IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20200158
Specialist (E-4) **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 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 DISCRETION BY DENYING A DEFENSE MOTION TO COMPEL THE APPOINTMENT OF AN EXPERT CONSULTANT IN THE FIELD OF FORENSIC PSYCHOLOGY.

Panel No. 4

Statement of the Case[1]

On 19 March 2020, a general court-martial comprised of officer members 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, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 934 (2019) [UCMJ]. (R. at 563; Charge Sheet). The panel sentenced appellant to reduction to the grade of E-1, 30 months' confinement, and a bad-conduct discharge. (R. at 615). The military judge adjourned appellant's court-martial on 19 March 2020. (R. at 617). On 15 April 2020, the convening authority took no action on the findings or sentence.[2] (Action). The military judge entered judgment on 21 April 2020. (Judgment of the Court). The military judge authenticated the record on 12 June 2020. (Authentication). On 24 July 2020, this court docketed appellant's case for appellate review.

Statement of Facts

1. Appellant's Offenses

On 25 March 2019, appellant initiated a conversation on the application Whisper[3] with a person he believed was a 13-year-old girl named "[redacted]."[4] (Pros.

[1] The crimes of which appellant was convicted were committed and referred after 1 January 2019. (Charge Sheet). Accordingly, the rules and punitive articles contained within the 2019 Manual for Courts-Martial apply to appellant's case and

Ex. 1; R. at 143–44). The conversation progressed and became sexual when Detective [redacted] asked appellant for pictures, and appellant responded by sending a picture of his face as well as his penis. (Pros. Ex. 1, pp. 2–3). Appellant engaged "[redacted]" in a sexually explicit conversation before Detective [redacted] informed appellant "Upfront. I'm 13 but love military guys and to party if that's okay..if not I understand… ur cock is still beautiful tho." (Pros. Ex. 1, pp. 3–6). Appellant responded to "[redacted]" and said, "I'm down. Can you send any nudes?" (Pros. Ex. 1, p. 6). Still under the impression he was engaged in a conversation with a 13-year-old girl, appellant asked, "[w]hen's the last time you had sex?"; "[d]id seeing

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are cited *infra*. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*, 2019].

[2] The convening authority's action—in addition to the "Action on Deferment Request" memorandum [memo]—documented the convening authority's denial of appellant's request "to defer the automatic forfeitures of pay until entry of judgment and to defer the adjudged reduction in grade for six months." (Action; Convening Authority "Action on Deferment Request" memo, 15 April 2020). The convening authority approved appellant's request to waive the automatic forfeitures for 180 days—effective 15 April 2020—and directed payment to appellant's spouse. (Convening Authority "Action on Deferment Request" memo, 15 April 2020).

[3] Whisper is "an application that you can download onto your electronic mobile device where you can create a very limited profile consisting of a short nickname, your age, and your gender." (R. at 142). Whisper enables users to "text online saying something . . . people can communicate . . . either publically or privately." (R. at 142).

[4] Unbeknownst to appellant, he was actually communicating with Detective [redacted]—a 16-year-veteran of the Maui Police Department—who served as part of a multijurisdictional online child enticement operation known as "[redacted]" (R. at 139–41).

my dick make u wet?"; and, "show me a sneak peak first then I'll text you momma . . . of ur pussy mommy!" (Pros. Ex. 1, pp. 6–10; R. at 155–60).

During a separate instance between 1 May and 2 May 2019, appellant used the Whisper application to communicate with a person whom he believed was a mother of three minor-aged daughters.[5, 6] During these communications, the "mother" asked appellant if he was "into young?" (Pros. Ex. 2, p. 1). Appellant asked, "How young?" and the "mother" responded that her "girls are 6, 9, and 13." (Pros. Ex. 2, p. 1). Special Agent [redacted] responded, "This probably isn't for you" and provided appellant with an "off ramp." (R. at 202; Pros. Ex. 2, p. 2).[7] Rather than disengage from any further communications, appellant asked "which one you want me to fuck?" and "What else can I do?" (Pros. Ex. 2, p. 3; R. at 203). In response to what appellant wanted to "teach" her three children, appellant said, "how to ride me until I come deep inside[.]" (Pros. Ex. 2, p. 3). Appellant then asked for a picture of the 13-year-old girl (Pros. Ex. 2, p. 4) and wanted to know "how many times" the "mother's" 13-year-old daughter had had sex. (Pros. Ex. 2,

[5] While on the Whisper application, appellant communicated under several usernames, including "Poseidon." (R. at 199–201; Pros. Ex. 2).
[6] Appellant was actually communicating with Special Agent [redacted], a criminal investigator assigned to the Naval Criminal Investigative Service at Pearl Harbor, Hawaii. (R. at 193; Pros. Ex. 2).
[7] Special Agent [redacted] testified that she messaged appellant, "This probably isn't for you" to provide an "off ramp" in case the topic of having sex with minors was "something [appellant] was not into." (R. at 202; Pros. Ex. 2, p. 2).

p. 4; R. at 204–05). Appellant also asked the person whom he believed was the children's mother whether her 6-year-old and 9-year-old "girls were sexually active." (Pros. Ex. 2, p. 4). When appellant learned that the 9-year-old "girl" had "tried" to have sex only once before, he asked if "she like[d] it?" (Pros. Ex. 2, p. 5). Appellant then asked, "Could I cum on the youngest and play with her pussy?" (Pros. Ex. 2, p. 5; R. at 205). Appellant asked the "mother" if she would watch as he had sex with her underage children. (Pros. Ex. 2, p. 5). Appellant then asked "when can I come over?" (Pros. Ex. 2, p. 5; R. at 205). Appellant promised to treat the children "amazing" and offered to send the "mother" a picture of his penis in order to "see if I can even fit?" (Pros. Ex. 2, p. 6). Appellant sent a picture of his penis (Pros. Ex. 2, p. 8 [redacted]) to the person he believed was the children's mother and said he would "slowly stretch the 9 and 13 year olds pussy to love [his] cock." (Pros. Ex. 2, p. 8). Appellant also told the "mother" that he would "love to fill one [of her minor daughters] up with cum and see her reaction as it drips out." (Pros. Ex. 2, p. 10). Afterward, appellant sent a picture of himself to the "mother" (Pros. Ex. 2, p. 11) and asked her to send him a picture of the 13-year-old "so I know ur not playing me[.]" (Pros. Ex. 2, p. 11).

After exiting the first Whisper conversation with the "mother," appellant re-engaged her in conversation via Whisper approximately two hours later and asked

her to text him. (R. at 210–11). Appellant then entered into a text message conversation with the girls' "mother" and discussed the details of him engaging in sexual activity with each of the three young daughters.[8] (Pros. Ex. 3). When asked what he would be interested in doing with each of the three young girls, appellant stated "well [it] would be up to [you] which one can I cum [inside]." (Pros. Ex. 3, p.1). Appellant further inquired regarding sexual intercourse with the three underage girls and asked whether he would "have to wear a condom." (R. at 215). Appellant said he did not have any condoms and stated he "kind of wanted to cum inside her and let her rub it all over her pussy." (Pros. Ex. 3, p. 3; R. at 215–16).

2. Appellant's Motion to Compel the Appointment of Dr. [redacted] as an Expert Consultant.

On 13 January 2020, prior to trial, appellant filed a motion with the trial court to compel the appointment of Dr. [redacted] as an expert consultant for the defense.[9] (App. Ex. I). Appellant averred that Dr. [redacted] services were needed because—

> [I]t is necessary that a complete forensic psychological evaluation be completed on him, which will determine he is not someone who has the characterology or personality traits which are predictive or known to correlate with sexual offending." This will assist the Defense in establishing SPC Hunt did not attempt to sexually abuse a child, nor did

[8] Prosecution 3 contains the text messages exchanged between appellant and the person whom he believed was the mother of three daughters, ages 6, 9, and 13-years-old. (Pros. Ex. 3, pp. 1–3).

[9] Dr. [redacted] is a forensic and clinical psychologist who avers expertise in the field of "sexual offending, sexual abuse, paraphilia, and sexual orientation." (App. Ex. I, Signed Affidavit).

> he wrongfully communicate language about what he would do to a minor. Rather, he was trying to obtain information from the pretend mother to report her to law enforcement authorities, which he did.

(App. Ex. I, pp. 3–4). Appellant further stated, "Dr. [redacted] findings will also be used as a matter of mitigation should [appellant] be convicted." (App. Ex. I, p. 4).

On 31 January 2020, appellant presented argument before the military judge concerning his motion to compel the appointment of Dr. [redacted]. (R. at 18). Appellant argued that "the appointment of [Dr. [redacted]] as an expert consultant in this case is necessary primarily for the defense theory of entrapment. That's on the merits and it's also necessary in sentencing for recognized sentencing purposes." (R. at 18). Appellant further specified that "the predisposition element is what we absolutely need [Dr. [redacted]] for. [Dr. [redacted]] says in her affidavit that the forensic psychological evaluation can establish that [appellant] does not have evidence or demonstrate any pedophilic tendencies." (R. at 18, 29). With regard to sentencing, appellant argued that Dr. [redacted] would "be able to help us with three recognized theories of sentencing: rehabilitative potential; danger to society, and amenability to treatment." (R. at 19).

3. The Military Judge Denies Appellant's Motion to Compel the Appointment of Dr. [redacted] as an Expert Consultant.

After reviewing the motions and hearing argument from the parties regarding the appoint of Dr. [redacted] as an expert consultant, the military judge denied the defense's request.[10] (App. Ex. VI). In his four-page written ruling, the military judge found "the defense has failed to establish the necessity of employing [Dr. [redacted]] as an expert assistant," because "[t]he underlying need for expert assistance is not established by the evidence presented to the court." (App. Ex. VI, p. 2). The military judge also determined that while appellant wanted Dr. [redacted] for the purpose of determining "whether he is someone who presents with the characterology or personality traits which are predictive of or known to correlate with sexual offending," the government presented "no such evidence to suggest that [he] would have such characterology or personality traits." (App. Ex. VI, p. 2). Indeed, the military judge concluded that "the evidence suggests just the opposite." (App. Ex. VI, p. 2). The trial court based its ruling—in part—because appellant "acknowledges his sexual interest in minors to not one, but two undercover agents in separate conversations." (App. Ex. VI, p. 3).

[10] The military judge denied appellant's motion to compel the appointment of an expert consult in a written findings and conclusions document dated 24 February 2020. (App. Ex. VI).

In addition to determining appellant failed to present sufficient evidence to establish why Dr. [redacted] was a relevant or necessary witness, the military judge also found, even if the witness was necessary, she was not relevant. Indeed, the court determined, "[Dr. [redacted]'s] testimony on the matter would be of little to no probative value." (App. Ex. VI, p. 3). The military judge explained his reasoning in a two-part analysis. (App. Ex. VI. p. 3).

First, the military judge determined that "Dr. [redacted]'s evaluation would have probative value, albeit minor, only with respect to the entrapment defense." (App. Ex. VI, p. 3). Further, the military judge found that "while [appellant's] character and personality traits may be relevant to the issue of predisposition, they would not refute what appears to be the government's main contention that [appellant] readily accepted the opportunity offered." (App. Ex. VI, p. 3). The trial court concluded that "[a]s a result, [Dr. [redacted]'s] evaluation and potential testimony is not necessary for a fair trial with respect to the entrapment defense." (App. Ex. VI, p. 3).

Second, the military judge determined that "[Dr. [redacted]'s] conclusions about the [appellant's] predisposition to engage in sexual conduct or communications with minors would be of little to no probative value to either of those defenses." (App. Ex. VI, p. 4). Further, that "evidence of what actually occurred is by far, the most relevant evidence." (App. Ex. VI, p. 4). Finally, the military judge concluded his

analysis by summarily stating that "[Dr. ■■■'s] assistance is not necessary to ensure a fair trial." (App. Ex. VI, p. 4).

In denying defense counsel's request to appoint the expert for assistance with presentencing preparation, the military judge also determined that Dr. ■■■ would not be necessary for sentencing to ensure appellant received a fair trial. (App. Ex. VI, p. 4, n.2).[11]

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).

Law

"A military judge abuses [his] discretion when [his] 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 is outside the range of choices reasonably arising from the applicable facts and law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). "The abuse of discretion standard is a strict one,

[11] On 2 March 2020, appellant filed a request for reconsideration of the military judge's denial of Dr. ■■■ as an expert consultant. (App. Ex. XVIII). At trial, the military judge stated "I denied that request [for reconsideration] because I didn't believe anything that was presented to me required reconsideration and [appellant's attorney] was not requesting a hearing for that reconsideration request." (R. at 55).

calling for more than a mere difference of opinion." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). "Moreover, [a] review for error is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that appellate counsel now wishes trial defense counsel had submitted." *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (emphasis in original).

An appellant is "entitled to expert assistance provided by the Government if he can demonstrate necessity." *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F 2001). Further:

> To demonstrate necessity an [appellant] "must demonstrate something more than a mere possibility of assistance from a requested expert . . ." an [appellant] "must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and denial of expert assistance would result in a fundamentally unfair trial."

Gunkle, 55 M.J. at 31 (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994).

The Court of Appeals for the Armed Forces [CAAF] has set forth a three-part test to determine necessity: "(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 assistance would be able to

develop." *Id.* at 32 (internal citations omitted). Necessity requires more than the mere possibility of assistance from a requested expert. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

"Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary." Rule for Courts-Martial [R.C.M.] 703(b)(1) (2019).

"Whether a witness shall be produced to testify during presentencing proceedings is a matter within the discretion of the military judge . . . ." R.C.M. 1001(f)(1) (2019).

Argument

The military judge did not abuse his discretion in denying appellant's request for the appointment of Dr. [redacted] as an expert consultant because appellant failed to present sufficient evidence to demonstrate the relevance or necessity of expert assistance. *See Gunkle*, 55 M.J. at 31 (internal quote omitted); R.C.M. 703(b)(1); R.C.M. 1001(f)(1). Put simply, appellant's request for relief should be denied because he failed to meet the standard when he could not adequately explain why the expert was needed, what the expert could accomplish for appellant, or why civilian defense counsel could not gather and present the evidence without the expert's assistance. *Id.* at 32 (citations omitted). At best,

appellant's expert appointment request averred nothing more than the "mere *possibility* of assistance from a requested expert." *Bresnahan*, 62 M.J. at 143 (emphasis added). Accordingly, the military judge's denial of appellant's expert appointment request was appropriate.

Alternatively, this court should deny appellant's request for relief because he failed to articulate a specific factual or legal error made by the military judge. Indeed, appellant cannot demonstrate how the military judge's findings of fact were clearly erroneous, that he held an erroneous view of the law, or how his decision fell outside the range of choices reasonably arising from the applicable facts and law. *See Miller*, 66 M.J. at 307.

The military judge reviewed the evidence and heard argument from defense counsel regarding appellant's alleged need for the appointment of an expert consultant. (R. at 18–21; App. Ex. I; App. Ex. XVIII). After he considered the government's response (App. Ex. II) and the parties' arguments (R. at 18–30), the military judge issued a detailed four-page ruling on the matter. (App. Ex. VI).

In his ruling, the military judge determined that the defense had "failed to establish the necessity of employing Dr. [redacted] as an expert assistant" due to the lack of "evidence presented to the court." (App. Ex. VI, p. 2). Indeed, appellant was charged with and convicted of one specification of attempted sexual abuse of a

child and one specification of communicating indecent language in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934 (2019). (R. at 563; Charge Sheet). Defense's request to have an expert "determine [appellant] is not someone who has the characterology or personality traits which are predictive of or known to correlate with sexual offending" (App. Ex. I, p. 3) was simply not relevant or necessary to prove whether appellant committed the offenses of which he stands convicted. *See Gunkle*, 55 M.J. at 31 (internal quote omitted); R.C.M. 703(b)(1). Indeed, appellant's defense counsel requested the appointment of Dr. [redacted], despite the fact she was neither logically relevant[12] nor legally relevant[13] to prove the elements of the charged offenses. (*See* R. at 498–511 [military judge's findings instructions]). Further, the military judge's denial of appellant's request to appoint Dr. [redacted] as an expert to assist during the presentencing phase was not an abuse of discretion and fell squarely within his discretion. *See* R.C.M. 1001(f)(1).

Additionally, the military judge expanded on his ruling, stating that "there is no evidence to suggest that the [appellant] would have such 'characterology' or personality traits. In fact, the evidence suggests just the opposite." (App. Ex. VI, p. 2). The military judge further explained that "even assuming . . . necessity is established, the denial of Dr. [[redacted]'s] assistance will not result in a fundamentally

[12] *See* Military Rules of Evidence [Mil. R. Evid.] 401 and 402.
[13] *See* Mil. R. Evid. 403.

unfair trial. Even if Dr. [■■'s] evaluation were to indicate the [appellant] does not have a sexual interest in children, her testimony on the matter would be of little to no probative value." (App. Ex. VI, p. 3). He underpinned this ruling by conducting a two-part analysis and concluding that "Dr. [■■'s] assistance is not necessary to ensure a fair trial," (App. Ex. VI, p. 3). Further, that Dr. ■■'s assistance "with respect to the defense sentencing case . . . is also not necessary to ensure a fair trial." (App. Ex. VI, p. 4, n.2).

Certainly, the military judge's findings are not erroneous and appellant neither disputes them nor claims the military judge omitted important facts. (Appellant's Br. 11–16). Accordingly, appellant has failed to show a factual deficiency with the military judge's decision. *See Miller*, 66 M.J. at 307 ("a military judge abuses his discretion when his findings of fact are clearly erroneous.").

Further, the military judge cited the appropriate law when he conducted his analysis. (App. Ex. VI, p. 2). Although the onus was on appellant to satisfy the 3-pronged test outlined in *United States v. Lloyd*[14] and *Gunkle*,[15] appellant's counsel failed to meet the required burden. Accordingly, the military judge analyzed appellant's expert appointment request under the appropriate standard outlined in

[14] 69 M.J. 95, 99 (C.A.A.F. 2010).
[15] 55 M.J. at 32 (internal citations omitted).

R.C.M 703(d)(1), R.C.M. 703(d)(2)(A), and *Lloyd*[16] before denying appellant's request. (App. Ex. VI, p. 2). Again, appellant does not argue (Appellant's Br. 11–16), nor could he, that the military judge applied the wrong law. *See Miller*, 66 M.J. at 307 ("a military judge abuses his discretion when . . . the court's decision is influenced by an erroneous view of the law.").

After the military judge applied the facts and analyzed appellant's request under the correct law, he declined to compel government production of the requested expert. (App. Ex. VI, pp. 2–4). Appellant does not state how his decision fell outside the range of reasonable choices available to the military judge. (Appellant's Br. 11–16); *See Miller*, 66 M.J. at 307. Indeed, beyond bare differences of opinion, appellant fails his burden to articulate a basis for how the military judge abused his discretion. *See McElhaney*, 54 M.J. at 130 ("The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion.").

In sum, appellant simply failed to establish why Dr. [redacted] was relevant and necessary to be appointed as an expert consultant. *See Gunkle*, 55 M.J. at 31–32 (internal quote and citations omitted); R.C.M. 703(b)(1); R.C.M. 1001(f)(1). Indeed, the military judge evaluated the evidence presented and analyzed

[16] 69 M.J. at 99; *see also Gunkle* , 55 M.J. at 32 (citations omitted); App. Ex. VI, p. 2 (military judge's findings of fact and conclusions of law)

appellant's request under the correct legal framework.[17] The military judge appropriately determined that "the defense failed to establish the necessity of employing [Dr. ■] as an expert assistant," because "[t]he underlying need for expert assistance is not established by the evidence presented to the court." (App. Ex. VI, p. 2). In sum, the military judge made no erroneous finding of fact, employed the correct law[18] in evaluating appellant's request, and issued findings of fact and conclusions of law that fall firmly within the range of choices arising from the applicable facts and law. *See Miller*, 66 M.J. at 307. This court should deny appellant's request for relief as his claims merely reflect his disagreement with the military judge's ruling. *See McElhaney*, 54 M.J. at 130.

Appellant's brief on appeal amounts to nothing more than a third motion requesting expert assistance after the conclusion of trial. Accordingly, this honorable Court should affirm the military judge's ruling and deny appellant's request for relief.

[17] *See* App. Ex. VI, pp. 2–4 (citing *Gunkle*, 55 M.J. at 31–32 ; *United States v. Freeman*, 65 M.J. at 458; *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *Lloyd*, 69 M.J. at 99).
[18] App. Ex. VI, p.2.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE, U.S. v. HUNT (20200158)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 9th day of April 2021.

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