

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
E.E. GEISER, R.G. KELLY, V.S. COUCH  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOSEPH M. MAHERS  
FIRE TECHNICIAN SEAMAN (E-3), U.S. NAVY**

**NMCCA 200700324  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 17 November 2006.

**Military Judge:** CDR John Wooldridge, JAGC, USN.

**Convening Authority:** Commander, Submarine Group TWO, Naval Submarine Base New London, Groton, CT.

**Staff Judge Advocate's Recommendation:** LCDR Meredith L. Robinson, JAGC, USN.

**For Appellant:** LCDR K.B. Reeves, JAGC, USN.

**For Appellee:** Capt R.E. Mattioli, USMC.

**17 July 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

COUCH, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of two specifications of arson, in violation of Article 126, Uniform Code of Military Justice, 10 U.S.C. § 926. The appellant was sentenced to a bad-conduct discharge. The convening authority approved the sentence as adjudged.<sup>1</sup>

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<sup>1</sup> We note with concern that the staff judge advocate, citing RULE FOR COURTS-MARTIAL 1107(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), advised the convening authority to grant clemency in this case by commuting the appellant's adjudged bad-conduct discharge to 120 days of confinement. Staff

The appellant raises four assignments of error: (1) the military judge abused his discretion in denying additional funding required for expert assistance of a forensic psychiatrist, and in excluding her testimony; (2) the military judge abused his discretion by granting a Government motion *in limine* which prohibited the defense from inquiring about alleged false statements by a Government law enforcement witness; (3) the evidence was legally and factually insufficient to convict the appellant of simple arson; and (4) the convening authority erred by approving the appellant's punitive discharge because the record of trial contained substantial omissions and was therefore not verbatim.

After considering the record, the appellant's brief and assignments of error, the Government's answer, and the appellant's reply, we conclude that the defense made an adequate showing of necessity and that denial of the expert assistance requested by the appellant did result in a fundamentally unfair trial. We will set aside both the findings and the sentence in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

### **Background**

The appellant was convicted of two specifications of arson stemming from two vehicle fires which occurred on 6 September 2004. One fire occurred just outside the front gate at the Naval Submarine Base New London, Groton, Connecticut, while the other occurred in a parking lot on the base. The appellant, standing watch in a nearby building, reported the fires to the base dispatch office. Later that same day, the appellant was interviewed concerning his reporting of the fires by a master-at-arms investigator. Seven months later, on 8 April 2005, Special Agent Brian Martineau of the Naval Criminal Investigative Service (NCIS) interviewed the appellant again regarding his role in reporting the fires, and he did not make any inculpatory statements.

On 30 June 2005, Special Agent Martineau re-interviewed the appellant as a suspect, because the appellant's name did not appear in the watch logbook even though he said that he was on watch when he reported the fires.<sup>2</sup> Two other NCIS special agents, Robert Iorio and Elizabeth Iorio, participated in the appellant's interrogation. After almost seven hours of interrogation the appellant admitted setting the fires, and his

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Judge Advocate's Recommendation of 5 Mar 2007 at 2. The trial defense counsel astutely objected, arguing that such action would deprive his client of appellate review by this court, and would result in an increase in the severity of punishment. Appellant's Request for Clemency of 16 Mar 2007 (citing *United States v. Carter*, 45 M.J. 168 (C.A.A.F. 1996), and *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990)).

<sup>2</sup> Special Agent Martineau admitted that he checked the wrong logbook in attempting to verify that the appellant was on watch. The parties stipulated that the appellant was in fact on watch when the fires were reported.

confession was reduced to a written statement. Regarding the vehicle fire that occurred off base, the appellant stated he had a difficult time remembering specific details about what he did, but states "I do remember picking one of the vehicles in the corner of the [parking] lot next to a tree to set fire to." Prosecution Exhibit 23 at 1. As for the vehicle fire that occurred on base, the appellant admitted that he set fire to some newspaper he found inside "and left the burning paper inside the passenger side of the truck." *Id.* at 2 (emphasis added). None of the physical evidence collected in the investigation connected the appellant to either fire, and both the Government and defense arson investigators testified that the on base fire was started on the driver's side rather than the passenger side of the vehicle. Record at 545, 746.

### **Denial of Expert Witness Funding and Testimony**

RULE FOR COURTS-MARTIAL 703(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) authorizes employment of experts to assist the defense at Government expense when their testimony would be "relevant and necessary." An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)(citing *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)). This showing of necessity requires more than the mere possibility of assistance from a requested expert; the accused must show that a reasonable probability exists "both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id.* (citations and internal quotation marks omitted).

To prove necessity, the defense must show: (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 assistance would be able to develop. *Id.* (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994) and *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996)). A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion. *Id.* (citing *Gunkle*, 55 M.J. at 32). In determining whether the military judge abused his discretion in denying the defense's request for an expert consultant, each case turns on its own facts. *Id.* For an appellate court to reverse for an abuse of discretion, it must find "'far more than a difference in opinion'" with the trial court. *Id.* (quoting *United States v. Travers*, 25 M.J. 61, 62-63 (C.M.A. 1987)). 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 at hand is outside the range of choices reasonably arising from the applicable facts and the law. *United States v. Miller*, 66 M.J. 306, 2008 CAAF LEXIS 306 at 4-5

(C.A.A.F. 2008)(citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

The Government's sole evidence connecting the appellant to the two vehicle fires was his confession to NCIS, and a partial reiteration of that confession to a civilian detective. Approximately six weeks after he had given his confession to NCIS, the appellant was arrested during a traffic stop and subsequently was interviewed by Sergeant John Varone of the Groton Police Department. After waiver of his *Miranda* rights, the appellant discussed his confession with Sergeant Varone and claimed the NCIS agents "had forced him to confess and that he had not committed the crimes," and that they "kept pressuring him" until he "finally gave in and told them what they wanted to hear." Appellate Exhibit IV at 25. The appellant went on to give a vague statement taking responsibility for the vehicle fires, while qualifying many of his statements with "I must have" or "they told me." *Id.* at 26-28.

In an effort to attack the appellant's confessions, the trial defense counsel sought the expert assistance of a forensic psychiatrist. After the convening authority denied the appellant's request for an expert, the appellant's motion for expert assistance was granted by a military judge, Captain Roberts, who directed the Government to provide an adequate substitute forensic psychiatrist for the one originally requested by the defense.<sup>3</sup> In his findings of fact and conclusions of law on the motion, the military judge found that the defense had shown the necessity for a forensic psychiatric examination, and was therefore entitled to assistance by an expert consultant to aid in the preparation of the appellant's case. Record at 70.

The military judge based his decision on a series of factors, including the appellant's statement to Sergeant Varone claiming he was coerced at NCIS, and that he had memory lapses regarding the vehicle fires. *Id.* at 70-71. The military judge also considered the circumstances of the NCIS interrogation of the appellant on 30 June 2005, including the length of the interrogation; the fact that at least three agents actively participated; the interrogation was conducted ten months after the fires; and the age and intelligence of the appellant. *Id.* The military judge concluded that "there's a reasonable probability that an expert would be of assistance to the defense and that denial of the expert assistance could result in a fundamentally unfair trial." *Id.* at 71. The military judge also found that forensic psychiatry is a specialized field, and that

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<sup>3</sup> Citing *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998), the Government argued that the military judge should decide the admissibility of the expert testimony sought by the appellant before determining whether to grant the appellant's request for expert assistance. Judge Roberts declined, preferring instead to bifurcate the issues of expert assistance and expert testimony. Record at 66-67.

the detailed defense counsel did not have the background necessary to conduct such a consultation. *Id.* at 72.

The Government provided the defense the services of Dr. Catherine Lewis, a forensic psychiatrist.<sup>4</sup> After two three-hour interviews with the appellant and a review of his service and medical records, Dr. Lewis determined that neuropsychological testing was necessary before she could complete her forensic evaluation. AE XXVI at 15. The defense made two requests for additional funding from the convening authority to obtain the testing, both of which were summarily denied, stating the defense request failed "to establish the necessity of this testing and the concurrent employment of an expert as required by [R.C.M. 703]." *Id.* at 14, 19. Pursuant to R.C.M. 703(d), the defense brought a motion to compel additional funding in order to obtain neuropsychological testing of the appellant. Record at 227; AE XXVI. In its response to this defense motion, the Government sought denial of additional funding and included a claim for relief seeking to have the testimony of the defense expert excluded. AE XXVII. The defense responded to the Government's response with a motion for a preliminary determination of admissibility of evidence relating to Dr. Lewis. AE XXVIII. These motions were heard by a subsequent military judge, Commander Wooldridge.

During litigation of these motions, Dr. Lewis testified that she believed the appellant may have a "dependant personality disorder," but that she needed to have additional neuropsychological testing performed before she could render a conclusive diagnosis. *Id.* at 253. Dr. Lewis described a dependant personality disorder as a psychiatric condition recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM), and characterized by an individual's difficulty in disagreeing with others or otherwise "taking an adversarial stance" when faced with conflict. *Id.* at 254. The DSM defines the essential feature of dependant personality disorder as "a pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears of separation." *Id.* at 285.

Dr. Lewis testified that the neuropsychological testing needed was a necessary and routine step in evaluating the appellant, and would allow her to rule out other causes for his behavior, specifically a non-verbal learning disorder or other

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<sup>4</sup> Dr. Lewis received her undergraduate degree from Yale College, and her medical degree from Yale University. She completed a general psychiatry residency and a fellowship in forensic psychiatry, and has taught on the faculties of the University of South Carolina and the University of Connecticut Health Center. Dr. Lewis has been published in the field of criminal forensic psychiatry in the *Journal of the American Academy of Psychiatry and the Law*, *Biological Psychiatry*, *Journal of Clinical Psychopharmacology*, *Behavioral Sciences and the Law*, and *Psychiatric Clinics*. The Government stipulated that Dr. Lewis is an expert in the field of forensic psychiatry. Record at 248-52.

psychotic disorders. Record at 264, 270-72. She stated that she was unable to conduct the testing herself, but would require the assistance of a neuropsychologist to test the appellant's intelligence, memory, concentration, verbal fluency, and executive function. *Id.* at 256-57. Dr. Lewis stated conclusively that she could not make a diagnosis that appellant has a dependant personality disorder without the additional testing. *Id.* at 295.

Ruling from the bench and without any reference to Judge Roberts' earlier ruling in this case, Judge Wooldridge denied the defense motion for additional funding, and granted the Government's motion *in limine* to exclude Dr. Lewis' testimony. *Id.* at 331-32; AE LX at 9. The military judge found that under the totality of the circumstances, he considered Dr. Lewis' expert opinion to be "a human lie detector form of testimony in this case."<sup>5</sup> Record at 331. The military judge was particularly concerned that under a MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) balancing analysis, Dr. Lewis' testimony "would lead to nothing more than a swearing match . . . between experts . . ." *Id.* at 332.

In his written findings of fact and conclusions of law submitted after adjournment, Judge Wooldridge held that the defense failed to demonstrate the necessity of the neuropsychological testing as required by *Gunkle*, 55 M.J. at 31, finding that the defense was "unable to show a reasonable probability that the neuropsychological tests would be of assistance to the Defense and that denial of such expert assistance would result in a fundamentally unfair trial." AE LX at 3-4. The military judge also held that the defense failed to establish the admissibility of Dr. Lewis' expert testimony with respect to dependant personality disorder, pursuant to the six factors set forth in *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993).<sup>6</sup> *Id.* at 4. While the military judge found that Dr. Lewis was a qualified expert and that her proffered testimony was potentially relevant and reliable, he concluded that she was "nothing more than a 'human lie detector'" and her testimony was prohibited by *United States v. Robbins*, 52 M.J. 455, 457-58 (C.A.A.F. 2000). *Id.* at 9. The military judge also found that "[t]he probative value of Dr. Lewis' testimony is substantially outweighed by the danger of confusing the issues, misleading the members, or wasting time." *Id.* at 5.

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<sup>5</sup> "Human lie detector" testimony has been described as "'an opinion as to whether the person was truthful in making a *specific* statement regarding a fact at issue in the case.'" *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)(quoting *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003))(emphasis added).

<sup>6</sup> The six *Houser* factors include: (1) the expert's qualifications; (2) the subject matter of the expert's testimony; (3) the foundation of the expert's testimony; (4) the evidence's legal relevance; (5) the evidence's reliability; and, (6) whether the testimony's probative value outweighs other considerations.

The military judge took exception to Dr. Lewis' testimony regarding the psychological phenomenon of "non-verbal learning disorder." Despite her testimony that she was not an expert on non-verbal learning disorder, the military judge concluded that Dr. Lewis intended to include that topic in her opinion regarding the appellant. *Id.* at 6 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993)). To the contrary, we find that Dr. Lewis testified that the purpose of the requested neuropsychological testing was to rule out whether the appellant suffered from a non-verbal learning disorder as opposed to a dependant personality disorder, which was a topic within her area of expertise. Record at 254-57.

The most significant finding by Judge Wooldridge was that the defense had failed to meet its burden to show necessity under *Breshnahan*, based upon the following:

11. The Defense never presented any evidence to suggest [the appellant's] confession was actually false. The Defense specifically argued that [the appellant] was not going to argue that the confession was involuntary. While there was evidence that [the appellant] was *diagnosed* by Dr. Lewis with "dependent personality disorder", there was no suggestion or evidence that [the appellant] suffered from any abnormal mental or emotional problem. In fact, the evidence was to the contrary. [The appellant] possessed a relatively high [Armed Forces Qualification Test score], volunteered and was accepted into the submarine service, and successfully completed required submarine school screenings, basic training and submarine "A" school training. (ROT, Art. 39(a) Session on 13 Nov. 06) [citation omitted]

12. There was no evidence to suggest that [the appellant] had a "submissive personality so weak or disoriented as to make false incriminating statements in response to accusations of serious criminal conduct." (ROT, Art. 39(a) Session on 13 Nov. 06; [citation omitted]).

AE LX at 7-8. The military judge also concluded that Dr. Lewis' "desire to conduct a battery of psychological testing was nothing more than a 'fishing expedition' in an attempt to offer an explanation on why [the appellant's] confession was false." *Id.* (citing *United States v. Kinsler*, 24 M.J. 855, 856 (A.C.M.R. 1987)).

Our review of this case convinces us that the military judge's findings are clearly erroneous and unsupported by the record for two reasons. First, the defense did provide some evidence that the appellant's confession to NCIS was, at least in part, false. In its original motion for expert assistance before Judge Roberts, the defense provided evidence that parts of the

appellant's confession did not square with the findings of both arson investigations conducted in this case, specifically, that the appellant stated he set the on base fire from the passenger's side of the vehicle, while both arson investigations indicate the fire was set from the driver's side. This fact, at a minimum, provides some indication that part of the appellant's confession may be false. Further, the appellant's confession regarding the off base fire is vague and conclusory, and does not provide any pertinent details other than an admission that he set the fire. When these factors are considered in context with Judge Robert's findings - - the length of the NCIS interrogation; the fact that at least three NCIS agents actively participated; the interrogation was conducted ten months after the fires; and the age and intelligence of the appellant - - there is at least some degree of doubt regarding the veracity of the confession.

Second, Dr. Lewis stated unequivocally that without the neuropsychological testing, she was unable to render a conclusive diagnosis that the appellant has a dependant personality disorder. Dr. Lewis noted some degree of suggestibility in the appellant, and noted that he reported experiencing blackouts on occasion. Record at 258. She testified that the appellant appeared "odd" to her in his presentation, exhibited strange facial expressions and mannerisms of speech. *Id.* at 262-63. Overall Dr. Lewis described the appellant's affect as "constricted," and she noticed an elevated paranoia scale in a prior psychological test conducted upon his entrance in the Navy. *Id.* Dr. Lewis' clinical observations appear to be consistent with the same unusual traits recorded by Sergeant Varone after his interview with the appellant.

We conclude that these litany of facts, coupled with Dr. Lewis' testimony that her clinical observations of the appellant revealed some indicators of a dependant personality disorder as recognized by the DSM, indicate that the defense met the "necessary precondition to establishing the expert's necessity as a witness" to warrant neuropsychological testing. *United States v. Warner*, 62 M.J. 114, 122 (C.A.A.F. 2005). As Dr. Lewis testified at the motions hearing, the only way to confirm a diagnosis of dependent personality disorder is to conduct neuropsychological testing, which is both necessary and routine in a case such as this. Far from what we consider a "fishing expedition," we find that neuropsychological testing of the appellant was entirely necessary for Dr. Lewis to complete her assessment of the appellant and, by extension, to afford him an adequate defense in this case. The nature of the testing was to confirm the "probable" diagnosis that he possessed a dependent personality disorder. Based upon our review of the record, we conclude that the defense made an adequate showing of necessity for the neuropsychological testing. We find that the military judge's denial of the motion and excluding Dr. Lewis' testimony was an abuse of discretion.

Before we can turn to the question of whether the appellant's right to present a defense was violated, we must also address the military judge's conclusion that Dr. Lewis' testimony would have been impermissible "human lie detector" evidence. An opinion as to whether a person was truthful in making a *specific* statement regarding a fact at issue in the case is impermissible testimony.<sup>7</sup> *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)(citing *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003)). However, expert testimony may be appropriate to describe psychiatric conditions that tend to make a declarant *in general* more impressionable or susceptible to suggestibility by an interrogator.

In response to questions from the military judge, Dr. Lewis testified that if she had the benefit of the neuropsychological testing to rule out other disorders, she could offer an opinion that the appellant had a diagnosis of dependant personality disorder. Record at 265. She testified that she would be able to say how this diagnosis would affect his ability to make a voluntary confession, but "would not testify as to whether or not his confession was true." *Id.* at 266. Dr. Lewis acknowledged that the truth of the statement was for the trier of fact to determine. She also testified that discussing a diagnosis regarding the way someone thinks "could help, potentially, the trier of fact in understanding that behavior." *Id.* She later clarified for the military judge that she would be testifying as to a specific diagnosis and how that diagnosis might affect behavior, but she "would not be testifying on the veracity of [the appellant's] confession" and acknowledged that such testimony would be beyond her expertise. *Id.* at 274. Dr. Lewis clearly understood the limits of her testimony:

If asked, was this confession valid, I would decline to answer. I don't have an opinion on that. I don't know the answer to that, but I do know that, if he has psychiatric pathology, I can testify how that might affect behavior in an interrogation setting and leave it at that.

*Id.* at 276-77.

Trial defense counsel additionally explained to the military judge the purpose behind Dr. Lewis's testimony would be to ask her about the appellant's diagnosis and what the characteristics a person with that diagnosis would exhibit. Trial defense counsel stated that he needed the expert testimony to allow him

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<sup>7</sup> Our superior court has recognized three reasons behind prohibiting "human lie detector" testimony. First, determination of truthfulness exceeds the scope of a witness' expertise; second, it violates "M.R.E. 608(a) because it offers an opinion as to the declarant's truthfulness on a specific occasion, rather than the knowledge of the witness as to the declarant's reputation for truthfulness in the community;" and third, it usurps the jury's exclusive province to weigh evidence and evaluate credibility. *Kasper*, 58 M.J. at 315. See also, *Robbins*, 52 M.J. at 455.

to argue to the members that the appellant was particularly susceptible to interrogation tactics because of his "peculiar personality characteristics." *Id.* at 305. The appellant's defense counsel provided a useful analogy to explain the relevance of Dr. Lewis' testimony:

There's testimony that's regularly offered and accepted in courts that refers to something called rape trauma syndrome. Rape trauma syndrome allows an expert to say that someone has exhibited characteristics consistent with someone who has been raped. They're never allowed to offer the opinion of whether, in fact, that person has been raped. I would say that the probative value here is similar, because [Dr. Lewis is] going to offer characteristics about [the appellant's] mental disorder, which is relevant to the ultimate question of whether his confessions are true, but is never going to opine on the fact of whether or not his confession, in fact, is true or false.

*Id.* at 330-31.

Based upon our review of the record, we find the military judge's conclusion that Dr. Lewis' testimony would be "human lie detector" evidence is unsupported by the record. Assuming the appellant received the neuropsychological testing sought by Dr. Lewis and she was able to reach a firm diagnosis of a dependant personality disorder, we find the record does support the conclusion that Dr. Lewis' testimony would have been helpful to the trier of fact for them to determine a fact in issue, the voluntariness of the appellant's confessions and the weight they should be afforded under all the circumstances of this case. MIL. R. EVID. 702 and 304(e)(2). As stated by Dr. Lewis for the court, her testimony would consist of the appellant's psychiatric diagnosis and the inherent personality traits associated with that diagnosis, but not an opinion by her on the ultimate issue: that the appellant's *specific* confession to NCIS was false. See *Kasper*, 58 M.J. at 315. We are not persuaded that the probative value of Dr. Lewis' purported testimony would have been substantially outweighed by the dangers of confusing the issues or misleading the members, or by any consideration of wasting time. MIL. R. EVID. 403. We now turn to the question of whether the appellant's right to present a defense was violated.

Our superior court has recognized that (1)"'[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'" *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007)(quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). This is especially true in a case, like this one, where the bulk of the Government's case against the appellant consists of his own inculpatory statements. Even though the appellant was unsuccessful in suppressing his

confession before trial, Record at 187, he still had the right "to present relevant evidence with respect to the voluntariness of the statement[.]" MIL.R.EVID. 304(e)(2). As the Supreme Court has observed, a confession of the accused is strong evidence, and the accused should be afforded ample opportunity to confront it:

Confessions, even those that have been found to be voluntary, are not conclusive of guilt. . . . [S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

*Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986).

In light of the evidence presented by the defense at both Article 39(a), UCMJ, sessions concerning the necessity of expert assistance in forensic psychiatry, which included the need for additional neuropsychological testing, we conclude that the military judge's error significantly impaired presentation of the appellant's defense. See *United States v. Scheffer*, 523 U.S. 303, 317 (1998). We now turn to the question of whether this error was harmless.

The Government did not have overwhelming evidence of the appellant's guilt. In fact, the Government relied exclusively on the appellant's confession to connect him with the vehicle fires. Given the fact that the confession was essential to the Government's case, we cannot conclude that the members would have found the appellant guilty if he had been able to present the psychiatric evidence calling his confession into question. The appellant's confession was the linchpin of the Government's case, and we therefore conclude that this error was not harmless beyond a reasonable doubt. *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004)(citations omitted).

We conclude that it was an abuse of discretion to deny the defense motion for neuropsychological testing. We further find that the appellant's due process right to present a defense was thereby violated and that the resulting error was not harmless. Having found that the appellant's right to expert assistance was violated, we need not discuss whether the military judge abused his discretion in granting the Government's motion *in limine* to exclude Dr. Lewis' testimony at trial.

### **Conclusion**

The findings of guilty and the sentence are set aside. The appellant's remaining assignments of error are therefore moot and we decline to address them. The record is returned to the convening authority and a rehearing is authorized.

Judge KELLY concurs.

GEISER, Senior Judge: (concurring in the result)

I concur with the majority's finding that the military judge abused his discretion when he denied the appellant's motion to compel additional funding for neuropsychological testing. The appellant offered adequate evidence to meet the test articulated in *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005) (internal citations omitted). I also concur that the appellant was prejudiced and that the appropriate remedy is to set aside the findings and the approved sentence and to authorize a rehearing.

The sole issue in this case is whether the appellant was improperly denied funding to permit his expert to make a medically valid psychological diagnosis. There was ample evidence presented that the appellant may suffer from a dependant personality disorder. Such disorder is recognized in the DSM. At a minimum, relevant expert testimony regarding the appellant's diagnosis and the characteristics a person with that diagnosis would exhibit would be admissible to help the members determine the voluntariness of the appellant's confession.

I do not concur with the majority's dicta which moves beyond this single issue to suggest that the appellant was denied his due process right to provide a defense and that the military judge erred when he determined that the potential expert testimony would be inadmissible because it would constitute human lie detector evidence. Such dicta are purely speculative and unnecessary to resolve this case.

Until such time as the defense expert is able to complete her testing and evaluation, we have no way of knowing what she would and would not testify to at trial. The majority opinion speculates that the expert would inevitably develop favorable psychological evidence and further speculates what the military judge might and might not have done if the expert's permissible testimony degenerated into impermissible "human lie detector" evidence. It is not this court's place to speculatively rule on what a military judge might have done.

For the Court

R.H. TROIDL  
Clerk of Court