IN THE UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

U N I T E D S T A T E S, )

 Appellee ) SUPPLEMENT TO PETITION FOR

 ) GRANT OF REVIEW

 v. )

 )

DARIN G. LOPEZ ) USCA Dkt. No. XXXXXX/NA

Intelligence Specialist ) Crim.App. No. 201400373
Second Class (E-5) )

United States Navy, )

 Appellant )

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES:

**ISSUES PRESENTED**

**I.**

**THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR SEXUAL ASSAULT DUE TO INTOXICATION WHERE E.H. CONSUMED ONLY THREE ALCOHOLIC DRINKS AND THERE IS NO EVIDENCE E.H. CONSUMED ANY OTHER INTOXICANT.**

**II.**

**APPELLANT WAS DENIED HIS RIGHT UNDER THE 6TH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PRESENT EXPERT TESTIMONY ON WHETHER OR NOT E.H. COULD HAVE EXPERIENCED MEMORY BLACKOUTS OR BECOME UNCOUNSCIOUS AFTER CONSUMMING ONLY THREE ALCOHOIC DRINKS.**

**Reasons to Grant Appellant’s Petition and Summary of Argument**

 Appellant’s right to compel the government to prove each element of the charged offense was materially prejudiced when the judge concluded that despite the evidence that E.H. had consumed only three drinks, she was, “incapable of consenting to the sexual act due to her impairment by an intoxicant . . . .” R. at App. Ex. XX. The alleged victim, E.H. testified that she consumed only three alcoholic drinks, had a full stomach, and was an experienced drinker. R. at 127, 129, 157. Based on the evidence introduced at trial, there are three possible explanations for E.H.’s claimed lack of memory: she was unconscious, she experienced alcohol induced blackouts, or she is lying about her lack of memory. The first two reasons are inconsistent with E.H.’s testimony that she consumed only three alcoholic drinks. The only reasonable explanation is that E.H. lied when she testified that she had no memory during critical periods on the evening in question. Because the military judge and the Navy court ignored the only logical explanation they relieved the government of its obligation to prove the second element of the charged offense beyond a reasonable doubt.

 Detailed defense counsel was ineffective when he failed to call his expert witness to testify to the likelihood that E.H. experienced memory blackouts before or was too intoxicated to consent as a result of consuming just three alcoholic drinks.. Appellant was prejudiced because the only contested issue in the case was whether E.H. was experiencing blackouts, was passed out during sex with appellant, or lied about her lack of memory. By failing to call the expert witness, defense counsel failed to present the most plausible explanation for E.H.’s testimony thereby depriving appellant of any defense at all.

**Statement of Statutory Jurisdiction**

 The Navy Court had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ]; 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)(2016).

**Statement of the Case**

 A military judge, sitting as a general court-martial convicted Intelligence Specialist Second Class (IS2) Darin G. Lopez [hereinafter appellant], contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ, 10 USC § 920(2012). R. at 209. The military judge sentenced appellant to be confined for a period of three years and to be discharged with a bad-conduct discharge. R. at 238. The convening authority approved the adjudged sentence. GCMO No. 19-14, 9 October 2014.

 On October 7, 2015, the Navy court returned the case to an appropriate convening authority to order a *DuBay* hearing or, in the alternative, to withdraw the original action and complete new post-trial processing with a substitute defense counsel representing appellant. *United States v. Lopez*, 2017 CCA LEXIS 21 \* (N.M.C.C.A. January 18, 2017)(unpub.)(Appendix A). The convening authority again approved the adjudged sentence on 11 February 2016. *Id*.

 On January 18, 2017, the Navy court issued an unpublished opinion affirming the findings and the sentence. *Id*. Appellant was notified of the Navy Court’s decision. In accordance with Rules 19 and 30 of this court’s Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review and motion for enlargement of time to file the supplement to the petition. This Court granted the motion to extend time to April 6, 2017 and a second motion to extend time to April 21, 2017. (Appendix B).

**Statement of Facts**

 In June 2012, Lance Corporal E.H. and appellant met at a taxi stand at a mall in Sierra Vista, Arizona when both were assigned to Fort Huachuca. R. at 123. Appellant gave E.H. a ride from the mall to her barracks on Fort Huachuca. R. at 124. The two exchanged phone numbers. *Id*. E.H. testified that later that day she went to dinner with appellant, but explained, “I don’t remember anything about it.” R. at 125. She had previously told investigators that she had dinner with appellant at Appelbees, but at trial claimed no memory of the details of the dinner or even that she had met appellant at Applebees. R. at 144.

 E.H. testified that after exchanging phone numbers she spoke with appellant “daily.” R. at 125. She also testified that she is “not entirely sure” when she saw appellant again. R. at 126. She further testified that on Saturday, 24 November 2012, she went to the Peacock club “late” in the evening in Sierra Vista to meet friends. R. at 126, 156. When her friends did not show up, she called appellant and invited him to meet her at the Peacock. R. at 126-27. That evening, E.H. made several phone calls to appellant.[[1]](#footnote-1) The call E.H. referred to in her testimony occurred at 10:55pm. *See* R. at 126-27; phone records. E.H. also made a fourteen-minute call to appellant at 11:25pm and a five-minute call to appellant at 11:53pm. *Id*. Appellant made three subsequent calls to E.H. that evening at 12:36am, 12:41am, and 12:53am. *See id*. This evidence demonstrates that E.H. was interacting with appellant during time periods when she alleges she had no memory.

 E.H. testified that she had a total of three drinks at the Peacock club: “Pineapple juice, Coconut Rum, mixed drinks, two of them, and one shot of Goldschlager.” R. at 127. She had nothing to drink before going to the Peacock. R. at 156. During that time period, E.H. drank a few mixed drinks once or twice per month without significant side effects. R. at 129. On the night at issue, however, she explained that she felt “dizziness.” *Id*. She described her level of intoxication as “more intense, different almost,” compared with other nights she would drink. *Id*.

 E.H. testified that the last thing she remembers about being at the bar was, “Just standing there.” *Id*. She testified that the next thing she remembers is waking up with appellant on top of her having sex with her. R. at 130-31. She testified that appellant said, “don’t worry, I used a condom.” R. at 130. Appellant’s apartment was a third floor walk-up. R. at 174. E.H. does not remember leaving the bar or going anywhere else. R. at 130. The government introduced no evidence as to how E.H. got from the bar to appellant’s apartment and up three flights of stairs.

 According to E.H. when she woke up that morning her black dress was up around her waist and she was covered in vomit and a sticky clear fluid. R. at 132-34. She “immediately got into the shower” at which point she discovered bite marks on her breasts and scratches on her lower back. R. at 133-34. When E.H. went for a medical appointment the morning of 24 November 2012, she did not show the injuries to anyone. R. at 143. There are no photos or any other record of the alleged injuries. *Id*.

 After getting out of the shower, E.H. testified that she wrote in the mirror, “I’m in hell, help me.” R. at 135. She then sat on a couch wrapped in a towel while she waited for her dress to finish in the dryer. R. at 136-37. She testified that she remembers hearing appellant’s voice in the apartment, but that she could not see him. R. at 137.

 Tamara Ruiz, a taxicab driver, testified for the government. R. at 104. Ms. Ruiz was dispatched to pick up a male at appellant’s address. R. at 105. When she arrived at the address, a male waived at her from the second floor and then E.H. came down and got into her taxicab. R. at 106, 112. E.H. appeared “desperate” and was “crying.” R. at 108, 110. Ms. Ruiz offered to take E.H. to the police, but E.H. declined the offer. R. at 111. Ms. Ruiz testified that she spoke with E.H. for an hour before dropping her off on Fort Huachuca. R. at 107. According to Ms. Ruiz, they stopped at a 7-Eleven where E.H. bought a pack of cigarettes and a soda. R. at 111-12. During cross-examination, E.H. stated that she has no memory of the hour-long conversation with the taxicab driver. R. at 143. E.H. also denied any memory of stopping at the 7-Eleven or buying cigarettes or a soda. R. at 144-45.

 Defense counsel conceded during his opening statement that a sexual act took place. R. at 100. In his Special Findings, the military judge found that appellant, “committed a sexual act upon LCpl E.H. . . .when LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant, a condition that was known or reasonably should have been known to Accused.” R. at App. Ex. XX. The military judge further explained that, “[i]n finding LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant . . . the Court relies upon the credible testimony of LCpl E.H.” *Id*. The military judge points to the statement, “don’t worry, I used a condom,” as “key in establishing . . . E.H. was not aware the sexual act was taking place when it began because she was unconscious due to her state of intoxication.” *Id*. The military judge does not address the possibility that E.H. suffered a memory blackout.

**I.**

**THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR SEXUAL ASSAULT DUE TO INTOXICATION WHERE E.H. CONSUMED ONLY THREE ALCOHOLIC DRINKS AND THERE IS NO EVIDENCE E.H. CONSUMED ANY OTHER INTOXICANT.**

**Standard of Review**

The legal sufficiency of the evidence is a question of law reviewed *de novo*. *United States v. Spicer*, 71 M.J. 470, 472 (C.A.A.F. 2013).

**Argument**

The test for legal sufficiency is whether, when viewed in a light most favorable to the government, any rational trier of fact could have found that the evidence met the essential elements of the charged offense. *United States v. Turner*, 25 MJ. 324, 324-25 (C.M.A. 1987).

The government was obligated to prove two elements beyond a reasonable doubt: 1) On or about 24 November 2012, at or near Sierra Vista, Arizona, appellant committed a sexual act upon E.H., to wit: penetration of her vulva with his penis; and 2) appellant did so when E.H. was incapable of consenting to the sexual act *due to impairment by an intoxicant*, and that condition was known or reasonably should have been known by appellant. MCM, pt. IV, ¶45(b)(2) (2012)(emphasis added). The first element was uncontested at trial. R. at 100.

**A. Because E.H. Consumed Just Three Alcoholic Drinks She Could Not Have Been Impaired.**

 The only evidence introduced at trial is that E.H. consumed just three alcoholic drinks over the course of the evening: two mixed drinks containing rum and pineapple juice and one shot of Goldschlager. R. at 127. There is no other evidence of an intoxicant. Furthermore, E.H. regularly consumed about that same amount of alcohol without significant intoxication and she had eaten dinner prior to arriving at the Peacock Club. R. at 129, 157. It is impossible to conclude that E.H. became intoxicated by the three drinks at a level rendering her unable to consent.

The government failed to introduce any other evidence of an intoxicant. However, during E.H.’s testimony the prosecution implied that appellant placed an unknown intoxicant in E.H.’s drink. *See* R. at 128-29. The trial counsel elicited from E.H. that at some point while drinking at the bar with appellant, she left to go to the restroom and when she returned she continued to drink. R. at 128. Finally, the military judge allowed the trial counsel to elicit from Tamara Ruiz, the taxicab driver, that E.H. told her during their conversation that E.H., “thought she had been drugged and raped.” R. at 118. This testimony amounted to speculation, not evidence of any wrongdoing by appellant.

 Despite there being no evidence whatsoever that appellant or anyone else placed a drug in E.H.’s drink, the military judge made special findings that “E.H. remembers going to the restroom on one occasion and then returning to the bar where she continued to drink.” *See* App. Ex. XX, ¶ 3.e. This factual finding is completely irrelevant unless the military judge believes that while E.H. was in the restroom appellant or someone else placed an unknown intoxicant in her drink. The military judge’s special findings are pure speculation.

 The military judge’s special findings are contrary to the available evidence. On 26 November 2012 at 1014, E.H. underwent a urine drug screen at a clinic on Fort Huachuca. A little more than twenty-four hours after leaving the Peacock Club E.H.’s urine tested negative for opiates, barbituates, amphetamines, benzodiazapenes, cocaine, phencyclidine, and cannabinoids. This information was available in the CID file as exhibit 17 and is included in the allied documents in the record of trial.[[2]](#footnote-2) Appellant’s defense counsel failed to utilize this information at trial to counter the prosecution’s implication that appellant placed an unknown intoxicant in E.H.’s drink.

**B. E.H.’s Lack Of Memory Is More Likely The Result of A Memory Blackout Or Deception Than The Result Of Passing Out.**

 E.H. suffered from significant gaps in her memory before, during, and after her sexual encounter with appellant. E.H.’s memory is oddly specific on certain topics in contrast with her significant memory gaps on other topics. She recalls the details of meeting appellant at a taxi stand at the mall, but cannot recall any details of having dinner with appellant at Applebees later the same night. R. at 125, 144. E.H. testified that after exchanging numbers at the mall, she spoke with appellant “daily” but is “not entirely sure” when she saw him next. R. at 124-25. In her testimony, E.H. was very specific in describing the three drinks she consumed: “Pineapple juice, Coconut Rum, mixed drinks, two of them, and one shot of Goldschlager.” R. at 127. On the other hand, she provides no information as to how she traveled from the Peacock Club to appellant’s apartment complex, up three flights of stairs, and into appellant’s small apartment. R. at 129-31, 174.

 Despite the inconsistencies and gaps in E.H.’s testimony, the Navy court found E.H. to be “highly credible”:

In weighing the evidence, we too find LCpl EH to be highly credible as she testified to: feeling dizzy and extremely intoxicated; blacking out while "just standing there" in the bar; waking up unable to move or speak; finding the appellant on top of her with his penis in her vagina; and hearing the appellant tell her, "don't worry, I used a condom," before she passed out again.

*Lopez*, 2017 CCA LEXIS 21, at \*6. The court’s conclusions defy logic. E.H. testified very clearly that she consumed only three drinks. R. at 127. However, the Navy court comes to the erroneous conclusion that she was credible when she also testified that she was “extremely intoxicated.” Both of those statements cannot be true.

 E.H. consumed no alcoholic drinks prior to arriving at the Peacock Club. R. at 156. E.H. called appellant and invited him to the Peacock Club and according to E.H. when he arrived, they were “socializing.” R. at 126-127. Appellant and E.H. ordered their drinks together while standing at the bar. R. at 127. Appellant therefore would have observed E.H. from the time he arrived at the bar when E.H. was completely sober until several hours later when she had consumed only the three alcoholic drinks.

 E.H.’s lack of memory as to how she got from the bar to appellant’s apartment dictates choosing one of two possibilities: E.H. either experienced a memory blackout (as opposed to passing out) or she lied. There is no evidence that appellant carried E.H. out of the Peacock Club and carried her up three flights of stairs at his apartment. It’s much more likely she was experiencing intermittent memory blackouts or she lied.

 The Navy court and the military judge point to another oddly specific part of E.H.’s testimony: E.H.’s claim that she woke up with appellant on top of her and appellant’s statement, “don’t worry, I used a condom.” App. Ex. XX, pp. 4-5. This alleged statement, according to the military judge is “key in establishing . . . pivotal facts . . . she was unconscious due to her state of intoxication.” *Id*. The Navy court and military judge completely ignore the fact that E.H. consumed only three drinks.

 E.H. testified that she woke up with appellant on top of her. R. at 130. The military judge’s conclusion that E.H.’s testimony on this point is accurate defies logic given the evidence is that E.H. consumed only three drinks. R. at 127. It is more likely that E.H. misled the court than it is that she passed out hours after consuming only three drinks.

 **II.**

**APPELLANT WAS DENIED HIS RIGHT UNDER THE 6TH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PRESENT EXPERT TESTIMONY ON WHETHER OR NOT E.H. COULD HAVE EXPERIENCED MEMORY BLACKOUTS OR BECOME UNCOUNSCIOUS AFTER CONSUMMING ONLY THREE ALCOHOIC DRINKS.**

**Standard of Review**

 Claims of ineffective assistance of counsel are reviewed de novo. United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015).

**Argument**

The Sixth Amendment to the constitution guarantees not only the right to counsel, but the “right to effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffective assistance of counsel, “an appellant must demonstrate both (1) that his counsel’s performance was deficient, and (2) that, but for his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. Id. (citing *Strickland*, 466 U.S. at 688, 694).

With respect to the first *Strickland* prong, appellant bears the burden to show that his “counsel’s performance fell below an objective standard of reasonableness – that counsel was not functioning as counsel within the meaning of the Sixth Amendment.” *United States v. Edmond*, 63 M.J. 343, 351 (C.A.A.F. 2006). Thus, the question is whether “the level of advocacy falls measurably below the performance ordinarily expected of fallible lawyers.” *United States v. Haney*, 64 M.J. 101, 106 (C.A.A.F. 2006) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

 Penetration was not at issue in this case. R. at 100. Whether E.H. was unconscious at the time of penetration, was experiencing a memory blackout, or testified untruthfully was the contested issue and key to an effective defense. Despite having significant evidence before and during trial that E.H. claimed a lack of memory while she was still up and moving, defense counsel failed present expert testimony as to the plausibility of her claim of lack of memory after consumming just three alcoholic drinks. Defense counsel thereby failed to present significant evidence as to the most plausible and exculpatory defense and thus fell well below the Strickland objective standard of reasonableness.

 Defense counsel presented an inconsistent and contradictory defense. In his opening statement, defense counsel told the military judge that he intended to call an expert witness to “talk about blackouts.” R. at 100. Inexplicably, however, defense counsel failed to present any evidence on blackouts to the court. However, defense counsel argued in his post-trial clemency request that E.H. experienced blackouts. *See* Matters Submitted By The Accused, (22 Sep 14). “It is entirely possible that LCpl H was in a blackout state in which she was not recording memories but outwardly appeared willing and able to make decisions (i.e. consent to sexual activity). To make the conclusion that a person was unconscious versus blacked out without any supporting evidence is too great of a leap to make in the absence of any expert analysis on LCpl H's symptoms.” *Id*. at p. 4. Defense counsel had an expert consultant available to do precisely what he asserts in the clemency request was necessary for an informed decision by the court. However, he failed to utilize that expert. *See* R. at 100.

 The Navy court ordered trial defense counsel to provide an affidavit addressing appellant’s allegations of ineffectiveness. *Lopez*, 2017 CCA LEXIS 21, at \*10. Defense counsel explains in his affidavit that he worked “extensively with Dr. KM, a defense toxicology expert. . . .” *Id*. The Navy court explains that, defense counsel asserted,

Dr. KM extensively reviewed the case file, LCpl EH's medication history, and the results of her drug screening conducted shortly after the assault before concluding that LCpl EH was not on any narcotics that would facilitate her blacking out or passing out. Further, given the available evidence, Dr. KM was unable to estimate LCpl EH's blood alcohol content at the time of the assault.

*Id*. at 10-11. Defense counsel states in his affidavit that he made the tactical decision not to call Dr. KM. *Id*. at 11. Defense counsel gave two reasons for not calling Dr. KM:

1) they did not believe the government had met its burden, 2) Dr. KM did not believe LCpl EH's prescription medications affected her memory, and the toxicology report similarly confirmed the absence of any recreational drugs that would make blacking out or passing out more likely, and 3) they did not want to expose Dr. KM to questions about "date rape" drugs—questions which the trial counsel had previously asked Dr. KM in a pretrial interview.

*Id*. The defense counsel’s explanation is satisfactory only if this Court believes that there were only two possibilities: either E.H. was experiencing alcohol induced memory blackouts, or she was too intoxicated to consent.

 The defense counsel’s explanation ignores the equally plausible explanation that E.H. was being untruthful about having no memory about such details as meeting appellant at Applebees, no memory as to how she traveled from the Peacock Club to appellant’s apartment complex, no memory of the hour-long conversation with the taxicab driver, and no memory of stopping at the 7-Eleven or buying cigarettes or a soda *See* R. at 129-31, 143-45, 174.

 The defense counsel claims he made the tactical decision not to call his expert KM because he was concerned KM would be exposed to questions about a date-rape drugs. However, KM had no information about a date rape drug being used in this case. *Lopez*, 2017 CCA LEXIS 21, at \*11. Any questions concerning a date rape drug would have been hypothetical – not actual evidence. Defense counsel, the military judge, and the Navy court make the assertion that somehow the lack of memory must be due to either memory blackouts or intoxication – they ignore the equally plausible explanation the E.H. was untruthful. Because defense counsel ignored this plausible explanation, his performance during trial was deficient.

 With respect to the second prong of the *Strickland* analysis, that the deficiency resulted in prejudice, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Polk*, 32 M.J. at 153. E.H. provided the only account of what occurred at the Peacock Club and at appellant’s apartment. Her claim that the last thing she remembers about being at the bar was, “Just standing there,” and that the next thing she remembers is waking up with appellant on top of her having sex with her was the key to the government’s case. R. at 129-31. Given her testimony that she consumed only three alcoholic drinks and the lack of any evidence of any other intoxicants, this explanation is preposterous.

 Had defense counsel called the expert to describe alcoholic induced blackouts and the implausibility of experiencing an alcohol induced blackout after only three drinks, the result would have been different. The fact finder would have been left with two explanations: E.H. consumed some unknown, unsubstantiated substance or she was being untruthful. Two equally plausible explanations must result in a finding of not guilty because the government failed to meet its burden to prove the second element of the offense beyond a reasonable doubt.

While military judges are presumed to know and apply the law, they cannot be presumed to know the evidence and to be expert toxicologists. The defense counsel’s failure to call KM as an expert witness was unreasonable and resulted in the conviction.

**Conclusion**

 Wherefore, appellant respectfully requests that this honorable Court grant his petition for review and set aside the conviction and the sentence.

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1. See motion to attach appellant’s phone records at Enclosure B. [↑](#footnote-ref-1)
2. A copy of the Laboratory Results is enclosed for the Court’s convenience. [↑](#footnote-ref-2)