

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

**Before  
J.K. CARBERRY, L.T. BOOKER, E.C. PRICE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**WILLIAM G. MCKINLEY III  
AEROGRAPHER'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201000120  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 16 October 2009.

**Military Judge:** CDR Tierney Carlos, JAGC, USN.

**Convening Authority:** Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

**Staff Judge Advocate's Recommendation:** CDR W.A. Record, Jr., JAGC, USN.

**For Appellant:** Greg D. McCormack, Esq., Civilian Counsel; Capt Bow Bottomly, USMC.

**For Appellee:** LT Ritesh K. Srivastava, JAGC, USN.

**30 June 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PRICE, Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his plea, of two specifications of knowingly receiving images of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge found the two specifications multiplicitous and set aside the finding of guilty to one of those specifications. The appellant was sentenced to 90 days confinement, reduction to pay grade E-1, and

a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant alleges four errors on appeal including that: (1) the CA improperly denied the defense request for additional funding to compensate the defense expert to remain at the court-martial and testify as an expert witness for the defense; (2) the military judge committed reversible error when he denied the defense's motion to compel the CA to provide sufficient funds for the defense expert to remain at the court-martial and testify; (3) the military judge failed to instruct the members regarding the weight to assign the testimony of the two Government expert witnesses; and (4) that the CA erroneously approved and promulgated a finding that is factually incorrect.

After careful consideration of the parties' briefs and the record of trial, we find merit in the appellant's second assigned error, set aside the findings and sentence, and authorize a rehearing. Our action moots the remaining assignments of error.

### **Background**

In a pretrial statement to criminal investigators, the appellant admitted downloading "Limewire," a file sharing program, onto a co-worker's home computer, then searching for and downloading pornographic videos to that computer. Prosecution Exhibit 7. He acknowledged noticing the acronym "pthc" in several of those videos and then using that acronym to search for additional pornographic videos.<sup>1</sup> *Id.* The appellant also admitted that "between four (4) and eight (8)" of the videos he "downloaded" included sexual acts involving "obviously underage" young girls, and to viewing each video for "a few seconds, [after realizing] what [he] was looking at . . . immediately delet[ing] the video[s]." *Id.*

The appellant contended that he "at no time intentionally downloaded child pornography" and that he downloaded the subject child pornography "without knowing what I was downloading, and realized it was child pornography only after it was downloaded and [] was able to view it. At this point, I deleted each video once I realized what I was viewing." *Id.* at 2.

At trial, the primary issue in controversy was whether at the time of the download, the appellant "knowingly received child pornography" and that "he knew he received child pornography." Record at 200-02, 550, 561, 596. The primary evidence of knowledge presented by the Government was the appellant's pretrial statement and the testimony of two witnesses called by the Government and qualified as experts in computer forensics. They testified that the subject computer's internet history reflected use of several terms "indicative of searching for child

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<sup>1</sup> "PTHC" is apparently an acronym for "pre-teen hard core" and a term commonly used to search the internet for illicit child pornography. Record at 298.

pornography," including "pthc," over the three-day period charged. *Id.* at 298-310, 411, 551-56; Prosecution Exhibits 1-4.

Trial defense counsel argued there was no evidence the appellant "knew what those terms meant," that the Government experts could not testify as to what the appellant saw on the computer screen with respect to images or computer file names during the download, noted the absence of saved files of child pornography and argued that when the appellant learned that he was downloading child pornography, he stopped the download and deleted the suspect files. Record at 201-02; 561.

Several months prior to trial, trial defense counsel requested the Government provide funding for expert assistance in the field of computer forensics. Appellate Exhibits I and XLV. On 28 July 2009, the appellant filed a "Motion for Appropriate Relief" requesting the trial court to "compel the government to provide the defense with funding for the consultation and potential testimony of an expert computer forensic analyst[.]" AE-I. On 14 August 2009, the CA approved the appellant's request, but limited expenditures to \$7,650.40. AE-XLV at 8.

In a 5 October 2009, Article 39(a), UCMJ, session convened to address outstanding motions, trial counsel commented that the Government had complied with the appellant's request for "production of an expert" and that the appellant's motion was effectively mooted by that action. Record at 20. Trial defense counsel essentially agreed stating, "we were given the funding for the expert. If there's [sic] any issues with the travel . . . we may ask the court to revisit it. But as of right now we [sic] no issues with the funding for the expert." *Id.* The military judge then recessed the court until the scheduled trial date of 13 October 2009. *Id.* at 89.

In a "Request for Additional Funding for Expert Assistance," dated 07 October 2009, trial defense counsel requested the CA allow the defense expert consultant to attend the trial "as a consultant or potential witness." Appellate Exhibit XLV at 9. The request noted the expert's forensic analysis of the computer hard-drive, the importance of his presence, and his assistance to defense counsel "in preparing cross-examination and potentially serving as an expert witness to rebut the Government's two expert witnesses." *Id.* On 08 October 2009, travel funding "not to exceed \$2,000.00" and additional funding for "vendor trial fees" was granted by the Government. *Id.* at 11.<sup>2</sup>

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<sup>2</sup> Trial defense counsel's motion and the attachments thereto reflect a discrepancy regarding the additional funding approved by the Government. In the motion, trial defense counsel asserts that additional funding not to exceed \$2,000 was approved, while the attached email indicates that the CA approved travel costs "not to exceed \$2,000.00" and "vendor trial fees" limited to "\$3,000" the maximum "single purchase limit" of a "government commercial purchase card," described as the "only contracting authority [available] for this quick turnaround[.]" Compare AE XLV at 2 and 11.

On 14 October 2009, following conclusion of the Government's case-in-chief, trial defense counsel commented that "we are running out of funding [for the defense expert]" and "ask the court to compel more funding to allow [the defense expert] to continue to stay." Record at 484. The military judge expressed concern over his authority to order a CA to fund a witness or order witness fees, and trial defense counsel responded that this was a "*witness production issue under the Rules for Court-Martial.*" *Id.* (emphasis added).

After acknowledging his authority to order the presence of a witness, the military judge questioned the requirement for the "continued presence of [the defense] consultant." *Id.* Trial defense counsel stated "having heard all the government's various witnesses and evidence . . . we would like to convert him into an expert witness." *Id.*

When asked for comment, the trial counsel claimed the Government had "received no notice up until now that the defense intended to have their expert consultant testify" and that no such request had been forwarded to the CA. *Id.* at 494. Trial defense counsel responded that "we are talking about calling our own expert [as] a witness in rebuttal," a determination that could be made only after hearing the Government witnesses testify. *Id.*

The military judge then expressed surprise over the timing of the request to convert the "consultant" into an "expert [witness]", and requested further explanation. *Id.* at 495. Trial defense counsel responded that it was his understanding that such a request is "normal operating procedure when dealing with experts of this kind", and again responded that he could not determine whether it was necessary to call the defense consultant in rebuttal until the Government experts testified. *Id.*

During a subsequent colloquy regarding the impact of the request, trial defense counsel asserted that the expert was ticketed by the Government on a flight scheduled to depart at 0900 the next morning, and argued that the requested action essentially required changing the defense expert's flight reservation and costs associated with his presence for an additional day. *Id.* at 496-97.

The military judge denied the motion after finding trial defense counsel's "lack of notice . . . and the use of this tactic [] totally unacceptable." *Id.* at 497. The military judge conducted no inquiry into the relevance or necessity of the defense expert's testimony and entered no findings of fact or conclusions of law.

Shortly thereafter, the military judge re-engaged trial defense counsel in discussion regarding his concerns over the timeliness of the request and expressed incredulity at trial defense counsel's asserted surprise by the Government's experts'

testimony as the basis for the belated request. *Id.* at 498-99. Trial defense counsel responded that he anticipated those experts would testify "consistent with some sound principles of forensic science" which "has not been the case," and that their testimony was inconsistent with their Article 32 investigation testimony and prior discussions with the defense team. *Id.* at 499.

In a motion filed the next morning to "Reconsider Denial of Expert Assistance" (sic), trial defense counsel asserted that the defense met its burden of establishing the "necessity of expert assistance" and that the defense had not acted in "bad faith" in providing notice to the Government of their intent to potentially call the defense expert assistant as a rebuttal witness. AE XLV at 3-4. Shortly after the prospective expert's flight was scheduled to leave the area, the military judge noted his earlier ruling, asked if trial defense counsel was requesting him to reconsider "denial of the expert" and commented that such a request was "a little moot at this point." Record at 514. The military judge conducted no further inquiry and did not rule on the motion.

#### **Military Judge Refusal to Compel Production of Defense Expert Witness**

The appellant essentially contends that the military judge erred when he failed to compel the CA to produce the defense expert consultant as a witness, where that request was to provide sufficient additional funding to extend the consultant's stay by one day at the court-martial *situs* in order to testify as a defense witness. We agree.

#### **Applicable Law**

All parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Art. 46, UCMJ. This ensures that "[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)).

The President has prescribed regulations for the employment and production of expert witnesses to assist the defense at Government expense when their testimony would be "necessary." RULE FOR COURTS-MARTIAL 703(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). If a CA denies a request, the appellant may renew the request before the military judge. A military judge "shall determine whether the testimony of the expert is relevant and necessary . . . ." *Id.* The military judge is the "gatekeeper" of expert-opinion evidence, as well as the ultimate decision-maker on whether to produce, at Government expense, an expert

witness. See R.C.M. 703(d); *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997).

We review a military judge's decision regarding expert witnesses for abuse of discretion. *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005). "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, 307 (C.A.A.F. 2008). We will not set aside a judicial denial of a witness request "unless [we have] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Ruth*, 46 M.J. at 3 (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)) (internal quotation marks and citation omitted). Those factors include that in order to require production of an expert witness, the moving party must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) whether the probative value of the testimony outweighs other considerations. *Billings*, 61 M.J. at 166 (citing *Houser*, 36 M.J. at 397).

### **Analysis**

Our review of the military judge's decision is hampered by the paucity of his findings of fact and conclusions of law. See *United States v. Doucet*, 43 M.J. 656, 659 (N.M.Ct.Crim.App. 1995). We conclude the military judge abused his discretion for the following reasons.

First, we conclude that the military judge erred as a matter of law by failing to determine whether "the testimony of the [requested] expert [was] relevant and necessary . . . ." R.C.M. 703(d). The military judge denied, solely as untimely, the appellant's motion to produce as an expert witness for the following day, a Government funded expert consultant for the defense then present at the trial *situs*. However, the record reflects no discussion, findings of fact or conclusions of law as to the relevance or necessity of his expected testimony.

Clearly, the defense motion constituted a request for production of the expert consultant as a witness. Although this motion was not a model of compliance with the Rules for Courts-Martial, trial defense counsel proffered as a basis for calling the theretofore expert consultant as a witness "numerous and myriad inconsistencies factually with the expert testimony elicited from the government's witnesses" that required calling the defense expert as a witness in rebuttal. Record at 498-99.

He further commented that: "we anticipated that [the two Government computer forensics' experts] would testify in some way that was consistent with some sound principles of forensic science. We now have developed reasons to believe, based on the testimony that has been elicited over the last few hours, that has not been the case." *Id.* at 499. The record also includes at least two documents informing the Government prior to that date that the defense expert consultant might be called as an expert witness. AE I at 4; AE XLV at 9.

We have "a definite and firm conviction that the [military judge] committed a clear error of judgment in the conclusion [he] reached upon a weighing of the relevant factors." *Ruth*, 46 M.J. at 3 (quoting *Houser*, 36 M.J. at 397) (internal quotation marks and citation omitted). Brief review of the *Houser* factors in the context of this record reflect that: (1) the requested expert was indeed qualified or at least recognized as an expert by both parties; (2) trial defense counsel intended to use the expert testimony to rebut unspecified portions of the two Government experts' testimony; (3) the basis for the expert testimony was manifest given the consultant's previous forensic analysis and observation of the Government witnesses' testimony; (4) the expected testimony was relevant in rebuttal of the Government experts' testimony regarding the appellant's knowledge at the time he downloaded the child pornography - the primary issue in controversy; (5) the reliability of the evidence is unclear given the absence of record, but again the Government previously recognized the significance of the consultant's forensic analysis and funded his travel to the court-martial *situs*, and (6) considerations such as the minimal additional costs do not outweigh the probative value of his expected testimony. *Billings*, 61 M.J. at 166 (citing *Houser*, 36 M.J. at 397).

The relevance and necessity of requested witness testimony appears manifest in this case. The appellant's knowledge at the time he downloaded the child pornography was the primary issue in controversy and the testimony of two Government computer forensics experts was pivotal on that issue. Indeed, after the court closed for deliberations, additional questions from the members prompted recall of one of those Government experts. His additional testimony filled more than 15 pages of the trial transcript, all after the defense expert consultant had departed the area on a ticket provided by the Government. Record at 629-46; AE L-LVIII. The Government's recognition of the defense expert's relevance and necessity as a consultant and the importance of his presence at trial weigh heavily against any conclusion to the contrary. To be clear, these are distinct determinations; however, the record is bereft of any factual inquiry or analysis of those distinctions.

In fact, the bulk of the documentary evidence relevant to this issue and present in the record was attached to the appellant's motion to reconsider filed with the trial court the morning after the military judge's ruling. AE XLV. However, the

record reflects no explicit ruling on that motion by the military judge, and is bereft of any findings of fact or conclusions of law related to that motion.

Second, the military judge's denial of the defense request as untimely appears, at least in part, attributable to a factually inaccurate statement by trial counsel. Again the paucity of findings hinders our review, but it appears the military judge placed some reliance upon trial counsel's claim that the Government had "received no notice up until [the conclusion of their case-in-chief] that the defense intended to have their expert consultant testify" and that no such request had been forwarded to the CA. Record at 494. Yet, the record includes at least two documents reflecting that the defense expert consultant may be called as an expert witness - (1) the appellant's 28 July 2009 Motion, that was filed with the court but not litigated, and the appellant's "Request for Additional Funding for Expert Assistance" of 07 October 2009 in which the appellant requested travel funding to allow the defense expert consultant to attend the trial "as a consultant or potential witness." AE I at 4; AE XLV at 9. Trial counsel's representation was, at a minimum, incomplete.

Having concluded that the military judge abused his discretion, we must determine if that error materially prejudiced the appellant's substantial rights. See *United States v. Lee*, 64 M.J. 213, 218 (C.A.A.F. 2006).

This was a contested general court-martial dependent upon complex forensic evidence to resolve whether the appellant knew the downloaded images were child pornography when he downloaded them. In his pretrial statement to investigators, he denied both the intent to download child pornography and knowledge of their content, and that was also the defense theory at trial.

The Government's evidence of knowledge was dependent upon the testimony of the two computer forensics experts. Those experts testified, *inter alia*, that the subject computer's internet history reflected use of several terms "indicative of searching for child pornography" over the charged timeframe, belief that differences in the "file created" time and "last written" time reflected that the file was "opened and saved", and assertion that in order to navigate the peer-to-peer network via Limewire a search term must be entered. Record at 298-310, 406, 408, 411, 551-556; Prosecution Exhibits 1-4. During cross-examination both experts acknowledged a lack of familiarity with Limewire Version 4.16, the version used by the appellant, claimed they were unable to obtain and test that version of Limewire, and acknowledged unfamiliarity with the data and images displayed during downloads using Limewire Version 4.16.

Review of the record leads us to conclude that the military judge's ruling effectively denied the appellant "a meaningful opportunity to present [expert witness] evidence, which

challenged the Government's scientific proof, its reliability, and its interpretation, [and] denied appellant a fair trial." *United States v. Van Horn*, 26 M.J. 434, 438 (C.M.A. 1988) (citations omitted).<sup>3</sup>

The Government's evidence of the appellant's knowledge at the time of the download was not particularly strong. Although the defense counsel effectively cross-examined the Government's experts, a number of the discrepancies mentioned in Mr. Peden's affidavit were not addressed through that cross-examination. Moreover, the appellant's defense of lack of knowledge was clearly weakened by the military judge's failure to order production of the defense expert. Additionally, the appellant was attempting to present expert testimony that supported his theory of the case, the materiality and quality of which cannot be questioned.

Courts-martial must not only be just, they must be perceived as just. The requirement of Article 46, UCMJ, for equal access to witnesses and evidence secures that just result and enhances the perception of fairness in military justice. Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense.

*Lee*, 64 M.J. at 218.

Here, the military judge denied the appellant's request to compel production of a witness whose presence as an expert

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<sup>3</sup> A post-trial affidavit of Mr. Peden, the prospective defense witness, provides additional support for the conclusion of material prejudice to the appellant's defense at trial. Mr. Peden claims that the testimony of those Government experts at trial "was extremely inaccurate and misleading." Affidavit of Kevin Peden of 20 Jul 2010. He also claims that he would have testified, *inter alia*, that Limewire Version 4.16 was available for downloading, that he had downloaded and used that version, that it performed differently from the versions the Government experts were familiar with and testified about, that Limewire Version 4.16 does not require entry of a search term to obtain results; that one of the Government's experts testified incorrectly regarding the meaning of the "last written time stamp" as it "records the last time any data was written to a file . . . [and] in no way indicates an opening or accessing of a file." *Id.* at 7. The defense expert also proffered testimony counter to that provided by the Government experts regarding the significance of "thumbnail cache," the meaning of the presence of files in the incomplete folder of the computer, forensic ability to determine if mass downloading occurred, the requirement for search terms or potential for unrequested files to download in Limewire 4.16, the unreliability of "last access date/time stamps," and the significance of link files as a means of determining access to files in the field of computer forensics. *Id.*

consultant the Government had previously determined relevant and necessary. This prospective witness was also present at the court-martial *situs* when the motion was made and denied. Notwithstanding the fact that the Government had previously authorized expenditures of approximately \$10,000 to provide his expert assistance to the appellant, or that the Government's case on the primary issue in controversy was dependent upon the testimony of two experts in computer forensics, the military judge denied the motion without inquiring into the relevance or necessity of the prospective witness' testimony.

We therefore conclude that the military judge abused his discretion and that this error denied the appellant "a meaningful opportunity to present" critical expert evidence, including testimony, to challenge the Government's scientific proof and its reliability, to present their defense, and a fair trial. See *Van Horn*, 26 M.J. at 438.

### **Conclusion**

Accordingly the findings and the sentence are set aside, and a rehearing is authorized.

Senior Judge CARBERRY and Senior Judge BOOKER concur.

For the Court

R.H. TROIDL  
Clerk of Court