IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20110449
Specialist (E-4) **Thomas C. Flesher,** United States Army, Appellant	)	USCA Dkt. No. 13-0602/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Granted

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED THE TESTIMONY OF A PUTATIVE EXPERT WITNESS IN VIOLATION OF THE MILITARY RULES OF EVIDENCE AND CASE LAW ON BOLSTERING, EXPERT QUALIFICATIONS, RELEVANCE, AND THE APPROPRIATE CONTENT AND SCOPE OF EXPERT TESTIMONY.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2006)[hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)(2006).

Statement of the Case

On June 1-2, 2011, a military judge convicted appellant, Specialist (E-4) Thomas C. Flesher, pursuant to his plea, of an assimilated offense of furnishing alcohol to minors (two

specifications), in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006). An enlisted panel convicted appellant, contrary to his plea, of aggravated sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Supp. IV 2010). (JA 313). Appellant was acquitted of one specification of burglary with intent to commit rape. (JA 313).

The panel sentenced appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for seven years, and to be dishonorably discharged. (JA 314). The convening authority deferred automatic and adjudged forfeitures until action, and waived automatic forfeitures for a period of six months for the benefit of appellant's dependents and approved the remainder of the adjudged sentence. (JA 337). On May 30, 2011, the Army Court of Criminal Appeals summarily affirmed the findings and sentence. (JA 9).

Summary of Argument

This court should grant appellant a rehearing because the military judge abdicated his gatekeeping responsibilities pursuant to *Daubert*. Even if this Court determines the military judge conducted a *Daubert* analysis, this Court must grant a rehearing because the military judge erroneously allowed the government to elicit opinions of a putative expert in counterintuitive victim behavior despite its failure to satisfy the basic requirements of Military Rule of Evidence 702 [hereinafter Mil. R. Evid.] and *United States v. Houser*, 36 M.J.

392 (C.M.A. 1993). The military judge compounded this error when he refused to provide appellant with an adequate substitute expert witness on counterintuitive victim behaviors after refusing to compel the production of appellant's requested expert.

Statement of Facts

The military judge docketed appellant's case for trial for the dates of June 1-3, 2011. On May 19, 2011, the government submitted its witness list, which included Ms. Sarah Falk, who was identified only by her place of employment, the "Evans Army Community Hospital" on Fort Carson, Colorado. (JA 18-19). The government witness list did not disclose that the government intended to call her as an expert witness. (JA 18-19). The defense contacted Ms. Falk, and concluded that she may indeed be called as an expert witness on counter-intuitive behaviors of alleged sexual assault victims. (JA 24-25).

On May 23, 2011, after being belatedly notified that the government intended to call Ms. Falk to testify as an expert, defense counsel promptly filed a motion with the trial court requesting a continuance based on lack of notice of the government's intent to call an expert witness. (JA 14). The government opposed the delay request, arguing that their expert was not a psychologist, would not interview the victim or testify about "the psychology of trauma," but would instead

testify about the "common behaviors and responses" of alleged victims, and maintained the defense could easily cross-examine her without expert assistance. (JA 32).

On May 24, 2011, the defense requested an Art 39(a), UCMJ, session to determine Ms. Falk's qualifications to testify as an expert under the criteria set forth in *Daubert*. (JA 20-23). *Duabert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The defense also requested its own expert witness, Dr. Thomas Greiger, in order to testify at a *Daubert* hearing. [1] Additionally, the defense asserted that Ms. Falk's anticipated testimony was irrelevant because it was unrelated to any persons or evidence in the case. (JA 22). On May 25, 2011, the defense submitted a request to the convening authority for Dr. Greiger, who it identified as an "Expert in the field of Psychiatry/Psychology for Counter Intuitive Behavior/Rape Trauma Syndrome." (JA 70-71).

On May 26, the military judge emailed the government and defense counsel providing:

> Re: the Defense motion for a continuance - As I understand the issue, Ms. Falk is going

[1] The defense proffered that "[Dr. Geiger] could testify as to the improper methodology of the studies which have been done on 'counter-intuitive behaviors.' He would testify that these studies have several problems, including: (1) many are based on 'self-reporting' with no follow up or verification, (2) no clear description of demographic factors, (3) telephone surveys often had very low response rates, and (4) lack of peer review. (JA 22).

> to testify she has seen lots of alleged sexual assault victims. Some act this way, some act that way, and the way some alleged victims act is not consistent with how one would think they would act. Is this correct Gov't? If so Defense, I would guess that Ms. Falk will agree on cross that there is no usual way that alleged victims react. Each alleged victim is different. I would also think you could get any SANE (for example) between now and next week to come in and testify to that. It doesn't take any preparation. If I am correct in all of this, why do you need a delay? . . .

(JA 61). The defense requested a *Daubert* hearing and expert assistance to challenge Ms. Falk's methodology. (JA 59). Defense also requested information about Ms. Falk's work, experience, qualifications, and methodology. (JA 59).

On May 26, the convening authority disapproved the defense request for Dr. Greiger, and instead "authorized the appointment of Ms. Christiana Thomas, [a] Sexual Assault Nurse Examiner" from the Fort Sill Hospital. (JA 66). On May 27, 2011, the military judge emailed counsel, in response to the May 26 email from defense, and stated that a *Daubert* hearing was "unlikely." (JA 58).

On May 28, 2011, the defense filed a motion with the court to compel the production of their requested expert or to exclude expert testimony of the government's witness. (JA 24). The defense requested that the military judge order the government to produce Dr. Greiger as an "expert assistant/witness." (JA

30). Additionally, the defense requested "alternatively . . . the Court deem any and all Counter Intuitive Behavior/Rape Trauma Syndrome testimony as irrelevant pursuant to MRE 402, and if the court deemed it relevant that it be excluded under MRE 403." (JA 30).

On June 1, 2011, the military judge noted that he denied the defense request for a continuance based on the government's purportedly limited scope of inquiry for their expert, Ms. Falk.[2] Additionally, he explained, "anyone who has dealt with alleged sexual assault victims extensively could testify to that. Some delay reporting; some don't delay reporting. Some do what would be counter-intuitive behavior." (JA 111-12). He observed that while it appeared the government followed his guidance in providing a SANE rather than Dr. Grieger, he was told by trial counsel "that [the government] didn't necessarily do that because I suggested that and [I] was just throwing out a possibility." (JA 111-12).

The military judge went on to discuss the anticipated content of the government's expert's testimony.

> [a]pparently, we were all under the impression that the government was bringing the expert to talk about counter-intuitive

[2] "Have you observed alleged victims? How many in the past?" And, "Some act this way; some act that way." And, "No two victims are the same." When I sent back the email saying "Is that correct, Counsel?" they confirmed that is correct. (JA 111).

> behavior, and the government informed us, in the 802 conference this morning in chambers, that they are not necessarily going to ask her about counter-intuitive behavior, but they are just going to ask her about how many alleged victims had she seen and is it unusual for an alleged victim not to scream.
>
> And I believe the other thing, Government, was you were going to ask her about how many alleged assaults are by strangers versus someone that the alleged victim knows. And so I don't know if that would be--I don't think that would be counter-intuitive behavior. . . .
>
> MJ: So is there any request at this point? Is there still a request for an expert?

(JA 113-114). Defense counsel still wanted a qualified expert, explaining that "despite how they're phrasing, the government's proffered testimony is still counter-intuitive." (JA 114). The military judge then asked the government about what topics it anticipated their expert would testify. (JA 115). The trial counsel responded by giving his opinion that "regarding scream, non-stranger, and not reporting to law enforcement . . . there is a difference between counterintuitive behaviors and "psychologically what trauma does to the brain", and that if the government did not call an expert on the latter, then the defense was not entitled to one either. (JA 115). The military judge asked the defense "if the government is only limiting their examination to those three things, how could an expert

consultant--let's talk about a consultant first. How could they possibly have helped you?" (JA 115-16). The defense responded:

> [w]e are talking about the actions of the victim in this case and what she did and why she would have done that. That is going to be counter-intuitive. Whether or not she has a degree in psychology or not, the government is trying to explain away behavior by the victim in something that they believe the panel will not be able to decide for themselves.

(JA 116).

The military judge followed up by asking the government "you are not going to ask your expert about why say, for example, she didn't scream. My understanding was you were just going to ask her: How many have you done? I have seen a hundred. Is it unusual for an alleged victim not to scream? No, that is not unusual." (JA 116). The government responded: "[W]ithout that testimony, we are kind of lost. Our case in chief is deficit [*sic*] without that testimony coming in." (JA 117).

The military judge described what he anticipated the defense expert would attest to:

> And, Defense, based on my experience all these experts will say some scream, some don't, some delay reporting, some report immediately, and I would think that the government's expert would admit all that on cross-examination. Say, yeah, some people

> scream, some don't,[3] some delay reporting, and some don't.
>
> And then you have your SANE to say however many people she has treated and how many times in her experience based on the history that they do with an alleged victim, you know, what kind of fight did you put up? I didn't do anything. I just sat there. So some don't fight, some do.

(JA 118). Defense counsel replied that he did not believe their appointed expert would be able to give an opinion about the behavior of victims. (JA 118). Defense counsel added that "the important issues here for the defense, that the government is trying to counter, is the behavior of the victim . . . how she claims she reacted during this alleged rape or sexual assault." (JA 118). The military judge replied by asking the government, "but again, Government, your expert is not going to testify about this is why she wouldn't have screamed, or this is why some victims don't scream." The government replied that she would not.[4] (JA 118).

The military judge denied the defense request for Dr. Greiger, concluding that he was not necessary to the defense and that there was never an actual motion to compel Dr. Greiger as

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[3] Ms. Falk actually testified that alleged victims "almost never" scream or fight back during sexual assault.

[4] Ms. Falk did indeed testify about *why* alleged victims don't scream, stating "there is a fear of escalating the violence or fear that they are going to be harmed even worse than they are already are if they yell or scream for help or upset the individual." (JA 230).

an expert witness.[5] (JA 121-22). "[M]y ruling is that the SANE . . . can testify to the same thing that the government's expert can testify to regarding some do this, some do that. There is nothing consistent about alleged victims." (JA 121-22).

On direct examination, the victim, S.A., testified that on the night of the alleged assault, she consumed alcohol with the appellant before sneaking back into her bedroom window in her parents' home. (JA 145-58). She stated she fell asleep in her bed. (JA 158). S.A. claimed that the next thing she recalled was appellant in her room attempting to remove her clothes, and that he pinned her down by holding her wrists, but also managed to lower her pants and underwear and also take his pants off. She testified that he assaulted her for approximately 15-25 minutes. (JA 164)). S.A. claimed that at times appellant used his mouth to cover her mouth after she "kept telling him no." (JA 160). However, she also testified that at some point after that, the appellant "kind of got up" after removing his own pants, and that he was "sitting on [her]" momentarily before he "laid back on top of me." (JA 160).

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[5] The defense Motion to Compel Expert or Exclude Expert Testimony stated "Therefore, in accordance with Article 46 of the UCMJ and RCM 703(d), the Defense respectfully requests that this Honorable Court order the Government to appoint Dr. Thomas Greiger as an expert assistant/witness. In addition, the defense motion clearly indicates that they contemplated needing and using an expert to assist them in preparation for the trial, but also provide testimony as an expert." (JA 28-30).

S.A. testified her parents were in the house during the incident. Trial counsel asked S.A. if she had "explained what happened, have people questioned you or want to know why you didn't scream?" (JA 164). This prompted the following exchange between S.A. and the trial counsel:

> Q. Do people ask you why you didn't fight; why you didn't gouge his eyeballs out.
>
> A. [No response].
>
> Q. Can you explain for the panel what was going on and what were you feeling and what was going on in your mind while this was going on?
>
> A. Scared, embarrassed. I don't know. I just didn't know what to do
>
> Q. Let's talk about "scared". Obviously, what was happening was scary in itself but was there anything that was more scary than what was actually happening?
>
> A. Just him being there. I didn't--it was scary because I didn't like comprehend what was going on. Like I knew it was going--because I was drunk and didn't have all my strength. I didn't know it was going to happen. I was scared.
>
> Q. Tell us a little bit about the embarrassment you were feeling.
>
> A. I didn't want people to walk in and see it and be embarrassed.
>
> Q. Is that what you expected would happen if you screamed?
>
> A. Uh-huh.
>
> Q. Tell us what that would be so bad?

> A. Just having my parents see me like that. I just didn't want it and it was--it would be embarrassing to have my brothers walk in, especially my younger brothers. I wouldn't want that.

(JA 164-65).

On cross-examination, S.A. testified that her fifteen-year-old brother, D.A., regularly slept on the couch in the living room. (JA 171). Additionally, she testified that on the night of the alleged assault, she recalled her bedroom door being open, and that it would have remained open unless her brother closed it. (JA 171).

On cross-examination, D.A. testified that he was indeed on the couch in the living room sleeping during the alleged assault. (JA 204). He went on to testify that S.A.'s bedroom door was open, stating that it was "a little open, not all the way open, but kind of cracked open." (JA 208). However, he then conceded that he had previously testified that the door was "halfway opened." (JA 208). D.A. testified that he did not hear a struggle, and never heard anyone say "no." (JA 208). Appellant testified the encounter with S.A. was consensual. (JA 246-51).

During its case-in-chief, the government also called its purported expert witness, Ms. Falk. (JA 224). Ms. Falk testified that she was employed by "MEDCOM" as a "victim

advocate." (JA 224). She testified that she had "bachelor's degree in law and society" and that she was pursuing a "graduate certificate in public policy", and had "extensive training in victim services." (JA 224). Ms. Falk testified that she had previously worked as a sexual assault response coordinator (SARC) at Fort Carson, Colorado, and that as a SARC, "you make contact with the victim upon a report of sexual assault. . . [and] walk them through the medical, legal, investigative processes." (JA 225). She testified that as a SARC, she interacted with sexual assault victims. (JA 225). Ms. Falk then listed a number of other agencies she had worked for in similar roles, and had received some additional training from the Army on "victim responses to trauma." (JA 227).

Ms. Falk claimed that she had personally worked with "thousands" of victims. (JA 227). The military judge, over defense objection, "recognized [Ms. Falk] as an expert in sexual assault--as a sexual assault response coordinator." (JA 227). The judge then clarified his ruling, stating "not in sexual assault victim responses or however you want to put it." (JA 228). After establishing that Ms. Falk had no prior involvement or interaction with S.A., the trial counsel asked her a series of questions regarding the reactions of victims of reported sexual assaults:

> Q. Okay. Just establishing where you are coming from. In your experience in dealing with victims, how often have you had a sexual assault victim who has fought back against her attacker?
>
> A. Almost never. And it's generally with an unknown subject, with somebody that person isn't familiar with; it's a stranger.
>
> Q. In your experience in dealing with victims, how often have you had a sexual assault victim who at the time of the assault screamed or called for help?
>
> A. Again, almost never. And, you know, they report afterwards that generally there is the fear of escalating the violence or fear that they are going to be harmed even worse than they are already are if they yell or scream for help or upset the individual.

(JA 229-30).

On cross-examination, Ms. Falk conceded that her job as a victim advocate was not to question alleged victims about the validity of their claims, and acknowledged that she would "go in with the assumption that every person [she] advocated for was a victim." (JA 231). When Ms. Falk stated that it is common for alleged victims not to ask for help, even when other individuals were nearby or in the same room, the defense counsel asked how often those cases actually resulted in a court-martial conviction. (JA 231). The government objected and the military judge sustained the objection without providing any specific grounds for doing so.

During its case-in-chief, the defense called Ms. Christina Thomas, the SANE nurse the convening authority appointed to serve as its expert on counter-intuitive behavior in lieu of Dr. Greiger. (JA 287). Ms. Thomas testified that she had a bachelor's degree in science and nursing, and had been working as a registered nurse since 2002. (JA 287). The defense counsel asked a series of questions

> addressing Ms. Thomas's qualifications to provide an opinion on victims of sexual assault, Ms. Thomas admitted she"couldn't say what was a typical response or not," and was "was not an expert in behavioral" matters.---
>
> Q. Right. And that you could not give an expert opinion on that aspect.
>
> A. Not in that aspect, no, but as a nurse I could.

(JA 288-89).

At this point the defense renewed its request to the military judge for a qualified expert assistant. The military judge responded by asking the witness "So, ma'am, your opinion is no two victims--alleged victims act the same way?" (JA 289). The witness responded "yes." (JA 289). The military judge then "noted" the defense request for a qualified expert assistant. (JA 289).

In the defense's closing argument, counsel raised the issue that S.A. did not cry out during the alleged attack, despite the

fact that she had family members nearby, her bedroom door was open, and her brother was sleeping approximately twenty feet away. (JA 301). On rebuttal, the government referred directly to the testimony of Ms. Falk to explain S.A.'s behavior during the alleged assault, arguing that "the reason that Ms. Falk came was to let you know, in her years of experience, dealing with thousands of victims, the most common response is the same that [S.A.] had[,] not to cry out, not to scream, not to fight, but rather to survive." (JA 310).

Argument

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED THE TESTIMONY OF A PUTATIVE EXPERT WITNESS IN VIOLATION OF THE MILITARY RULES OF EVIDENCE AND CASE LAW ON BOLSTERING, EXPERT QUALIFICATIONS, RELEVANCE, AND THE APPROPRIATE CONTENT AND SCOPE OF EXPERT TESTIMONY.

A. Law

"An expert may testify about matters within his or her *area of expertise* where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *United States v. Brooks*, 64 M.J. 325, 326 (C.A.A.F. 2007) (citation omitted) (emphasis added). However, "an expert may not testify regarding the credibility or believability of a victim, or 'opine as to the guilt of innocence of the accused.'" *Id.* (citation omitted). Moreover, an expert "should not be permitted to give

testimony that is the *functional equivalent* of saying the victim in a given case is truthful or should be believed." *Id.* at 329. (emphasis added). "This [c]ourt reviews a military judge's decision to admit or exclude expert testimony over defense objection for an abuse of discretion." *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005).

In *Daubert*, the Supreme Court held that "Fed.R.Evid. 702 assigns to the trial judge the duty to act as a gatekeeper, *i.e.*, 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786, *quoted in United States v. Griffin*, 50 M.J. 278, 283-84 (C.A.A.F.1999). To help determine whether scientific evidence meets the requirements for reliability and relevance, the Supreme Court provided six factors to be considered by the judge: "(1) Whether the theory or technique 'can be (and has been) tested'; (2) Whether 'the theory or technique has been subjected to peer review and publication'; (3) The 'known or potential' error rate; (4) The 'existence and maintenance of standards controlling the technique's operation'; (5) The degree of acceptance within the 'relevant scientific community'; and (6) Whether the 'probative value' of the evidence 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' " *Griffin*, 50 M.J. at 284

(quoting *Daubert*, 509 U.S. at 593-95, 113 S.Ct. 2786).

This Court subsequently held that "although *Houser* was decided before *Daubert*, the two decisions are consistent, with *Daubert* providing more detailed guidance on the fourth and fifth *Houser* prongs pertaining to relevance and reliability." *Griffin*, 50 M.J. at 284 (See generally *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993)). This court also noted that while *Daubert* focused on scientific evidence, it left open the "question of whether the same analysis applied to 'technical or other specialized knowledge.'" *Id.* (quoting *Daubert*, 509 U.S. at 590 n.8, 113 S.Ct. 2786). The Supreme Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), answered this question when it held that the trial judge's gate-keeping function applies to all types of expert testimony, even if it is characterized as "technical" or "other specialized knowledge," rather than "scientific knowledge." *Id.* at 141, 119 S.Ct. 1167. The Court also held that the "trial court may consider one or more of the specific factors" that *Daubert* mentioned when doing so will help determine the testimony's reliability. *Id.* Furthermore, the Court noted that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether expert testimony is reliable." *Id.* at 152, 119 S.Ct. 1167.

Military Rule of Evidence 702 provides that an expert may only provide an opinion if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." This court has held that in order for a witness to provide an expert opinion, he or she must be "qualified and testimony in his or her area of knowledge [will] be helpful" to the factfinder." *Billings*, 61 M.J. at 166. Further, the proponent of the expert testimony is required to

> demonstrate that expert's qualifications by establishing the six factors articulated in *United States v. Houser*: (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) that the probative value of the expert's testimony outweighs the considerations outlined in M.R.E. 403.

Id. (citation omitted). Although this Court has previously upheld decisions of trial judges to allow expert testimony to explain counter-intuitive behaviors of alleged victims sexual abuse/assault cases, appellant's case is distinguishable from each of these cases. *See United States v. Suarez*, 35 M.J. 374 (C.M.A. 1992); *United States v. Rynning*, 47 M.J. 420 (C.A.A.F. 1998); United States v. *Pagel*, 45 M.J. 64 (C.A.A.F. 1996); *Houser*, 36 M.J. 392 (C.M.A. 1993); *United States v. Peel*, 29

M.J. 235 (C.M.A. 1990). In fact, appellant's case provides a striking example of the potential pitfalls in this approach, and the risks associated with expanding it to his or similar cases.

B. Analysis

1. Military Judge Abdicated His Obligation to Conduct a Daubert Analysis

The military judge abdicated his role as gatekeeper in appellant's case, failing, despite appellant's efforts to the contrary, to conduct a *Daubert* hearing, to provide his findings of fact or conclusions of law, or even indicate that he conducted any of his *Daubert* gate-keeping functions whatsoever.

Recent federal cases analyzing a trial judge's gatekeeper role have held that even when a judge holds a *Daubert* hearing it is an abuse of discretion when the judge fails to make a preliminary assessment of the reliability of the testimony. For example, the Seventh Circuit Court of Appeals has held that a judge "must provide more than just conclusory statements about admissibility to show that it performed its gatekeeping function." *Schultz v. Akzo Nobel Paints, LLC, 721* F.3d 426, 431 (7th Cir. 2013)(citing *Ortiz v. City of Chicago*, 656 F.3d 523, 536 (7th Cir. 2011). In appellant's case, not only did the military judge not hold a *Daubert* hearing, but he appeared to rely on testimony of past experts in the general field in concluding that Ms. Falk's testimony was admissible.

In *Best v. Lowe's Home Centers, Inc.*, the Sixth Circuit Court of Appeals addressed a similar situation when it ruled "not every opinion that is reached via a differential-diagnosis method will meet the standard of reliability required by *Daubert*." *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 179 (6th Cir. 2009). For the military judge to conclude that Ms. Falk was not only qualified to testify as an expert but also that her testimony was reliable enough to satisfy *Daubert* based on testimony on similar matters at other trials is a complete abdication of the gatekeeper role.

Indeed, the record can be searched in vain to discover what, if any, analysis the military judge conducted. He merely made conclusory statements that the evidence was admissible (JA 117) and that a *Daubert* hearing was "unlikely." (JA 58). See *Smith v. Dorchester, et. al.*, 732 F.3d 51, 64 (1st Cir. 2013)(holding without specific findings it is impossible to determine if the district court carefully reviewed the evidence or simply made an 'off the cuff' decision to admit expert testimony); *Barabin v. Astenjohnson Inc.*, 700 F.3d 428 (9th Cir. 2012)(verdict vacated where court neglected to perform its gatekeeping role under Daubert in admitting expert testimony); *McClain v. Metabolife International, Inc.*, 401 F.3d 1233 (11th Cir. 2005)(holding judge abused discretion where expert testimony was insufficiently reliable to be admissible under

Daubert); *Kilpatrick v. Breg, Inc.* , 613 F.3d 1329, 1338 (11th Cir. 2010)(district court did not abuse its discretion in concluding that the expert failed to apply the differential diagnosis methodology reliably).

Given the vague and confusing limitations which the military judge placed on Ms. Falk's testimony, defense counsel should have been allowed to question the purported expert on the basis for her opinions and conclusions. The military judge denied the defense this opportunity. While the military judge did allow defense counsel the opportunity to voir dire Ms. Falk on her qualifications and the basis for her opinion outside the presence of the members, the military judge had already noted that he would allow Ms. Falk's testimony. A *Daubert* hearing would have exposed that Ms. Falk's testimony did not rely on any accepted scientific standard. Rather, it was a mere recitation of numbers followed by generalized conclusions bolstered with the title of "expert witness." When defense counsel objected again, rather than give his findings and apply the *Daubert* test, the military judge simply stated, "Your objection is noted." (JA 223). The military judge's failure to conduct a proper *Daubert* analysis on the record must result in this Court finding the military judge abused his discretion. *Barabin*, 700 F.3d at 428, *Smith v. Dorchester*, 732 F.3d at 64.

Additionally, the lack of *Daubert* hearing resulted in ill-defined limitations as to what expert opinions Ms. Falk would be allowed to provide. The military judge attempted to limit the scope of Ms. Falk's testimony by repeatedly listing for government counsel the questions she was going to be asked and her anticipated responses. Had a *Daubert* hearing been conducted, the military judge would have recognized that not only was Ms. Falk entirely unqualified to answer the questions but also prone to expand her answers beyond the scope of his limitations. The result was that an unqualified expert witness, with no accepted methodology to speak of, was allowed to bolster the government's key witness as to critical portions of her testimony. When the defense counsel attempted to undermine that opinion by questioning Ms. Falk's methodology in front of the panel, the military judge stopped the inquiry and allowed her unqualified opinion to stand unchallenged.

2. Qualification as an Expert

Ms. Falk was not a qualified expert under the basic tenets of Mil.R.Evid. 702, which require that an expert must possess "scientific, technical, or other specialized knowledge" based on "knowledge, skill, experience, training, or education." Here, regardless of the government's efforts to claim otherwise, the subject area of the testimony was counter-intuitive behaviors, inherently a dimension of behavioral science (ie, psychology).

In each of the above-mentioned cases in which this court allowed for testimony about counter-intuitive behaviors of alleged victims, the expert witnesses were vastly more qualified in relevant fields of behavioral science than Ms. Falk. In fact three of the four witnesses possessed doctorate degrees in psychology or social work.[6] *Pagel*, 45 M.J. 64; *Houser*, 36 M.J. 392; *Peel*, 29 M.J. 235. On the contrary, during the government's effort to qualify Ms. Falk as an expert, she testified that she had no formal training or advanced degrees in behavioral sciences.[7]

Additionally, in *Rynning* and *Houser*, the defendants conceded that the government's witness qualified as an expert, while the defense attorney in *Pagel* withdrew each of his objections concerning expert qualifications. 47 M.J. at 421; 36 M.J. at 394; 45 M.J. at 65, 67. Here, appellant's defense counsel objected to Ms. Falk's status as an expert following trial counsel's review of her training and education. (JA 228).

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[6] In *U.S. v. Rynning* it was not clear what the expert's educational background was, but this Court recognized her "expertise in the area of child sexual abuse," highlighting her testimony supporting this description. 47 M.J. at 422.

[7] Ms. Falk testified that she had a bachelor's degree in "law and society" in additional to her pursuit of a "certificate in public policy." She also claimed to have "extensive training in victim services" provided by the "U.S. Army Sexual Assault Prevention Response Program." Ms. Falk's resume, which was not admitted into evidence, revealed that this "extensive" training was actually two 40-hour classes from the Army, and a third from the state of Colorado. (JA 315).

3. Subject Matter of Expert Testimony

Despite the government's and military judge's tortured efforts to avoid labeling the content of Ms. Falk's testimony as belonging to any form or field of behavioral science (i.e. counter-intuitive behavior), the inescapable conclusion is that the government felt compelled to offer an expert who could somehow explain away S.A.'sthe behavior during the alleged rape. The military judge settled on the notion that if a witness simply talks about counter-intuitive behaviors in terms of quantity (i.e., some victims do this and some do that), but not quality (i.e., *why* victims display these behaviors or *why S.A.* behaved this way), then the area of expertise does not necessitate an expert in psychology. Ultimately, when Ms. Falk took the witness stand and provided her qualifications, the military judge defined her area of expertise as "a sexual assault response coordinator . . . [but] not in sexual assault victim responses." Nonetheless, Ms. Falk promptly provided a sweeping opinion about the responses of sexual alleged assault victims. (JA 230).

4. Basis

"*Everything an expert says* has to be relevant, reliable, and helpful to the factfinder. A rational and demonstrable basis is the *sine qua non* of expert opinion." *United States v. King*, 35 M.J. 337, 342 (C.A.A.F. 1992). Ms. Falk lacked an

adequate basis to provide expert opinion testimony during the government's case. "An expert's opinion may be based upon personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial." *Houser*, 36 M.J. at 399. Military Rule of Evidence 702(c) requires that the "[expert] witness has applied the principles and methods reliably *to the facts of the case*."

Here, the government failed to establish any of these bases to provide meaning or context to Ms. Falk's opinion that "almost never" scream or fight back against an attacker. (JA 229). In fact, the trial counsel actually established the opposite, eliciting responses from Ms. Falk that prior to her testimony, she had no involvement in the case at all. (JA 228). She testified that she had never met or spoken to S.A., and she had not reviewed any "investigation files." (JA 228). There is no evidence to suggest that Ms. Falk listened to any testimony, and the trial counsel did not provide her with any "assumed facts" or hypothetical situations specific to the appellant's case.[8]

Without an adequate basis for her opinion, Ms. Falk's testimony arose in a complete vacuum, devoid of any context or meaningful way to evaluate whether her experience and "expertise" in assisting victims were applicable or even related

[8] Trial counsel asked Ms. Falk "In your experience in dealing with victims, how often have you had a sexual assault victim who has fought back against their attacker?" (JA 229).

to appellant's case.[9] For instance, Ms. Falk did not provide any indication that her opinion applies (or does not apply) when an alleged perpetrator allegedly breaks into the victim's home in the middle of the night, as opposed to other situations where the victim and accused were acquaintances sharing the same house, room, bed, etcetera.

5. Relevance

Ms. Falk's testimony can distilled to her observations of what other people did (or reported) in other cases completely unrelated to the appellant, or the facts of his case. On the other hand, in *Suarez*, *Rynning*, *Pagel*, and *Peel*, the government expert met with the alleged victim or observed the victim's testimony prior to giving their opinions on counter-intuitive behaviors. *Suarez*, 35 M.J. 394; *Rynning*, 47 M.J. 420; *Pagel*, 45 M.J. 64; *Peel*, 29 M.J. 235. In *Houser*, this court noted that the expert was not required to interview the victim, but then highlighted that during her testimony she responded to hypotheticals, and also went into significant detail about her qualifications and the sophisticated model she used in analyzing counter-intuitive behaviors. 36 M.J. at 396.

[9] The closest Ms. Falk came to providing any context or basis for her opinion was on cross-examination when she stated "there have been reports" of assaults occurring in the military population when the roommate is present. (JA 231).

Most critically, Ms. Falk—by design of the government—could not and did not provide an informed basis for *why* victims of alleged assaults do not generally, or often, cry out for help during the attack. Although Ms. Falk did state that "you know, [alleged victims] report afterwards that generally there is the fear of escalating violence. . . ." she provided no further explanation about these "report[s]" or how they might be relevant in appellant's case.

In *Rynning,* this court once again recognized that qualified experts are permitted to testify in certain situations involving counter-intuitive behavior. However, the court specifically noted that "most important" . . . [the expert] explain[ed] the *reasons*" for the counter-intuitive behavior of the alleged victim. 47 M.J. at 422. Thus, a qualified expert may be able to provide relevant testimony concerning counter-intuitive behaviors of an alleged victim, but the value in this testimony comes from the expert's possession of a *basis* for their opinion, and the ability to give an *explanation* for why these behaviors may occur based on their knowledge, skill, experience, and training.

Alternatively, assuming *arguendo* that this court is convinced that Ms. Falk's testimony satisfied the relevance threshold of Mil. R. Evid. 401 that has been recognized within the context of counterintuitive behaviors, appellant's case

includes a number of critical distinctions from *Suarez*, *Houser*, and their progeny. In *Houser*, this Court specifically noted that expert testimony on counterintuitive behavior is relevant because factfinder's may be incapable of moving beyond their own preconceived notions of how an individual should respond to an assault. The court reasoned that:

> Certain behavioral patterns such as failure to resist or delay in reporting a rape could be confusing to the factfinders because these may be counter-inutitive. It is logically relevant for an expert to explain that certain behavior patterns occur in a certain percentage of rape cases or child abuse cases. This is no to say that the offense occurred, but rather, that these events may happen to some victims. Without he testimony the members are left with their own intuition.

Houser, 36 M.J. 392. Those same concerns are simply not present here.

S.A. testified extensively about what she claimed happened on the night in question. At the time of her testimony she was seventeen years old, and did not appear to have any problems explaining or articulating the events as she recalled them. S.A. testified in detail about why she did not scream or call out, stating that she was scared and embarrassed. (JA 164-65). She provided a simple answer to a simple question. It was a straightforward answer that did not require any additional elaboration or explanation by an expert. Although it may have

been counterintuitive in some respects, it was not so complex or sophisticated that the panel needed to hear from an "expert" who could bolster S.A.'s testimony by claiming that other alleged victims respond in a similar fashion. *See United States v. Stark*, 30 M.J. 328, 330 (C.M.A. 1990) (expert should possess "substantive knowledge in a field beyond the ken of average court member").

In fact, it was the government's direct examination of S.A that raised the issue of her not calling out for help during the alleged attack. Essentially, it was able to elicit potentially damaging evidence during S.A.'s testimony, and then rehabilitate and bolster her account with its expert waiting in the wings. While this may not be dispositive in evaluating this factor, it should certainly be a consideration.

Further, the military judge himself observed that it is almost "common knowledge" that alleged victims often display counter-intuitive behaviors following an assault. (JA 121). Here, the panel members simply did not need opinions or explanations from an expert to get beyond misconceptions or intuition about the behavior of victims. This was made crystal clear when they explicitly disclaimed that a victim who did not behave the way they expected, and specifically who did not resist during and alleged assault, would not affect them.

Thus, while expert testimony may be helpful to a factfinder under certain circumstances involving counter-intuitive behavior, in this case, the government's direct examination of S.A., coupled with the military judge's position on the issue strongly suggest that any expert—let alone Ms. Falk—would not have been particularly helpful to the panel.

6. Reliability of Expert's Method

Even assuming *arguendo* that Ms. Falk was somehow qualified to testify as an expert on counter-intuitive behavior, the basis for her opinion (ie, assault victims "almost never" call for help) is not reliable. Based on her testimony, her methodology for arriving at this conclusion can be boiled down to the fact that she has worked with a lot of individuals who report that they were sexually assaulted, and that she recalls that most of them told her they did not scream or call for help. Ms. Falk did not discuss how many of these cases were ultimately investigated or prosecuted by the authorities, or if there was ever any evidence beyond the initial reports she received to support or refute that an assault occurred. In fact, on cross-examination, she stated that she was not responsible for determining if a claim was valid, and acknowledged that in her work she operated under the assumption that everyone she assisted was a victim. (JA 231).

The lack of relevance and reliability in Ms. Falk's testimony raises the concerns articulated by this Court in *United States v. King*, in which the government's putative expert provided a damaging opinion about King, despite not being "in any position to pronounce on [King's] condition or prospects, either by way of her training and experience, or by way of her knowledge of appellant." 35 M.J. 337, 343. The C.M.A. cautioned:

> People accused of crime—as well as their alleged victims—are discrete individuals. It is not "only the name that changes." They are not some mosaic or composite of 20 or 30 years worth of other people. Counsel will do well to limit their witnesses to people who either have a basis for making generalizations that bear a rational relationship to issues in the case or who know something germane about the subject of the given court-martial.

Id. Ms. Falk's irrelevant and unreliable testimony about appellant falls squarely within these concerns.

As the testimony was elicited at trial, it was comparable to "human lie detector" evidence. In *United States v. Mullins*, this Court held it was error to admit expert testimony from which members could infer there was a 1 in 200 chance the allegations were false. *United States v. Mullins*, 69 M.J. 113, 115 (C.A.A.F. 2010). In *Mullins*, a forensic child interviewer testified to the frequency of children lying about sexual abuse, which this Court compared to bolstering. This Court noted that

testimony that involves a statistical statement of how often false accusations of sexual abuse occur raise the inference that the victim is truthful and should be believed. *Id.* at 116. This Court then concluded that such an inference invades the province of the court members to determine the credibility of witnesses. *Id.* at 116. A statement that there was a "1 in 200" chance the allegations were false is directly comparable to Ms. Falk's statement that victims "almost never scream." This Court found no prejudice in *Mullins* because the military judge then challenged the scientific basis for the opinion in the presence of the panel. *Id.* at 118. In appellant's case, however, the military judge failed to conduct a *Daubert* hearing, stopped defense counsel from attacking the basis of Ms. Falk's opinion on cross examination, and denied the defense the assistance of a qualified expert who could refute her unfounded assertions.

7. Probative Value Versus Prejudice

Even if this court were to determine that Ms. Falk was a qualified expert, and that her opinion was relevant, reliable, and helpful, the prejudice to appellant plainly outweighed any probative value. In addition to the fact that the appellant was deprived of the ability to retain his own expert or an adequate substitute, S.A. gave a detailed and sensible, albeit counter-intuitive, explanation for her behavior. Beyond S.A. and Ms. Falk, appellant was the only other witness who could provide

testimony directly on the issue of consent. To allow the government to bolster its case with the testimony of Ms. Falk was highly prejudicial to appellant's defense. This prejudice heavily outweighed any probative value her testimony may have offered to the panel, and is inconsistent with the balancing requirement established in Mil. R. Evid. 403.

Ms. Falk's unqualified and unreliable opinion likely caused significant harm to appellant in light of all the other testimony and evidence provided to the panel. Based on the panel's acquittal of appellant on the burglary charge, as well as appellant's testimony that he had consensual sex with S.A., the case presumably came down to the conflicting testimony of S.A. and appellant regarding the encounter. Appellant testified that S.A. invited him to her room, and that they had consensual sex—without S.A. crying out or resisting—while S.A.'s bedroom door was partially open. S.A. testified that appellant broke into her room. However, the panel did not convict appellant of this offense. S.A. testified that appellant engaged in a sexual act with her, and that even though she did not cry out for help and her bedroom door was partially open, the act was done without her consent by force of the appellant. Thus, the central issue for the panel to resolve was whether the encounter was consensual.

In *United States v. Rodriguez*, this Court reversed the conviction of the accused after it determined that the military judge erroneously admitted unreliable government expert testimony interpreting polygraph results[10] of the accused. 37 M.J. 448 (C.M.A. 1993). The unreliable evidence conflicted with the testimony of the accused, and the court concluded that "the credibility of appellant's denials—surely a critical part of his case—was devastated" by the admission of the unreliable evidence, and set aside the findings.

Here, SPC Flesher's testimony was almost certainly undermined, if not *devastated* by Ms. Falk's testimony. The government bolstered S.A.'s testimony with Ms. Falk's opinion during its own case-in-chief, and then hammered her claim home on its rebuttal. Government counsel conceded "our case in chief is deficit [*sic*] without that testimony coming in" when describing the potential damage that could be done by evidence that S.A. did not scream. (JA 117).

The accumulation of the military judge's errors allowed the government to proffer an unqualified expert who rendered an

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[10] The military judge allowed the results of the polygraph to be admitted via expert testimony on rebuttal following the accused's testimony on direct denying knowing use of cocaine. This Court (accused's trial occurred prior to approval of Mil. R. Evid. 707) reasoned that although polygraph results were admissible under these circumstances, the government failed to lay the necessary foundation for the results. *Rodriguez* at 452, 453. Mil. R. Evid. 707.

opinion about the most critical element of appellant's case, while simultaneously denying appellant a necessary expert on the same topic. In *United States v. Dollonete*, this Court reversed the conviction of the appellant under similar circumstances, in which the government put on inadmissible expert testimony regarding the victim's credibility, and the appellant was improperly denied an expert that could have assisted his defense. 45 M.J. 234 (C.A.A.F. 1996). The Court noted that "the evidence of guilt was not overwhelming; rather, the prosecution's case rested entirely on the alleged victim's credibility." *Id.* at 242. In setting aside the findings, this court concluded that "such unilateral piling on with inadmissible expert testimony distorted the factfinding process in this 'hotly contested' case to such an extent that we find the results unreliable." *Id.* at 243.

Conclusion

The military judge permitted the government to introduce unreliable and irrelevant testimony from an unqualified expert, which combined with the denial of his own expert caused immeasurable damage to appellant's ability to adequately defend himself in a "hotly contested" case.

WHEREFORE, the appellant respectfully requests that this Court grant the requested relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Flesher, Crim.App.Dkt.No. 20110449, USCA Dkt. No. 13-0602/AR, was electronically filed with both the Court and Government Appellate Division on December 16, 2013.

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