

**IN A GENERAL COURT-MARTIAL  
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY  
FORT BRAGG, NORTH CAROLINA**

UNITED STATES	)	
	)	
v.	)	Government Response to Defense
	)	Motion to Compel Expert Assistance
BERGDAHL, ROBERT BOWDRIE	)	(Investigator)
(BOWE)	)	
SGT, U.S. Army	)	
HHC, Special Troops Battalion	)	3 February 2016
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	

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**Relief Sought**

The Government requests the Defense Motion to Compel Expert Assistance (Investigator) be denied.

**Burden of Persuasion and Burden of Proof**

The Defense, as the moving party, bears the burden of persuasion on any factual issue whose resolution is necessary to decide this motion. The burden of proof is a preponderance of the evidence. Rule for Courts-Martial [hereinafter "R.C.M."] 905(c).

**Facts**

On a request dated 6 January 2016, the Defense requested Government-funded expert assistance, in the form of a private investigator. The Defense identified Mr. Garland Slate, a private investigator located in the Fayetteville, North Carolina area, and requested Government payment of his fees and expenses. On 28 January 2016, the General Courts-Martial Convening Authority denied the Defense Request for the Expert Assistance.

On 30 December 2015, the Defense submitted a Request for Forces (RFF) to the Government, requesting Government funding for two reserve JAG attorneys and three reserve paralegals to be located at Fort Bragg and dedicated to SGT Bergdahl's defense. [Enclosure 1] On 7 January 2016, the FORSCOM Deputy Chief of Staff approved the RFF in its entirety. [Enclosure 2] To date, the Defense has identified all five personnel they wish to request by-name from the reserve forces, and one attorney has already arrived at Fort Bragg. The Trial Defense Service at Fort Bragg has arranged for office space and life support for all five personnel.

### Witnesses

The Government does not intend to call any witnesses.

### Enclosures

1. Defense Memorandum Requesting Forces for Defense dated 30 December 2015
2. Memorandum from the Deputy Chief of Staff G-3/5/7 granting Defense RFF dated 7 January 2016

### Legal Authority and Argument

#### I. The Defense Has Not Made the Required Showing of "Necessity" Warranting Government-funded Expert Assistance.

On a Motion to Compel Production of an Expert, "when an accused applies for the employment of an expert, he must demonstrate the necessity for the services." *United States v. Garries*, 22 M.J. 288 (1986) (reviewing a request for payment to a defense investigator under the necessity analysis of *Ake v. Oklahoma*, 470 U.S. 68 (1985)). In order to obtain expert assistance, an Accused must meet the two-pronged "necessity" standard for expert assistance, first, that the expert would be of assistance to the Defense, and second that "denial would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (2008); *United States v. Bell*, 72 M.J. 543, 550 (ACCA, 2013); *United States v. McVeigh*, 2013 CCA Lexis 444, 17 (NMCCA, 2013).

In order to meet the first prong of the necessity analysis, the Defense must establish three things; "[f]irst, why the expert assistance is needed, second, what would the expert assistance accomplish for the accused, and third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." *Freeman*, 65 M.J. at 451; *United State v. Gonzales*, 39 M.J. 459, 460-461 (1994) (finding that the Defense had not shown the necessity for an NCIS investigator to conduct a broad, generalized investigation). If the Defense makes the "necessity" showing, they are entitled to investigative assistance. *United States v. Gray*, 51 M.J. 1, 77 (1999).

The first part of the three-part analysis requires the Defense to show "why" expert assistance is needed. The Defense request for Mr. Slate, dated 6 January 2016, and incorporated by reference as grounds for the Motion to Compel, does not meet the required showing. The Defense grounds on "why" they need expert assistance are twofold; 1) that the Government had significant resources during the investigatory phase and during document review, and therefore, the Defense is entitled to similar resources; and 2) that there may be a high volume of work in this case.

Put more succinctly, on pages 19 -20 of Defense Appellate Exhibit 7, the Defense, in summary, says: The Government had a team of 23 individuals assigned to assist on the AR 15-6 investigation. The Defense believes that the Government has a large amount of evidence/witnesses against SGT Bergdahl, including a lengthy Section III disclosure. The AR 15-6 Investigator spoke with multiple agencies outside the U.S. Army during the investigation. The Government had 10 attorneys performing document review, therefore the Defense will require similar resources. The Government may provide 25,000 documents of documents which might have to be reviewed by the Defense. The Government provided notice after referral of six military members wounded during search and recovery operations for SGT Bergdahl. [Enclosure 2 to Defense Appellate Exhibit 7]

These reasons do not meet the first part of the analysis. The composition of the Government team is irrelevant to the "necessity" analysis. The Court specifically held in *United States v. Washington* "...that the defense cannot establish its inability to gather evidence, even in a foreign country, simply by noting that the prosecution employed expert assistance to prepare its case." *United States v. Washington*, 46 M.J. 477, 480 (1997). Workload is also not a valid reason to appoint an investigator under the exert assistance analysis. The *Washington* court noted with some disapproval, that the Defense request "indicated that it was unable to perform these tasks because of the amount of travel necessary, coupled with the defense counsel's current case load." *Id.* at 479. The Government has a significantly higher burden and responsibility in a court-martial, it bears the burden of proof beyond a reasonable doubt. Rule for Courts-Martial (R.C.M.) 918. The Government also bears the burden of producing evidence under R.C.M. 701 and R.C.M. 703, and it is the Government who must comb through evidence to make the disclosure determination, not Defense.<sup>1</sup> Therefore, a "similar resources" argument by the Defense is not applicable.

Even if a large workload was a creditable reason, the Government has already provided the Defense with five additional Government-funded personnel to assist. On 7 January 2016, the Government approved, in its entirety, the Defense request for two additional attorneys, and three paralegals, making the Defense team, to date, composed of five attorneys and three paralegals.<sup>2</sup> The request was granted seven days after submission, and the Defense has been able to select, by name, the attorneys and paralegals it wishes to employ. Therefore, the Government has already provided the

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<sup>1</sup> As the Government has already noted to the Court, the *Ritchie* Court also stated that "where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987); see *U.S. v. Campa*, 529 F.3d 980, 995 (11th Cir. 2008) ("Ordinarily, the government alone determines whether material in its possession must be turned over to a defendant.").

<sup>2</sup> To the Government's knowledge, CPT Alfredo Foster and Mr. Eugene Fidell are still detailed to the case and counsel to the Accused, respectively.

appropriate, Government-funded resources to address the Defense concerns regarding workload.

The second part of the three-part analysis requires the Defense to show "what" expert assistance would accomplish for the Accused. The tasks must be specific and not speculation or fishing. In *United States v. Robinson*, the U.S. Court of Military Appeals cited with approval the Eleventh Circuit holding in *Moore v. Kemp*. *Moore v. Kemp*, 809 F.2d 702, 712, cert. denied, 481 U.S. 1054 (1987). *Moore* held that the Defense must show not just the mere possibility of assistance, but a "reasonable probability both that an expert would be of assistance to the Defense." *Id.*

The Defense does not state cognizable grounds as to "what" an investigator might do under the expert assistance rubric, that are more than a mere possibility, and that the five additional Defense personnel cannot do. Specifically, the Defense avers that Mr. Slate will: interview witnesses, conduct background checks on witnesses, locate and interview witnesses, testify during trial, collect and analyze documents and evidence. The Courts have not upheld these as valid grounds to compel production of an investigator. In *United States v. Washington*, the Court denied the Defense request for an investigator on grounds that are nearly identical to those stated by the Defense in the case sub judice. *Washington*, 46 M.J. at 480. In *Washington*, the Accused was charged with larceny, bribery, graft and extortion arising out of her service as a contingency contracting officer in the United Arab Emirates. The offenses took place over two years, and in a foreign country. The Court upheld the denial of an investigator in *Washington* when the Defense argued it was necessary in order to "interview Government witnesses, and conduct background checks on Government witnesses, locate and interview potential Defense witnesses, trace documents..." the exact same grounds listed by the Defense. *Id.* at 479.

The Defense must also show why it is "unable" to perform these tasks under the third part of the analysis, and make "a plausible showing that the investigator could obtain information that the defense and its staff would not be able to obtain on its own." *Washington*, 46 M.J. at 479. In sum, the Defense's arguments on inability amount to workload, and a lack of trust in paralegals. From Enclosure 2 of Defense Appellate 7, the Defense reasons are in sum: attorneys cannot be witnesses, and any investigation on a case makes an attorney a witness. Paralegals do not work after hours, and "remember things differently than Defense counsel" and therefore cannot be used as witnesses to potential prior inconsistent statements. Counsel are not trained to conduct interviews and are too busy with workload ("must rush back to the office to finish motions, assuming the attorney even has the time to travel to where a witness is located."). Defense counsel are restricted from handling or storing evidence. Defense Appellate Exhibit 7, Enclosure 2, pages 21-22. The Defense has articulated no grounds that it does not possess an actual special skill as is required for expert assistance. (C.f. *Gonzales*, 39 M.J. at 461, where the Court denied the request for investigator, but did order the appointment of an interpreter who could be used to assist Defense counsel in interviewing potential Spanish-speaking witnesses.)

Finally, the Defense is also required to show how denial of the expert assistance would result in an unfair trial under the second prong of the necessity analysis. *Freeman*, 65 M.J. at 458. The Defense has not made any showing on this second prong. Moreover, the Government does not believe that even if the first prong of the necessity were met, that denial of expert assistance would result in an unfair trial under the second prong, given the five additional personnel already provided to the Defense by the Government.

## II. Adequate Substitute

Assuming, arguendo, that the Court does find that the Defense has met the burden to compel Government funding of expert assistance for an investigator, the Government requests the opportunity to provide an adequate substitute. The Government is required to provide "competent" assistance, "basic and integral tools," when offering an adequate substitute, the Defense is not entitled to Government-funding of the premiere person in a field. *United States v. Ndanyi*, 45 M.J. 315, 319 (1996). Further, the Defense may not preemptively reject the option of an adequate substitute on the grounds of "alleged bias and the appearance of impropriety," *Id.* which the Defense has done in the case. Enclosure 2 to Defense Appellate Exhibit 7, page 22-23.

## III. Defense Has Not Made the Proper Showing to Produce GEN Robert Abrams.

The Defense listed GEN Robert Abrams, Commander, United States Forces Command, as a witness for the purposes of this motion. The Government notes that the Defense did not make a request to produce GEN Abrams under R.C.M. 703(c)(2), nor did it submit the required "synopsis of expected testimony sufficient to show its relevance and necessity" as required by that R.C.M. The Government is therefore not treating the Defense's listing of GEN Abrams as a request to produce a witness. Even if the Defense listing of GEN Abrams as a witness were a request for production, the General Courts-Martial Convening Authority has no testimony that would be relevant as to whether the Defense has met the legal burden showing it met the standard for Government funded expert assistance, and would deny production.

Conclusion

The Defense Motion to Compel Expert Assistance (Investigator) should be denied.



MARGARET V. KURZ  
MAJ, JA  
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 3 February 2016.



MARGARET V. KURZ  
MAJ, JA  
Trial Counsel



DEPARTMENT OF THE ARMY  
UNITED STATES ARMY TRIAL DEFENSE SERVICE  
9275 GUNSTON ROAD  
FORT BELVOIR, VIRGINIA 22060

30 December 2015

MEMORANDUM THRU Colonel Vanessa A. Berry, Staff Judge Advocate, United States Army Forces Command, Fort Bragg, North Carolina 28310

FOR General Robert B. Abrams, Commander, United States Army Forces Command, Fort Bragg, North Carolina 28310

SUBJECT: Request for Forces for Sergeant Bergdahl's Defense

1. Sergeant Bergdahl, through counsel, requests that you sign a request for forces for one-year mobilizations for two (2) reservist judge advocate officers in the grades of O3 or O4 and three (3) reservist paralegals of any grade to work at Fort Bragg on Sergeant Bergdahl's defense team.

2. Why the request is appropriate.

a. The size of the prosecution team raises significant fair trial concerns. The prosecution's four detailed trial counsel were augmented by 10 additional Assistant Trial Counsel, who will soon be replaced by mobilized reservists obtained in a manner similar to this request. *The prosecutors have declined to answer our questions about the size of the prosecution team*, which may include still more support attorneys, paralegals, and investigators. There are now more prosecutors working on this *single case* than at some entire large Army installations; by size alone this case appears to involve the largest prosecution effort for a one-accused court-martial in the modern era, if not ever. For a case in which the investigation officer and preliminary hearing officer each recommended lenient disposition, SGT Bergdahl's case now has more prosecutors than the 10 currently assigned to prosecute alleged 9/11 mastermind Khalid Sheikh Mohammad in a capital case at the Office of Military Commissions. The overwhelming manpower provided to just one side of a trial is likely to result in delay, vulnerable results, challenges about irregularity, and diminished public confidence in the fairness of the proceedings. Simply as a matter of fairness, the parties are entitled to rough equality of arms, and we currently do not have anything remotely resembling that.

b. By comparison, the defense team is miniscule. The defense currently has no paralegal support. The defense has two attorneys working on the case, Mr. Fidell and LTC Rosenblatt; the detailed military counsel, CPT Alfredo N. Foster, is extremely limited in his ability to work on the case for reasons described later in this memorandum.

c. The volume of case materials is extraordinary. The AR 15-6 investigation conducted by (now) LTG Dahl consists of thousands of pages of materials and statements of 57 witnesses (many of whom the defense must interview as a matter of due diligence) that were compiled by

SUBJECT: Request for Forces for Sergeant Bergdahl's Defense

an investigative team of 23 people working full-time over a period of months. The prosecutors disclosed several thousand more pages of materials after referral two weeks ago. The amount of classified material includes 25,000 pages that the prosecutors have described as potentially discoverable and may also include tens of thousands of more pages of classified materials. (As an example of the practical burden this presents, a defense counsel would need to review ~150 pages of classified material every single workday from now until the proposed August 2016 trial date just to get through the materials. As another example, the extensive Section III disclosure prepared by the expanded prosecution team will take a single defense attorney several weeks of fulltime work to look into and prepare trial strategy in response). Further, the case presents novel legal issues that will require significant amounts of time to research and prepare motions about before presentation to the court-martial. The sheer size of the prosecution team is unanswerable proof that we need significant additional resources.

3. How the mobilized reservists will be utilized.

a. The paralegals will work full-time to organize discovery materials, scan and review classified evidence, draft filings, prepare exhibits, and perform legal research under the supervision of counsel. They will receive office space and support from the Fort Bragg TDS field office.

b. The attorneys will perform all expected duties of trial defense counsel, including formulation of trial strategy, legal research and writing, and courtroom advocacy. They will also receive office space and support from the Fort Bragg TDS field office.

4. Why active duty support cannot meet the defense's needs.

a. In preparation for this request, I coordinated with the Regional Defense Counsel of the Southeast Region at Fort Bragg. He told me that he can detail a TDS officer to the Bergdahl defense team, but that the detailed officer would only be able to work on the case part-time in addition to other full-time defense duties. This is due to the Fort Bragg office's high caseloads, shortage of personnel, and departure timelines for current defense counsel. The paralegals under his control are fully employed already and he cannot provide additional paralegal support to SGT Bergdahl's defense team.

b. I coordinated with the Regional Defense Counsel for the Southwest Region at Fort Hood, who confirmed that SGT Bergdahl's detailed defense counsel, CPT Foster, would remain extremely limited in his involvement with the Bergdahl case due to his heavy workload as Senior Defense Counsel at Fort Sam Houston, his pending reassignment, and because trial venue has moved to Fort Bragg.

c. I coordinated with Headquarters, U.S. Army Trial Defense Service. There is a shortage of 10 active duty officers in U.S. Army Trial Defense Services (USATDS) worldwide, a problem attributed to the high priority given to filling other billets such as Special Victim Counsel from a limited population of second-term judge advocates, an expansion for the JAG Corps that leaves

SUBJECT: Request for Forces for Sergeant Bergdahl's Defense

many TDS billets unfilled even as caseloads and defense obligations remain at sustained high levels across the force. There simply are no active duty TDS attorneys or paralegals who are available to work full-time on this case.

d. I coordinated with officials involved with mobilizing TDS reservists. The use of TDS reservists to work on the case on their Annual Training time of 14 days per year is not realistic or desirable for work requiring the formation of an attorney-client privilege and the kind of sustained, uninterrupted effort that is plainly needed. The only realistic process for mobilizing full-time (yearlong) reservist support is through a Request for Forces (RFF) signed by the general court-martial convening authority. Because SGT Bergdahl's case originated in Afghanistan, the approved request for reservist support can be funded from overseas contingency operations (OCO) funds. The officials I spoke with stated that a request such as this for court-martial defense support that was signed by the FORSCOM commander would likely be approved.

5. Necessary qualifications of mobilized reservists. This request deliberately avoids asking for greater specification for the mobilized reservists than what is listed in paragraph 1. Based on the guidance of officials involved with mobilizing reservist augmentees to active duty, questions such as specific qualifications of counsel or whether they are currently assigned to a TDS Legal Operations Detachment are more appropriately addressed in the detailing phase after the RFF is approved.

6. If I can provide any additional information that will aid in the approval of this request, I can be reached at franklin.d.rosenblatt.mil@mail.mil or 703-693-0283.

7. Expedited consideration is requested.



FRANKLIN D. ROSENBLATT  
LTC, JA  
Defense Counsel



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JAN 07 2017

AFCG-CS

MEMORANDUM FOR OTJAG Personnel, Plans and Training Office (DAJA-PT), Office of The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200

SUBJECT: Request for Mobilized Forces - Forces Command, Office of the Staff Judge Advocate for 365 days

1. Concur with and recommend approval of Subject Request for Forces (RFF) dated 6 January 2016.
2. As noted in the RFF, Army Reservists are necessary to assist in the defense of Sergeant Bergdahl. The assigned military Defense Counsel has stated he is unable to execute the defense requirements using Active Component resources. The mobilization of Reserve Component assets is necessary to accomplish this legal mission.
3. Please contact CW3 Christina Porter at (910) 570-5913, DSN: 670-5913, christina.m.porter3.mil@mail.mil regarding any questions concerning the RFF.

A handwritten signature in black ink, appearing to read "R. P. White", is positioned above the printed name.

ROBERT P. WHITE  
Major General, USA  
Deputy Chief of Staff G-3/5/7



DEPARTMENT OF THE ARMY  
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND  
4700 KNOX STREET  
FORT BRAGG, NORTH CAROLINA 28310-5000

AFCG-JA

JAN 06 2017

MEMORANDUM FOR Personnel, Plans & Training Office, Office of The Judge Advocate General, 2200 Army Pentagon, Room 2B517, Washington, DC 20310-2200

SUBJECT: Request for Mobilized Forces

1. Request the following positions be filled to ensure mission accomplishment in support of a high-profile military justice mission assigned to the FORSCOM OSJA, Fort Bragg, NC. These positions will be in support of the Trial Defense team. It is my intent that the requested Soldiers be mobilized in one phase, consisting of two (2) Judge Advocates and three (3) paralegals for a period of 365 days with an effective mobilization date as soon as available. Request the mobilization of these Soldiers as a unit augmentation element to the FORSCOM OSJA unless the United States Trial Defense Services (TDS) organization can provide paragraph/line authorizations.


2. Justification for Request:

a. The Defense team in the case US v. Sergeant Bergdahl has requested forces through the FORSCOM OSJA to augment their defense team in order to prepare for all pretrial and trial proceedings. Given the volume of documents and materials the defense will need to review, the augmented forces are necessary.

b. This case stems from a Soldier's actions during Operation Enduring Freedom. The Soldier was deployed to Afghanistan at the time of his alleged actions. The relevant evidence consists primarily of operational and administrative in-theatre documents, information obtained from personnel deployed with the Soldier, and paperwork regarding the Soldier's overseas deployment.

3. The FORSCOM OSJA TDA authorized personnel strength for military justice support is one. Actual shortage for the performance of this specific request is five personnel. Although this request will augment TDS personnel, it will be in furtherance of the overall FORSCOM OSJA mission. The requested personnel will be assigned to Fort Bragg.

4. Point of contact for this memorandum is CW3 Christina Porter at 910-570-5913 or by e-mail at christina.m.porter3.mil@mail.mil.

  
VANESSA A. BERRY  
COL, JA  
Staff Judge Advocate