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

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| UNITED STATES,<br>Appellee<br><br>v.<br><br>Specialist (E-4)<br>**TAYRON D. DAVIS,**<br>United States Army,<br>Appellant | **SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE (ON REMAND)**<br><br>Docket No. ARMY 20220272<br><br>Tried at Kaiserslautern, Germany on 14 February, 11 April, 19 May, and 23–24 May 2022, before a general court-martial convened by Commander, Headquarters, 21st Theater Sustainment Command, Colonel Charles Pritchard and Lieutenant Colonel Thomas Hynes, Military Judges, presiding. |

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

**Supplemental Assignment of Error**

**WHETHER THE MILITARY JUDGE ERRED IN DENYING DEFENSE'S EXPERT CONSULTANT REQUEST**

**Panel 2**

## Statement of the Case[1]

On 13 February 2025, the Court of Appeals for the Armed Forces (CAAF) reversed this court's decision to set aside and dismiss the charges with prejudice. *United States v. Davis*, __ M.J. __, 2025 CAAF LEXIS 112, at *25 (C.A.A.F. 2025). The CAAF returned the case for review "of the claims that were mooted by the lower court's prior decision to overturn the conviction. *Id*. This court, in its previous review of appellant's *Grostefon* matters, explained in a footnote, "[o]ur disposition renders it moot, but we do harbor concern that an impartial observer could reasonably conclude that the interests of speed improperly influenced the military judge to deny appellant's motion for expert assistance." *United States v. Davis*, ARMY 20220272, 2024 CCA LEXIS 144, at *2 n.2 (Army Ct. Crim. App. Mar. 27, 2024) (mem. op.).

[1] The Government adopts/incorporates the Statement of the Case contained in it's Brief on Behalf of Appellee, filed with this court on 18 October 2023, and supplements with the additional information offered herein.

## Statement of Facts[2]

### A. Appellant's request for an expert consultant.

On 22 February 2022, appellant requested appointment of MAJ CJ as an "expert consultant in the field of alcohol, intoxication, alcohol's effects on memory, and automatism." (App. Ex. VII-A). On 25 March 2022, the Convening Authority denied appellant's request. (Pre-trial Allied Docs). At trial, appellant moved to compel MAJ CJ, this time as a forensic psychiatrist. (App. Ex. VII; R. at 17). Appellant, at the trial court, maintained their request for "an expert confidential consultant and potential expert witness in the fields of alcohol intoxication, alcohol's effect on the memory, and automatism." (App. Ex. VII; R. at 19).

### B. Appellant's basis for requesting an expert consultant.

Appellant's basis for requesting appointment of MAJ CJ was that, "[n]otably, according to the CID case agent summary entries, [the victim] described her level of intoxication as slurring her speech, stumbling while walking, falling asleep, and did not remember what happened during some periods of the night." (App. Ex. VII, p. 2). Appellant did not request, nor call, any witness in support of their motion to compel. (App. Ex. VII, p. 2).

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[2] The Government adopts/incorporates the Statement of Facts contained in it's Brief on Behalf of Appellee, filed with this court on 18 October 2023, and supplements with the additional facts outlined herein.

**C. The Military Judge questioned Defense Counsel about their attempt to self-educate on the subject matter.**

The military judge addressed appellant's motion to compel appointment of an expert consultant at an Article 39(a) session on 11 April 2022. Appellant, in arguing the necessity of an expert, claimed "[w]e cannot gather this evidence on our own because the field of study is ever evolving and updating. It would be impossible for defense to adequately become knowledgeable in this field without the assistance of an expert consultant." (R. at 20). When the military judge asked for a single example of how the field of intoxication was "ever evolving," defense counsel could not provide one. (R. at 23–24; App. Ex. XV, p. 2).

## Supplemental Assignment of Error

**WHETHER THE MILITARY JUDGE ERRED IN DENYING DEFENSE'S EXPERT CONSULTANT REQUEST**

## 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). An abuse of discretion occurs when a military judge's findings of fact are "clearly erroneous," if the trial judge's decision is "influenced by an erroneous view of the law," or if the decision 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); *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.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *Miller*, 46 M.J. at 65; *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

## Law

To be entitled to a government-provided expert consultant, an accused must demonstrate necessity. *United States v. Tinsley*, 81 M.J. 836, 841 (Army Ct. Crim. App. 2021) (citing *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986)).

That is, an accused "must show the trial court that there exists a reasonable probability *both* that an expert would be of assistance to the defense *and* that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994) (quoting *Moore v. Kemp*, 809 F.2d 709, 712 (11th Cir. 1987)) (emphasis added). With respect to the first "assistance" requirement, the defense must provide sufficient justification to answer three separate inquiries: "(1) Why is the expert needed? (2) What would the expert accomplish for the defense? and (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop?" *United States v. Gunkle*. 55 M.J. 26, 32 (C.A.A.F. 2001); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.A.A.F. 1994).

## Argument

Appellant is not entitled to expert assistance just because the facts involve alcohol and sex; as such, the military judge did not abuse his discretion when he denied appellant's motion to compel expert assistance. *See United States v. Thoms*, 2014 CCA LEXIS 944 *6–7 (C.G. Ct. Crim. App. 2014). Appellant's argument, at best, demonstrated a "mere possibility of assistance," which the CAAF explained is "not sufficient to prevail on the request." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citing *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)).

**A. Appellant did not demonstrate necessity.**

The defense failed to carry its burden to show why an expert "in the fields of alcohol, intoxication, alcohol's effects on memory, and automatism[,]" (1) was needed; (2) what this expert would accomplish for the defense; and (3) why the defense could not gather and present this evidence without the expert. *Gonzalez*, 39 M.J. at 461.

**1. Appellant failed to establish why an expert was needed or what the expert assistance would accomplish.**

As the military judge correctly outlines, appellant claimed that he "need[ed] an expert's help to understand alcohol's effects on memory, cognitive function, sleep, and perception of reality if awakened in an intoxicated state." (App. Ex. XV). Appellant's basis for the request was the Case Activity Summary (CAS) entry from one of the CID Agents which highlighted the victim's statement that she could not remember periods of the evening. (App. Ex. VII-B; R. at 21). Armed with this minimal information, and without demonstrating any effort to further investigate the issue of intoxication or memory, appellant sought expert assistance. (App. Ex. VII, p. 8).

The military judge did not abuse his discretion in finding appellant failed to

demonstrate why an expert was needed. (App. Ex. XV, p. 2).[3] Further, the military judge properly addressed appellant's arguments relating to the need for an expert to assess whether the victim experienced a "blackout" or "pass-out[,]" because the record was devoid of any facts to support such a claim. (App. Ex. XV, p. 3).[4] Finally, appellant's suggestion that an expert was needed to examine the potential for "automatism" was also refuted in the record, here with appellant's own concessions:

> Regarding an expert's assistance in understanding automatism, Defense acknowledges that it is not offering the defense of automatism on behalf of the Accused, and they neither presented nor referred to any evidence that [the victim] suffers from automatism. In this regard, Defense has not demonstrated that expert assistance in understanding automatism is even remotely necessary.

(App. Ex. XV, p. 3).

**2. Appellant failed to explain why they could not gather and present evidence related to the victim's memory or level of intoxication.**

"Defense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case. There are a number of primary and secondary materials counsel may consult to attain competence." *United States*

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[3] "Defense does not explain why expert assistance on this topic is needed other than to say that they are not qualified to conduct this analysis." (App. Ex. XV, p. 2).

[4] "To the extent that 'blackouts' or 'pass-outs' are technical concepts, Defense provided no evidence that the [victim] either blacked out or passed out, only that she claims not to remember some of the events from the night of the alleged assaults." (App. Ex. XV, p. 3).

*v. Kelly*, 39 M.J. 235, 238 (C.M.A. 1994). The fact that expert assistance may be helpful does not negate the responsibility of defense counsel to demonstrate why "they themselves [are] unable to gather and present any evidence that the expert would have been able to develop." *Freeman*, 65 M.J. at 459 (citing *Bresnahan*, 62 M.J. at 143–44).

In examining appellant's request for an expert, the Military Judge inquired as to what defense counsel had done to educate themselves on the subject matter they claimed to need an expert for:

> MJ: Now, you say that the study how alcohol impacts memory has materially changed in recent years. Give me an example.
>
> ADC: Yes, Your Honor. It's -- and I don't have an exact example for you in front of me; that's why we would need to discuss with an expert consultant to get those more recent examples. I haven't been ----
>
> MJ: How do you know it's changed and from what to what?
>
> ADC: Your Honor, I believe it's just an ever-evolving there's new data, there's new studies coming out every day. I don't have the exact studies in front of me; that would be what we would get through help - - help from an expert consultant.
>
> MJ: I believe what you said was that the study how alcohol impacts memory has materially changed in recent years and my question is: How has it materially changed? From what to what?
>
> ADC: Yes, Your Honor. I believe just with new data, new understanding of the effects of alcohol, there's been new studies. I don't have one directly in front of me; that would be the information we would get from an expert consultant.
>
> MJ: So, you think that the study how alcohol impacts memory may

have materially changed; is that a more accurate statement?

(R. at 23–24). Quite simply, appellant's request for appointment of an expert wasn't ready for the minimal scrutiny the military judge gave it:

> Defense does not explain why expert assistance on this topic is needed other than to say that they are not qualified to conduct this analysis. Defense states that this field of study has materially changed and advanced in recent years but could not provide even a vague reference as to what has changed or what new theories would be explained by a consulting expert.

(App. Ex. XV, p. 2).

> Defense asserts that it is not educated in "the field of alcohol," or its impact on the body and behavior, or on the study of automatism, and requires an expert to decipher the "technical concepts therein." When pressed to describe what it had done to fill this apparent gap in its case preparation, Defense stated that it had "googled" some of the concepts but offered nothing more. Defense offered no evidence that a) there are any technical concepts that it wants to understand, or b) that it has done anything beyond a cursory web search to learn about alcohol and its impact on memory and cognitive function. To the extent that "blackouts" or "pass-outs" are technical concepts, Defense provided no evidence that the AV either blacked out or passed out, only that she claims not to remember some of the events from the night of the alleged assaults.

(App. Ex. XV, p. 3).

The military judge was within "the range of choices reasonably arising from the applicable facts and the law" when he determined that defense counsel did not do their homework or show why expert assistance was necessary. *Miller*, 66 M.J. at 307. As such, the military judge did not abuse his discretion in denying

appellant's request for expert assistance. *Gonzalez*, 39 M.J. at 461; *Freeman*, 65 M.J. at 458.

**B. *Kornickey* and *Wordlaw* are not applicable to this case.**

Appellant's reliance on *Kornickey* and *Wordlaw* is misplaced as they are factually distinguishable with the present case. (Appellant's Br. 6–8); *United States v. Kornickey*, ARMY 20210636, 2023 CCA Lexis 336 (Army Ct. Crim. App. 31 July 2023) (mem. op); *United States v. Wordlaw*, ARMY 20230235, 2025 CCA LEXIS 102, *27-28 (Army Ct. Crim. App. 12 March 2025) (mem. op.). In both *Kornickey* and *Wordlaw*, there was evidence demonstrating the victims in those respective cases experienced either a "black out" or "pass-out" before or during the sexual assaults. *Kornickey*, 2023 CCA LEXIS 336, at *2-3; *Wordlaw*, 2025 CCA LEXIS 102, at *27. Here, there is no such evidence. Rather, the victim testified her memory of the evening was not impaired due to her consumption of alcohol. (R. at 186).

**C. Assuming *arguendo* appellant met the *Gonzalez* factors he still failed to demonstrate how denial of expert assistance would result in a fundamentally unfair trial.**

In addition to finding that appellant's motion to compel failed the "assistance" prong, the military judge also found appellant's motion failed to demonstrate how denial of the expert would result in a fundamentally unfair trial. (App. Ex. XV, p. 3). In his motion to compel appointment of MAJ CJ, appellant

referenced the three *Gonzalez* factors but failed to reference, or analyze, the fundamental fairness test under *Freeman*. (App. Ex. VII); See *Gonzalez*, 39 M.J. at 461; *Freeman*, 65 M.J. at 458. By making no showing, appellant clearly failed to carry his burden.

Even had appellant made a showing, he could not prove a reasonable probability that the denial would result in a fundamentally unfair trial. *Freeman*, 65 M.J. at 458. This case does not involve novel, complex, or evolving technology that is the lynchpin of the government's case. *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006). The Military Judge even highlighted:

> All of this information is all too common knowledge, particularly in the world of criminal law. It is so common that there is a standard findings instruction on voluntary intoxication, "The law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants." U.S. DEPT OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 5-12 (29 Feb. 2020).

(App. Ex. XV, p. 2).

**D. Denial of expert assistance did not result in a fundamentally unfair trial.**

The military judge did not abuse his discretion when he concluded denial of expert assistance wouldn't result in a fundamentally unfair trial. (App. Ex. XV., p. 3). As the military judge presciently reasoned, "[d]efense would have an expert do for them what they are expected to do as advocates - assess a witness's ability to perceive events and show how that perception may have been limited through

thorough, well-prepared cross examination of that witness." (App. Ex. XV, p. 2). Defense counsel did exactly that. (R. at 185–87).

The victim denied any issue related to her memory being impaired, and stated she could not recall telling CID agents otherwise. (R. at 186–87). Defense contradicted the victim's testimony in that regard with that of Special Agent (SA) BW, who stated the victim reported "various gaps in her memory or recollection from the evening of the incident." (R. at 315). Defense also called SA JL, who testified the victim stated, "She just told me she was very intoxicated. She had memory – memory lapses from that night." (R. at 328). When the prosecution was able to cross-examine SA JL they were able to highlight that despite any suggestions about issues with the victim's memory, she was able to clearly articulate what occurred during the portion of the evening where she was sexually assaulted. (R. at 339–42).

The military judge properly precluded appellant from arguing the victim suffered from a fragmentary blackout; however, defense counsel was not prohibited from arguing about the relationship between the victim's level of intoxication and potential deficiencies in her memory. (R. at 358–59). Defense counsel repeatedly challenged the trustworthiness of the victim's memory in their closing argument, and properly pivoted from suggesting the existence of a

"fragmentary blackout" to characterizing the issue as "lapses in memory" attributable to the victim's level of intoxication. (R. at 359, 361–64).

## Conclusion

WHEREFORE, the government respectfully requests this honorable court deny appellant's request for relief and affirm the findings and sentence.

[redacted]

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**CERTIFICATE OF SERVICE, U.S. v. DAVIS (20220272*)***

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 23rd day of April, 2025.

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