filed a brief on 21 February 2023 and 26 June 2023, respectively. Thereafter, this court granted appellant's motion for leave to file a supplemental brief. Appellant filed a supplemental brief on 26 July 2023. On 2 August 2023, this court specified an additional issue and required both parties to file briefs on the specified issue.

Statement of Facts

The government incorporates its statement of facts contained in its Brief on Behalf of Appellee, dated 26 June 2023, and provides additional facts:

On 19 July 2021, appellant requested Dr. [redacted] be appointed as an expert consultant in the field of forensic psychiatry due to appellant's behavior during the charged events.[3] (App. Ex. XXII). The Convening Authority denied

[2] The panel acquitted appellant of one specification of sexual assault. (R. at 692).
[3] Appellant clarified during the motions hearing that defense did not seek to

this request. (App. Ex. XXXIII).

Thereafter, appellant filed his motion to compel production of Dr. [redacted] as an expert consultant in the fields of forensic and clinical psychology.[4] (App. Ex. XXXII). Attached to the motion were seven sworn statements by various lay persons describing appellant's behavior during the charged events, Dr. [redacted]'s curriculum vitae, the request for a Rule for Courts-Martial [R.C.M.] 706 Board,[5] appellant's request to the convening authority for Dr. [redacted]'s appointment as an expert consultant, and the convening authority's denial. (App. Ex. XXXII at 4). SFC [redacted]'s sworn statement referenced appellant's history of drug use. (App. Ex. XXIX at 1).

The prosecution's response additionally included email communications between the government and the R.C.M. 706 Board, the short form results of the R.C.M. 706 Board, and a memorandum for record of trial counsel's interview with SSG [redacted] about appellant's recent misconduct. (App. Ex. XXXIV at 3). At the 27 September 2021 motions hearing, the prosecution stipulated to the facts and consideration of the enclosures contained in appellant's brief. (R. at 13–14).

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conduct their own R.C.M. 706 evaluation but submitted their request based on appellant's behavior arising from the evidence. (R. at 15).

[4] Appellant used the term "psychiatry" and "psychology" interchangeably in his request. *See, e.g.*, App. Ex. XXII at 9.

[5] At trial, all parties referred to the R.C.M. 706 inquiry as "R.C.M. 706 Board." Throughout this brief, it will be referred to as such for consistency.

Appellant had received the R.C.M. 706 Board long form by this time. (R. at 16).

When asked to address the prosecution's argument that appellant's request lacked specificity, his counsel responded:

> [W]ithout the assistance of Dr. [redacted] and her consultation and her being on the team and in the capacity of a confidential consultant, we are somewhat limited in our ability to explore . . . more specific avenues through which Dr. [redacted] could provide assistance. And . . . the counterargument to . . . mere possibility . . . to further flesh out and understand the implications . . . of [appellant's] behaviors and conditions, we would need [redacted] appointed and designated as an expert consultant bound by the accompanying privileges[.]

(R. at 17).

In a written ruling denying appellant's request, the military judge found appellant failed to demonstrate Dr. [redacted]'s necessity, in part, for not stating a theory, speculation, as well as failure to demonstrate attempts to conduct initial assessments. (App. Ex. XXXIX at 6–7). She explained:

> While due process requires an accused be given the basic tools to present a defense, defense counsel is responsible for doing his or her homework. This applies to evidence of partial mental responsibility and evidence in mitigation. Many of the issues raised by Defense's pleadings are either unknown or could be explored initially by Defense in an effort to determine if specific assistance is required. On the latter point, the Court notes, first, that psychological issues can sometimes be complex and difficult to understand, but also, second, that counsel are required to conduct initial assessments of the evidence and other forms of self-help before requiring the government to provide expert assistance at government expense.

(App. Ex. XXXIX at 7) (internal quotation marks and citation omitted).

The military judge further wrote that either party could ask for

reconsideration of her ruling at any time on the record. (App. Ex. XXXIX at 7). Appellant did not motion the court to reconsider, otherwise renew his motion, or file a motion to compel production of an expert witness in forensic psychology.

Assignment of Error

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN DENYING THE DEFENSE MOTION FOR EXPERT ASSISTANCE IN THE FIELD OF FORENSIC PSYCHOLOGY?

Standard of Review

A military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citing *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)); *United States v. Kornickey*, ARMY 20210636, 2023 CCA LEXIS 336, *14 (Army Ct. Crim. App. 31 Jul. 2023) (mem. op.). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion[.]'" *Lloyd*, 69 M.J. at 99. (quoting *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000)). In reviewing a military judge's ruling for abuse of discretion, the court reviews the record material before the military judge. *Id*. at 100.

Law

To compel production of government-provided expert assistance, appellant must make a showing of necessity. *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001). Appellant must establish that a reasonable probability exists (1)

an expert would be of assistance to the defense and (2) denial of expert assistance would result in a fundamentally unfair trial. *Lloyd*, 69 M.J. at 99 (citing *Freeman*, 65 M.J. at 458). The mere possibility of assistance is not sufficient to prevail on the request. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

To determine whether an expert would be of assistance to the defense, courts apply a three-part analysis, requiring defense to "show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *Lloyd*, 69 M.J. at 99 (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)).

Argument

In this case, the military judge did not abuse her discretion when she denied the defense motion for expert assistance in the field of forensic psychology. Her ruling was supported by the evidence, she used correct legal principles, applied those principles to the facts in a way that was reasonable, and considered all important facts. (App. Ex. IXL at 2–3, 6–7). Even if this court finds she abused her discretion, such error was harmless.

A. Appellant failed to show a reasonable probability the expert would assist the defense.

1. Appellant failed to show that the appointment of an expert consultant in forensic psychology was necessary.

The military judge found appellant failed to meet this prong because (1) he did not state a precise explanation of his theory for which he needed expert help in exploring, (2) the R.C.M. 706 Board addressed his counsel's concerns over his ability to comprehend issues and matters at hand, and (3) his diagnosis of severe cannabis use disorder with cannabis-induced psychotic disorder, without more, did not demonstrate a necessity for expert assistance. (App. Ex. IXL at 6). In making these findings, the court relied on correct legal principles and applied them to the facts in the case in a way that was reasonable.[6]

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[6] The military judge's decision relied upon *United States v. Lloyd*, 69 M.J. 96 (C.A.A.F. 2010) (finding no abuse of discretion absent a precise explanation of the defense theory and an expressed desire to explore mere possibilities); *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010) (finding in part no abuse of discretion in the absence of any reason beyond a childhood diagnosis of Attention Deficit Disorder and the convening of an R.C.M. 706 Board to suggest that appellant might lack the mental capacity to form the specific intent required); *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994) (finding no abuse of discretion where the bases for expert witness were potential extenuation and mitigation evidence and education of the defense on the issues of recidivism and rehabilitation potential); *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004) (finding abuse of discretion where appellant's state of mind was central to the case and there was a wealth of relevant information to use in defense of premeditation allegations and mitigation); *United States v. Hunt*, ARMY 20200158, 2021 CCA LEXIS 457 (Army Ct. Crim. App. 9 Sep 2021) (mem. Op.) (citing *United States v. Warner*, 62 M.J. 114, 122 (C.A.A.F. 2005) (finding no

Each of her findings were supported by the evidence. First, one of appellant's bases for requesting Dr. [redacted] was appellant's present mental and neurological condition. (App. Ex. XXII at 7). But the R.C.M. 706 Board determined appellant was not presently suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings or to cooperate intelligently in his defense.[7] (App. Ex. XXXVI at 2).

Relatedly, while the R.C.M. 706 Board diagnosed appellant with "severe cannabis use disorder with cannabis-induced psychotic disorder," there was no information (i.e., its triggers, its presentations and effects, its duration) other than its existence. Although appellant received the R.C.M. 706 Board results after drafting his request, there is nothing in the record suggesting appellant was precluded from supplementing his motion either prior to, during, or after the motions hearing. As in *United States v. Anderson*, the diagnosis, without more, did

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abuse of discretion where appellant could only show he needed an expert to first examine him to determine there was a possibility he could produce favorable evidence); *United States v. Cook*, 61 M.J. 757, 760 (A.F. Ct. Crim. App. 2005) (citing to *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996)) (finding no abuse of discretion where the bases for expert witness were potential extenuation and mitigation evidence and education of the defense on the issues of recidivism and rehabilitation potential).

[7] In the Motion for Appropriate Relief - Release from Pretrial Confinement Based upon Insufficient Evidence, dated 11 August 2021 [MFAR (Release from PTC)], his counsel also asserted that he recognized and appreciated the seriousness of the criminal proceeding against him and understood the importance of his attendance at trial. (*Compare* App. Ex. II, *with* App. Ex. XXII; *see also* App. Ex. VII).

not indicate he lacked mental capacity or was unable to form the requisite intent at the time of the charged events because of it. *See* 68 M.J. at 381–82. Appellant failed to connect every inferential link in the chain to demonstrate reasonable probability. On its face, appellant's request suggested no more than a mere possibility of assistance.

As in *United States v. Lloyd*, appellant did not state a specific theory and instead put forth a general hypothesis. 69 M.J. at 99. For example, appellant's motion cited to "the high likelihood that [appellant] is of both low intelligence and suffering from a mental or neurological condition, and how that may relate to these potential defenses or extenuating or mitigating evidence" as bases for the request. (App. Ex. XXII at 7). Notably, there was neither discussion before the court of appellant's intelligence nor evidence of a neurological condition. When asked if he had any specific defenses or was requesting assistance in general, his counsel replied, "And exploring these implications." (R. at 17–18). To demonstrate reasonable probability, defense must provide more than a "general hypothesis" and instead provide a "precise explanation of the theory" the defense hopes to pursue through the aid of the expert. *Lloyd*, 69 M.J. at 96; *United States v. Hennis*, 75 M.J. 796 (Army Ct. Crim. App. 2016).

Moreover, the military judge's ruling reflects she considered all important facts. She noted appellant's behaviors during the charged events, the requirement

he be restrained, as well as his hospitalization after members of his unit observed him acting erratically, speaking to a door, and talking about demons to his Platoon Sergeant and Commander. (App. Ex. IXL at 2–3). She even cited to SGT [redacted]'s statement that he could tell appellant was "not in a normal state of mind." (App. Ex. IXL at 3). But she also considered the results of the R.C.M. 706 Board that found appellant was able to appreciate the nature and quality or wrongfulness of his conduct at the time of the charged events. (App. Ex. XXXVI at 1).

On appeal, appellant argues defense's theory was that he "may not have had the 'state of mind necessary to prove an element of the offense'" and was suffering from "a mental disease." (Br. on Behalf of Appellant on Specified Issue at 7, 9). But in reviewing a military judge's ruling for abuse of discretion, the court reviews the record material before the military judge. *Lloyd*, 69 M.J. at 100. The R.C.M. 706 Board determined he had no mental disease. (App. Ex. XXXVI at 1–2). If appellant disagreed with the board's findings, he provided no justification for that disagreement. (App. Ex. XXII at 6). Ultimately, his request and arguments before the military judge lacked precision, specificity, and evidentiary support sufficient to demonstrate a necessity for expert assistance.

2. Appellant failed to show what the expert would accomplish for the accused.

Here, appellant argued Dr. [redacted] would assist him with (1) developing mitigation material, (2) interpreting and critically reviewing the R.C.M. 706 Board

and evaluating the reliability of the same, (3) developing cross-examination questions for the Government's mental health professionals, (4) assessing the presence of any psychiatric substance or abuse disorders present at the time of the offenses, and (5) analyzing available discovery materials, including the R.C.M. 706 Board report, "any behavioral health records," and "potentially evaluating [appellant]." (App. Ex. XXXII at 7–9).

The military judge addressed the speculative nature of each proposition. There was no evidence of any unusual circumstance in appellant's life or a stated theory to demonstrate necessity to develop mitigation material. *Short*, 50 M.J. at 732. There was no evidence of any irregularities with the board's proceedings. There was also no evidence the Government intended to call mental health professionals as experts. (App. Ex. IXL at 6–7).

While assessing psychiatric or substance abuse disorders present at the time of the offenses was asserted as a basis for expert assistance, the defense indicated it already received a R.C.M. 706 long form discussing appellant's diagnosis. (R. at 16). The depth of the assessments and diagnosis is not clear from the record. But, as explained in part A.1 supra, there was no evidence before the court about the diagnosis other than its existence, making the need for further assessment speculative. The military judge's determination that these matters were already addressed by the R.C.M. 706 Board was fair.

Similarly, appellant asserts that the record was "replete with evidence . . . [demonstrating] appellant was suffering from a mental disease." (Br. on Behalf of Appellant on Specified Issue at 9). But appellant did not argue mental disease in his motion to compel Dr. [redacted] and the results of the R.C.M. 706 Board unequivocally found he had no mental disease. (App. Ex. XXXVI at 1–2). *Cf. Kreutzer*, 59 M.J. at 777 (discussing prima facie mental health issues known to the judge).

Lastly, the military judge correctly reasoned that review of discovery material was the responsibility of counsel. (App. Ex. IXL at 7).

3. Appellant failed to show why defense counsel is unable to gather and present the evidence that the expert would be able to develop, having made no showing of attempts to conduct initial assessments.

With respect to this prong, the military judge assessed appellant's pleadings were "either unknown or could be explored initially by Defense to determine if specific assistance is required." (App. Ex. IXL at 7).

The dearth of evidence in the record supports her ruling. Appellant argued it was "*impossible* to reasonably understand the complex concepts in the field of forensic [psychology] through self-study." (App. Ex. XXII at 9) (emphasis added). On the record, his counsel stated they could not provide more specific reasoning without having Dr. [redacted] first being appointed as a confidential consultant. (R. at 17). In other words, appellant told the court he could not determine whether and

how Dr. [redacted] could help in his defense unless and until he disclosed protected information. His arguments to the court supported the military judge's finding that his counsel did not conduct self-help.

While acknowledging Dr. [redacted]'s specialized field could sometimes involve complex concepts, the military judge explained that counsel are required to educate themselves using primary and secondary materials readily available. (App. Ex. IXL at 7 (citing to *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999))). Appellant provided no evidence the defense took steps to attain competence in defending an issue presented in his case. *See United States v. Kelly*, 39 M.J. 235, 238 (C.A.A.F. 1994). The court's finding that appellant failed to meet his burden as the moving party was fair and in accordance with correct legal principles. *See Short*, 50 M.J. at 372 (citing *Kelly*, 39 M.J. at 238).

Moreover, not only was appellant free to file a motion to reconsider demonstrating the attempts defense made to conduct initial assessments, but the military judge explained what was needed to address this otherwise curable deficiency. (App. Ex. XXXIX at 7). *Cf. Kornickey*, 2023 CCA LEXIS 336, at *19 (finding the military judge's three denials of appellant's oral requests for reconsideration constituted an abuse of discretion). As in *Short*, supra, appellant knew what additional information to provide but did not do so. Nor did he compel Dr. [redacted] to testify as a witness at trial. *Compare United States v. Hendrix*, 76

M.J. 283, 288 (C.A.A.F. 2017).

B. Appellant failed to show a reasonable probability that denial of expert assistance would result in a fundamentally unfair trial.

Appellant was not prevented from "fully exploring and possibly presenting" a theory. A request with no specified theory based on conjecture was insufficient to show necessity and reasonably precluded a finding of fundamental unfairness.

Moreover, in weighing evidence, quantity is not necessarily the sole or central factor. Appellant argues the military judge's finding that his disorder may raise the issue of voluntary intoxication was erroneous because there was "less evidence introduced to support that he was on drugs during the alleged charges."[8] (Br. on Behalf of Appellant on Specified Issue at 8 and fn.1). But what the court had before it was evidence of behavior based on the observations of lay witnesses, a cannabis-induced clinical psychiatric diagnosis, and a R.C.M. 706 Board report determining appellant had no mental disease or defect that prevented him from understanding the nature and wrongfulness of his conduct at the time of the charged events. (App. IXL at 7). It was within the realm of reasonable possibilities for the military judge to conclude that evidence of appellant's disorder

[8] The day after Defense filed its Motion to Compel Dr. [redacted], it filed its MFAR (Release from PTC). Included in the filing was the commander's 72-hour memorandum, dated 6 July 2021, accounting for appellant's hospitalizations on 23 June 2021 and 25 June 2021, the dates of the charged events, during which he tested positive for THC. (App. Ex. V at 5).

may raise the issue of voluntary intoxication and in turn, may be shown to negate the element of knowledge in Article 91 and specific intent in Article 115.

CONCLUSION

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence.

[redacted]

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APPENDIX

PANEL NO. 3

United States v. Kornickey

United States Army Court of Criminal Appeals

July 31, 2023, Decided

ARMY 20210636

Reporter
2023 CCA LEXIS 336 *

UNITED STATES, Appellee v. Specialist MICHAEL J. KORNICKEY, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, 1st Special Forces Command (Airborne). Alyssa S. Adams, Military Judge. Lieutenant Colonel Christopher M. Ford, Staff Judge Advocate.

Core Terms

military, blackout, memory, expert testimony, alcohol, consultants, sexual assault, panel member, defense counsel, expert assistance, present evidence, voir dire, experiencing, factfinder, alcohol consumption, contradict, manifested, calculate, witnesses, blacked, intoxication, non-consent, assess, reconsideration motion, theory of a case, alleged victim, probability, remembered, scientific, charging

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Sean P. Flynn; JA (on brief); Colonel Michael C. Friess, JA; Major Mitchell D. Herniak, JA; Captain Sean P. Flynn, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Captain Cynthia A. Hunter, JA; Captain Elizabeth A. Hays, JA (on brief).

Judges: Before FLEMING, HAYES, and MORRIS, Appellate Military Judges.

Opinion by: FLEMING

Opinion

MEMORANDUM OPINION

FLEMING, Senior Judge:

Appellant asserts the military judge abused her discretion by denying appellant's numerous requests to compel expert consultants. We agree. Appellant's conviction and sentence is set aside in the decretal paragraph below.[1]

BACKGROUND

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault by bodily harm without the consent of Specialist [TEXT REDACTED BY THE COURT] [hereinafter victim], in violation of *Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920*.[2] The panel sentenced appellant to a dishonorable discharge, confinement for three months, **[*2]** forfeiture of $785 per month for three months, and reduction to the grade of E-1. The convening authority approved the findings, disapproved the adjudged forfeitures, but approved the remainder of appellant's sentence.

Appellant and victim met in basic training and remained in contact after transitioning to their respective duty stations. Appellant visited victim occasionally. The two engaged, one time, in consensual sexual intercourse approximately nine months prior to early December

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[1] As we find appellant's assignment of error regarding expert consultants warrants setting aside his conviction and sentence, we do not address his assignment of error containing numerous issues regarding the selection of panel members. We have given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, but find they do not merit discussion or relief.

[2] The panel acquitted appellant of one specification of assault consummated by a battery in violation of Article 128, UCMJ and one specification of disorderly conduct in violation of Article 134, UCMJ, *10 U.S.C. §§ 928*, 934.

2018 (the date of the event resulting in appellant's sexual assault conviction).

That evening, appellant and his friend traveled to visit the victim at her home. Arriving very late in the evening, appellant, his friend, victim, and victim's friend, began drinking Crown Royal. Victim reported consuming between three and five "shots" of Crown Royal prior to appellant arriving, and another three shots after his arrival. Victim testified she remembered watching the beginning of a movie in the living room, and her next memory was feeling appellant inserting his penis into her vagina while they were on her bed in her bedroom. Victim testified she told appellant to get off, he responded stating "just let me finish," **[*3]** and victim threatened to urinate on him. The military judge found victim's last memory was "around 0030 or 0045 [and] . . . after she 'blacked out' or 'passed out,' she woke up around 0400 and looked at the clock ... [and] the accused was on top of her and she felt 'him forcing himself into her.'"

Later that morning, victim drove to the hospital to see a Sexual Assault Nurse Examiner (SANE) and underwent a Sexual Assault Forensic Examination (SAFE). Approximately ten months later, during an interview with the United States Army Criminal Investigation Command (CID) Special Agents, victim stated she "blacked out" within five minutes after the beginning of watching the movie.[3]

Because of victim's statement regarding her blackout, appellant moved, after denial by the convening authority, for the military judge to compel two expert consultants, a forensic toxicologist and forensic psychologist, to assess the victim's blood alcohol content (BAC) to determine if her self-proclaimed blackout from alcohol impacted her memory.

The requested forensic toxicologist testified at the motion hearing that he was able to review the evidence to calculate a BAC range of a hypothetical person matching victim's **[*4]** age, size, and alleged alcohol consumption. He testified the calculated BAC range was consistent with being in or around a state of blackout. Appellant presented the expected testimony of their requested forensic psychologist regarding a person's memory formation, when in or around a state of blackout, and that victim's condition could have resulted in her fragmented or *en bloc* memory loss.

During argument on the motion, as to the necessity of the requested expert consultants, and additional possible defense request for their testimony at trial, if relevant and necessary, appellant argued victim's description of being in a state of blackout supported the defense's theory of the case that her memory of the events was not accurate because of her alcohol consumption.[4] Defense counsel asserted their theory of the case was that appellant and victim engaged in consensual sexual intercourse but because of her either fragmented or *en bloc* memory loss, she did not remember her consent and she erroneously believed she told him to get off her.[5]

In response, the government argued: (1) the charged offense of sexual assault by bodily harm without consent occurred when victim told appellant to **[*5]** stop and he did not, (2) victim remembered everything correctly, and (3) any expert assistance or testimony regarding victim's intoxication was not relevant as the government's charging theory was not based on her incapacitation and the alleged offense occurred while

[3] We pause to note victim's intoxication and potential memory loss were corroborated at trial by the SANE who testified that victim stated during her medical examination "she couldn't remember everything, so there was some lapses of memory loss."

[4] Defense's motion requested to compel expert "consultants" for case preparation and presentation of their case. We interpret the defense's motion, and their further argument on the motion, as a request for not only an expert consultant to assist with case preparation but also for an expert witness to testify. We recognize the interrelated, but distinct, roles of each. *See* United States v. Roberts, ARMY 20150023, 2019 CCA Lexis 501, at *9 (Army Ct. Crim App. 11 Dec. 2019) ("Although an expert consultant frequently morphs into an expert witness at trial, like a caterpillar into a butterfly, those are separate roles controlled by distinct rules and legal tests. *See* Rule for Courts-Martial 703; Military Rule of Evidence 702; United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994) (providing a three-prong standard to demonstrate the necessity of an expert consultant); United States v. Houser, 36 M.J. 392 (C.M.A. 1993) (articulating six factors for determining admissibility of expert testimony).")

[5] We pause again to note, the defense theory that victim did not remember the alleged sexual assault was corroborated at trial during the defense's cross-examination of victim's friend, Ms. SH. Early in the morning after the alleged sexual assault, victim called Ms. SH, who confirmed during her cross-examination that victim said "she woke up and she felt like she had been touched . . . [a]nd the reason that she thought she had been touched was because she knows how her body feels . . . after intercourse ... [a]nd that's what prompted her to go to the hospital."

she was awake. During the same argument, the government, however, conceded to the military judge that victim's act of "blacking out [was] relevant . . . [and t]he factfinder can hear all of that, but we ask that you not elevate this to an inaccessible scientific level without any nexus to a charged offense."

Defense counsel then clarified the necessity of their requested expert consultants, arguing:

> [T]he government's charging theory, is the government's charging theory. But the defense should be allowed to present evidence regarding why that theory doesn't make sense. I know the government believes that these facts occurred the way they occurred, but the alleged victim is going to indicate that she had five to eight drinks that night. . . . Then all of a sudden, after she blacked out, her words . . . then all of a sudden, she woke up and was able to have perfectly coherent conversation with an individual and was able to **[*6]** walk around, was able to interact with other individuals in this home, and was cloudy, in her words, she was cloudy. But she doesn't explain where did this cloudiness come from. Was she cloudy because she was groggy, because she just woke up? Or was she cloudy because she was still drunk, she was walking around the house drunk. And that's important because what she says may not make sense if we're able to put forth facts regarding her blood alcohol content. She may have thought that's what she said. But maybe she didn't say that. She may have thought that that's what she was doing, but maybe that didn't occur.

The military judge found the requested defense experts possessed knowledge and expertise beyond that of defense counsel, but denied appellant's motion, reasoning the experts were not necessary because victim's "language and behavior clearly indicated she did not consent at any point during the alleged sexual assault" and the evidence regarding her non-consent was "unrebutted." The military judge ruled victim's "level of intoxication was relevant" and she could "testify as to how much she drank" but it was irrelevant "concerning the amount of alcohol consumed by [victim] and the **[*7]** effects it could have on behavior and memory" because she "manifested a lack of consent." The military judge reasoned "[w]hether she was sober or whether she was in a blackout state, the accused would still have heard and seen the same manifestations of non-consent."

Despite a clear defense request for expert testimony, the military judge's ruling did not delineate between the two different standards applied for determining the appointment of an expert consultant for case preparation and the admissibility of expert testimony.[6]

After this initial ruling, appellant filed a motion for reconsideration highlighting the ability of the requested experts to explain the impact of victim's alcohol consumption on her ability to accurately recall the events of the alleged assault, to include her alleged expression of non-consent. The defense challenged the military judge's finding of fact that victim's manifestation of non-consent was "unrebutted" asserting that defense expert testimony could cast doubt on the reliability of her memory and version of events.

Defense's reconsideration motion asserted:

> The expert's testimony is the evidence to contradict [victim's] version of events. [Victim's] self-assessment **[*8]** of her memory is either unintentionally or intentionally wrong. . . . The expert's testimony, after they review all the evidence, could contradict what [victim] stated and did during the timeframe in question and is therefore relevant and necessary as it relates to [victim's] perceived memory of her manifested lack of consent. The Defense does not agree that it is an unrebutted fact that she manifested lack of consent. Consent is a fact of consequence for the fact-finder to determine after gauging, evaluating, and giving proper weight to the expert's testimony.

Appellant argued that without expert testimony, defense counsel could not present evidence to the factfinder from which the panel members could understand whether to accept or doubt victim's memory based on her intoxication, and any defense cross-examination of victim could not sufficiently challenge her, as the complaining witness, regarding the level of impact alcohol played on her ability to accurately form the memories to which she was testifying.

The military judge denied appellant's motion for reconsideration but conceded "alcohol and its effects will likely play prominently in the presentation of evidence and in the weight **[*9]** the evidence is given by

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[6] Throughout this entire case, the military judge, the trial parties, and even the appellate parties in their briefs, consistently interwove the issue of the appointment of an expert consultant for case preparation and the admissibility of expert testimony without any apparent realization that a different test applied for both.

the factfinder." The military judge determined expert assistance was unnecessary to address the effects of alcohol because "lay panel members may draw upon their experience, understanding, and knowledge of the ways of the world to come to a conclusion as to whether [victim's] memory may have been affected by the use of alcohol, and if so, whether that alcohol use creates reasonable doubt in relation to the evidence presented." The military judge reasoned an expert could not contradict victim's testimony because "[a]n expert cannot provide any evidence of a factual nature concerning the events of the evening. Only the witnesses who were present can do that. The impeachment evidence the defense seeks can be obtained through cross-examination of [victim] and the other witnesses who were present."

During voir dire at appellant's court martial, the panel members arrived in two groups or "waves." After group voir dire of the first wave of panel members, appellant again moved the court for reconsideration of the denial of expert consultants, citing that seven of eight panel members responded they did not believe a person could potentially consent to sexual activity **[*10]** while experiencing a blackout. Appellant's counsel argued the military judge's prior finding of fact determining lay panel members were capable of making the necessary determinations regarding blackout were contradicted by the panel members' own statements during voir dire.

The military judge denied the defense motion again, ruling the members, as finders of fact, were able to assess victim's testimony. The military judge indicated the defense counsel could raise the motion again, after victim testified, and suggested the defense propose a finding instruction to address any concerns with victim's alcohol consumption and memory.

Immediately after individual voir dire of the second wave of panel members, appellant yet again renewed his motion to compel expert consultants, citing that five of the previous eight potential panel members during individual voir dire appeared to misunderstand what a blackout was. The military judge stated that without the victim's testimony it was, at that point, uncertain whether she was, in fact, experiencing a blackout or just using the term colloquially.

Appellant again argued expert consultants were able to provide evidence using scientifically accepted **[*11]** calculations and data to explain whether victim was in the range of a BAC consistent with blackout at relevant portions of the offense timeline. Appellant pointed out that the military judge was required to instruct the panel that argument by either party could not be treated as evidence and, without expert testimony, defense would have no way to present evidence regarding what did or did not constitute a blackout and the implications of blackout on victim's memory of the offense.

The government reiterated their prior argument— that appellant did not need an expert because the government case included no scientific evidence and their lay witness victim was going to testify she woke up to being sexually assaulted and told appellant to stop.

Defense reasserted their theory of the case:

> [B]ecause the alleged victim says something doesn't make it so. It is a disputed fact. Her recollection of what occurred is in dispute. So, just because she says that she remembers something doesn't make it so. That is why an expert is required in order to put that fact in context of how the mind would have worked coming out of a blackout, or how the mind would have worked when you're in blackout. And, Your **[*12]** Honor, to paint the complete picture to the fact finder, expert testimony is needed.

The military judge once again denied appellant's reconsideration motion, ruling:

> [T]he expert could not say whether the alleged victim did in fact say or do the things that she says she said or did. In that regard, the expert cannot shed any light on what actually happened....I have not heard anything that could change a fact finder's assessment of the evidence, because they're only going to hear from the witnesses. They're going to hear from the witnesses who were present, you know, or whoever was in the house: the alleged victim and maybe from the accused, I don't know, but the expert wouldn't have been there. . . . So, it's the court's finding that the defense can develop what they need to develop through cross-examination of the lay witness, of the alleged victim, and potentially other witnesses who were there, but that the testimony of an expert witness is not going to change the outcome. The court does not find that they would — that it could sway them [the panel] one way or the another. It's not relevant at this point. I haven't seen anything that allows the court to find it even relevant.

Throughout **[*13]** the contested trial, appellant's counsel conceded that sexual intercourse occurred between appellant and victim and focused the panel on

the issue of whether the act was consensual.

During the government's direct examination, victim did not testify that she was experiencing a state of blackout, as she previously told CID Special Agents [SAs], but instead she testified she fell asleep watching a movie on her couch after drinking alcohol. She agreed she had previously told CID SAs that she was experiencing a blackout but remained adamant that actually meant she had fallen asleep. Defense counsel attempted to cross-examine her on her lack of memory for the period of time leading up to the sexual assault on the night of the offense, as well as her understanding of the impact of alcohol on her memory.

After victim's testimony, appellant raised the motion for appointment of an expert consultant for a fifth time, referencing her inconsistent statements about the events surrounding the offense, her alcohol consumption, and her new position that she merely feel asleep rather than experiencing a blackout.[7] The government stood on its argument asserting expert testimony was unnecessary because victim **[*14]** testified to the possible effects of a blackout and her credibility had been attacked by the defense based on the inconsistency of her testimony.

The military judge once again denied appellant's motion, reasoning it was unclear whether victim was passed out or blacked out and again pointed out the expert was not present on the night of the offense to observe the events. The military judge found neither "necessity [n]or relevance for an expert witness . . . to discuss blackout" and stated "the court is not convinced that there was a blackout . . . simply based off of the testimony."

LAW AND DISCUSSION

We review a military judge's ruling on a request for expert assistance for an abuse of discretion. *United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)* (citing *United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005)*). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *Id.* (quoting *United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008)*. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion, the challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.* (quoting *United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)*) (cleaned up).

A military accused is entitled to expert assistance provided by the government **[*15]** if he can make a showing of necessity. *United States v. Gunkle, 55 M.J. 26, 31 (C.A.A.F. 2001)*. In making the showing of necessity, a military accused must establish a "reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *Lloyd, 69 M.J. at 99* (citing *Freeman, 65 M.J. at 458*). We apply the three-part analysis from *United States v. Gonzalez* to assess the first prong; requiring defense to "show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *Id.* (citing *Gonzales, 39 M.J. 459, 461 (C.M.A. 1994)*). While the initial request was for expert assistance, the tenor of the repeated requests shifted to a discussion of expert witnesses rather than only expert consultants. *See United States v. Warner 62 M.J. 114, 122 (C.A.A.F. 2005)* (discussing the need for defense to consult with an expert prior to determining whether the expert's testimony will be presented in the case). *See* also *Houser, 36 M.J. 392 (C.M.A. 1993)* (articulating six factors for determining admissibility of expert testimony).[8]

Appellant presented evidence at the motion hearing that an expert consultant could, from a review of the case, calculate an approximate BAC for victim which would **[*16]** indicate she was at a level of intoxication consistent with experiencing some form of blackout and the negative impact that could have on the accuracy of victim's memory perception. It was an undisputed fact at the motion hearing, conceded by the government, that victim told CID SAs that she "blacked out" in her interview conducted approximately ten months after the alleged sexual assault.

The combination of victim's statement and the defense

[7] Later in the trial, the SA testified that during victim's interview, she never said she fell asleep and only used the language that she had "blacked out."

[8] For expert testimony to be admissible, certain factors must be established: the qualifications of the expert, the subject matter of the expert testimony, the basis for the expert testimony, the legal relevance of the evidence, the reliability of the evidence, and whether the "probative value" of the testimony outweighs other considerations under Mil.R.Evid. 403.

evidence presented by the experts demonstrated: (1) an expert was necessary to assess the victim's BAC range and her description of the sexual assault in light of the science of the impact of alcohol on the formation and accurate recall of memory; (2) each expert would use the evidence to assist the defense to prepare an alternate theory of the case than the government; and (3) the inability of the defense counsel to calculate a BAC or interpret scientific evidence explaining the impact of alcohol on the formation and recall of memory. The military judge abused her discretion in denying the defense with expert consultants to prepare their case.

Likewise, although the applicable case law was never cited on any ruling involving expert testimony, the **[*17]** military judge ruled the requested expert testimony was "irrelevant" in light of victim's manifestation of non-consent.[9] Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action." Mil. R. Evid. 401(a), (b).

We find expert testimony on the potential impact of victim's alcohol consumption and reported lapses in memory on her ability to accurately perceive and describe the offense, to include her reported manifestations of non-consent, *does* have a tendency to make a fact of consequence more or less probable than it would be without the expert testimony and is therefore relevant. The military judge ruled, when weighing the evidence in light of the balancing test articulated in Mil. R. Evid. 403, that the evidence would only confuse the issues, be misleading to the factfinder, and be a waste of time. The military judge offered no further analysis on this point but cited *United States v. Linck* in support of her ruling that an expert was not necessary considering the availability of lay witness testimony readily understandable by the factfinder. *United States v. Linck, ACM 39627, 2020 CCA LEXIS 293 at *35-6 (Air Force Ct. Crim. App. 25 Aug. 2020)*. We find the military judge's reliance on a case in which **[*18]** an accused was denied the assistance of an additional expert based, in part, on the adequacy of the expert assistance he already had, when used to deny appellant *any* expert assistance reflects an erroneous application of the law. *Id.*

In denying appellant's first motion for reconsideration, the military judge altered her prior position on the relevance of victim's intoxication, now finding victim's intoxication would play "prominently...in the weight the evidence is given by the factfinder." Nonetheless, the military judge found the expert testimony could not contradict victim's description of the sexual assault because the "expert cannot provide any evidence of a factual nature concerning the events of the evening."

The military judge's ruling suggesting an expert could not contradict victim because they were not present is inconsistent with Military Rule of Evidence [Mil. R. Evid.] 703 which permits experts to base their testimony on facts of which the expert has been made aware.[10] The experts were free to draw from the statements of witnesses in reaching their opinion and could testify to victim's BAC range based on the evidence of the alcohol she consumed that night. While victim adamantly asserted she had perfect memories and **[*19]** was not experiencing a blackout, the expert calculations of her BAC placed her within the range associated with blackout, contradicting victim's testimony by presenting an alternate hypothesis of the evidence for the fact finder to apply in deciding the weight to give her testimony.

We find the military judge's three denials of appellant's oral requests for reconsideration—twice during voir dire and once after victim's testimony—constituted an abuse of discretion. In reaching her rulings, the military judge repeatedly found lay panel members were capable of assessing the impact of alcohol on the accuracy of victim's memory without expert testimony based on their knowledge and understanding of the world. This finding of fact used by the military judge to deny appellant's reconsideration motions is clearly erroneous, considering the statements from numerous lay panel members during voir dire demonstrating they did not have a full understanding of the impact of alcohol on the accuracy of memory and would find expert testimony helpful. *See* *Bresnahan, 62 M.J. at 143*.

The panel was instructed in order to find appellant guilty, the government had to present evidence sufficient to exclude every fair and reasonable **[*20]**

[9] We pause to note the military judge's ruling, which determined appellant engaged in sexual acts with victim after seeing and hearing her clear physical and verbal manifestation of non-consent appears to have accepted full-cloth victim's most favorable version of events, despite defense evidence challenging the validity of her memory and prior inconsistent statements, and ultimately had the effect of pre-determining appellant's guilt as a factual basis for denying him expert assistance.

[10] *See* Mil. R. Evid. 703.

hypothesis of the evidence except that of appellant's guilt.[11] The military judge's five denials of appellant's requests for expert testimony precluded appellant from placing fair and reasonable hypotheses of the evidence, except that of his guilt, before the factfinder.

The panel was also instructed, "the fact that a person is physically conscious, but incapable of forming memories, due to alcohol consumption, does not prevent them from giving consent." This instruction, without any supporting expert testimony for the panel to apply in considering it, was insufficient to cure the military judge's errors. Without expert testimony informing the panel of the state of scientific research on the subject, lay personnel cannot be reasonably expected to have the knowledge basis or background to assess whether a witness adamantly purporting to have clear memories, while having consumed enough alcohol to have a BAC within the range associated with blackout, may nonetheless be experiencing blackout and misremembering the actual events. Multiple panel members expressed a lack of complete understanding of what blackouts were during voir dire and indicated medical testimony would assist their understanding. **[*21]** Appellant was nonetheless precluded from placing expert testimony before the fact finder which could have informed their understanding of the application of the evidence to the law as instructed by the military judge.

Victim's first recollection of the offense was of an act already in progress; she must, for some reason, have been unable to recall the events immediately prior to her first memory. Appellant presented expert proffers demonstrating how victim's calculated BAC placed her in the range of a BAC associated with blackout, as well as the impacts a blackout could have on her ability to accurately perceive and recall the events she testified to remembering despite her assertions of a clear memory. We cannot overemphasize the defense theory that victim was in a "black out" state initially derived, not from their own experts, but from the victim's own words she used during her CID interview that she was "blacked out."

As appellant's trial defense counsel adeptly stated, "the government's charging theory, is the government's charging theory. But the defense should be allowed to present evidence regarding why that theory doesn't make sense." Instead, the military judge accepted the **[*22]** government's theory of the case and effectively limited appellant to contesting his guilt only insofar as he did not deviate from the government theory of the case.[12]

Appellant demonstrated a reasonable probability the expert would be of assistance to defense and a reasonable probability he would receive an unfair trial without the expert. Despite meeting his burden, appellant was denied expert consultants and we find he did not receive a fair trial.

CONCLUSION

On consideration of the entire record, the findings of guilty and sentence are SET ASIDE. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a). A rehearing may be ordered by the same or different convening authority.

Judge HAYES and Judge MORRIS concur.

FOR THE COURT:

JAMES W. HERRING, JR.

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[11] See Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, Para. 2-5 (29 Feb. 2020) [Benchbook].

[12] See *United States v. Griffin, 50 M.J. 278, 283-84 (C.A.A.F. 1999)* (discussing the role of the trial judge as gatekeeper in assessing the admissibility of expert testimony).

United States v. Hunt

United States Army Court of Criminal Appeals

September 9, 2021, Decided

ARMY 20200158

Reporter
2021 CCA LEXIS 457 *; 2021 WL 4130930

UNITED STATES, Appellee v. Specialist ROBERT L. HUNT, United States ***Army***, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Hunt, 2021 CAAF LEXIS 974, 2021 WL 5815861 (C.A.A.F., Nov. 8, 2021)*

Motion granted by *United States v. Hunt, 2021 CAAF LEXIS 979, 2021 WL 5773720 (C.A.A.F., Nov. 9, 2021)*

Review denied by *United States v. Hunt, 2022 CAAF LEXIS 37 (C.A.A.F., Jan. 13, 2022)*

Prior History: **[*1]** Headquarters, 25th Infantry Division. Mark A. Bridges, Military Judge. Colonel Terri J. Erisman, Staff Judge Advocate.

Core Terms

military, sentencing, expert assistance, sexual, girls, sex, profile, chat, responded, entrapment defense, mere possibility, penis

Case Summary

Overview
HOLDINGS: [1]-Where appellant engaged in graphic sexual on-line chat sessions with two people who both turned out to be undercover law enforcement officers, military judge did not err by denying his motion to compel the appointment of a forensic psychologist as an expert consultant to his defense team because appellant could show only the possibility that the expert could have assisted in his defense.

Outcome
Findings of guilty and sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Motions > Appropriate Relief

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN1[] **Motions, Appropriate Relief**

Servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense. To demonstrate the necessity of expert assistance, an accused must show that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial. Within the first assistance requirement are three sub-requirements that the defense must meet, namely: (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop. A successful showing of necessity requires more than the mere possibility of assistance from a requested expert.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN2[] **Judicial Review, Courts of Criminal Appeals**

The U.S. ***Army*** Court of Criminal Appeals reviews a military judge's decision on an expert-assistance motion for abuse of discretion. To reverse a military judge's decision for an abuse of discretion involves far more than a difference in opinion. Rather, a military judge abuses his or her discretion only when the military judge's findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law. In other words, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

HN3[] **Admissibility of Evidence, Character, Custom & Habit Evidence**

Profile evidence presents a characteristic profile of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile, and is generally improper as evidence of guilt or innocence in criminal trials.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN4[] **Imposition of Sentence, Factors**

Protection of society from the wrongdoer is one of the principal reasons for the sentence of those who violate the law.

HN5[] It can be difficult to demonstrate an expert's necessity before first securing the expert's services. The best way to articulate and explain the need for an expert is by using just such an expert to describe their evidence analysis and development process.

Counsel: For Appellant: Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Captain Carol K. Rim, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Captain Carol K. Rim, JA (on reply brief).

For Appellee: Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Thomas J. Darmofal, JA (on brief).

Judges: Before ALDYKIEWICZ, EWING,[1] and WALKER, Appellate Military Judges. Judges ALDYKIEWICZ and WALKER concur.

Opinion by: EWING

Opinion

MEMORANDUM OPINION

EWING, Judge:

Appellant engaged in graphic sexual on-line chat sessions with two people who both turned out to be undercover law enforcement officers, one pretending to be a thirteen-year-old girl, and the other posing as the mother of three minor children available for sex. After appellant's resulting conviction and sentencing at a general court-martial, his sole claim on appeal is that the military judge erred by denying his motion to compel the appointment of a forensic psychologist as an expert consultant to his defense team. Finding no error, we affirm. **[*2]** [2]

BACKGROUND

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

[2] An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of attempted sexual abuse of a child and one specification of communicating indecent language in violation of *Articles 80* and *134* of the Uniform Code of Military Justice, *10 U.S.C. §§ 880* and *934*, respectively. The panel sentenced appellant to a bad-conduct discharge, confinement for thirty months, and reduction to the grade of E-1. The convening authority took no action on the findings and sentence other than deferring the automatic forfeitures.

A. The Chats

In late March 2019 appellant was a helicopter mechanic stationed at Hunter ***Army*** Airfield, Hawaii. At the same time, a joint law enforcement task force in Hawaii was conducting an undercover operation to identify, locate, and arrest individuals seeking sex with minors on the internet. As part of that operation, a Maui Police Department detective used an internet application called "Whisper" to impersonate a thirteen-year-old girl nicknamed "Hoku."[3] "Hoku" posted to Whisper that she was looking to chat with a "military man out there who has to be real and down to meet." Appellant, using the moniker "Bello," replied by sending "Hoku" first a photo of his erect penis and then one showing his face and upper torso in an ***Army*** uniform. Via Whisper's geolocation function, the parties to the chat could tell that they were approximately 11 miles apart. Appellant and "Hoku" exchanged multiple messages in which appellant described—in no uncertain terms—his desire to have sex with Hoku, who had listed "her" age as eighteen to twenty on her Whisper profile under the moniker "Youngandfun." Appellant asked Hoku, "do you want to [have sex] or no?" The two then had the following exchange: **[*3]**

> Appellant: I can come over now.
> Hoku: Upfront. I'm 13 but love military guys and to party if that's okay. . . if not I understand. . . .ur [penis] is still beautiful tho.
> Appellant: I'm down. Can u send any nudes?

Appellant then asked Hoku when she last had sex, whether the photo of his penis had aroused her, and whether she would send him nude photos of her genitals in return. When Hoku responded that appellant could see her nude in person if he "play[ed] his cards right," appellant responded, "[w]hen?" The chat session ended after appellant continued to ask Hoku for nude photos.

A little over a month later in early May 2019, appellant again used Whisper to communicate with a person he believed was the mother of three minor daughters, ages six, nine, and thirteen. The "mother" was actually a Special Agent with the Naval Criminal Investigative Service ("NCIS") in Hawaii, who had posted on Whisper under the tag line "taboo on base." Appellant, this time posting as "Poseidon," asked the mother what "kind of taboo" her post referenced. The mother then asked appellant whether he was "into young," to which appellant replied, "how young?" The mother responded that her "girls [were] 6, 9, and **[*4]** 13."

After learning the ages of the "girls," appellant rejected another "off ramp" offered by the mother/NCIS agent,[4] as follows:

> Mother: This probably isn't for you.
> Appellant: I'm down,

The "mother" told appellant that she wanted her daughters to "learn," and appellant responded that he would "treat [the girls] amazing," and described various sex acts that that he wanted to commit with all three girls. Appellant sent the mother a photo of his erect penis, and said that he wanted to "stretch" the nine-and-thirteen-year-olds' vaginas so that his penis would fit, and that he wanted to ejaculate on the six-year-old and "play with" her vagina. The mother told appellant that she was house-sitting on base, and appellant asked, "Ok, when can I come over?" The Whisper chat session ended after appellant asked the "mother" if she was a police officer, to which she responded that she was not and accused appellant of making the situation "super sketchy."

Approximately two hours later, appellant again contacted the "mother" using a different Whisper name ("nelly"). At the time, the NCIS agent/mother did not realize that she was once again talking to appellant. Appellant provided his cell phone number, **[*5]** said "text me," and, in response to the mother's question of whether he was "into young," said "[l]et's keep everything a secret." Appellant and the mother then engaged in a text chain outside of the Whisper application in which appellant again made clear that he wanted to engage in sex acts with the children and asked whether he would "have to wear a condom." When the mother responded that he would, appellant expressed disappointment because he desired to ejaculate inside one of the young girls.

B. The Expert Assistance Litigation

[3] "Whisper" allows for essentially anonymous on-line communications between users who are required only to provide a short nickname, age, and gender.

[4] Both undercover officers testified that they had been trained to offer what the NCIS agent termed an "off ramp" where the officers unequivocally state the ages of the "children" involved in the sexual chats and give the individual on the other side of the conversation the opportunity to disengage from the session.

Before trial, appellant filed a motion to compel the appointment of Dr. ES, a forensic psychiatrist with expertise in sexual offenders, as an expert consultant for the defense team. Appellant contended that he needed Dr. ES to perform a "battery of tests to determine whether [appellant was] someone who presents with the characterology or personality traits which are predictive of or known to correlate with sexual offending." Appellant contended that he needed Dr. ES's services both to show that he lacked the predisposition to commit the offenses—as relevant to an entrapment defense on the merits—and for sentencing as it related to rehabilitative potential, **[*6]** danger to society, and amenability to treatment. Appellant conceded that he could not predict Dr. ES's ultimate findings and conclusions. Similarly, in an affidavit appended to appellant's motion, Dr. ES explained that if retained as an expert consultant she would perform various psychological tests on appellant "to determine whether he is someone who presents with the characterology or personality traits which are predictive of or known to correlate with those who are known to engage in sexual offending."

The government opposed appellant's motion. Following a hearing on the motion the military judge denied appellant's motion in a four-page written order. Citing, *inter alia,* *United States v. Lloyd, 69 M.J. 95 (C.A.A.F. 2010)*, *United States v. Bresnahan, 62 M.J. 137 (**C.A.A.F. 2005**)*, and *United States v. Gunkle, 55 M.J. 26 (C.A.A.F. 2001)*, the military judge held that appellant had "failed to establish the necessity of employing" Dr. ES as an expert witness, because such a showing required "more than the mere possibility of assistance from a requested expert." The military judge noted there was no evidence Dr. ES would be of assistance to appellant, in part because the evidence suggested appellant *did* have a sexual interest in children. The military judge further held that even assuming appellant could establish necessity, the employment **[*7]** of Dr. ES at government expense was not necessary for a fair trial either on findings or sentencing.

LAW AND DISCUSSION

A. Legal Principles and Standard of Review

HN1[↑] "Servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense." *United States v. Freeman, 65 M.J. 451, 458 (C.A.A.F. 2008)* (citation omitted). To demonstrate the necessity of expert assistance, an accused must show that a "'reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.'" *United States v. Hennis, 79 M.J. 370, 382-83 (**Army** Ct. Crim. App. 2020)* (quoting *Lloyd, 69 M.J. at 99*). Within the first "assistance" requirement are three sub-requirements that the defense must meet, namely: "(1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *Hennis, 79 M.J. at 383*. A successful showing of necessity "requires more than the mere possibility of assistance from a requested expert." *Bresnahan, 62 M.J. at 143*.

HN2[↑] This Court reviews a military judge's decision on an expert-assistance motion for abuse of discretion. *Lloyd, 69 M.J. at 96*; *Bresnahan, 62 M.J. at 143*. To reverse a military judge's decision for an abuse of discretion "involves far more than a difference **[*8]** in opinion." *Bresnahan, 62 M.J. at 143* (cleaned up). Rather, a military judge abuses his or her discretion only "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller, 66 M.J. 306, 307* (C.A.A.F. 2008. In other words, "[w]hen judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *United States v. Cannon, 74 M.J. 746, 750 (**Army** Ct. Crim. App. 2015)* (cleaned up).

B. Discussion

One fact guides the resolution of this appeal: appellant can show only the possibility that Dr. ES could have assisted in his defense. *See* *Bresnahan, 62 M.J. at 143* (showing necessity "requires more than the mere possibility of assistance"). *See also, e.g.,* *Cannon, 74 M.J. at 751-52* (finding defense's necessity showing deficient where "defense counsel specifically stated it need[ed] expert assistance to run a series of psychological tests *to determine* if appellant suffered from intellectual deficits impacting his ability to process **[*9]** information or if he was open to

suggestibility without offering evidence to support this hypothesis") (emphasis in *Cannon);* United States v. Bell, 72 M.J. 543, 551 (**Army** Ct. Crim. App. 2013) (necessity showing deficient where defense team "admitted" that they needed a false confession expert "to help them determine if they may have a false confession issue"); Hennis, 79 M.J. at 383 (no showing of necessity for expert where defendant could only assert that "additional forensic testing *might* result" in "*potentially*" exculpatory evidence). As in *Cannon, Bell*, and *Hennis*, the best appellant can show is that he needed Dr. ES to *first* examine appellant to determine whether there was a possibility that Dr. ES could *then* opine that appellant did not have the "characterology or personality traits which are predictive of or known to correlate" with sexual offenses with children. Even assuming arguendo the admissibility of such evidence, such a showing is insufficient.

This "mere possibility" issue undermines appellant's arguments both as to findings and sentencing. As to findings, while expert assistants and expert witnesses are related but distinct concepts, *see, e.g.,* Cannon, 74 M.J. at 751, appellant's proffers related to Dr. ES were akin to "profile evidence" that he wished to present either in **[*10]** connection with an entrapment defense or at sentencing. ***HN3***[⬆] Profile evidence "presents a characteristic profile of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile," and is generally improper "as evidence of guilt or innocence in criminal trials." United States v. Traum, 60 M.J. 226, 234 (C.A.A.F. 2004) (collecting cases so holding). To the extent that such evidence was potentially admissible as to an entrapment defense on the question of predisposition, *see* Rule for Courts-Martial 916(g) ("[i]t is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense"), entrapment is an "affirmative defense." United States v. Hall, 56 M.J. 432, 436 (C.A.A.F. 2002). Appellant's main defense theme was not that he committed the offenses but was entrapped (although he did seek and receive an entrapment instruction from the military judge). Rather, appellant told CID and testified at his trial that he did not actually believe "Hoku" was a 13-year-old, and that he was attempting to gather additional information on the "mother" of the three young children so that he could report her to the police. This is not an entrapment defense, but rather a claim that appellant lacked **[*11]** the requisite *mens rea* to commit the charged offenses in the first place. Regardless, appellant has not shown that Dr. ES would in fact have produced favorable profile evidence, even if such evidence were admissible.

As to sentencing, appellant now takes issue with a portion of the government's sentencing argument in which the government implored the panel to protect society from "actors like [appellant] who would use children for sex and do horrific painful things to them that would change the course of their lives." The government further argued that appellant was a "danger to society" and to "any parent who cannot monitor their child's every move online." While appellant did not object to this argument and contended in his own sentencing argument that there was no evidence that society needed to be protected from him, he now contends that the government's evidence "amounted to" the sort of profile or propensity evidence that they were precluded from obtaining from Dr. ES. Appellant is incorrect. The government did not, for example, offer expert testimony that appellant fit the psychological description of a pedophile, but rather made the common-sense link between the offenses for **[*12]** which the panel had just convicted appellant and the need to protect society. ***HN4***[⬆] Our superior court has said that "[p]rotection of society from the wrongdoer" is one of the "principal reasons for the sentence of those who violate the law." United States v. Ohrt, 28 M.J. 301, 305 (C.M.A. 1989). And, again, appellant can only speculate that Dr. ES could have provided him with favorable profile-type testimony, even presuming such testimony was admissible.

This case bears a striking resemblance to our sister court's decision in *United States v. Arthurton*, 2017 CCA LEXIS 115 (N.M.Ct. Crim. App. 2017) (unpublished). The charges in *Arthurton*, like here, stemmed from sexually explicit on-line chat sessions between the defendant and undercover law-enforcement officials posing as underage girls. As here, Arthurton requested the assistance of a forensic psychologist to both assist in potentially mounting an entrapment defense and to show that the accused was not "predisposed to commit sexual misconduct with children." *Id.* at *1-2. The military judge denied Arthurton's expert assistance request, and the Navy-Marine Court of Criminal Appeals affirmed, explaining that "[w]hile it is possible that the requested expertise might have assisted the appellant at trial, a 'mere possibility' alone is not sufficient." *Id.* at *2 (citing **[*13]** Lloyd, 69 M.J. at 99).

The same is true here. The military judge applied the correct legal framework, made no clearly erroneous factual findings, and his denial of appellant's expert

assistance request fell well within his zone of discretion.

HN5[] In closing, both our court and our superior court have acknowledged that it can be difficult to demonstrate an expert's necessity before first securing the expert's services. *See* *United States v. Warner, 62 M.J. 114, 122 (**C.A.A.F. 2005**)* ("The best way to articulate and explain the need for an expert is by using just such an expert to describe their evidence analysis and development process.") (quoting *United States v. Kreutzer, 59 M.J. 773, 777 & n.4 (**Army** Ct. Crim. App. 2004)*). Nevertheless, to be entitled to expert assistance at government expense, defendants must make more of a showing of necessity than appellant did here.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and sentence are AFFIRMED.

Judges ALDYKIEWICZ and WALKER concur.

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CERTIFICATE OF SERVICE, U.S. v. WATKINS (20210638)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 17th day of August, 2023.

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