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. Dkt. No. 20140476
	)	USCA Dkt. No. 16-0731/AR
Specialist (E-4) **AUSTIN L. HENDRIX**, United States Army, Appellant	)	

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INDEX

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Page

Case Law

Supreme Court

Court of Appeals for the Armed Forces / Court of Military Appeals

Statutes

Uniform Code of Military Justice

Miscellaneous

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A DEFENSE MOTION TO SUPPRESS RELATED TO THE IDENTIFICATION OF THE APPELLANT DURING A VOICE LINEUP.

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO COMPEL AN EXPERT CONSULTANT, EP, IN THE FIELD OF AUDIO FORENSIC SCIENCE AND VOICE IDENTIFICATION.

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 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On March 25, May 8, and June 4–6, 2014, at Kaiserslautern, Germany, a panel with enlisted representation sitting as a general court-martial convicted Specialist (SPC) Austin L. Hendrix, contrary to his plea, of one specification of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2012) [hereinafter UCMJ]. The panel sentenced SPC Hendrix to a dishonorable discharge, confinement for thirty months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On July 18, 2016, the Army Court affirmed the findings of guilty and the sentence. (JA 1–6). Specialist Hendrix was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on September 9, 2016. This Honorable Court granted appellate defense counsel's motion to extend time to file the supplement on September 12, 2016, and the Supplement to

the Petition for Grant of review was filed on September 29, 2016. On December 12, 2016, appellant's petition for review was granted on five issues.[1]

Statement of Facts

In June 2013, SPC PK, Mrs. SK, and their four daughters were preparing to move from Kaiserslautern, Germany to Fort Eustis, Virginia. (JA 152–54, 160). On the night of June 10, 2013, SPC Brian Wiegand[2] and appellant went over to SPC PK's on-post apartment. (JA 154). Both of them had been to his apartment before. (JA 153). In fact, SPC Wiegand was a regular visitor at SPC PK's residence, slept over multiple times, and even wanted SPC PK's two oldest daughters to think of him as "their uncle." (JA 153, 179–80).

That night, SPC PK's family, SPC Wiegand, and appellant were drinking, talking, playing videogames, and hanging out. (JA 169, 181). Eventually, SPC PK's ten year-old daughter—Ms. JNK—went to her bedroom, which she shared with one of her younger sisters. (JA 106).

Prior to Ms. JNK falling asleep, her sister came into their bedroom after taking a shower. (JA 107). The adults went to sleep in various rooms: SPC PK

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[1] The order from this Honorable Court stated "Briefs will be filed under Rule 25 on Issue I and Issue V only." *United States v. Hendrix*, Dkt. No. 16-0731/AR, 2016 CAAF LEXIS 986 (C.A.A.F. Dec. 12, 2016).

[2] At the time of the incident, he was SPC Wiegand. During the subsequent trial, he was Private First Class Wiegand. (JA 179).

and Mrs. SK went to their bedroom, SPC Wiegand fell asleep on the game room couch, and appellant stayed in the living room. (JA 155, 181–83, 227). After falling asleep, the next thing appellant remembered was SPC PK waking him up for work around 0530. (JA 228).

The next day, Ms. JNK asked Mrs. SK if she had ever been sexually assaulted. (JA 128, 170–71). Ms. JNK later testified she heard the term "sexual assault" from an Armed Forces Network commercial. (JA 112, 128). Specialist PK was still at work when this conversation between Ms. JNK and his wife occurred. (JA 171).

When he arrived home from work, SPC PK smelled cigar smoke. (JA 156–57). After Mrs. SK denied lighting any cigars, SPC PK knew it was either Ms. JNK or her sister. (JA 157). However, when he questioned them about the smoke, both girls blamed each other. (JA 157, 162–63). After several rounds of questioning from multiple people (including their neighbor), SPC PK gave the girls one last chance to tell the truth. (JA 163). After another set of denials, SPC PK spanked the girls with his work belt and "gave them some time to think it over." (JA 163). When the mutual denials and finger-pointing continued, SPC PK spanked them again. (JA 164). The spankings left bruises on Ms. JNK. (JA 133). After the second round of spankings, Ms. JNK told her sister to take the blame because she had been sexually assaulted the night before. (JA 133). Mrs. SK

overheard this discussion and the spankings stopped. (JA 133, 172). Ms. JNK later admitted she was the one who lit up a cigarette, but instead told her parents that she saw her sister lighting matches. (JA 130–32).

In describing this alleged sexual assault, Ms. JNK testified that a tall man came into her room, pulled down her pants and underwear, and touched her "private area" inside her underwear. (JA 107–11). On other occasions, Ms. JNK said she was touched over her pants and the man did not pull down her clothes. (JA 188, 232–33). Ms. JNK also remembered the man saying, "Is your sister asleep" and "Promise me you won't tell anybody." (JA 108-09, 112, 119).

Preferral of Charges and Article 32, UCMJ, Investigation

The government preferred charges against SPC Hendrix on October 23, 2013, which was five months after the alleged incident.

An Article 32, UCMJ, investigation was conducted, and the Investigating Officer's report was completed on January 21, 2014.[3] In this report, the Investigating Officer wrote, "I do not find that reasonable grounds exist to believe the accused committed the offenses alleged in the Charges and their Specifications." (JA 303).

[3] The defense attached the Investigating Officer's report and memorandum as evidence to support the motion to suppress the voice lineup. (JA 291, 297, 302). Both parties consented to the military judge considering each side's enclosures when deliberating on the motions. (JA 11–12).

The Investigating Officer also prepared a separate memorandum outlining his findings and recommendations. Within this memorandum, the Investigating Officer reiterated, "I do not find that reasonable grounds exist to believe that the accused committed the offenses alleged in the Charges and their Specifications," but noted "CID never did a voice lineup to confirm whether Ms. [JNK] could identify the [accused's] voice." (JA 297–98). The Investigating Officer also stated he did not find Ms. JNK's CID interview to be credible, and he concluded "[Ms. JNK] was not being truthful when she was interviewed." (JA 298).

Voice Lineup and Referral of Charges

After receiving the Investigating Officer's report, the government sought to arrange a voice lineup. The government contacted the defense counsel about the voice lineup on February 26, 2014, and the voice exemplars were recorded at the Kaiserslautern CID office on February 28, 2014. (JA 39–40).

On March 7, 2014 – which was nearly nine months after the alleged incident and two months after the Article 32, UCMJ, investigation – a voice lineup was conducted at Fort Eustis, Virginia. (JA 19–24, 118–21, 205–08, 290, 305, 311–14). This voice lineup was conducted by Special Agent (SA) Anthony Hughes and consisted of three segments of recorded voice exemplars from six individuals, including the appellant and SPC Wiegand. (JA 21, 210, 311–14). Essentially, each segment was "the same people but in different order." (JA 21).

On these recordings, the six individuals stated two sentences related to the alleged assault: "Is your sister asleep" and "Promise me you won't tell anybody." (JA 119, 314). All participants repeated these sentences at three different voice levels: (1) a whisper; (2) above a whisper; and (3) a normal speaking voice. (JA 15, 41, 314). On each recording, these six total sentences—two phrases repeated at three different voice levels—were stated sequentially, with limited pauses in-between. (JA 314). Counting from the beginning of the first sentence to the end of the sixth sentence, each of the six exemplars lasts approximately 12-15 seconds. (JA 314).

During the voice lineup, Ms. JNK quickly recognized SPC Wiegand's voice as one of the exemplars. (JA 138). She also thought some of the voice exemplars were strange, as one of them was "Australian sounding" and others contained "really deep voices" that were different from anyone she knew. (JA 137–38).

During the first segment of the lineup, Ms. JNK did not identify any specific exemplar as belonging to her assailant. (JA 22, 213–14, 311, 319, 344). Ms. JNK initialed a form stating she could "not positively identify any of the depicted voices as being involved in the incident being investigated." (JA 22, 213–14, 311, 319, 344). On this same form, Ms. JNK listed two different exemplars where "both voices matched" the person who "touched me wrong." (JA 22, 213–14, 311, 319, 344). After this initial result, SA Hughes proceeded with two additional segments

of the voice lineup, which contained the same voice exemplars. During these two subsequent segments, Ms. JNK identified appellant's voice exemplar as the person who touched her. (JA 23, 215–16, 312–13, 319–20, 345–46).

At trial, Ms. JNK initially testified she was told to "write down the number that you think is Austin." (JA 119–20). Ms. JNK subsequently testified she was asked to identify the person who came into her room, "which I knew was Austin cause he was the only person in my house who had the girlish voice." (JA 120–21). However, during cross-examination, Ms. JNK again testified she was told to pick out "Austin's voice." (JA 138). For his part, SA Hughes said he never told Ms. JNK to identify SPC Hendrix's voice, but instead asked if she recognized the "alleged offender." (JA 21, 210, 212, 215–16, 319–20).

Less than two weeks after the voice lineup, the government referred the charges to a general court-martial. (JA 9). Prior to trial, the government dismissed the additional charge on the charge sheet. (JA 8). Therefore, at trial, the appellant was only charged with one specification of violating Article 120b, UCMJ.

Defense Motions to Suppress Voice Lineup and Compel Expert Consultant

Prior to trial, the defense filed a motion to suppress the voice lineup and a separate motion to compel an expert consultant, Mr. EP, in the field of audio forensic science and voice identification. (JA 287, 315). The government filed a response to both motions. (JA 304, 335). At the motions hearing, both parties

consented to the military judge considering each side's enclosures when deliberating on the motions. (JA 11–12).

Notably, despite a request from the defense for his presence, SA Shackelton, the agent from the Kaiserslatern CID office who created the voice exemplars, was not present at the motions hearing. (JA 12). However, following a lengthy proffer by the defense counsel over his expected testimony and the government stating it had no disagreements with this proffer, the military judge said "the court will consider those as an agreement as to what his testimony would be. So, defense, you can argue those as facts supporting your motion." (JA 12–18).

Among other things, these "facts" included that SA Shackelton had never conducted a voice lineup and the Kaiserslatern CID office had no protocols regarding how to conduct one. (JA 16). Absent any internal guidance, SA Shackelton organized the voice lineup based on his experience with photo lineups. (JA 16). Furthermore, while collecting voice exemplars, SA Shackelton made no effort to screen the individuals. (JA 14–15). Instead, he just "grabbed six different people and had them come and provide samples." (JA 15). These six people included three CID agents, SPC Wiegand,[4] the appellant, and a Navy Sailor with a Jamaican background who was picked "at random" because "he happened to be the

[4] There are a few references to "Specialist Regan" or "Specialist Reagan" in the proffer, but the overall record—to include the written motion—shows the defense counsel was referencing SPC Wiegand. (JA 14–15, 289, 293, 311–14).

first guy that was found at the studio." (JA 14–15). The proffer also explained the agent did not prepare any samples for the voice lineup that removed the appellant's voice exemplar, and he did not format the files in a "double-blind" manner. (JA 16–17).

During the motions hearing, the defense also presented testimony from a prior defense counsel on the case, who was present during the recording of the voice exemplars. (JA 30–31). This prior defense counsel said one of the CID agents had a speech impediment, struggled to read the sentences, and needed approximately 15-20 takes to actually provide a sample. (JA 41). He also testified why it was "odd" the Navy Sailor was chosen to provide a voice exemplar: this Sailor was Jamaican, had a cough and sinus infection, and weighed over 200 pounds. (JA 42–43).

The prior defense counsel also testified that all the way through the Article 32, UCMJ, investigation, "the defense had only been told that the alleged victim had made an identification based only on a whisper that she heard . . . she could not identify the person because it was dark." (JA 42). He further testified, "The only way that she had identified who allegedly did this was through a whisper that she heard that night when she thought she was dreaming. So, it seemed odd to me that they would ask for anyone during the lineup to give a normal voice, *because that's not what the alleged victim heard that night*." (JA 42) (emphasis added).

The defense also presented testimony from Mr. EP, who was the subject of the separate motion to compel an expert consultant in the field of audio forensic science and voice identification. (JA 50). In explaining the dual purpose of Mr. EP's testimony, the defense counsel said "if we could call him and limit it just for what he would have to offer with regard to the motion to compel experts. And then if any potential--or, any crossover there, we would ask that you consider it for this motion [to suppress] also." (JA 48).

The military judge recognized Mr. EP as an expert in voice identification. (JA 50–51). During his testimony, Mr. EP outlined reliability issues related to whisper identifications and how physical and background characteristics can significantly affect someone's voice. (JA 51–53, 56–57).

Additionally, Mr. EP testified about his concerns with the voice lineup in appellant's case. (JA 53–58). In fact, based on his knowledge of the case, Mr. EP said this voice lineup was "not reliable" and "should not be used to prosecute or convict somebody of a crime, based on such an unreliable methodology for voice identification." (JA 55). Mr. EP also described how he could help with the defense case. (JA 55–58). More specifically, Mr. EP said he would "reverse engineer what has been done so far" and "understand the case better so that [he] could help guide a process to solve the complications that we currently have involved in this case." (JA 55).

During his testimony at the motions hearing, Mr. EP also had the following exchanges with the defense counsel:

> Q. If a witness hears a voice at a whisper tone and then months later is asked to identify the person who whispered that tone those months before, and the voice exemplars are given at a whisper level, a normal speaking level, and a louder level, and all of those are listened to, would that--how would that affect your opinion on reliability?
>
> A. *It's not reliable at all in my opinion*. Memory is not something that serves us well with understanding and being able to identify somebody through their voice. And that would be my opinion with regard to that.
>
> . . .
>
> Q. How do [physical and background characteristics] impact voice?
>
> A. *Oh, they affect voice dramatically*. Physical characteristics, ethnicity, they all have a collective volume of experiences that come into play with the way a person speaks. So, a person from Russia is going to have a different type of accent and voice, tone, and the manner of delivery than somebody from let's say New Orleans.

(JA 56–58) (emphasis added).

During arguments for the motion to suppress, the trial counsel said "this lineup was not suggestive," "Specialist Hendrix's name . . . was never mentioned to [Ms. JNK] prior to the lineup," "most of what [the prior defense counsel] said is completely irrelevant," and the lineup included "all white males between the ages of 20 and 40 and it is not required that they have identical voices." (JA 64–65).

The trial counsel concluded his argument by stating "this lineup, admittedly, was not perfect," but the government "*should be entitled to present this evidence because this evidence is important, sir*. It's important that the victim identified the accused and excluded this other man very confidently several times. She nailed it, sir. She nailed the lineup and that is important evidence at trial." (JA 65) (emphasis added).

In response, the defense counsel highlighted multiple issues related to the procedures used by CID, the physical and background characteristics of the personnel, the differences in the voice exemplars, and further reiterated that Mr. EP – who the military judge recognized as an expert witness – concluded the voice lineup was unreliable. (JA 66–72). The defense counsel also argued "not only are they not similar samples, they are not a reasonable depiction of what the victim alleged." (JA 70). Instead, "we are comparing a whisper to a normal voice lineup . . . which Mr. [EP] said was unreliable." (JA 70).

The parties also argued the motion to compel an expert consultant in the field of audio forensic science and voice identification. The defense mostly stood on its existing motion and testimony, and the trial counsel gave a short argument stating, "All of the holes in this voice lineup, I think, are pretty obvious . . . the defense is certainly entitled to cross-examine and elicit through other means at trial and they don't need an expert to do that." (JA 77).

The military judge's initial ruling over for motions was merely one word: "Denied." (JA 339). The military judge added "[the] Court reserves the right to supplement its rulings with essential findings of fact and conclusions of law at a later date." (JA 339).

Court-Martial

At trial, the government did not admit the voice exemplars into evidence. However, the government elicited testimony from Ms. JNK that she recognized appellant's voice during the voice lineup, elicited additional testimony about the lineup from SPC PK, and even had SA Hughes outline both the procedure and results of the voice lineup. (JA 118–21, 158–59, 205–17). The government also referenced the voice lineup during its opening statement, closing argument, and rebuttal argument:

> The last important detail, the last important fact that you need to know is that about nine months after the molestation [JNK] still remembers it and she still remembers the voice of the person who touched her, *CID ran a voice line up. [JNK] nailed it.* It wasn't a perfect voice lineup. Defense will make it very clear that there were shortcomings in the way it was run, but [JNK] and Special Agent Michael Austin, who ran the voice lineup, will also make it clear that [JNK], nine months after this, had no doubt in her mind about the voice of the person who came in her room and touched her genitalia. That voice belonged to Specialist Hendrix.

(JA 89) (emphasis added).

> And we have the fact that *this girl nine months later was able to recognize the voice* and say, "That's the man who touched me wrong."

(JA 247) (emphasis added).

> The defense attorney suggested that the lineup answer was suggested to [JNK]. The evidence to support that was [JNK's] honest answer. *When I asked her about it she said, "Yeah, they told me to pick Austin." But she's a little girl and she doesn't really know what she's saying*. She explained to you after that what she meant to say. "They told me to pick the guy who touched me wrong and it happened to be Austin. I knew that that's who it was." And then both other people who were at that lineup said, "Yeah, that's exactly what happened."
>
> She really is just a little girl who sometimes gives the wrong answers when she's nervous, when she's in a situation like this in a big room with lots of people and she doesn't know what to answer. *The truth about what happened at the lineup is that [JNK] was not told who to pick up--who to pick out, and she identified the voice of "the man who touched me wrong."*

(JA 272–73) (emphasis added).

Military Judge's Supplemental Rulings

More than four months after the court-martial, the military judge issued supplemental rulings for several defense motions. For the defense motion to suppress the voice lineup, the military judge wrote, "The Government elected not to admit the voice lineup into evidence. Therefore, the Court will not issue findings of fact and conclusions of law . . . ." (JA 340). Similarly, for the defense motion to compel an expert consultant in the field of audio forensic science and

voice identification, the military judge found "the Government elected not to admit the voice lineup into evidence" and therefore:

> Since the Government did not move for the admission of the audio of the voice lineup into evidence and were unable to lay the foundation necessary to admit the document showing the names associated with the voice files (Prosecution Exhibit 11 for identification), *it is unnecessary for the Court to enter findings of fact and conclusions of law as it relates to the appointment of Mr. [EP] to the defense team . . .*

(JA 342) (citing JA 344–46)

As necessary, additional facts relevant to the issues presented are included in the relevant subsections below.

Summary of Argument

In this case, the military judge abused his discretion in denying two separate defense motions. First, the military judge abused his discretion in denying the defense motion to suppress the voice lineup, which was so suggestive as to create a substantial likelihood of misidentification. Second, the military judge abused his discretion in denying the defense motion to compel an expert consultant in the field of audio forensic science and voice identification. The government's use of this flawed lineup was arguably the main difference between the Article 32, UCMJ, investigation and the court-martial: the former resulted in a recommendation to not proceed to a court-martial, while the latter resulted in a conviction.

Issue I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A DEFENSE MOTION TO SUPPRESS RELATED TO THE IDENTIFICATION OF THE APPELLANT DURING A VOICE LINEUP.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress evidence for an abuse of discretion, viewing the evidence in the light most favorable to the party prevailing below. *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (citing *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015)).

Under an abuse of discretion standard, this Court determines "whether the military judge's findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Baker*, 70 M.J. 283, 290 (C.A.A.F. 2011) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). "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. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013) (citations omitted). "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly

warranted." *United States v. Flesher*, 73 M.J. 303, 313 (C.A.A.F. 2014). However, the converse is also true:

> When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . . .

Id. at 312 (citation omitted).

When a military judge does not make any findings of fact or explicit conclusions of law, the military judge's application of the law is reviewed de novo. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002).

Law

Military Rule of Evidence 321 [hereinafter Mil. R. Evid.] outlines the admissibility of eyewitness identifications. More specifically, Mil. R. Evid. 321 functionally codifies the two-part test established by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1973). *Baker*, 70 M.J. at 288. This test examines: (1) whether a pretrial identification was unnecessarily suggestive, and (2) if a pretrial identification was unnecessarily suggestive, whether it was conducive to a substantial likelihood of misidentification. *Id*. at 284 (citing *United States v. Rhodes*, 42 M.J. 287, 290 (C.A.A.F. 1995)).

To that extent, Mil. R. Evid. 321(b) states an identification of the accused as participating in an offense remains inadmissible if "[t]he identification is the result of an unlawful identification process" or "[e]xclusion of the evidence is required by the Due Process Clause of the Fifth Amendment to the Constitution of the United States as applied to members of the Armed Forces." Notably, the protections of Mil. R. Evid. 321(b) cover eyewitness identifications "made at the trial or otherwise." Mil. R. Evid. 321(c)(1) further clarifies "[a] lineup or other identification process is unreliable, and therefore unlawful, if the lineup or other identification process is so suggestive as to create a substantial likelihood of misidentification."

In outlining the required burdens and standards of proof for analyzing unreliable identifications, Mil. R. Evid. 321(d)(6)(B) separates the "initial unreliable identification" from any "identification[s] subsequent to an unreliable identification." For the initial unreliable identification, "the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances." Mil. R. Evid. 321(d)(6)(B)(i). Furthermore, "[w]here factual issues are involved in ruling upon such motion or objection, the military judge will state his or her essential findings of fact on the record." Mil. R. Evid. 321(d)(7).

When determining whether a lineup creates "a substantial likelihood of misidentification," this Court has explained this "inquiry centers on the reliability

of the identification as determined by the *Biggers* factors." *Baker*, 70 M.J. at 288 (citing *Rhodes*, 42 M.J. at 291); *see also United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). These factors include: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the witness' demonstrated level of certainty during the confrontation; and (5) the elapsed time between the criminal act and the confrontation. *Biggers*, 409 U.S. at 199–200 (1972).

Argument

In this case, the military judge abused his discretion in failing to grant the defense's motion to suppress the voice lineup, which was so suggestive as to create a substantial likelihood of misidentification.

1. The military judge's ruling is due minimal deference from this court.

For the motion to suppress, the military judge did not make any findings of facts or conclusions of law. Instead, the military judge's initial ruling merely said "[d]enied," and his supplemental ruling said "the Government elected not to admit the voice lineup into evidence. Therefore, the Court will not issue findings of fact and conclusions of law . . . ." (JA 339–40).

However, as outlined above, the government elicited extensive testimony from Ms. JNK, SPC PK, and SA Hughes about the procedure and results of the

voice lineup. (JA 118–21, 158–59, 205–17). The government also explicitly referenced the results of the voice lineup during its opening statement, closing argument, and rebuttal argument. (JA 89, 247, 272–73). Most strikingly, the trial counsel told the panel "CID ran a voice lineup. [JNK] nailed it." (JA 89).

Because the military judge did not issue findings of fact and conclusions of law (based on a clearly erroneous assertion that the government did not admit evidence of the voice lineup), his ruling should receive minimal deference from this Court. *Flesher*, 73 M.J. at 312.

2. The voice lineup in this case was unnecessarily suggestive.

In appellant's case, there were several critical infirmities in the selection, creation, and administration of the voice exemplars and voice lineup. As outlined below, this flawed process created an unnecessarily suggestive lineup.

In selecting and creating the voice exemplars (which he had never done before), SA Shackelton made a series of mistakes and errors. While SA Shackelton did not testify at the motions hearing, the military judge said the defense's proffer of his expected testimony constituted "an agreement as to what his testimony would be" and authorized the defense to "argue those as facts supporting your motion." (JA 18).

First and foremost, "prior to obtaining samples from each of these individuals, [SA] Shackelton didn't do any type of screening to see if they sounded

alike at all." (JA 14–15). Instead, SA Shackelton "just grabbed six different people and had them come and provide samples," with the last person "picked simply at random" because he "happened to be the first guy that was found at the studio." (JA 14–15). One of these men had a speech impediment. (JA 41). Another was ill, from Jamaica, and weighed over 200 pounds. (JA 41). By contrast, SPC Hendrix is a 69 inch tall, 129 pound, 23-year old white male from Alabama. (JA 292).

Ultimately, this shoddy selection process led to a voice lineup where Ms. JNK agreed that some of the exemplars were "really strange," including an "Australian sounding" exemplar and others with "really deep voices" that were different from anyone she knew. (JA 137–38). This scenario is exactly why Mr. EP testified voice lineups should use voices with "similarities of the defendant." (JA 58).

Second, while the voice lineup consisted of six individuals, this number is highly misleading. Ms. JNK recognized SPC Wiegand's voice as one of the exemplars, and she already "knew" he was not her alleged attacker. (JA 138, 142). She also testified SPC Wiegand's voice is different from appellant's voice. (JA 109). Therefore, by including SPC Wiegand's exemplar, that only left five options. But two of these options were MC3 Cox (the overweight and ill Jamaican with a distinct voice) and SA Ahrend (who has a speech impediment and similarly

distinct voice). Both of these exemplars are highly problematic in the context of a voice lineup.

At the motions hearing, appellant's prior defense counsel testified that MC3 Cox was "Jamaican," "extremely ill that day with cough and sinus infection," and "weighed over 200 pounds." (JA 43). Based on these characteristics, appellant's prior defense counsel said "it seemed odd to me [ ] that he was one of the people selected to give a voice exemplar." (JA 43). Furthermore, MC3 Cox's voice exemplar is clearly distinguishable. For example, MC3 Cox does not put a "p" on the end of "asleep" and it is almost indeterminable that he is saying "Is your sister asleep?" (JA 314).

Special Agent Ahrend's voice exemplar is similarly problematic. In the defense counsel's proffer of how SA Shackelton would testify about "what Agent Ahrend did and what he sounded like," he said "it took Agent Ahrend several takes because he simply couldn't whisper" and "Agent Ahrend also has a *noticeable speech impediment*." (JA 15) (emphasis added).[5] Appellant's prior defense counsel similarly testified that SA Ahrend "had extreme difficulties giving an exemplar" and "had a very odd speech impediment." (JA 41).

[5] Again, the trial counsel agreed this proffer was accurate, and the military judge said "the court will consider those as an agreement as to what his testimony would be." (JA 18). Therefore, the agreed testimony for SA Shackelton included SA Ahrend having "a noticeable speech impediment." (JA 15).

Therefore, after accounting for SPC Wiegand, MC3 Cox, and SA Ahrend, there were only three remaining options: SA Shackelton, SA Zurilgen, and SPC Hendrix. But even this number is misleading. On his exemplar, SA Shackelton does not sound anything like SPC Hendrix.[6] (JA 314). At the motions hearing, the defense counsel argued SA Shackelton is "much older. *It's a different voice*. He's heavier. Those factors come into play on how a person's voice is impacted and how they are different based on their ethnicity, height, and weight." (JA 68) (emphasis added).[7]

As constructed, the voice lineup in this case only had two possible options: SA Zurilgen and SPC Hendrix. Notably, these are the same two voice exemplars selected by Ms. JNK during the first iteration of the voice lineup. She said "both voices matched" the person who "touched me wrong." (JA 22, 213–14, 311, 319, 344). On that point, the defense counsel argued "Agent Zurilgen is the only person in the lineup who sounds anything similar to the accused, and that's who she picked on the first iteration . . . Zurilgen and Specialist Hendrix." (JA 71).

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[6] Appellant also notes the oddity of the CID agent responsible for acquiring the voice exemplars providing his own exemplar for use during the lineup. During the motions hearing, the defense counsel noted "[i]f this is a photo lineup, he wouldn't have included a picture of himself." (JA 68).

[7] The defense counsel also said "we had requested that these individuals [come] here to testify today so that they—the court could see that they do look different and do have different heights and weights." (JA 68).

Third, the same six exemplars were used during each segment of the voice lineup. As the defense counsel stated in his proffer of SA Shackelton's testimony, CID did not create any lineup iterations that excluded SPC Hendrix's exemplar. (JA 16). Furthermore, each lineup iteration contained the critically flawed exemplars from SPC Wiegand, MC3 Cox, SA Ahrend, and SA Shackelton. A less suggestive lineup would have intermixed a variety of voice exemplars and then removed appellant's exemplar from at least one of the iterations. Instead, the voice lineup simply re-ordered the same six exemplars during each iteration.

Fourth, the exemplars consisted of two phrases consecutively and rapidly stated at three different voice levels. (JA 15, 210, 314). Again, this was contrary to the evidence provided to the defense, which was "the only way that [JNK] had identified who allegedly did this was through a whisper that she heard that night when she thought she was dreaming." (JA 42). Appellant's prior defense counsel testified "it seemed odd to me that they would ask for anyone during the lineup to give a normal voice, because that's not what the alleged victim heard that night." (JA 42).

Plain and simple, there was no viable reason to prepare voice exemplars that contained two separate voice levels above a whisper. As the defense counsel explained ". . . a whisper is different. It is completely different. You have different muscles, different long intake, different factors that make a whisper

different from a normal voice." (JA 70–71). This is borne out by simply listening to the voice exemplars, which were provided to the military judge for his consideration. (JA 11, 314). Ultimately, by repeatedly playing exemplars that contained multiple voice levels above a whisper, CID made it far more likely Ms. JNK would pick out SPC Hendrix's voice exemplar. Additionally, because the appellant was a person known to the accusing witness, the only independent evidentiary value in the voice identification would have been her ability to identify his whisper, not his normal speaking voice.

Fifth, on direct examination, Ms. JNK testified she was told to "write down the number that you think is Austin." (JA 119–20). The trial counsel subsequently asked her if she was told to identify who came into her room, and Ms. JNK said "Yes, which I knew was Austin because he was the only person in my house who had the girlish voice." (JA 120–21). During cross-examination, Ms. JNK again said she was told to pick out "Austin's voice." (JA 138).

While SA Hughes testified he never told Ms. JNK to identify SPC Hendrix's voice, he instead asked if she recognized the "alleged offender." (JA 21, 210, 212, 215–16, 319–20). This would actually have the same effect. Critically, at the time of the voice lineup, SPC Hendrix had already been charged—he *was* the alleged offender in the case. Therefore, by asking Ms. JNK if she recognized the "alleged offender," SA Hughes was literally asking her if she recognized SPC Hendrix. (JA

21, 210, 212, 215–16, 319–20). Furthermore, her ability to identify the voice of SPC Hendrix, a person she knew as a family friend, proves nothing.

Sixth, during the motions hearing, the trial counsel argued "the purpose of this lineup wasn't to identify the accused from strangers who sounded exactly like him. The purpose of this lineup was to exclude the other man in the house who might have been the perpetrator." (JA 65). The trial counsel was essentially claiming the voice lineup was not actually conducted to see if the alleged victim could identify the person the government had already charged with the crime. However, and more importantly, this exact type of argument was explicitly rejected by Mr. EP at the motions hearing:

> Q. Mr. [EP], you were talking about how a lineup should have all voices that sound similar. Have you been involved in lineups to exclude certain voices?
>
> A. Yes, I have.
>
> Q. In those kinds of lineups, it is important [to] have both the defendant's voice and the person's voice that you want to exclude?
>
> A. Yes.
>
> Q. *And is that true even if those two voices are very different?*
>
> A. *No. If those voices are very different, there should be two separate lineups* conducted where people in each one providing exemplars, where there are similar characteristics as I had mentioned just a few minutes ago--so, if we have somebody we are trying to eliminate and

> somebody we are trying to convict, we would need to have--and *if they were two completely different people, we would need two completely different voice lineups to work on both aspects*. That would be a two-part voice identification.

(JA 59) (emphasis added).

Again, for this case, even Ms. JNK thought SPC Wiegand's voice is different from appellant's voice. (JA 109). Therefore, even assuming the government's true "purpose of this lineup was to exclude the other man in the house who might have been the perpetrator," Mr. EP testified that a separate lineup still should have been used.

In summary, the clear and critical infirmities in the selection, creation, and administration of the voice exemplars and voice lineup created an unnecessarily suggestive lineup. As shown below, these errors also created a substantial likelihood of misidentification by confusing the issue of whether Ms. JNK was identifying the *whisper* of an assailant or the *voice* of a person she knew.

3. The lineup was conducive to a substantial likelihood of misidentification.

Even if a lineup is suggestive, the second inquiry relates to the reliability of the identification. For this analysis, this Court has explained this "inquiry centers on the reliability of the identification as determined by the *Biggers* factors." *Baker*, 70 M.J. at 288 (citing *Rhodes*, 42 M.J. at 291); *See also United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). These factors include: (1) the opportunity of the

witness to view the perpetrator at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the witness' demonstrated level of certainty during the confrontation; and (5) the elapsed time between the criminal act and the confrontation. *Biggers*, 409 U.S. at 199–200 (1972).[8]

First, Ms. JNK had a limited opportunity to hear the alleged perpetrator, as she said she heard only a handful of whispered phrases. At the motions hearing, the prior defense counsel testified "the defense had only been told that the alleged victim had made an identification based only on a whisper that she heard . . . the only way that she had identified who allegedly did this was through a whisper that she heard that night when she thought she was dreaming." (JA 42). In its motion response, the government only referenced the two statements from the voice lineup. (JA 304–10). These two statements contain ten total words. During her testimony at trial, Ms. JNK described three statements containing approximately

[8] The identification process in this case was solely predicated on Ms. JNK being able to identify her alleged attacker's voice. This alleged incident occurred late at night, the lights in her room were off, she had taken sleeping medication, and she only saw the man's approximate height and hair. (JA 107–09, 112, 126). She even told a CID agent she did not see the face of the man because it was "really dark." (JA 188–89, 293, 304). In one of his rulings, the military judge wrote Ms. JNK "stated that she did not clearly see the face of the perpetrator, but did hear the perpetrator . . . ." (JA 341).

fourteen total words. (JA 108–09, 112). Under either account, Ms. JNK would have heard less than fifteen words during the alleged incident.

Second, Ms. JNK's inconsistencies show that her degree of attention must have been limited. In describing this alleged sexual assault, Ms. JNK testified her assailant pulled down her pants and underwear and touched her "private area" inside her underwear. (JA 107–11). However, on other occasions, Ms. JNK said her attacker did not pull down her clothes and she was touched over her pants. (JA 188, 232–33). As one example, the sexual assault nurse examiner testified that she asked Ms. JNK about the touching several times using different phrasing, but Ms. JNK "answered the same every time" and said she was touched over her clothes. (JA 232–33). The sexual assault nurse examiner also asked Ms. JNK whether the man pulled down her pants, but Ms. JNK "said that he did not pull her pants down." (JA 233). Such a large variation supports the notion she must have had a limited degree of attention.

Furthermore, and even more clearly, the defense counsel and SA Wiesner had the following exchange during trial:

> Q. When you asked [Ms. JNK] the question, "Does she know what the person was doing with their hands at the time this was happening," she said, "*I was really tired. I don't remember that much about it.*"?
>
> A. Yes, sir.

(JA 187) (emphasis added).

Third, Ms. JNK did not give any prior descriptions of the voice of the man who touched her. In its motion response, the government even said "this factor does not apply, because [Ms. JNK] did not provide a prior description of the accused's voice . . . [w]hat [Ms. JNK] did know is that the voice was not her father's and it was not [SPC Wiegand's]. She confirmed this at the voice lineup when she confidently excluded the other man." (JA 308). Similarly, Mrs. SK testified her daughter initially "didn't know who [it was], but she knew it wasn't [SPC Wiegand] because she knew his voice." (JA 176).

Fourth, Ms. JNK's degree of certainty during the voice lineup wavered. After the first segment of the voice lineup, Ms. JNK initialed the part of the form stating she could "not positively identify any of the depicted voices as being involved in the incident being investigated." (JA 22, 213–14, 311, 319, 344). Essentially, after hearing appellant's voice exemplar the first time, Ms. JNK did not positively identify him as her assailant.

This brings up another key issue. The night of the incident, Ms. JNK only would have heard each phrase one time. However, during each exemplar in the voice lineup, Ms. JNK heard the same phrases spoken three separate times at three different voice levels. Therefore, within each exemplar, Ms. JNK heard more statements than she heard during the entire incident. Despite these additional

repetitions of each phrase, Ms. JNK still could not positively identify the voice of her alleged assailant during the first iteration.

Additionally, as explained by the defense counsel, the other exemplar selected by Ms. JNK during the first iteration was the only exemplar that was even remotely similar to appellant's. (JA 71). To that extent, Ms. JNK initially wrote that "both voices matched" the person who "touched me wrong." (JA 22, 213–14, 311, 319, 344).

Fifth, there was a lapse of nearly nine months between the statements and the voice lineup. In *Biggers*, the Supreme Court said a gap of merely seven months "would be a seriously negative factor in most cases." 409 U.S. at 201. Furthermore, in this case, the nine-month gap was exacerbated by the other events in this timeframe: SPC Hendrix was charged and an Article 32, UCMJ, investigation occurred. (JA 8–9, 37, 297, 302). If anything, these events would have reinforced in her mind that identifying SPC Hendrix's voice exemplar was the exact same thing as identifying her assailant.

However, even more broadly, the Supreme Court has explained "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). In this case, there is additional evidence and testimony demonstrating the voice lineup was unreliable and created a substantial likelihood of misidentification.

First, the motions hearing in this case included testimony from an expert witness that the voice lineup in this case was unreliable. (JA 52–56). Most notably, Mr. EP concluded the time gap in this case created significant issues over the voice lineup's reliability:

> Q. If a witness hears a voice at a whisper tone and then months later is asked to identify the person who whispered that tone those months before, and the voice exemplars are given at a whisper level, a normal speaking level, and a louder level, and all of those are listened to, would that-- how would that affect your opinion on reliability?
>
> A. *It's not reliable at all in my opinion*. Memory is not something that serves us well with understanding and being able to identify somebody through their voice. And that would be my opinion with regard to that.

(JA 56).

For this motion to suppress, the government held the burden, and the government did not seek to counter Mr. EP's testimony with its own expert witness. In fact, the government presented limited evidence and testimony, and then argued the lineup was "not suggestive, which is usually the key for determining whether a lineup is unreliable." (JA 64). The government also argued "[t]his lineup is also reliable because the voices that were used were similar enough to make it reliable. *These are all white males between the ages of 20 and 40* and it is not required that they have identical voices." (JA 64) (emphasis added). Such arguments pale in comparison to having an expert

witness repeatedly testify that the voice lineup in this case was unreliable. (JA 51–56).

Second, it appears Ms. JNK was specifically listening for SPC Hendrix's voice. To that extent, if Ms. JNK was directly listening for *SPC Hendrix's* voice—instead of comparing the exemplars to her *assailant's* voice—it creates a substantial likelihood of misidentification. Furthermore, whether Ms. JNK was able to eventually recognize SPC Hendrix's voice among the exemplars is not independent evidence of her ability to recognize her assailant's whisper.

As outlined above, Ms. JNK testified she was told to "write down the number that you think is Austin." (JA 119–20). The trial counsel subsequently asked her if she was asked to identify who came into her room, and Ms. JNK said "*Yes, which I knew was Austin* because he was the only person in my house who had the girlish voice." (JA 120–21) (emphasis added). Then, during cross-examination, Ms. JNK again said she was told to pick out "Austin's voice." (JA 138). Under each of these scenarios, Ms. JNK was specifically listening for *Austin's* voice, creating a substantial likelihood of misidentification.

The testimony of SA Hughes provides the exact same result, as he repeatedly testified that he told Ms. JNK to listen for the "alleged offender." (JA 21, 210, 212, 215–16). Again, at the time of the voice lineup, SPC Hendrix *was* the alleged offender. The voice lineup occurred after the preferral of charges and

the Article 32, UCMJ, investigation, in which Ms. JNK's parents testified and she elected not to participate. (JA 8-9, 297, 299-300).

Therefore, by asking Ms. JNK if she recognized the "alleged offender," SA Hughes was actually asking her if she recognized SPC Hendrix. (JA 21, 210, 212, 215–16). In addition to SA Hughes' testimony, this exact same phrase was used in the CID Agent Investigation Report: "SA Hughes then explained to [Ms. JNK] that SA Hughes would play each line-up and at the end of each segment would then *ask if she recognized the voice of the alleged offender*." (JA 319) (emphasis added).

Additionally, the voice exemplars in this case inexplicably included three different voice levels stated in rapid succession: (1) a whisper; (2) above a whisper; and (3) a normal speaking voice. (JA 15, 41, 314). Based on the nature of the allegation, the only relevant voice level was a whisper, but there is no evidence that Ms. JNK actually relied on the whispers during the voice lineup. When listening to SPC Hendrix's voice exemplar, Ms. JNK could have made her identifications based off his "normal voice" instead of his "whisper," particularly due to their prior interactions. Recognizing SPC Hendrix's "normal voice" is not the same as recognizing an assailant's "whisper" from nine months earlier. Plain and simple, due to the flawed voice lineup, it remains unclear which voice level was used to identify the appellant during the second and third iterations.

In conclusion, based on the evidence and testimony presented, the voice lineup in this case was both unnecessarily suggestive and created a substantial likelihood of misidentification. As Mr. EP stated in this testimony, such a lineup "should not be used to prosecute or convict somebody of a crime." (JA 55).

4. The admission of the voice lineup was highly prejudicial.

Based on the weakness of the government's case, the evidence of the voice lineup was highly prejudicial. In fact, prior to the voice lineup, the Investigating Officer concluded, "I do not find that reasonable grounds exist to believe the accused committed the offenses alleged in the Charges and their Specifications." (JA 297, 303).

In particular, the circumstances surrounding the initial report cast doubt on Ms. JNK's credibility, as does the quality and quantity of evidence. Ms. JNK initially mentioned the assault to her sister when trying to get her to take the blame for Ms. JNK lighting a cigarette. However, rather than reporting that someone touched her or scared her, Ms. JNK reported she was "sexually assaulted"—the exact same words she heard on an Armed Forces Network commercial. (JA 112, 128, 174, 236). The defense expert at trial, Ms. Nielsen, testified it is "extremely irregular" for children to use the words "sexual assault" when reporting an incident because "they don't understand what it means" and it is "not a term that children use." (JA 239).

The description of the alleged assault also changed over time. Initially, Ms. JNK reported she was touched over her clothes, but later testified she was touched under her clothing. (JA 107–11, 188, 232–33). Ms. Nielsen testified this change was "odd" because the "core pieces of an assault . . . don't usually change." (JA 239). Indeed, this change in Ms. JNK's story was a significant enough deviation from the charged offense that it resulted in the military judge deciding to provide a variance instruction to the panel. (JA 242–43).

Additionally, the small amount of touch DNA evidence was at best marginally probative. (JA 192–203). The DNA merely showed that male DNA was on Ms. JNK's shorts and underwear. (JA 197–99). Left unanswered was whose DNA was it? Was it her father's DNA? Was it a mover's DNA? Was it SPC Hendrix's DNA? These are all possible sources. The government witness at trial even testified "I can say there was male DNA there, but again I can't say how it got there." (JA 201).

Plain and simple, the voice lineup was critical to the government's case. This voice lineup was arguably the major difference between the Article 32, UCMJ, investigation and the panel's subsequent conviction. The government referenced the voice lineup throughout every phase of the court-martial and even told the panel that Ms. JNK "nailed it." (JA 89). Under the circumstances of this case, the evidence of the voice lineup was clearly prejudicial to the appellant.

Issue V

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO COMPEL AN EXPERT CONSULTANT, EP, IN THE FIELD OF AUDIO FORENSIC SCIENCE AND VOICE IDENTIFICATION.

Law and Standard of Review

A military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion. *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2009). An accused is entitled to expert assistance at the government's expense if the assistance is necessary to the defense. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008).

To show expert assistance is necessary, "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." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (citations omitted) (internal quotation marks omitted). In deciding the necessity of expert assistance, there is a three-part test: (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 would be able to develop. *Id*.

Argument

In this case, the military judge made limited findings of fact and no conclusions of law when he denied the defense motion to compel Mr. EP as an expert consultant in the field of audio forensic science and voice identification. (JA 339, 341–43). The military judge's initial ruling was merely one word: "Denied." (JA 339). Then, four months after the conclusion of the court-martial, the military judge wrote in his supplemental ruling:

> Since the Government did not move for the admission of the audio of the voice lineup into evidence and were unable to lay the foundation necessary to admit the document showing the names associated with the voice files (Prosecution Exhibit 11 for identification), it is unnecessary for the Court to enter findings of fact and conclusions of law as it relates to the appointment of Mr. [EP] to the defense team, since the purpose of his expert assistance would be to assist the Defense in their preparation to attack the reliability of the voice lineup.

(JA 342).

By finding it "unnecessary" to "enter findings of fact and conclusions of law," the military judge's ruling is due minimal deference. *Flesher*, 73 M.J. at 312. Also, while the government did not admit "the audio of the lineup," the government elicited testimony about the lineup from three witnesses, and the trial counsel referred to the lineup during his opening statement, closing argument, and rebuttal argument. (JA 89, 118–21, 158–59, 205–17, 247, 272–73). At one point, the trial counsel told the panel "CID ran a voice line up. [JNK] nailed it." (JA 89).

1. The defense showed expert assistance was needed.

Within the requests for an expert consultant in the field of audio forensics and voice identification,[9] the defense clearly articulated the need for expert assistance for multiple reasons, including: (1) evaluating and understanding the complex scientific evidence related to using audio recordings for administering voice lineups; (2) explaining and critiquing the methodologies used by CID in preparing and presenting the voice exemplars; (3) preparing the cross-examination of any government witness testifying about the voice lineup; and (4) explaining how the voice lineup was not performed according to the accepted standards of the scientific community. (JA 323–24, 328–29).

Several of these reasons were directly supported by Mr. EP's testimony at the motions hearing. (JA 50–58). He described multiple scientific aspects related to the voice lineup: the reliability of whisper identifications versus full voice identifications, the methodology of playing the voice exemplars, issues with memory based voice identifications, and the effect of the physical and background characteristics of personnel providing voice exemplars. (JA 53–55). This testimony helped demonstrate why the defense needed an expert to assist them in

[9] The two requests for assistance were attached to the defense's motion to compel and were specifically labeled as "evidence." (JA 317). At the motions hearing, both parties consented to the military judge considering each side's enclosures when deliberating on the motions. (JA 11–12).

understanding the interplay between the science of voice lineups and the procedures used in this case.

Furthermore, during the motions hearing, the defense counsel provided another explanation for why expert assistance was needed:

> [I]f this court denies the motion to suppress that lineup, the government has created a huge red herring that the defense just simply has to answer. We have to address [it]. And in order to do that, Mr. [EP] is the best person in that position to be able to do that. He has the requisite experience, he has the requisite knowledge, and is literally re-writing or writing the book on voice identification. He would absolutely – he is absolutely relevant and necessary if that evidence is coming in, Your Honor.

(JA 76).

Pursuant to this evidence and testimony supporting their motion, the defense sufficiently demonstrated that expert assistance in the field of audio forensics and voice identification was needed.

2. The defense demonstrated what the expert would accomplish.

Within their requests for an expert consultant in this field, the defense also explained what an expert would accomplish. This included stating Mr. EP "would review and evaluate the case file, voice exemplars, and the voice lineup and apply his knowledge in the field to assist the accused and counsel." (JA 324, 329). The defense also listed several specific accomplishments, including: (1) discovering improper or invalid methods used to prepare the voice exemplars and conduct the

voice lineup; (2) providing avenues of how the technical aspects of the voice exemplars and voice lineup could be advantageous to the defense; (3) evaluating the equipment and software used by the government; (4) assisting the defense in cross-examining witnesses at trial; (5) discussing how the background and physical characteristics of individuals providing voice exemplars can effect a voice lineup; and (6) explaining whether a child is capable of identifying someone almost nine months after an incident based on her memory of a whisper. (JA 324, 329).

Again, Mr. EP's testimony at the motions hearing supported several of these statements. Among other things, Mr. EP testified a whisper identification is less reliable than a full voice identification, highlighted several potential issues with the methodology used in this case, explained "[m]emory is not something that serves us well with understanding and being able to identify somebody through their voice," and said physical background characteristics "affect voice dramatically." (JA 56–57). Additionally, if hired by the defense, Mr. EP said he would "reverse engineer what has been done so far" in order to "understand the case better so that I could help guide a process to solve the complications that we currently have involved in this case." (JA 55).

3. The defense was unable to gather and present evidence that the expert would be able to develop.

The defense counsel attempted to educate themselves on the topics of audio forensics and voice identification. However, through the process of learning about

these topics, the defense counsel discovered "the field of Audio Forensics and Voice Identification analysis is a highly specialized field." (JA 324, 329). The defense "also learned it lacks the expertise to apply those principles adequately in this case." (JA 324, 329–30).

Critically, the defense did not have a way of obtaining the necessary information from other witnesses. Neither of the Special Agents who created or administered the slipshod voice lineup had any prior experience with voice lineups. (JA 16, 26). They had only worked with photo lineups. (JA 16, 26). Even further, the Kaiserslautern CID office "doesn't even have any type of protocols for how to conduct a voice lineup." (JA 16). Thus, any pretrial interviews with the relevant fact witnesses regarding the specific field of audio forensics and voice identification would have been futile.

4. The lack of expert assistance resulted in a fundamentally unfair trial.

The incomplete and misleading voice lineup evidence presented to the panel in this case resulted in a fundamentally unfair trial. The erroneous ruling deprived the appellant of expert assistance to develop cross-examination and potential expert testimony to undermine the illusionary strength of the voice identification.

Based on the limited information Mr. EP reviewed in this case, he already had significant concerns about the procedures and overall reliability of the voice lineup. (JA 53–57). His testimony at the motions hearing met the defense burden

under *Bresnahan*. As discussed above, the evidence against SPC Hendrix was weak and the voice identification was crucial to the finding of guilt. More specifically, the unfair use of voice lineup was arguably the major difference between the Article 32, UCMJ, investigation and the court-martial: the former resulted in a recommendation to not proceed to a court-martial, while the latter resulted in a conviction.

Without the assistance of an expert, the defense was left unable to adequately cross-examine SA Hughes and Ms. JNK on their participation in the voice lineup. The defense was also left without expert assistance and testimony that could have greatly—if not completely—diminished the probative value of the voice lineup in the eyes of the panel. This was the exact fear of the defense counsel during the motions hearing, when he explained "if this court denies the motion to suppress that lineup, the government has created a huge red herring that the defense just simply has to answer . . . Mr. [EP] is the best person in that position to be able to do that." (JA 76). Essentially, in addition to denying the defense motion to suppress the voice lineup, the military judge also denied their ability to properly attack it.

In conclusion, under the facts and circumstances of this case, the military judge's denial of the defense request for an expert consultant in the field of audio forensics and voice identification was an abuse of discretion.

Conclusion

Wherefore, SPC Hendrix requests this Honorable Court set aside and dismiss The Specification of The Charge.

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1. This brief complies with the type-volume limitation of Rules 24(c) because it contains 10,310 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hendrix*, Crim. App. Dkt. No. 20140476, USCA Dkt. No. 16-0731/AR, was delivered to the Court and Government Appellate Division on January 26, 2017.

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