Pass Go, Collect $200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense's Right to a Government-Funded Expert

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Introduction

In trials by court-martial, the defense and the government have equal access to witnesses and evidence. The source for this right is Article 46 of the Uniform Code of Military Justice (UCMJ).[1] Under Article 46, an accused is entitled to an expert witness without regard to his ability to pay for those services.[2] However, before the government may be required to provide funding for an expert witness, the accused, under Rule for Court-Martial (RCM) 703(d), must show that the expert witness is relevant and necessary.[3]

Traditionally, the process of showing necessity in this context begins with the defense submitting a request for employment of an expert witness to the convening authority prior to trial.[4] This request must be accompanied by a "statement of reasons why the employment of the expert is necessary."[5] If the convening authority denies the defense's request, such a request may be renewed before the military judge.[6] At trial, the defense will have to demonstrate necessity by showing 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.'"[7] Applying this requirement to the defense in cases where the government does not have its own expert witness or when the government introduces objective expert testimony that is neutral and non-accusatory is appropriate. However, the requirement to show necessity should not apply when the government seeks the benefit of expert testimony that is inherently subjective or accusatory. An example of a subjective or accusatory expert would be one that gives conclusory opinions as to the cause of an injury or as to whether an alleged victim exhibits signs consistent with being abused. In these situations, the defense should be entitled to rebut the subjective expert testimony by relying on a government-funded expert without a specific showing of necessity. In other words, the defense should be able to "pass go, collect $200, and hire itself an expert."

This article argues that the defense is entitled to a government-funded expert under both fundamental fairness and Article 46 of the UCMJ in order to rebut subjective or accusatory expert testimony offered by the government. It suggests that the traditional requirement of the defense showing "necessity" under RCM 703(d) for an expert witness should be presumed in situations where the government relies upon subjective or accusatory expert testimony in support of its own case. The article begins by examining the leading case on the defense's requirement to establish necessity before being entitled to a government-funded expert. It then details the ongoing efforts of military courts to clarify what is meant by the requirement to establish "necessity." Next, the article explores the difference between subjective and non-subjective expert testimony,

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[1] Article 46 provides:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Commonwealths and possessions.

UCMJ art. 46 (2008).

[2] *Id.*; United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

[3] Rule Court-Martial 703(d) provides in part: "[T]he military judge . . . shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide and adequate substitute." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2008) [hereinafter MCM].

[4] *Id.* The defense must make this request *before* employing the expert. Under the *Manual for Courts-Martial* (*MCM*) there is no provision for the government to ratify previously accomplished employment.

[5] *Id.*

[6] *Id.*

[7] United States v. Lee, 64 M.J. 213, 217 (2006) (quoting United States v. Bresnahan, 62 M.J. 137, 143 (2005)); *see also* MCM, *supra* note 3, R.C.M. 703; United States v. Freeman, 65 M.J. 451 (2008).

and why the defense should be entitled to rebut the former as a matter of right and without an explicit finding of necessity. Finally, it concludes by arguing that when the government secures a subjective or accusatory expert witness for its case, both fundamental fairness and Article 46 of the UCMJ should require that the defense be provided equal access to expert testimony through a government-funded expert.

Overview of the Requirement to Establish Necessity

The Federal System

Any discussion of the defense's requirement to establish necessity before being entitled to a government-funded expert inevitably begins with the Supreme Court's 1985 seminal decision in *Ake v. Oklahoma*.[8] Ake was an indigent charged with first-degree murder.[9] At his arraignment, Ake's behavior was so bizarre that the trial judge, sua sponte, ordered him to be examined by a psychiatrist.[10] The examining psychiatrist determined that Ake was incompetent and suggested that he be committed rather than stand trial.[11] As a result, Ake was sent to a state mental hospital.[12] However, six weeks later, the same psychiatrist opined that Ake was now competent to stand trial on the condition that he continued to be sedated with an antipsychotic drug.[13]

Based on the psychiatrist's report, the State thereafter resumed the proceedings against Ake.[14] At a pretrial hearing, the defense notified the court that it would rely upon the defense of insanity.[15] In order to present this defense, Ake's attorney requested that the court order a state-funded psychiatric evaluation of his client to determine Ake's mental state at the time of the offense.[16] Ake's attorney argued that the Federal Constitution entitled his indigent client to a state-funded evaluation.[17]

The trial court rejected the defense's argument that the Federal Constitution required the state to fund a psychiatric evaluation.[18] Despite not having the benefit of a psychiatric evaluation, Ake continued to rely upon the defense of insanity.[19] At trial, the court instructed the jurors that insanity at the time of the offense was a defense.[20] However, the court also instructed the jurors that Ake was presumed to be sane at the time of the offense unless he could present evidence to raise a reasonable doubt as to his sanity.[21] Without a state-funded expert, Ake was unsuccessful in rebutting the presumption of sanity. The jurors found Ake guilty of the charged offenses and ultimately sentenced him to death.[22]

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[8] 470 U.S. 68 (1985).

[9] *Id.* at 70–71.

[10] *Id.* at 71.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 71–72.

[14] *Id.* at 72.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 72–73.

[22] *Id.* at 73.

On appeal, Ake argued that as an indigent defendant, he should have been provided with a state-funded psychiatrist in order to adequately present his defense.[23] The Oklahoma Court of Criminal Appeals rejected Ake's argument, and affirmed the findings and sentence.[24] The Supreme Court granted certiorari and reversed, holding that the Due Process Clause of the Constitution afforded an indigent accused with the right to supplement his defense team with expert assistance whenever such assistance was necessary for a fair trial.[25]

The Supreme Court in *Ake* thus recognized that the Constitution entitles an indigent defendant to expert assistance, but only after the defense establishes "necessity."[26] The Court in *Ake* neglected to provide guidance as to how a defendant would establish necessity. Instead, the Court presumed such a need whenever "the defendant is able to make an *ex parte* threshold showing [to the trial court] that his sanity is likely to be a significant factor in his defense . . . ."[27] Such a presumption, while perhaps applicable to cases involving the issue of sanity, provides little guidance to a court or practitioner in other instances where the defendant may need the assistance of an expert.

The Military System

A year after *Ake*, the United States Court of Military Appeals (CMA)[28] decided *United States v. Garries*.[29] In *Garries*, the court held that servicemembers were also entitled to expert assistance when necessary for an adequate defense.[30] Garries was charged with the murder of his pregnant wife. At trial, the defense requested the assistance of a government-funded investigator to aid the preparation of its case.[31] Although the court did not require the defense to show indigency in order to be entitled to a government-funded expert, it did require the defense to show necessity.[32] Unfortunately, as in *Ake*, the court in *Garries* failed to provide much guidance on what the defense must show in order to establish necessity.[33]

Nearly a decade later, in *United States v. Gonzalez*,[34] the CMA was once again confronted with the issue of whether the defense was entitled to government-funded expert assistance.[35] In *Gonzalez*, the defense requested the assistance of a

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[23] *Id.*

[24] *Id*. at 73–74.

[25] *Id*. at 74.

[26] *Id*. at 82–83.

[27] *Id*. The defense may be entitled to such a hearing to justify their request for a defense expert. This is not an absolute right and is only for unusual situations. *See* United States v. Garries, 22 M.J. 288 (C.M.A. 1986); *see also* United States v. Kaspers, 47 M.J. 176 (1997).

[28] The United States Court of Military Appeals was renamed the U. S. Court of Appeals for the Armed Forces pursuant to Pub. L. No. 103-337, § 924, Stat. 2663, on 5 Oct. 1994. Additionally, each court of military review was renamed court of criminal appeals.

[29] *Garries*, 22 M.J. 288.

[30] *Id.* The issue in *Garries* was whether the defense was entitled to expert assistance prior to trial. *Id.* In *United States v. Brenahan*, the court held that Article 46 of the UCMJ entitled an accused to not only expert testimony at trial, but also expert assistance "before trial to aid in the preparation of his defense upon a demonstration of necessity." 62 M.J. 137, 143 (2005); *see also* United States v. Kreutzer, 61 M.J. 293, 305 (2005).

[31] Relying upon *Ake*, the court required Garries to demonstrate necessity for the government-funded investigator. *Garries*, 22 M.J. at 291. Garries refused to make a showing of necessity on the record. *Id.* Instead, he requested an ex parte hearing (a hearing without notice to or presence of the opposing party). *Id.* The military judge denied Garries' request. *Id.* Garries contended that the military judge's refusal to grant an ex parte hearing denied him the ability to demonstrate necessity without giving away defense trial strategy to the government. *Id.* The Court disagreed, stating that it is only in the most unusual of circumstances where an ex parte hearing was required to ensure a fair trial. *Id.*

[32] The CMA noted that a military accused, after showing necessity, could access the resources of the Government under Article 46 of the UCMJ and Rule for Courts-Martial (RCM) 703(d). *Id*. at 290.

[33] *Id*. at 291 ("Because appellant's request for funds to obtain investigative services did not explain why an investigator was needed, what the investigator would do, and why appellant's two detailed defense counsel and their staff could not perform any additional investigative work needed, the military judge did not abuse his discretion in denying the request.").

[34] United States v. Gonzalez, 39 M.J. 459 (1994).

[35] *Garries* and *Gonzalez* both dealt with the issue of necessity in the context of expert assistance. Although there is some debate about whether the necessity standard for government-funded expert witnesses is the same as that for government-funded expert assistance (see United States v. Langston, 32 M.J. 894 (A.F.C.M.R. 1991)), the better view is that the same standard applies to both. *See* Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143 (1996).

government-funded investigator to explore the defense theories surrounding the death of appellant's wife.[36] Unlike in *Garries*, the CMA gave clear guidance as to what would be required in order to establish necessity for expert assistance. The CMA adopted a three-part analysis first set forth by the Navy-Marine Court of Military Review in *United States v. Allen*.[37] Under this test, which is now commonly referred to as the *Gonzalez* analysis,[38] the defense must establish: (1) why the expert assistance is needed; (2) what the expert assistance would do for the accused, and; (3) why the defense is unable to provide the evidence the expert assistant would provide.[39] Therefore, unless the defense is able to fund the expert witness on its own,[40] it must be prepared to show "necessity."

In meeting the *Gonzalez* analysis, the defense should be prepared to answer several questions, including:

> 1. What have you done to educate yourself in the requested area of expertise?
> 2. What experts and government employees having knowledge in this area have you interviewed?
> 3. If the issue in question involves a laboratory analysis by the [Criminal Investigation Division] CID or the [Federal Bureau Investigation] FBI, have you requested the opportunity (using [Trial Defense Services] TDS funding) to visit the crime lab and to examine the procedures and quality control standards used in the laboratory in this or any other case?
> 4. What did you learn from the visit?
> 5. What do you need to learn that you still do not understand in order to defend the accused in this case?
> 6. What treatises have you examined?
> 7. Are there experts other than the one requested who would meet your needs? Have you talked with them? Would providing an Army employee as an expert consultant meet your needs? If not, why?
> 8. How many other cases involving this issue have you tried? As to military defense counsel with little or no expertise in this area:
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> > (a) Have you requested that the senior defense counsel or regional defense counsel detail another defense counsel with greater familiarity in the area of expertise to help defend the accused? Have you advised the accused of his right to request an [Individual Military Counsel] IMC who has greater familiarity in this area?
> > (b) Have you requested through TDS channels that CID or other Army organizations provide you and other counsel with training in this area?
> > (c) If this area of expertise is common to many cases in your jurisdiction, why have no such requests been made previously?
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> 9. Have you requested through TDS channels any resource material in this area, if not readily obtainable from local sources?[41]

In general, the more prepared the defense is in addressing the aforementioned questions, the greater the likelihood it will be able to meet the *Gonzalez* necessity requirement for an expert witness. The necessity requirement under *Gonzalez* is appropriate in those cases where the government has not hired an expert or where the government's expert will present objective and non-accusatory testimony. However, in cases where the government hires an expert to offer subjective or accusatory testimony, the defense should not be required to meet the nine non-exhaustive factors listed above in assessing whether the defense is entitled to a government-funded expert.

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[36] Gonzalez believed that his wife was part of a Spanish criminal drug element and had been robbed and killed by members of that drug element. *Gonzalez*, 39 M.J. at 460. In order to prove his belief, Gonzalez wanted a government-funded expert to investigate his wife's background and her known associates. *Id.*

[37] United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

[38] *See generally* United States v. Washington, 46 M.J. 477 (1997).

[39] *Gonzalez*, 39 M.J. at 461 (citing *Allen*, 31 M.J. at 623).

[40] Nothing prevents the defense from hiring an expert on its own. If the defense does so, it only need be concerned with Military Rules of Evidence 401, 403, and 702.

[41] Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1, 16 n.160.

This article proposes that the nature of the expert testimony involved—and in particular, whether such testimony is objective or subjective or accusatory—is relevant in assessing whether a full *Gonzalez* analysis is called for prior to the defense being entitled to a government-funded expert witness. There is nothing in Article 46 of the UCMJ, R.C.M. 703(d), or any other provision of the *Manual for Courts-Martial* (*MCM*) that addresses the distinction between subjective and objective expert testimony. However, for the purposes of the defense's requirement to show necessity for a government-funded expert, this article proposes that there is a real distinction between the two.

Consider a sexual assault nurse examiner who opines that the alleged victim was sexually abused or a forensic psychologist that testifies that the accused could appreciate the wrongfulness of his actions at the time of the offense. In either case, the testimony offered by the government is subjective, accusatory, and will undoubtedly be used by the trier of fact as evidence of the guilt or innocence of the accused. The defense will obviously want to counter such evidence, not only through cross-examination of the government expert witness, but also by eliciting favorable testimony from an expert of its own. In a case where the government proffers expert testimony that is subjective or accusatory, there should be no need to require the defense to establish necessity for a government-funded expert by going through the *Gonzalez* inquiry.

Suppose instead that the government calls a toxicologist who testifies that the blood alcohol level of the victim at the time of her death was .12 or a meteorologist who testifies that it snowed in Chicago on 4 September 2007. The testimony of the toxicologist or meteorologist could just as easily be used by the trier of fact to determine the guilt or innocence of the accused. However, this testimony differs substantially from the previous examples in that the testimony is objective and non-accusatory. The testimony does not rely upon the interjection of subjective judgments by the expert witness. Thus, the necessity for an independent defense expert in this situation is not as obvious. That is not to say that the defense would not want to hire an independent expert in this regard or that an independent expert could not assist the defense. However, if the defense wishes to retain an expert at the government's expense, it should be required to demonstrate necessity in accordance with *Gonzalez*.

At least one military court has implicitly recognized the difference between subjective and objective expert testimony. In *United States v. Mann*, the government relied upon expert testimony to support the allegations of a four-year-old girl who alleged that Mann had digitally penetrated her vagina and anus while babysitting her.[42] The government expert examined the girl and concluded that the medical evidence of her injuries was consistent with one-time digital or penile penetration of her vagina.[43] At trial, the defense requested the services of a government-funded expert to assist it in establishing that physical evidence from the girl's examination was in fact inconsistent with digital or penile penetration.[44]

According to *Mann*, the testimony proffered by the government was "neither neutral nor non-accusatory, [was] inherently subjective, and differ[ed] in kind from that type of expert assistance, for example, provided by a chemist identifying the components of a substance."[45] Although noting that the expert testimony at issue was accusatory and subjective, the court did not eliminate the need for the defense to meet the *Gonzalez* necessity test for a government-funded expert. The military judge ultimately denied the defense request, concluding that:

> [T]here was no showing of materiality and necessity for the services of Dr. Strickland, because (a) the medical evidence was inconclusive; (b) expert opinion of chronic abuse would not have made out a defense for appellant because of his admitted opportunities to assault [the four-year-old] in the months preceding this alleged offense, even were Dr. Strickland to interpret the medical evidence that way; (c) there was no showing whatsoever, other than the unsubstantiated assertions of the trial defense counsel, that Dr. Strickland, if employed, would have rendered such an opinion of chronic abuse, or that [the four-year-old's] injuries were not consistent with a single act of digital and penile penetration of [the four-year-old's] vagina; the intimations of the defense that she would have were "pure speculation and wishful thinking . . . a fishing expedition, and the government is not required to provide the net" . . . .[46]

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[42] United States v. Mann, 30 M.J. 639, 643 (N.M.C.M.R. 1990), *rev. denied*, 32 M.J. 45 (C.M.A. 1990).

[43] *Id.* at 641.

[44] *Id.* at 642.

[45] *Id*.

[46] *Id*. at 643.

The court concluded that the military judge acted within his discretion in denying the defense request for a government-funded expert because the defense failed to establish necessity in accordance with *Gonzalez*.[47] Nonetheless, *Mann* supports the position that there is an appreciable distinction between objective and subjective experts.

Why Is a New Approach to Government-Funded Defense Experts Warranted?

Article 46 of the UCMJ

Though it is generally the defense's burden to establish necessity under the *Gonzalez* analysis in order to be entitled to a government-funded expert, recent Court of Appeals for the Armed Forces (CAAF) opinions indicate that Article 46 of the UCMJ may be loosening this requirement in order to allow the defense to rebut subjective and/or accusatory expert testimony by a government witness.[48]

In *United States v. Warner*,[49] the defense requested the services of a civilian expert witness. The defense's need for an expert witness was not disputed. What was in dispute was whether the government provided an adequate substitute to the defense requested civilian expert. Under military law, the government is not required to provide the defense with the particular expert it requested, but need only provide an adequate substitute to the defense.[50]

After obtaining one of the Air Force's preeminent experts on shaken baby syndrome, the government denied the defense's request for a civilian expert of similar qualifications.[51] The government then appointed a military expert whom they claimed was an adequate substitute for the civilian expert.[52] The CAAF held that "[p]roviding the defense with a 'competent' expert satisfies the Government's due process obligations, but may nevertheless be insufficient to satisfy Article 46 if the Government's expert concerning the same subject matter area has vastly superior qualifications."[53] The court in *Warner* acknowledged that while the government may have satisfied the requirements of RCM 703(d), this did not mean that it met the requirements of Article 46.[54] As a congressional statute, the CAAF stated "[t]o the extent that Article 46 provides rights beyond those contained within R.C.M. 703, it is our judicial duty to enforce the statutorily-established rights."[55]

The effect of the *Warner* decision is to ensure that the government is not able to exploit its opportunity to obtain an expert vastly superior to that of the defense. The government is now required to either provide the defense requested expert,

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[47] The *Mann* court stated:

> We conclude that the military judge acted within his discretion in denying the defense motion requesting government funding for the services of Dr. Strickland as an investigative assistant. There was no *evidence* presented to the military judge from which he could conclude that Dr. Strickland could determine that the medical evidence of [the 4-year-old girl's] injuries indicated chronic abuse as their cause, or that she could provide more specific expert investigative assistance to the defense than that which had already been provided by Dr. Wulfsberg.

Id. at 643. However, Dr. Wulfsberg had testified that he was not qualified to render a forensic medical opinion as to the cause of injuries. *Id*. at 644.

[48] *See* United States v. Warner, 62 M.J. 114 (2005); United States v. Lee, 64 M.J. 213 (2006).

[49] *Warner*, 62 M.J. 114.

[50] *Id*. at 118 (citing United States v. Calhoun, 49 M.J. 485, 487–88 (1998)).

[51] *Id.* at 117.

[52] If the defense believes the substitute expert provided by the government is not adequate, it bears the burden of demonstrating that the employment of the civilian expert is necessary. United States v. Robinson, 24 M.J. 649, 652 (N.M.C.M.R. 1987).

> We believe that the Sixth Amendment right of an accused to have compulsory process for obtaining witnesses in his favor demands that an "adequate substitute" for a particular requested expert witness at trial not only possess similar professional qualifications as the requested witness, but also be willing to testify to the same conclusions and opinions. To find otherwise would be to effectively foreclose the accused from obtaining favorable expert testimony to counter Government experts testifying against him at trial and would surely amount to a denial of "raw materials integral to the building of an effective defense."

Id. (citing Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).

[53] *Warner*, 62 M.J. at 119.

[54] *Id.*

[55] *Id.* at 121.

or provide one whose "professional qualifications [are] at least reasonably comparable to those of the Government's expert."[56]

Without a requirement for parity between government and defense experts, the court-martial system would be open to abuse. The government would always have a vested interest in seeking to obtain preeminent experts for itself, while providing the minimally required experts under RCM 703(d) to the defense. According to the CAAF, "Article 46 reveals that Congress intended a more even playing field."[57]

Similarly, in *United States v. Lee*, the CAAF decided that the playing field is "rendered even more uneven when the Government benefits from scientific evidence and expert testimony while the defense is wholly denied a necessary expert to prepare for and respond to the Government's expert."[58] In *Lee*, the government granted itself an expert in computer forensic and digital photo analysis.[59] The defense requested, but was denied, a government-funded expert to assist in preparing its case.[60] The CAAF held that:

> Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, *fundamental fairness* compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in preparation or presentation of his defense.[61]

It is likely that the CAAF will continue to expand the reach of Article 46 to ensure that the playing field is level between the government and defense. At the very least, *Warner* and *Lee* have opened the door to possibility of the defense not being required to satisfy the *Gonzalez* necessity requirement when requesting a government-funded expert.

Fundamental Fairness

If the defense is unable to meet its obligation to establish necessity for a government-funded expert, it has been asserted that a "fundamental fairness" standard may also exist for justifying expert assistance.[62] The question of whether fundamental fairness could be a basis for justifying expert assistance originated in *United States v. Mosely*.[63] In *Mosely*, the CAAF reviewed the decision of a military judge to order a retest of Mosely's urine sample.[64] Mosely had previously tested positive for cocaine in a random urinalysis.[65] The military judge cited RCM 703(f)(1) to support his decision to grant the defense retest request.[66] Despite the military judge's cited authority, the CAAF determined that his ruling was actually primarily "keyed to the grounds urged by the defense: fundamental fairness, relevance, and the minimal burden on the Government."[67]

Although *Mosely* initiated the discussion of a possible fundamental fairness standard, the CAAF in that case never expressly adopted the doctrine. Rather, the court based its decision on the determination that the military judge did not abuse his discretion. As asserted by one author:

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[56] *Id*. at 120.

[57] *Id*.

[58] 64 M.J. 213, 218 (2006).

[59] *Id.* at 214–15.

[60] *Id.* at 215.

[61] *Id*. (emphasis in original).

[62] Gunn, *supra* note 35 (noting, but dismissing the possibility that a new "fairness" standard exists for justifying expert assistance).

[63] 42 M.J. 300 (1995).

[64] *Id.* at 301.

[65] *Id.* at 300–01

[66] Under RCM 703(f)(1), "each party is entitled to the production of evidence which is relevant an necessary." MCM, *supra* note 3, R.C.M. 703(f)(1).

[67] *Mosely*, 42 M.J at 303.

> [R]ather than signaling the emergence of a new standard for receiving expert assistance, the case should probably be seen as merely reaffirming the fact that the military judge has broad discretionary power to order additional evidence and to provide or deny expert assistance at government expense.[68]

Even though the court did not embrace fundamental fairness as support for its ruling, it also importantly chose not to question the military judge's decision to rely upon the doctrine. Fundamental fairness, as discussed in *Lee*, is at the heart of Article 46's mandate that both sides have equal access to witnesses and evidence.[69] A military judge should, in order to even the playing field, use this doctrine to support a determination that the defense is entitled to a government-funded expert whenever the government relies upon a subjective or conclusory expert in its case.

The Intuitive Appeal of "If You Get One, I Get One Too"

Aside from the strict legal basis for why the necessity requirement should be presumed in cases where the government has hired an expert to offer subjective and/or accusatory testimony, the author offer in addition a common sense basis for the proposed new approach: If the matter at issue was important enough for the government to have gone through the trouble to hire an expert, then by extension, it would appear necessary for the defense to hire an expert to rebut the government's witness. In other words, if the matter was so significant and complex that the government hired someone to opine on it, how can a defense expert be anything less than necessary? By definition, if it is "necessary" for the government to hire an expert to testify as to a subjective and/or accusatorial matter, then so too is it "necessary" for the defense to hire its own expert. It would be a rare case indeed where an issue was so vital that the government hired an expert witness to adduce testimony at trial, but where the defense would be sufficiently equipped to present rebuttal testimony by using solely the resources at its disposal.

A Bright Line Rule

Finally, a bright-line rule for military judges to apply in cases where the government has hired an expert to offer subjective and/or accusatory testimony has the benefits of certainty, predictability and ease of application. These benefits cannot be overstated. First, the defense will know where it stands in terms of the availability of government-funded experts. Second, the government will be encouraged to prepare its case on the understanding that if it retains a certain type of expert, it will be required to provide the benefits of expert assistance to the defense as well. This will motivate the government to use expert evidence judiciously and only where genuinely needed. Finally, with a bright-line rule, a military judge will not have to engage in a searching and comprehensive review of the case to ascertain whether the defense has demonstrated that a government-funded expert is necessary.

Colonel Henley's list of nine non-exhaustive factors[70] that courts could consider in assessing the necessity requirement suggests how burdensome the analysis can become for all involved. The resources of both the courts and the parties are more effectively utilized by eliminating the need for such a detailed review, especially where such a review should, in the vast majority of cases, lead to the conclusion that the defense is in fact entitled to a government-funded expert.

A Suggested Approach for Military Judges

The suggested approach for military judges to employ in considering whether to require the defense to meet the requirement of establishing necessity for a government-funded expert is one which focuses both on whether the government has secured the benefit of expert testimony for itself, as well as the nature of the expert witness' testimony. Where the government has determined that it is not necessary for it to secure an expert for trial, a military judge should require the defense to meet the *Gonzalez* necessity test. Where, however, the government secures an expert witness for trial, the court should then consider the nature of the expert witness' testimony in order to ascertain whether a necessity inquiry is required.

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[68] Gunn, *supra* note 35, at 150 (citing United States v. Robinson, 39 M.J. 88 (C.M.A. 1994), as supporting the proposition that *Mosely* should be read as a case reaffirming the broad discretionary power of the military judge); *see also* United States v. Washington, 46 M.J. 477 (1997). *But see* United States v. Mann, 30 M.J. 639 (N.M.C.M.R. 1990), *rev. denied*, 32 M.J. 45 (C.M.A. 1990) (stating defense may be entitle to expert assistance in developing its case because the government had similar help).

[69] United States v. Lee, 64 M.J. 213, 218 (2006) ("Courts-martial must not only be just, they must be perceived as just.").

[70] Henley, *supra* note 41, at 16 n.160.

In cases where the expert's testimony is objective and non-accusatory, the court should apply the necessity test as traditionally understood. In situations where the government intends to elicit subjective or accusatory expert testimony, however, the court should permit the defense to rebut this testimony with a government-funded expert without the requirement to meet the *Gonzalez* necessity test. Fundamental fairness and Article 46 require nothing less.

There will be cases, of course, where the characterization of the expert witness' testimony cannot easily be classified as "objective" or "subjective." In such a case, it should be left to the sound discretion of the military judge whether a *Gonzalez* analysis is necessary. It is suggested that the closer the expert's testimony comes to opining on a central fact at issue—even if couched as a neutral opinion—the more likely an explicit necessity showing is not needed.

Conclusion

The time has come to re-think the requirement for an explicit showing of necessity in cases where the government has retained an expert who will offer subjective and/or accusatory testimony. In such circumstances, the requisite necessity should be presumed by the mere fact that the government has deemed it essential to hire an expert. The *Gonzalez* test for necessity, however, should be preserved for cases where the government has not hired an expert or where the government's expert will present objective and non-accusatory testimony.

This common sense approach to government-funded defense experts is supported by the idea of fundamental fairness that is beginning to develop in the military justice case law. Although not fully defined or accepted by military courts, there is a strand of case law that rests on the idea that the defense is entitled to a government-funded expert as a matter of fundamental fairness. The approach is further bolstered by Article 46 of the UCMJ, which is a clear statement of congressional intent that the defense should not be placed at a disadvantage in a court-martial.

The proposed solution will not only ensure just results in courts-martial, but will also enhance the perception of fairness in the military justice system. At the end of the day, government funding for defense experts is a small price to pay for a justice system that is fair and evenhanded.