IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20200158
Specialist (SPC) **ROBERT L. HUNT** United States Army	Appellant	Tried at Wheeler Army Airfield, Hawaii, on 15 November 2019, 31 January, and 17-19 March 2020, before a general court-martial appointed by the Commander, 25th Infantry Division, Colonel Mark A. Bridges, military judge, presiding.

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

Assignment of Error

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRECTION BY DENYING A DEFENSE MOTION TO COMPEL THE APPOINTMENT OF AN EXPERT CONSULTANT IN THE FIELD OF FORENSIC PSYCHOLOGY.

Statement of the Case

On 19 March 2020, a general court-martial consisting of officer members convicted appellant, Specialist (E-4) Robert L. Hunt, contrary to his pleas, of one specification of attempted sexual abuse of a child and one specification of communicating indecent language to another, in violation of Articles 80 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880 and § 934. (R. at 563). The members sentenced appellant to be reduced to the grade of E-1, confined for

30 months, and discharged from the service with a bad-conduct discharge. (R. at 615). On 15 April 2020, the convening authority took no action on the findings or sentence. (Action). The military judge signed the Judgment of the Court on 21 April 2020. (Judgment).

Statement of Facts

Appellant was charged with one specification of attempted sexual abuse of a child, in violation of Article 80, UCMJ, and one specification of indecent language, in violation of Article 134, UCMJ. (Charge Sheet). In The Specification of Charge I, the government alleged appellant attempted to commit a lewd act of communicating indecent language to a person he believed to be less than 16 years old. In The Specification of Charge II, the government alleged appellant communicated indecent language to a Naval Criminal Investigative Service Special Agent (i.e. Special Agent [redacted]) by writing to her the sexual acts he would do to her imaginary minor daughters. (Charge Sheet; R. at 198). The charges stemmed from online chats appellant had with undercover law enforcement agents (UCA) posing as a 13 year-old girl and the mother of three minor daughters. (R. at 198).

One of the earliest defense theories raised was the defense of entrapment. In order to successfully present this defense, appellant needed to show he did not have the predisposition to commit the charged offenses. Rule for Courts-Martial (R.C.M.) 916(g). On 17 December 2019, the defense submitted a request to the

convening authority for the appointment of Dr. [redacted], a forensic psychologist, as an expert consultant and potential expert witness. (App. Ex. I, p. 2). The request provided detailed information regarding (a) why expert assistance was necessary, (b) what Dr. [redacted] would accomplish for the defense, and (c) why the defense was unable to gather this evidence in the absence of expert assistance. (App. Ex. I, p. 2). The request was denied. (App. Ex. I, p. 2).

On 13 January 2020, the defense filed a motion to compel the government to appoint Dr. [redacted] as a forensic psychologist to assist the defense as an expert consultant and potential witness. (App. Ex. I). The motion to compel requested Dr. [redacted] be appointed to assist the defense with both the merits and sentencing portions of trial. (App. Ex. I, p. 4–5). To adequately represent SPC Hunt, the defense requested funding for Dr. [redacted] to perform a complete forensic psychological evaluation on SPC Hunt, consisting of a full battery of tests. (App. Ex. I, p. 4). This evaluation was necessary to generate data that would inform Dr. [redacted] in order to make reasonable conclusions about any evidence of psychopathology consistent with sexual offending (or the absence of this). (App. Ex. I, p. 4). The generated data would also afford an understanding of the appellant's psychological functioning, which may include observation of personality and/or psychosocial stressors, that would explain his behavior and decision-making in the alleged offenses. (App. Ex. I, p. 4).

The generated data would assist the defense in establishing the lack of character or personality traits that are consistent with seeking sex with minors, and the lack of evidence of demonstration of any pedophilic tendencies. (App. Ex. I, p. 4). The defense further explained that, if appellant should be convicted, Dr. [redacted] findings would be used as mitigation, and her expert opinion and testimony would be used to establish that appellant was not a danger to the community and had extraordinary rehabilitative potential. (App. Ex. I, p. 4). The defense planned to present Dr. [redacted] testimony to explain the extent of the appellant's amenability to treatment, dangerousness to the community, and rehabilitative potential. (App. Ex. I, p. 4).

The defense stated that there was more than a mere possibility Dr. [redacted] assistance was necessary; that there was more than a reasonable probability her expert consultation would provide assistance for sentencing purposes; and that this would be an important factor in the determination of an appropriate sentence. (App. Ex. I, p. 4). Specifically, in an attached affidavit, Dr. [redacted] clarified her role in sentencing as follows:

> If SPC Hunt is convicted, his psychological profile would be critical and necessary to the Defense, as a matter of extenuation. His anticipated lack of pedophilic sexual orientation and/or arousal to minors will certainly be an important factor in the determination of an appropriate understanding of SPC Hunt, and any sentencing. My testimony regarding the evaluation findings, synthesized

> with a full review of all relevant discovery, will assist and educate the members of the panel.

(App. Ex. I, Encl. 1).

On 13 January 2020, the government provided defense counsel notice of its intent to offer evidence pursuant to Military Rule of Evidence (MRE) 404(b). (App. Ex. IV). According to the notice, the government intended to offer testimony from law enforcement officers, to include Special Agent [redacted] to rebut appellant's contention that his participation in the charged offenses was the result of entrapment. (App. Ex. IV).

On 14 January 2020, the government responded to the defense motion to compel. (App. Ex. II). The government characterized the proffered evidence that Dr. [redacted] findings may develop as "profile" evidence and argued the defense did not meet the burden of showing necessity for its expert request because the defense could not properly present such "profile" evidence in the defense's case-in-chief. (App. Ex. II, p. 5). The government then discussed the three exceptions regarding when "profile" evidence would be admissible as stated in *United States v. Banks*, 36 M.J. 150, 162. (App. Ex. II, p. 5). Specifically, with regard to the third exception, where "profile" evidence may be admitted in rebuttal when a party opens the door by introducing potentially misleading testimony, the government stated as follows:

> Most importantly, Exception 3 does not apply as the Government has no intent whatsoever to offer psychological profile evidence of the Accused on merits or sentencing, and therefore will not be 'opening the door' to such usage by Defense in rebuttal. The mere possibility of such a 'door opening' is so unlikely that it should not serve as the basis for compelling the Government to fund Defense's proffered expert.

(App. Ex. II, p. 5).

On 31 January 2020, the military judge heard oral arguments at a 39(a) hearing. (R. at 18). The defense explained they needed expert assistance both for merits, for the defense theory of entrapment, and for sentencing, for the impact of any predisposition evidence on the accused's rehabilitative potential, whether he is a danger to society, and his amenability to treatment. (R. at 18–19). Opposing this expert, the government again argued "the government ha[d] no intention whatsoever to introduce any profile evidence; not on the merits and not on sentencing." (R. at 25). The military judge asked questions throughout counsels' arguments to clarify their positions with regard to the proffered evidence in the context of merits. (R. at 19-20; R. at 26–29). In closing, defense counsel again reminded the military judge the defense was requesting the expert for both merits and sentencing purposes. (R. at 29).

On 24 February 2020, the military judge denied the defense motion to compel the employment of Dr. [redacted] as an expert assistant. (App. Ex. VI). His findings of fact and conclusions of law discussed the lack of the necessity to

employ Dr. [redacted] for assistance to the defense during the merits portion of the case. However, the entire ruling only mentioned the defense request for the expert's assistance during sentencing once, stating in a footnote that "Dr. [redacted] assistance with respect to the defense sentencing case is also not necessary to ensure a fair trial." (App. Ex. VI, n.2).

On 2 March 2020, the defense filed a motion for reconsideration. (App. Ex. XVIII). On 17 March 2020, prior to the start of trial, the military judge stated on the record his denial of the request but provided no additional findings or conclusions of law. (R. at 54).

After hearing evidence regarding the defense of entrapment (including evidence of a separate occasion when appellant began a chat with a third undercover agent but blocked them when told that they were young), and instructions from the military judge regarding the entrapment defense and that the evidence of the indecent language offense alleged in Charge II could be considered for the limited purpose of its tendency to prove the requisite intent of the offense alleged in Charge I, the panel found appellant guilty of both charges. (App. Ex. XXVIII; R. at 503–05; R. at 508; R. at 563).

Later, as part of his sentencing instructions, the military judge instructed as follows: "In selecting a sentence, you should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings. Thus, all

the evidence you have heard in this case is relevant on the subject of sentencing." (R. at 592).

In its sentencing argument, the government asked the panel to sentence appellant to five years of confinement, reduction to E-1, and a dishonorable discharge. (R. at 593). To support this sentence, the government stated:

> And right now, Specialist Hunt is a danger to society, the children on this island, and to any parent who cannot monitor their child's every move online. Specialist Hunt needs to understand that talking with children about sex is criminal behavior, and that he must never participate in such behavior ever again.

(R. at 594).

The government also offered "Specialist Hunt need[ed] to be specifically deterred from doing something like this ever again." (R. at 595). Further, government stated that a stronger punishment might "ultimately be the path that leads to his eventual rehabilitation…" (R. at 596).

In highlighting the particular sentencing philosophy that society needed to be protected from appellant (R. at 597), the government argued that "[s]ociety needs protection 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." (R. at 597–98). They argued that it would be a way for appellant to "spend his time." (R. at 598). The government suggested that appellant knew he was wrong, "and now is the time to decide a just punishment, taking into account the need for his

rehabilitation." (R. at 600).

In defense's sentencing argument, counsel argued there was no evidence presented during trial that appellant was a danger to society or that society needed to be protected from him. (R. at 603–04). The panel sentenced appellant to be reduced to the grade of E-1, to be confined for 30 months, and to be discharged from the service with a bad-conduct discharge.

Standard of Review

A military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion. *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010). "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014). The converse is also true:

> When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . . .

Id. at 312 (quoting *United States v. Benton*, 54 M.J. 717, 725 (Army Ct. Crim. App. 2001)).

"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." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Under the abuse of discretion standard, "[f]indings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011). A constitutional error is harmless beyond a reasonable doubt when "beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005); *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003) (quoting *United States v. Davis*, 26 M.J. 445, 449 n.4 (C.M.A. 1988)).

Law

Employment of an expert to assist the defense at government expense is authorized if the expert is "relevant and necessary." R.C.M. 703(d). An accused is entitled to expert assistance at the government's expense if the assistance is necessary to their defense. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008). To show expert assistance is necessary, an accused "must show that a reasonable probability exists" that an expert would be of assistance to the defense and denial of an expert "would result in a fundamentally unfair trial." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). In deciding the necessity of expert assistance, this Court applies a three-part test: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the

accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert would be able to develop. *Id*.

Argument

I. Appellant needed expert assistance to explain the extent of his amenability to treatment, to establish the lack of dangerousness to the community, and to describe his extraordinary rehabilitative potential.

The defense clearly requested the assistance of the expert forensic psychologist for merits as well as sentencing. If the defense's request had been granted, the expert would have performed a complete forensic psychological evaluation of appellant, often referred to as a Stoll Evaluation. (App. Ex. I; R. at 19). The Stoll Evaluation would have generated, through a battery of tests, valid and reliable results and ultimately determined whether appellant was someone who presents with the "characterology" or personality traits predictive of or known to correlate with sexual offending.

The findings from the Stoll Evaluation would have served the expert for two distinct purposes toward the appellant's defense. During the merits portion of the case, defense proffered the expert would prove appellant's innocence by establishing an affirmative defense. (App. Ex. I; R. at 21). Findings from Dr. [redacted] evaluation would demonstrate a lack of predisposition for sexual offenses and Dr. [redacted] could testify to her methods and opinion on that issue. During the sentencing portion, defense proffered that expert assistance was necessary to

establish appellant's rehabilitative potential, lack of dangerousness to society, and amenability to treatment. (App. Ex. I, p. 4; R at 19).

In its request to compel the expert to assist with sentencing preparation, the defense specifically stated that expert assistance was necessary for mitigation and sentence appropriateness. (App. Ex. I, p. 4). Therefore, at a minimum, Dr. [redacted] would have educated the defense team and assisted their preparation to deliver the best sentencing case.

Defense counsel was also prepared to use Dr. [redacted] during its sentencing case. The expert's findings for a lack of sexual orientation and/or attraction to minors would have been highly relevant evidence for the panel in determining the sentence, as it relates to appellant's extraordinary rehabilitative potential and amenability to treatment. (App. Ex. I, p. 5). The proffered testimony would have assisted the panel to understand the extent to which appellant was not a danger to the community and would have directly impacted the panel's assessment of the appropriate sentence. (App. Ex. I; R. at 19).

II. The defense counsel were unable to gather and present the evidence that the expert would be able to develop.

No member of the defense team was an expert in forensic psychology. No defense counsel could have reasonably attained the necessary level of academic training or professional certification to perform a forensic psychological evaluation of appellant, such as the Stoll Evaluation, that would yield scientifically valid and

reliable test results. (App. Ex. I, p. 5). Additionally, as a practical matter, defense counsel themselves would not be able testify during trial.

III. The military judge made no findings or legal conclusions regarding the defense's request for expert assistance for sentencing, and this Court should find his denial of defense request to be an abuse of discretion.

In his ruling, the military judge addressed the first basis of the defense's expert request (i.e. merits) with findings and legal conclusions but failed to do the same for the second basis of defense's expert request (i.e. sentencing). This sharp contrast highlights the error of his denial. Because the military judge did not place his analysis for the denial of expert assistance for sentencing on the record, the appellate court has no actual findings to review, much less to which to give deference. Similarly, the appellate court cannot benefit from the military judge's legal reasoning in determining whether he abused his discretion.

The stark paucity of findings and legal conclusions in the denial of expert assistance for sentencing gives rise to the presumption that the military judge did not fully consider each individual basis in the defense's request. Because the military judge made no specific findings of fact to support his summary conclusion that "Dr. [redacted] assistance with respect to the defense sentencing case is also not necessary to ensure a fair trial", this Court should give no deference to his decision to deny the defense's expert request and find an abuse of discretion.

IV. Denial of expert assistance was an error that prejudiced appellant and was not harmless beyond a reasonable doubt.

For findings, by denying Dr. [redacted] the military judge denied appellant's ability to present a complete defense. As defense counsel proffered, the expert would have provided evidence of appellant's innocence by establishing an affirmative defense. (App. Ex. I; R. at 21).

For sentencing, the defense expert's proffered testimony would have assisted the panel by informing its decisions with regard to mitigation, extenuation, and sentence appropriateness. The military judge's denial of the expert request presumes that the expert's proffered testimony was not relevant or necessary. (App. Ex. VI). However, this presumption directly contradicts what actually happened at the sentencing portion of appellant's trial. The government argued in its brief and at the motions hearing that such an expert was not necessary, *inter alia*, because they had no "intent whatsoever" to offer "profile" evidence either during the merits or on sentencing. (App. Ex. II, p. 5; R. at 25).

Yet, in arguing for its requested sentence, the government made both direct and indirect references to appellant's ability for rehabilitation and the danger that he presently posed and would pose in the future to society. (R. at 594–98). Whatever the government's earlier intent was, at sentencing they clearly argued what amounted to the appellant's character and/or predisposition for committing sexual offenses against children both at the time of the trial, and in the undefined

future. (R. at 595, 597–98). Taking the record as a whole, in light of the evidence that was presented during the course of the trial and the instructions given to the panel, the government was able to draw negative inferences and argue for its requested sentence specifically by presenting its own assessment of appellant's rehabilitative potential and the higher punishment required to cure the danger that appellant supposedly posed to society.

Without the highly relevant and necessary testimony proffered by the expert, defense was not able to present any scientifically assessed predisposition evidence on the appellant's rehabilitative potential and lack of dangerousness to society to counter the government's assertions. The defense also lacked the means to present appellant's amenability to treatment. As anticipated in their request, defense could not adequately address the three grounds for which they requested Dr. [redacted] assistance.

In *Ake v. Oklahoma*, the Supreme Court of the United States held denial of expert assistance was a due process violation where evidence raised issue of accused's future dangerousness, which the prosecutor relied upon at sentencing. *Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985). While *Ake* pertained to future dangerousness as an aggravating factor under a capital sentencing scheme, the due process violation still applies to appellant's case because future dangerousness is an aggravating consideration under R.C.M. 1001(b)(4). Without the expert's

assistance, the defense of the appellant was incomplete and inadequate. As such, it cannot be said that the military judge's ruling denying the defense's expert request was error that was harmless beyond a reasonable doubt.

Conclusion

WHEREFORE, based on the deprivation of appellant's due process rights, appellant respectfully requests this Court set aside the findings and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 21 December 2020.

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Panel No. 4