UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

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

ARMY 20210636

Headquarters, 1st Special Forces Command (Airborne)
Alyssa S. Adams, Military Judge
Lieutenant Colonel Christopher M. Ford, Staff Judge Advocate

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).

31 July 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

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]

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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.

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 [redacted] [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, 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 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," 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]

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[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.

[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

(continued . . .)

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 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

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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).")

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 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 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 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,

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[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."

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 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 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

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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.

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 the evidence is given by 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 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 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 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 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 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 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

[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."

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 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 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 military judge ruled the requested expert testimony

[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.

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 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

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[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.

asserted she had perfect memories and 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 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. 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

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

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 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:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[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).