

**DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY**

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| UNITED STATES |) | |
| |) | |
| v. |) | DEFENSE MOTION TO COMPEL |
| |) | PRODUCTION OF EXPERT |
| SRA LOGAN A. MCLEOD |) | CONSULTANT IN |
| AFLCMC Detachment 5 (AFMC) |) | FORENSIC PATHOLOGY |
| Maxwell AFB, Alabama |) | |
| |) | Date: 18 April 2022 |

COMES NOW the Accused, Senior Airman (SrA) Logan A. McLeod, by and through counsel, and respectfully moves this Honorable Court to order the government to appoint a properly qualified expert in pathology to perform analysis for and provide assistance to the Defense.

This motion is made pursuant to the Fifth and Sixth Amendments to the United States Constitution, U.S. CONST. amend. V-VI; Article 46 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; Rules for Courts-Martial (R.C.M.) 703, 905(b)(4), and 906(b)(7); and applicable case law.

I. FACTS

1. The Defense incorporates by reference the fact sections in Defense's previously filed motions, specifically the procedural portions.

Defense Request for Expert Assistance

2. Per the Court's Scheduling Order, Defense Expert Requests were due on 28 January 2022 with Government decision on acceptance of denial due on 15 February 2022. Attachment 1 at 1.

3. On 26 January 2022, Defense asked for an extension to 28 February 2022, citing the recent turnover of large amounts of discovery and some discovery being outstanding.

4. On 28 January 2022, in the Joint Status Update (JSU) to the Court, the request for an extension was noted and the Government cited they did not object. The Court did not make any additional note of the extension. Attachment 2 at 1.

5. On 23 February 2022, the Defense requested the Convening Authority appoint a confidential expert in forensic pathology to assist the Defense. Attachment 3.

6. The Defense's request pointed to the nature of the charge sheet and the fact the Government will enter trial proceedings having to prove, beyond a reasonable doubt, that SrA McLeod's plans for "Sarah" and "Caitlin" would have resulted in grievous bodily harm or death. *Id.* at 3, para. 6.

7. In addition to citing the factual basis for the requested expert, the Defense's submission identified what the requested expert assistance would accomplish for SrA McLeod, the anticipated duties of the requested expert, and why the Defense counsel is unable to perform the duties of the requested expert. *Id.* at 1-3.

8. On 13 April 2022, Defense reached out to Government inquiring about the status of both the Digital Forensic Expert (DFE) and Forensic Pathologist Request. Attachment 4 at 1. This email went without response from the Government.

9. On 14 April 2022, Defense was cc'd on an email chain with the DFE that had been requested and ultimately included a Memorandum of Agreement. Attachment 5. Defense never received any confirmation of such approval from the Government beyond being party to the email exchange between Trial Counsel and the DFE. There was no reference regarding approval of the Forensic Pathologist. *Id.*

10. Defense was first notified the Forensic Pathologist Request had been denied in the weekly JSU, submitted by the Government to the Military Judge and all parties on 15 April 2022. Attachment 6 at 1. As this was the first time Defense was put on notice of any denial, Defense sent a follow-up email to the Government seeking the Convening Authority's formal denial of the expert request. Attachment 7 at 1. The Government responded on the same date, indicating such denial had not been sent to Defense, but would be immediately forthcoming. Attachment 8 at 1.

11. Defense sent a follow-up email again on 18 April 2022 regarding the official denial and the need to have a copy in hand for this very motion. Attachment 9. at 1.

12. As of this motion's filing, Defense still has not received the Convening Authority's formal denial of Defense's request for an expert consultant in forensic pathology.

II. BURDEN

13. Under R.C.M. 905(c), the Defense bears the burden of persuasion. The burden of proof for any factual issue whose resolution is necessary to decide this motion is a preponderance of the evidence.

III. LAW

14. A military accused is guaranteed Due Process and the effective assistance of counsel by the United States Constitution. U.S. CONST. amend. V-VI.

15. R.C.M. 703, in concert with Article 46, UCMJ, provides that when employment of an expert at government expense is considered necessary by a party, the party shall submit a request to the convening authority. Additionally, R.C.M. 703(d) establishes the requirements for the content for the request for employment of an expert, specifically "a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment."

16. A military accused is entitled to expert assistance in preparing for trial when necessary for an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986); *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989); *United States v. Tornowski*, 29 M.J. 578, 580 (A.F.C.M.R. 1989). Further, an accused's entitlement to expert assistance is not limited to actual expert testimony at trial. The entitlement to that expertise is available "before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005); *see also Garries*, 22 M.J. at 290-91.

17. In other words, military courts have explained that there are two ways in which an expert may assist the defense: (1) "as a witness to testify at trial" and (2) "as a consultant to advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and argument to be made." *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989).

18. To show necessity, an accused must show more than a "mere possibility of assistance from a requested expert;" rather, an 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.'" *Bresnahan*, 62 M.J. at 143, (quoting *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001) (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994))).

19. "With the rapid growth of forensic-science techniques, it has become increasingly apparent that complex cases require more than general practitioners." *United States v. McAllister*, 55 M.J. 270, 275 (C.A.A.F. 2001).

20. Courts apply a three-part test to determine whether expert assistance is necessary. "The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *Bresnahan*, 62 M.J. at 143 (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)); *United States v. Ndayi*, 45 M.J. 315, 319 (C.A.A.F. 1996)).

21. As the Court of Appeals for the Armed Forces has noted, "While establishing the need for a particular expert consultant may require an accused to reveal his theory of the case and lose the element of surprise, counsel must weigh these factors against all others in making the decision whether to request additional expert assistance." *United States v. Warner*, 59 M.J. 573, 580 (C.A.A.F. 2003) (citation omitted). The Court enumerated possible ways to do this, including explaining how an expert consultant can establish weaknesses in the evidence links of the Government's case, how an expert would help develop cross-examination to cast doubt on the Government's case, or how the expert supports a particular defense theory of the case. *Id.* (citing *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990)).

22. As the Court of Appeals for the Armed Forces has made clear, entitlement to expert assistance is not limited to whether the expert will testify; rather, the entitlement exists "before trial to aid in the preparation of [the defense] upon a demonstration of necessity." *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006) (citations omitted).

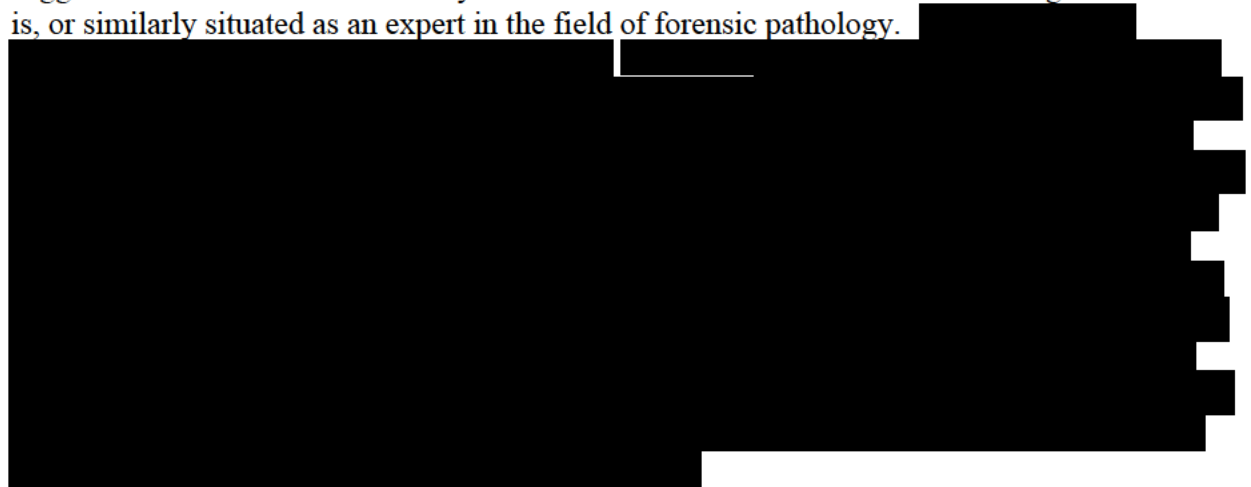
IV. DISCUSSION

23. This Honorable Court should grant the Defense's motion to compel production of an expert consultant in Forensic Pathology because the Defense cannot properly and completely analyze the alleged actions and statements of the accused, government agents/experts, their testimony, their likelihood to cause harm/trauma, and credibility without the assistance of an expert consultant.

24. While the Defense recognizes this Court cannot directly require the Convening Authority to spend money on Defense experts, the Court may indirectly compel this by abating the case until the Convening Authority appoints an appropriately qualified expert who can provide the assistance requested and required by the Defense.

25. The Defense established the necessity of this expert in its request. Attachment 1. The Defense's request satisfied each of the three prongs of the *Ford* test, outlining clearly why the expert assistance is needed, what the expert would accomplish for SrA McLeod, and why the untrained Defense counsel would not be able to develop this evidence. *Id.*; *Ford*, 51 M.J. 445 at 455.

26. As previously stated, given the nature of the charge sheet, the Government will enter trial proceedings having to prove, beyond a reasonable doubt, that SrA McLeod's plans for "Sarah" and "Caitlin" would have resulted in grievous bodily harm or death. This charging scheme suggests the Government will likely have to enter evidence on these matters using someone that is, or similarly situated as an expert in the field of forensic pathology.



27. Again, the expert consultant is needed to assist the Defense in understanding the physical/biological implications of these alleged acts and the likelihood these acts could have resulted in grievous bodily harm or death. Attachment 3. The expert would do this by, among other tasks, reviewing case discovery, consulting with the Defense, asking further relevant questions, evaluating and applying the evidence and testimony in this case, questioning other witnesses, developing/applying the information to a Defense trial theory, analyzing the proposed acts in developing further discovery, trial strategy and witness cross-examination, determining the realistic extent of trauma that could have been caused, potentially leading to further discovery and trial strategy and analyzing the factual issues described above, as they relate to bruising,

healing, and other sexual trauma in developing further discovery, trial strategy and witness cross-examination. *Id.* at 2-3, para. 7-8. Defense counsel lack the education, training, and experience in forensic pathology concepts to perform the assistance requested of the expert. *Id.* at 3, para. 9. Consultation with an expert with the requisite education, training, and experience is necessary to develop a strategy around the complex medical issues in this case concerning the charged conduct, and this Honorable Court should compel such assistance in light of such necessity and the Convening Authority's denial.

V. HEARING

28. A hearing pursuant to R.C.M. 905(h) is requested at this time.

VI. RELIEF REQUESTED

29. Wherefore, the Defense respectfully requests that the Military Judge grant the Defense's request and order the government to appoint a properly qualified expert in forensic pathology to perform analysis for and provide assistance to the Defense.

Respectfully submitted on April 18, 2022.

[REDACTED]

[REDACTED]
Defense Counsel

MBERS, USAF

Attachments:

1. Scheduling Order for U.S. v. SrA McLeod, dated 11 January 2022 (4 pages)
2. Government JSU email, dated 28 January 2022 (1 page)
3. Defense Request for Expert in Forensic Pathology, dated 23 February 2022 (12 pages)
4. Defense email to Government re: Status of Expert Requests, dated 13 April 2022 (2 pages)
5. Government Email to Defense's Digital Forensic Expert, dated 14 April 2022 (3 pages)
6. Government JSU email, dated 15 April 2022 (1 page)
7. Defense Email Response to Government JSU email, dated 15 April 2022 (1 page)
8. Government Counsel Response re Expert Denial, dated 15 April 2022 (1 page)
9. Defense Email Follow-Up to Government re: Status of Denial, dated 18 April 2022 (1 page)
10. Art 32 Hearing Audio (reference Attachment 4 to Defense MTS Statements, dated 31 March 2022), dated 6 Dec 21 (1 disc)

CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the Defense Motion to Compel Production of Expert Consultant in Forensic Pathology to the Military Judge and the Trial Counsel, via electronic mail and the case Sharepoint site, on 18 April 2022.


MARCELINA R. RIVERA-CHAMBERS, USAF

Defense Counsel