

**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
BERGDAHL, ROBERT BOWDRIE)	APPOINTMENT OF FORENSIC
(BOWE))	PSYCHIATRIST CONSULTANT
SGT, U.S. Army)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	19 AUGUST 2016
Fort Bragg, North Carolina 28310)	

I. RELIEF SOUGHT

The Government requests the Court deny the Defense Motion to Compel Appointment of Forensic Psychiatrist Consultant.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Accused, as the moving party, has the burden of persuasion in accordance with RCM 905(c)(2), and the burden of proof is preponderance of the evidence in accordance with RCM 905(c)(1).

III. FACTS

On 30 June 2009, the Accused deserted from his place of duty at Observation Post Mest Afghanistan, while deployed as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East. After leaving the Observation Post, he was captured by enemy forces, where he remained in captivity until 31 May 2014, when he was returned to military control.

Between 30 June 2009 and 31 May 2014, multiple entities from the United States Government gathered intelligence, physically searched for the Accused and attempted diplomatic solutions to effect his return.

Charges were preferred against the Accused on 25 March 2015, and an Article 32 Preliminary Hearing was conducted on 17 and 18 September 2015. The matter was referred to trial on 14 December 2015.

On 31 December 2015, the Defense submitted a request to the Convening Authority to appoint Dr. Mary Connell as an expert consultant in the field of forensic psychology at Government Expense [Encl 1].¹ On 11 January 2016 the request was approved for \$130,000.00 plus travel expenses [Encl 2].

On 11 January 2016, the Convening Authority approved the appointment of Dr. Saathoff, a board certified forensic psychiatrist, to serve as an expert consultant for the Government.

On 2 May 2016, the Defense requested the Convening Authority appoint Dr. (LTC(P)) Scott Moran, a board certified forensic psychiatrist as an expert consultant in the field of Forensic Psychiatry [Encl 3].

At the time of their by-name request for Dr. Moran, the Defense team was aware of the Government's employment of Dr. Saathoff and, in part, used it to justify their by-name request for Dr. Moran [Encl 3].

At the time of the request Defense was also aware Dr. Moran was serving as Command Psychiatrist for United States Army Special Forces Command. In their request, Defense cited Dr. Moran's position and the job requirements of the position as one of the reasons Dr. Moran was uniquely qualified to fulfill the requested role as their expert consultant [Encl 3].

Dr. Moran, as described by the Defense, has "extensive experience in a deployed environment....By nature of his specialized training gained through his educational background and practical experience, he has a wealth of knowledge regarding psychiatric treatment of conditions arising during or resulting from combat both in deployed environments and garrison." [Encl 3].

Dr. Moran does have extensive experience in the area of forensic psychiatry. He was a Forensic Psychiatry Fellow at the National Capital Consortium and previously served as the Assistant Deputy Commander for Behavioral Health at Walter Reed National Military Medical Center. Dr. Moran also served as the Residency Training Director at the National Capital Consortium in the Psychiatry Residency Program. Dr. Moran has significant experience instructing, most recently at the National Capital Consortium. He has also been an instructor for Judge Advocates, presenting for Judge Advocates from multiple services in programs presented by both Defense Counsel Assistance Program and Trial Counsel Assistance Program [Encl 4].

Dr. Moran is published, including a co-authored article with one of the psychiatrists who conducted SGT Bergdahl's RCM 706 evaluation [Encl 4].

Dr. Moran is the Forensic Behavioral Health Consultant for the Atlantic Region. He is no stranger to the military justice or RCM 706 process. A review of his CV indicates experience in high stakes courts-martial including charges ranging from desertion to

¹ Dr. Connell was also previously appointed to the Defense team for the Article 32 hearing.

murder. He has been qualified as an expert while testifying for the defense and prosecution in cases ranging from burglary and sexual assault to premeditated murder [Encl 4].

On 9 May 2016, the Defense by-name request for Dr. Moran was approved [Encl 5].

On 2 May 2016, the Defense requested the Convening Authority appoint Dr. (MAJ) Joseph Afanador as an expert in the field of Survival, Evasion, Resistance, and Escape (SERE) Psychology [Encl 6]. On 9 May 2016, the by-name request was approved [Encl 7].

On 1 August 2016, only three months after their initial by-name request for Dr. Moran, and despite having never previously requested Dr. Morgan, the Defense requested the Convening Authority to “authorize and fund the **continued** expert assistance of Dr. Charles A. Morgan, III, as a defense expert consultant in the field of forensic psychiatry. The defense requests that he **remain** designated as a member of the defense team bound by the attorney-client privilege in accordance with Military Rule of Evidence 502(a).” Emphasis added. [D APP 35 at 6].

On 5 August 2016, the Convening Authority denied the request to appoint Dr. Morgan as a Defense expert consultant, at Government expense.

IV. EVIDENCE

1. Defense Request for Dr. Connell
2. Appointment of Dr. Connell, Expert Consultant Forensic Psychology
3. Defense Request for Dr. Moran, Expert Consultant Forensic Psychiatry
4. Dr. Moran's *Curriculum Vitae*
5. Appointment of Dr. Moran
6. Defense Request for Dr. Joseph Afanador, Expert Consultant SERE Psychology
7. Appointment of Dr. Afanador

V. LAW AND ARGUMENT

An accused is entitled to expert assistance provided by the Government if he demonstrates necessity. *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010); See also *United States v. Freeman*, 65 M.J. 451,458 (C.A.A.F. 2008); *United States v. Garries*, 22 M.J. 288, 291 (CMA 1986). A showing of necessity requires more than a mere possibility of assistance from a requested expert. *United States v. Robinson*, 39 M.J. 88, 89 (CMA 1994). Rather, an accused must show that a reasonable probability exists both that “(1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.” *Anderson*, 68 M.J. at 383. To establish that an expert would be of assistance to the defense an accused “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.”

Id.; See also *United States v. Freeman*, 65 M.J. 451,458 (C.A.A.F. 2008); and *United States v. Ford*, 51 M.J. 445, 455 (CAAF 1999). Additionally, when the Defense requests a non-military expert they have an additional obligation to demonstrate that a military expert would be inadequate. Anderson, 68 M.J. at 383.

The Defense motion is primarily, and almost exclusively, about their need for a forensic psychiatrist – which the Government has already provided. The Defense has not demonstrated that Dr. Morgan would be of assistance, or how denial of Dr. Morgan would result in a fundamentally unfair trial. Further, the Defense did not show how the Military expert, they requested by name, would be inadequate.

The motion to compel Dr. Morgan and the original request for Dr. Moran are strikingly similar, advancing almost the exact same justification for appointment. Both requests reference the RCM 706 evaluation conducted in this case, both contemplate considering a potential lack of mental responsibility defense, both identify the need to examine the effects of the Accused's time in captivity for potential mitigation evidence, and his general mental health as potential extenuation evidence, and both requests discuss the need for a psychiatrist who is familiar with issues unique to military members.

There are only two statements in the motion to compel that are unique to Dr. Morgan. The first statement appears as an unsupported declaration that they now need an "independent" psychiatrist who "has experience testifying in high-profile cases and has published extensively in the relevant areas of forensic psychiatry." The second statement comes at the end of the request when they identify the Government's expert as "a national leading expert in forensic psychiatry." The Defense's statements ignore the significant experience of their expert, Dr. Moran, including the specific military experience they have repeatedly alleged they require in this case. The Defense also ignores the numerous high-stakes courts-martials Dr. Moran has testified in and the significant training and teaching he conducts in the field. Perhaps most remarkable is the Defense failure to point out that they requested Dr. Moran after they knew the Government had hired Dr. Saathoff. In addition, the Defense requested, and was provided, a military expert in SERE Psychology.

While Defense's indignation at the financial cost of the Government witness is clear, they also failed to mention that the Convening Authority approved Dr. Mary Connell, a preeminent Forensic Psychologist, at a cost of \$130,000. The Defense now has at least three mental health experts assigned to the team. All three of the mental health experts appointed by the Convening Authority were by-name requests from the Defense.

The Defense now asks this court to compel the Government to bankroll an expert they have presumably already been using when they already have an extremely reputable expert in Dr. Moran who is sought out by the Government and Defense in cases requiring a forensic psychiatrist (just as Defense sought him in this case).

While the Defense filing cited a number of cases supporting the need for a forensic psychiatrist, they failed to cite any cases that even suggest the Government should provide Dr. Morgan under the facts in this case. The only case they do cite as support for compelling the Government to provide a second forensic psychiatrist, *United States v. Warner*, 62 M.J. 114 (C.A.A.F 2005) is so dissimilar to the situation at hand, it is hard to understand how it is in support of the Defense position. In *Warner*, a child assault case requiring testimony on shaken baby syndrome, the Trial Counsel obtained a leading Air Force Expert on shaken baby syndrome, denied the Defense's request for an expert, and instead provided a consultant with "no apparent experience in the area of shaken baby syndrome." 62 M.J. at 115. Further, the case goes on to discuss that when the Government **denies** the requested expert, and provides a substitute, the substitute should have "qualifications at least reasonably comparable to the Government's expert."

Here, the situation could not be more different. The Government did not provide Dr. Moran as an adequate substitute, he was requested by the Defense **after** the Government's expert was already identified. Additionally, as Defense raised in their request for Dr. Moran, he is extremely qualified in the area of forensic psychiatry and has extensive experience in the areas requested by the Defense. In fact, Dr. Moran has potentially more experience in the area of military and deployment specific mental health issues than the Government's expert. Neither *Warner*, nor Article 46 require appointment of a second forensic psychiatrist to the Defense team simply because the Government procured a civilian.

The Government also notes that the Defense request suggests that Dr. Morgan is already working with the Defense. The Defense is of course free to work with Dr. Morgan, just not at Government expense. Neither the letter nor the spirit of Article 46 require the Government to support expert shopping for the Defense or a trade in of the extremely experienced government funded and Defense requested expert in order to subsidize an expert with whom the Defense is already working.

VI. CONCLUSION

The Defense has failed to meet thier burden on thier motion to compel. There is no factual or legal support to compel the Government to provide a second forensic psychiatrist. For those reasons, the Government requests that the Court deny the Defense motion.



EILEEN C. WHIPPLE
CPT, 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 19 August 2016.

A handwritten signature in cursive script, appearing to read "E. Whipple".

EILEEN C. WHIPPLE
CPT, JA
Trial Counsel



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
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31 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 Employment of Expert Assistance for the Defense, U.S. v. Bergdahl

1. Sergeant Bergdahl, through counsel, requests that you authorize and fund the continued expert assistance of Dr. Mary A. Connell, Ed.D., ABPP, as a defense expert consultant in the field of forensic psychology. The defense requests that she remain designated as a member of the defense team bound by the attorney-client privilege in accordance with Military Rule of Evidence 502(a).

2. The accused is entitled to expert assistance to prepare for a court-martial. *See United States v. Short*, 50 M.J. 370 (1999); *United States v. Ndanyi*, 45 M.J. 315 (1996). The accused must show that the employment of expert assistance is necessary. *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). There are three aspects to showing necessity. First, why is the assistance needed? Second, what would the assistance accomplish for the accused? Third, why is defense counsel unable to gather and present the evidence that the expert assistant would be able to develop? *United States v. Gonzales*, 39 M.J. 459, 461 (C.M.A. 1994).

3. Why the expert assistance is needed: SGT Bergdahl is charged with two specific intent offenses at general court-martial where he faces the possibility of life imprisonment. He was previously discharged from the U.S. Coast Guard for psychological reasons (adjustment disorder with depression) and required a psychological enlistment waiver to later join the Army. After SGT Bergdahl deployed to Afghanistan, one NCO noticed that SGT Bergdahl was having difficulty adjusting to the deployment and was concerned enough to recommend to his company leadership that he receive a behavioral health evaluation. SGT Bergdahl spent five years in captivity by the Haqqani network where he was subjected to sustained physical, mental and emotional torment. He received a permanent physical profile a year after returning, indicating that he no longer meets Army medical retention standards for physical or mental health. An R.C.M. 706 board conducted by Dr. Christopher Lange concluded that SGT Bergdahl possesses the severe mental diseases or defects of schizotypal personality disorder and post-traumatic stress disorder, and that he possessed the first of these disorders at the time of the charged misconduct. For these several reasons, SGT Bergdahl's mental condition and defects will be factors in determining whether he committed the charged offenses and, if so, whether they are mitigating factors for punishment. These factors were at issue in the Article 32 preliminary hearing in

SUBJECT: Request for Defense Expert Consultant, U.S. v. Bergdahl

September, where Dr. Connell attended and played an invaluable role in helping the defense team understand the mental health issues.

4. What expert assistance will accomplish for the accused:

a. A key to the defense's presentation of a case will be determining SGT Bergdahl's mental state on the day of his departure from Observation Post Mest. Dr. Connell can materially assist the defense in evaluating all available data, including SGT Bergdahl's discharge from the U.S. Coast Guard for psychological reasons, witness accounts from fellow soldiers, SGT Bergdahl's writings, and SGT Bergdahl's own account of events, along with the later R.C.M. 706 evaluation and other mental health evaluation and treatment data since his recovery from captivity. It is anticipated that review of relevant discovery documents will require eight days of work; however, based on the prosecution's Section III disclosures paragraphs 1(g) through 1(q), it is not known to the defense exactly the time that will be required to accomplish the review and the defense may require additional time for Dr. Connell's review depending on the amount of data contained therein.

b. Dr. Connell will likely perform further assessment of SGT Bergdahl's mental state, including interviews and the administration of psychological assessment instruments, to form the basis for opinions she may then offer at trial regarding the level of appreciation and understanding of the risks his unit faced and his moral and ethical responsibilities to act. There are questions regarding his capacity to rationally form intent and also regarding the force of potential delusional thinking in impelling him to act. Such further assessment should occur over several days, face to face. At a bare minimum, three days of assessment are required.

c. Additionally, should SGT Bergdahl be found guilty of any offense and the matter therefore proceeds to sentencing, Dr. Connell will potentially testify regarding factors in mitigation and extenuation, including the conditions in which he grew up, the effects of social isolation and other salient factors in the family home, how those factors bore upon his ability to adapt to military service and deployment, and how they may have contributed to his ability to accurately perceive and understand his moral and ethical responsibilities as a Soldier. Further, Dr. Connell may testify about SGT Bergdahl's current psychological condition, treatment needs, prognosis for successful rehabilitation and adaptation, and the consequences of confinement for his mental health during and after any period of confinement.

d. To accomplish the preparation for sentencing testimony, it is necessary to conduct interviews with SGT Bergdahl's parents, sister, brother-in-law, and godmother, who are literally the only sources of information regarding his childhood, aside from SGT Bergdahl himself. They can add an essential perspective. These interviews should occur in person if at all possible. To gaining level of trust that is essential for an open dialogue, extended interview time is likely to be required; visits to the home of his extended family for a minimum of two days each (six days total) are likely to be required. The likelihood of good information being gained through alternate means such as Skype or video-conferencing, considering the particular preferences of his family to eschew "grid" communications, makes face-to-face contact essential. Additionally, interviews of close associates including Kim Harrison, Kayla Harrison, and Monica Lee may be required in

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order to assess SGT Bergdahl's late adolescent and early adult development and the ways in which his childhood experiences might have demonstrably affected his decision-making as a young adult. These combined interviews are likely to require an additional three to five hours of work.

e. The SERE psychologists who worked with SGT Bergdahl through Phases I and II of the reintegration may have essential information regarding his mental state and it will be essential to meet with them to explore their observations. Understanding their work was somewhat different in kind from ordinary psychological assessment and treatment, it is unlikely there are session notes or discharge summaries that would detail their observations; however, whatever notes or recordings exist may illuminate their intervention and findings are critically important. Given that these two phases spanned a number of weeks, with several hours-long sessions each day, and with multiple psychologists, it is highly likely that the psychologists have a great deal of information and several hours of consultation with them will likely be necessary. Because much of the field of SERE psychology involves classified materials, including most of the source materials in this case, Dr. Connell will also require a SECRET clearance. This billable work with classified materials will require approximately four days of work.

f. Further, because of the very complex but critical matter of diagnosis of mental disorder in this matter, consultation with Dr. Lange (who conducted the R.C.M. 706 board), LTC Penny Hoofman (SGT Bergdahl's behavioral health treatment provider), and the neuropsychologist who provided neuropsychological assessment at the behest of LTC Hoofman, will be necessary. These consultations can be accomplished by telephone and may take 5-10 hours.

g. Consultation with counsel regarding the issue of SGT Bergdahl's mental responsibility will require more time than ordinarily required for case preparation consultation. There are extremely technical matters to understand in order to determine what to do with this issue in developing trial strategy. Diagnosticians may struggle with the refinement of a diagnosis of an individual, particularly for his mental state at some earlier time, and may use language unfamiliar to even psychologically sophisticated counsel. Gaining a granular appreciation for the nuances of different diagnoses will take time. Further, competently cross-examining government experts on the matter will require assistance. Finally, the consequences of a successful defense of lack of mental responsibility are considerable and the matter must be considered with great care. Ten days of pretrial consultation will be necessary following Dr. Connell's full assessment of SGT Bergdahl's psychological state and well-being before trial, to allow for adequate trial preparation. These matters cannot be sorted out in the usual two or three days of pretrial consultation on the eve of trial.

h. An additional consideration for why Dr. Connell's expert assistance will be needed involves the impact of a lengthy trial on SGT Bergdahl. It was observed that he had tremendous difficulty getting through the testimony during the preliminary hearing in September 2015. Being in COL Clint Baker's presence and hearing the graphic descriptions of his captivity offered by Terrence Russell were excruciatingly painful to him. Although we had not had reason to doubt his competency to stand trial or his ability to participate intelligently with counsel in his own defense, we are concerned that there is a possibility of re-traumatization during trial and that

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breaks in the proceedings may prove necessary in order to allow for consultation with his treating psychologist, LTC Hoofman, so that he can proceed. Dr. Connell can assist with an ongoing appraisal of his capacity to proceed and participate meaningfully throughout a trial that is likely to last three weeks. SGT Bergdahl does not easily disclose his difficulty with his emotions and offers platitudes when questioned about his emotional well-being. Counsel require professional assistance in determining his level of mental stability and capacity to meaningfully participate in his defense on an ongoing basis during trial.

i. Dr. Connell will be able to provide the defense with an outside perspective on the R.C.M. 706 board conducted by the government and whether to challenge its findings. She will help counsel understand the mental health issues at stake to inform our requests for evidence and advocacy. Given the multiple mental health diagnoses SGT Bergdahl has received from military providers, Dr. Connell's outside view will help the defense determine which are the most warranted and whether SGT Bergdahl's severe mental diseases or defects amount to a defense to the charged offenses or mitigation.

5. Why the defense counsel cannot do this on their own without an expert: Defense counsel have no substantive training or experience in the field of clinical and forensic psychology. No amount of self-study will give the defense team the understanding or professional judgment of an experienced forensic psychologist. The defense counsel envision that the expert consultant could become an expert witness in the case. Thus, even if defense counsel could explore these areas without the assistance of an expert (in whatever limited capacity they may be able to do so), the defense would be unable to present the information to the court without the aid of an expert.

6. Adequate Substitute: A substitute at this point would be completely inappropriate since Dr. Connell has already begun preparations with the defense team and begun preparing for the court-martial based on her personal observations of the Article 32 preliminary hearing. A substitute would substantially deprive SGT Bergdahl of necessary expert assistance and would cost needless money and delay to get the substitute expert up to the same level of understanding and participation with the defense team. Dr. Connell's civilian status is especially important for her independence given the deeply held feelings and attitudes about the case and about SGT Bergdahl within the Army. Dr. Connell and SGT Bergdahl have established a rapport. Injecting a new face would disrupt that relationship and require the new expert to start from scratch with the accused.

7. Fees: Dr. Connell's fee schedule is enclosed. We request that you approve expenses for up to 50 days of professional services billed at her rate of \$325 per hour (which represents a steep military discount from her normal fees in civilian cases) for eight hours per day (up to a total of \$143,000), plus approval of an amount not to exceed \$25,000 for travel expenses and per diem (a total approval of up to \$168,000). The request for 55 days is based on the sum of 50 days in the individual justifications for work in paragraph 4 of this request plus five days for unforeseen requirements.

8. I can be reached at 703-693-0283 or franklin.d.rosenblatt.mil@mail.mil.

SUBJECT: Request for Defense Expert Consultant, U.S. v. Bergdahl



FRANKLIN D. ROSENBLATT
LTC, JA
Defense Counsel

ENCLS

Dr. Connell's curriculum vitae

Dr. Connell's fee schedule (2016 military rate)

Dr. Connell's fee schedule (2015 military rate)

Dr. Connell's fee schedule (2016 civilian rate)

Dr. Connell's list of court-martial consultations

Washington Post article, "Bergdahl's writings reveal his fragile state before vanishing"

Dr. Lange's R.C.M. 706 memorandum to government counsel

SGT Bergdahl's permanent physical profile

U.S. Coast Guard memorandum concerning SGT Bergdahl's adjustment disorder with depression

U.S. Coast Guard record of SGT Bergdahl's adjustment disorder with anxiety



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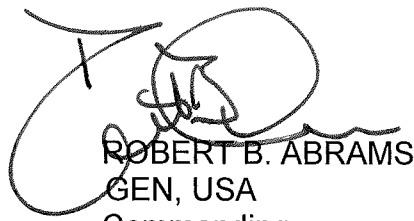
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10 1 JAN 2016

MEMORANDUM FOR LTC Franklin Rosenblatt, Defense Counsel, United States v. Bergdahl

SUBJECT: Approval of Government Funded Defense Expert Consultant, Dr. Mary Connell

1. On 31 December 2015, the Defense submitted a request for approval of a Government-funded Defense expert consultant and a potential Defense expert witness, Dr. Mary Connell, a forensic psychologist. Dr. Connell previously served as a member of the Defense team prior to and during the Article 32 Preliminary Hearing. [Enclosure] The request is granted, as detailed below.
2. Per the Defense request, Dr. Mary Connell is appointed at Government expense as an expert consultant with privilege to the Defense team, (Military Rule of Evidence 502), with the possibility of becoming an expert witness at trial (Rule for Courts-Martial 703(d)). Dr. Connell will be paid as follows; for an estimated 50 days (8 hours per day) of preparation, consultation, interviews, testing of the Accused, and testimony at trial, at \$325.00 per hour, not to exceed \$130,000.00.
3. Dr. Connell will be reimbursed at the Government travel rate for travel to and from witness interview sites, consultation sites, and location of trial from her place of business in Fort Worth, Texas. The total period of work is authorized until completion of trial.
4. If you desire to use Dr. Connell as an expert witness in any proceeding, you are required to give notice to the trial counsel pursuant to R.C.M. 703. Pursuant to RCM 701(e), if Dr. Connell is used as an expert witness, then she will no longer be bound by any attorney-client privilege or confidentiality established as an expert consultant.
5. If a security clearance for Dr. Connell is required, the Defense is reminded of the requirement to submit a formal request to the Convening Authority under AR 380-67.


ROBERT B. ABRAMS
GEN, USA
Commanding

Encl
as



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AFZA-JA-T

2 May 2016

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

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

SUBJECT: Request for Designation of Expert Assistance in the Area of Forensic Psychiatry for the Defense, United States versus Sergeant Robert Bergdahl

1. Purpose. Pursuant to R.C.M. 703(d), Sergeant Robert Bergdahl by and through his counsel, requests that you appoint LTC Scott C. Moran as an expert consultant in the field of Forensic Psychiatry for the defense to assist in preparation of its case in accordance with R.C.M. 703, and *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994). Sergeant Bergdahl further requests that LTC Moran be designated as a member of the defense team bound by the attorney-client privilege, in accordance with M.R.E. 502(a).

2. Facts. Sergeant Bergdahl is charged with two specific intent offenses at a general court martial where he faces the possibility of life imprisonment as a maximum punishment if convicted. These offenses stem from a deployment to Afghanistan where Sergeant Bergdahl spent a total of five years in captivity by the Haqqani network where he was subjected to extensive physical, mental and emotional torment. In addition, an RCM 706 Board conducted by Dr. Christopher Lange concluded that SGT Bergdahl suffers from the severe mental disease or defect of schizotypal personality disorder and from post-traumatic stress disorder and he suffered from the first of these disorders at the time of the alleged misconduct. Sergeant Bergdahl has been receiving intensive psychiatric treatment since his return from captivity.

3. Law. Article 46, UCMJ, provides that the Defense and the Government should have equal opportunity to obtain witnesses. A military Accused is "entitled to investigative or other expert assistance when necessary for an adequate defense." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citations omitted); see also R.C.M. 703(d), *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994) (quoting *United v. Allen*, 31 M.J. 542, 623 (N.M.C.M.R. 1990) aff'd, 33 M.J. 209 (C.M.A. 1991)). The Accused has the burden of establishing that "a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial. *Freeman*, 65 M.J. at 458 (citations omitted). To establish the first prong, the Defense must show:

(a) Why the expert is needed,

(b) What the expert assistance would accomplish for the Accused, and

(c) Why the Defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop.

a. Why Expert Assistance is Needed. Expert assistance is needed in this case to evaluate a number of issues having to do with Sergeant Bergdahl's psychological state. These include the genesis of his schizotypal personality disorder and the treatment he has required in the past, currently requires, and will require in the future; the impact of the physical, mental and emotional torment on Sergeant Bergdahl's mental state and the treatment that is required to manage the effects of five years in captivity and the consequent PTSD and any other psychiatric condition made worse by that captivity; and finally, the consequences of disruptions in necessary psychiatric treatment, including but not limited to medication.

This information is expected to be relevant not only for the defense case in chief, but also at sentencing, should that be necessary. At sentencing, the impact of Sergeant Bergdahl's severe mental illness upon his moral culpability is of paramount importance, and beyond that, the question of how his psychiatric condition can be managed, and the consequence to his mental condition should he be sentenced to confinement, must be addressed by defense. A forensic psychiatrist is necessary to assist the defense in understanding the pharmacological treatment necessary to manage psychiatric symptoms resulting from his major mental illness as diagnosed in Sergeant Bergdahl's 706 examination, as well as to assist the defense to identify factors relevant to a defense for any of the charged offenses. This requires the understanding in detail the unique psychiatric effects of deployments in combination with the psychiatric conditions, post deployment, of someone who was in captivity.

Further, on 11 January 2016 in response to the Defense request for Dr. Mary Connell in the area of forensic psychology, the Government requested that you appoint Dr. Gregory Saathoff, a forensic psychiatrist, as an expert consultant to the Government. The Government further provided in this request that there is a possibility Dr. Saathoff would testify as an expert witness under Rule for Courts-Martial 702(d). Unlike Dr. Connell who is an expert in the area of forensic psychology, Dr. Saathoff is a forensic psychiatrist who is qualified to consult and testify about psychotropic medications when addressing Sergeant Bergdahl's mental health diagnoses. The Government further indicated that Dr. Saathoff would provide the Government with expertise in treatment and future care needs of these diagnoses. Dr. Connell is not qualified to address pharmacological treatment and future care of these diagnoses, since that is the province of medication.

b. What Expert Assistance Would Accomplish for the Accused. LTC Moran is a forensic psychiatrist with extensive experience in a deployed environment. By nature of his specialized training gained through his educational background and practical experience, he has a wealth of knowledge regarding psychiatric treatment of conditions arising during or resulting from combat both in deployed environments and garrison. LTC Moran currently sits as the Command Forensic Psychiatrist for United States Army Special Forces Command and by virtue of his job requirements for this position, has extensive experience treating and medically managing individuals suffering from severe mental illness.

LTC Moran can assist the Defense in evaluating, understanding and reviewing the evidence regarding Sergeant Bergdahl's mental condition leading up to and including the time of the alleged offenses as well as following captivity. His technical knowledge and expertise in the treatment of psychiatric conditions and knowledge of psychiatric medications will allow the Defense to understand issues that may arise with legal and moral culpability, necessary treatment for his major mental illness, and consequences of interruptions in treatment. LTC Moran will apply such knowledge and expertise in assisting the Defense in the understanding of the pharmacological treatment for a person with schizotypal personality disorder. Evaluation in this area is necessary in a determination of any potential lack of mental responsibility defense for the charged offenses. Further, analysis of effective medical management of both the schizotypal personality disorder and post-traumatic stress disorder is relevant toward the determination of an appropriate punishment, if there is a conviction at trial.

c. Why the Defense is Unable to Gather and Present this Evidence. The Defense is unable to gather and present this evidence because to do so requires expertise well beyond the capabilities of counsel. No member of the Defense possesses the scientific background or practical experience or credentials of a psychiatrist. While Dr. Mary Connell possesses a scientific background, practical clinical and forensic experience, and credentials in psychology, she does not possess credentials in the area of psychiatry. LTC Moran will be able to evaluate the etiology, course, and prognosis for Sergeant Bergdahl's severe mental illness and consult with the Defense about the medications required for management for such diagnoses. Although Dr. Connell is familiar with medications for treatment of mental health diagnoses, she is not qualified to prescribe such medications and therefore does not have the knowledge or credentials required to consult and to testify about such medications. While the Defense has conducted some inquiry into the area of Psychiatry, becoming familiar with this complex area of science would require specialized training and access to resources the Defense does not have and it would not be possible for the Defense to accomplish such training. LTC Moran is qualified for this appointment as evidenced by his enclosed curriculum vitae.

4. Cost to the Government. The Defense has found a Psychiatrist within the DoD in an that is no cost to the Government. The Defense requests that the Government provide

AFZA-JA-T

SUBJECT: Request for Employment of Expert Assistance in the Area of Forensic Psychiatry for the Defense, United States versus Sergeant Robert Bergdahl

LTC Moran, who has the requisite qualifications and is a DoD employee, making him significantly less expensive than requesting a civilian expert with the requested qualifications. If LTC Moran is required to travel as part of his duties we ask that you approve \$10,000 in TDY costs. LTC Moran is available to assist the Defense upon approval.

5. The point of contact for this memorandum is the undersigned at 910-907-1428 or Jason.d.thomas62.mil@mail.mil.

Enclosures:

Government Request for Dr. Gregory Saathoff
LTC Scott Moran, CV
RCM 706 "Short Form"

JASON D. THOMAS

MAJ, JA
Defense Counsel

Curriculum Vitae

April 5, 2016

Name: Scott Campbell Moran, M.D., LTC (P), MC, USA

Address: Office - United States Special Operations Command
2929 Desert Storm Drive
Ft Bragg, NC 28310
(910) 432-2491 office
[REDACTED]

Email - scott.c.moran2.mil@mail.mil

Birth: [REDACTED]

EDUCATION:

University of Arkansas, Little Rock, AR, BS Biology, BA Chemistry 1989-1994

University of Arkansas for Medical Sciences, Little Rock, AR, M.D. degree 1994-1998

GRADUATE MEDICAL EDUCATION:

Fellowship, Forensic Psychiatry, Walter Reed National Military Medical Center 2014-2015

Fellowship, Geriatric Psychiatry, Walter Reed Army Medical Center, 2004-2005

Residency, Psychiatry/ Family Practice, Tripler Army Medical Center, 1999-2003

Internship, Psychiatry/ Family Practice, Eisenhower Army Medical Center, 1998-1999

HOSPITAL OR OTHER PROFESSIONAL APPOINTMENTS:

Command Psychiatrist, United States Army Special Operations Command
Ft Bragg, NC July 2015 to present

Forensic Psychiatry Fellow, National Capital Consortium (NCC) Forensic Psychiatry
Fellowship, Bethesda, MD July 2014- June 2015

Assistant Deputy Commander for Behavioral Health, Walter Reed National Military
Medical Center, Bethesda, MD August 2012- July 2014

Residency Training Director, National Capital Consortium (NCC) Psychiatry Residency, Washington, DC March 2007- March 2013

Assistant Chief, Psychiatry Consult-Liaison Service, Walter Reed Army Medical Center, Washington, DC July 2005- August 2006

Geriatric Psychiatry Fellow, National Capital Consortium (NCC), Washington, DC, July 2004- July 2005

Division Psychiatrist, 2d Infantry Division, Camp Casey, Republic of Korea August 2003- June 2004

Staff Family Practice Physician, US Army Health Clinic, Camp Casey, Republic of Korea August 2003- June 2004

Battalion Surgeon, 702d Main Support Battalion, Camp Casey, Republic of Korea August 2003- June 2004

Medical Director, Army Substance Abuse Program, Camp Casey, Republic of Korea August 2003- June 2004

Chief Resident, Tripler AMC Psychiatry/ Family Practice Residency, Honolulu, HI June 2002- June 2003

DEPLOYMENT EXPERIENCE:

United States Forces- Afghanistan Theater Behavioral Health Consultant, Bagram Air Field, Afghanistan September 2013- February 2014

Officer in Charge, Behavioral Health, 86th Combat Support Hospital, Sather AFB, Baghdad, Iraq December 2010- April 2011

Medical Director, 1972nd Medical Detachment (Combat Stress Control), Operation Iraqi Freedom 05-07, FOB Kalsu, Iraq August 2006-January 2007

AFFILIATIONS AND PROFESSIONAL SOCIETY MEMBERSHIPS:

Associate Professor of Psychiatry, Uniformed Services University for Health Sciences, Bethesda, MD

American Academy of Psychiatry and Law

American Psychiatric Association

Alpha Omega Alpha

Society of Uniformed Service Psychiatrists

CERTIFICATION AND LICENSURE:

Medical License: State of Indiana No. 01051651A Expires October 2017

Adult Psychiatry, American Board of Psychiatry and Neurology, September 2004

Geriatric Psychiatry, American Board of Psychiatry and Neurology, October 2010

American Board of Family Practice, July 2003- December 2010 (certification not renewed)

AWARDS AND HONORS:

Selected for promotion to COL, USA December 2015

Promoted to LTC, MC, USA June 2010

Promoted to MAJ, MC, USA June 2004

Promoted to CPT, MC, USA May 1998

Direct Commission to 2LT, MSC, USAR June 1994 (US Army Health Professions Scholarship Program)

Expert Field Medic Badge-25th Infantry Division Schofield Barracks, HI March 2003

EFMB Medal of Excellence- Fastest Road March 25th Infantry Division Schofield Barracks, HI March 2003

Meritorious Service Medal with one oak leaf cluster (2 Awards)

Joint Service Commendation Medal

Army Commendation Medal with two oak leaf cluster (3 Awards)

Joint Service Achievement Medal

Army Achievement Medal with one oak leaf clusters (2 Awards)

Afghanistan Campaign Medal

Operation Iraqi Freedom Campaign Medal (2 Awards)

National Defense Service Medal with Bronze Star (2 Awards)

Army Service Ribbon

Korean Defense Service Medal

Overseas Service Ribbon with a 2 device

NATO Non-Article 5 medal with ISAF device

John M. Powers Family Practice Resident of the Year Award, TAMC, June 2002

Jewel Minnis Trust Scholar, UAMS, 1994-1998

TEACHING:

Course Co-director, Forensic Psychiatry, NCC Psychiatry Residency, July 2014- June 2015

Course Director, Geriatric Psychiatry, NCC Psychiatry Residency, July 2004- June 2011

Supervising Staff, NCC Geriatric Psychiatry Fellowship, July 2005- Present

Assistant Program Director, National Capital Consortium (NCC) Psychiatry/ Family Practice Residency, Washington, DC July 2005- June 2009

Staff Lecturer, Grand Rounds Journal Club Series, NCC Psychiatry Residency, October 2005- June 2015

PCLS Site Director, MS-3 Introduction to Clinical Medicine Course, Uniformed Services University for Health Sciences February 2005- July 2011

Director, NCC Psychiatry Residency Mock Boards Experience, December 2004- December 2008

Director, 2006 Artiss Symposium, WRAMC Department of Psychiatry Washington, DC Jan 2006- June 2006

Guest Lecturer, Staff Development Series, Armed Forces Retirement Center- Washington DC July 2004- Present

Advanced Cardiac Life Support Instructor, 121st General Hospital, Seoul, Republic of Korea August 2003- June 2004

91 X-Mental Health Specialists Training, Camp Casey, Republic of Korea August 2003- June 2004

Suicide Prevention Training, 2d Infantry Division Warrior Leaders Course, Camp Red Cloud, Republic of Korea August 2003- June 2004

Director of Curriculum, Tripler AMC Family Practice Department Residency
Educational Activities June 2002- June 2003

Advanced Cardiac Life Support Instructor, Tripler Army Medical Center, Honolulu, HI
June 2001-June 2003

USUHS MS-III Instructor, Anxiety Disorders, Tripler Army Medical Center July 2000-
June 2003

TAMC Sole Provider Committee, Honolulu, HI June 2001- June 2003
USUHS MS-III Instructor, Anxiety Disorders, Tripler Army Medical Center July 2000-
June 2003

TAMC Psychiatry/ Family Practice Resident Selection Committee, Resident Member
July 2000- June 2003

PRESENTATIONS:

Sexual Assault Response Behaviors: Scientific, Legal and Ethical Challenges, 168th
Annual Meeting, American Psychiatric Association, Toronto, ON May 2015

Secondary Trauma in Legal Professionals, 2015 DC Bar Association Annual Meeting,
Washington, DC April 2015

Secondary Trauma in Legal Professionals, 2015 USN Judge Advocate General TCAP
webinar, Washington Navy Yard, Washington, DC February 2015

Secondary Trauma in Legal Professionals, 2014 USN Judge Advocate General
Leadership Symposium, Washington Navy Yard, Washington, DC November 2014

Forensic Behavioral Health, US Army Judge Advocate General Center and School
Graduate Course, Charlottesville, VA November 2014

Alcohol Facilitated Sexual Assault, Defense Counsel Assistance Program Training,
Columbia, SC July 2014

Walter Reed from 9-11 to today: How the longest war changed Military Psychiatry,
Clinical Symposium, 167th Annual Meeting, American Psychiatric Association, New
York, NY May 2014

Management of Traumatic Brain Injury, Clinical Symposium, 167th Annual Meeting,
American Psychiatric Association, New York, NY May 2014

Traumatic Brain Injury in the U.S. military: From Roadside to Bedside, Clinical Symposium, 166th Annual Meeting, American Psychiatric Association, San Francisco, CA May 2013

Care of Complex Traumatic Brain Injury Patients in the U.S. military, Clinical Symposium, 166th Annual Meeting, American Psychiatric Association, San Francisco, CA May 2013

Evaluating and Treating the Effects of War, Workshop, 165th Annual Meeting, American Psychiatric Association, Philadelphia, PA May 2012

Evaluating and Treating the Effects of War, Workshop, 164th Annual Meeting, American Psychiatric Association, Honolulu, HI May 2011

Suicides in Psychiatric GME, teaching residents to cope effectively, 38th Annual Meeting, American Association of Directors of Psychiatric Residency Training, Tucson, AZ March 2009

Traumatic Brain Injury Training in Psychiatric Residencies- a National Survey of Training Directors, 37th Annual Meeting, American Association of Directors of Psychiatric Residency Training, New Orleans, LA March 2008

“Mental Health in Primary Care-Improving Outreach and Outcomes for Soldiers and their Families” Opening Remarks 2006 Artiss Symposium, Walter Reed Department of Psychiatry June 2006

“Mental Health in Poly-Trauma” Walter Reed Department of Physical Medicine and Rehabilitation Seminar on Amputee Care May 2006

“A Multi-dimensional Meta-analysis of Psychotherapy for PTSD” Walter Reed Department of Psychiatry Grand Rounds February 2006

“Risk of Death in Elderly users of Conventional v. Atypical Antipsychotic Medications” Walter Reed Department of Psychiatry Grand Rounds December 2005

“Effectiveness of Anti-psychotics in Patients with Chronic Schizophrenia- the CATIE Trial” Walter Reed Department of Psychiatry Grand Rounds November 2005

“Management of Agitation in Dementia” Armed Forces Retirement Center- Washington, DC March 2005

“Anti-cholinergic Delirium” Tripler Army Medical Center Psychiatry Grand Rounds May 2003

PUBLICATIONS

Cazares, P., Santiago, P., Tsai, A., Moulton, D., Moran, S. (2015) Suicide Response Guidelines for Residency Trainees- A Novel Post-vention Response for the Care and Teaching of Psychiatry Residents who Encounter Suicide in their Patients. *Academic Psychiatry* 39, (4), 393-397

Tsai, A., Moran, S., Shoemaker, R., Bradley, J. (2012) Patient Suicides in Psychiatric Residencies and Post-vention Responses: A National Survey of Psychiatry Chief Residents and Program Directors. *Academic Psychiatry*, 36(1), 34-38.

Grammer, GG, Moran S, Geriatric PTSD, Benedek, D. M., & Wynn, G. H. (Eds.) *Clinical manual for management of PTSD*. American Psychiatric Publishing 2010

Wain, H J, Moran, S, Oleshansky, M, Bouterie, A, Lange, C, Psychiatric Intervention for Medical Surgical Patients Following Traumatic Injuries, *Combat and Operational Behavioral Health*, Borden Institute Press 2009

CURRENT RESEARCH:

Assistant Investigator, Use of Post Deployment Behavioral Health Assessment Data from Aerovac'd Military Admitted to Walter Reed from Theater of Operations in Iraq and Afghanistan to Establish a Research Databank WU# 360023

PAST RESEARCH:

Principal Investigator, Title: A prospective, double blind, randomized, multicenter study to evaluate the utility, safety, and efficacy of using PEER Interactive to inform the prescription of medications to patients with a primary diagnosis of a depressive disorder and comorbidity of non-psychotic behavioral disorders versus treatment as usual. IRBNet # 378604-4.

Assistant Investigator, Biofeedback Treatment of mTBI Pathology Utilizing an Optimized Training Environment, Louis M. French, PI, WU# 384227-1

Assistant Investigator, Pinholt, E., Moran, S., "The Effects of Learning about Driving by Elders on Residents and Staff (The E.L.D.E.R.S Study)

CONSULTANT POSITIONS:

Consultant to MG Wood, Commander, 2d Infantry Division, regarding mental health issues including suicide prevention, sexual assault, drug and alcohol issues, and family advocacy

US Forces-Afghanistan Theater Behavioral Health Consultant- responsible for US Army Navy and Air Force Behavioral Health personnel in theater and BH staff officer for CUOPS and FUOPS planning.

AREAS OF INTEREST:

Teaching Psychiatry Residents
Military Forensic Psychiatry
Information Technology and Medicine
Geriatrics and Aging
Business Models of Medicine

FORENSIC PSYCHIATRY EXPERIENCE:

Training:

US Army Judge Advocate General Center and School JAG Officer Basic Military Criminal Law Course, Charlottesville, VA, July 2014 to September 2014

Consultant:

Forensic Behavioral Health Consultant, US Army Regional Health Command- Atlantic, US Army Medical Command

Medical Review Officer:

Medical Review Officer, US Special Operations Command, July 2015 to present
Medical Review Officer, Walter Reed National Military Medical Center, April 2014 to July 2015
Medical Review Officer, US Forces-Afghanistan, September 2013 to February 2014
Medical Review Officer, 86th Combat Support Hospital, December 2010 to April 2011
Medical Review Officer, 2nd Infantry Division, June 2003 to July 2004

Psychological Autopsies:

Mrs. Maria L. Walker
PFC Brian F. Hughes

Threat Assessments:

CPT Nuri Ruzi, Walter Reed National Military Medical Center
Mr. Aaron Spicher, Behavioral Analysis Unit 3, Federal Bureau of Investigation
Mr. Michael Canby, US Army Protective Services Battalion, US Army Criminal Investigation Command

R.C.M 706 examinations:

US v. Ohalete- Desertion, Assault consummated by Battery, Unlawful Entry
US v. Velez-Pagan- Murder, Obstruction of Justice, Possession of Controlled Substance
US v. Daniels- Various specifications of Article 86, 89, 91, 92, 117, and 134
US v. Foster- False Official Statement, and Sexual Assault
US v. Waters- Theft, False Official Statement

US v. Cooke- Disobeying a Lawful Order, Cruelty and Maltreatment, Conduct Unbecoming of an NCO

Defense Expert Assistance:

US v. Fleck- Sexual Assault, Burglary*

US v. Page- Premeditated Murder*

US v. Corbin- Premeditated Attempted Murder*

US v. Aguilar- Premeditated Attempted Murder

US v. Angulo- Sexual Assault*

US v. Nava- Sexual Assault

US v. Dallarosa- Sexual Assault

US v. Hamilton- Sexual Assault*

US v. Miller- Assault, Leaving Place of Duty, Communicating a Threat, Disrespecting an NCO

US v. Johnson- Sexual Assault

Government Expert Assistance:

US v. Plaster- Sexual Assault

US v. Milton- Sexual Assault*

US v. Solis- Sexual Assault*

US v. Brown- Sexual Assault

US v. Walker- Sexual Assault*

Criminal Competency Evaluations:

US v. Von Greenbrier- Criminal Division, DC Superior Court

US v. Thompson- Criminal Division, DC Superior Court

US v. Conway- Criminal Division, DC Superior Court

US v. Venable- Criminal Division, DC Superior Court

US v. Jordan- Criminal Division, DC Superior Court

US v. Logan- Criminal Division, DC Superior Court

State of Maryland v. Bradley Efferson, Baltimore City Circuit Court

State of Maryland v. Joseph Minoglio, Washington County Circuit Court

State of Maryland v. Troy Dixon, Prince Georges County Circuit Court

State of Maryland v. Cyndi Vigneri, Wicomico County Circuit Court

State of Maryland v. Justin L. Cook, County Circuit Court

State of Maryland v. Mark Christopher Ward, Harford County Circuit Court

State of Maryland v. Maria Vasquez, Prince George's County District Court

State of Maryland v. Charles A. Palmer, Baltimore County Circuit Court

State of Maryland v. Louise Blount, Prince George's County Circuit Court

Criminal Competency and Criminal Responsibility Evaluations:

State of Maryland v. Domenic Anderson- Baltimore City Circuit Court

State of Maryland v. Yera Basnueva- Montgomery County Circuit Court

State of Maryland v. Glendale Collins- Prince George's County Circuit Court

Civil Competency Evaluations

SSgt Kristopher T. McDonald, USMC, Walter Reed National Military Medical Center
Mr. William Palmer, Armed Forces Retirement Home, Washington, DC

* qualified as expert witness

Conducted over 200 evaluations of disability, fitness for duty, and security clearances



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

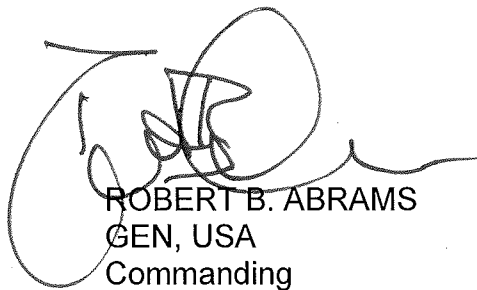
AFCG

MAY 09 2016

MEMORANDUM FOR MAJ Jason Thomas, Defense Counsel, United States v. Bergdahl

SUBJECT: Approval of Dr. (LTC) Scott C. Moran as a Defense Expert Consultant

On 2 May 2016, the Defense submitted a request to appoint Dr. (LTC) Scott Moran as a Defense expert consultant in the field of Forensic Psychiatry. The request is granted, and Dr. Moran is appointed as an expert consultant with privilege to the Defense team under Military Rule of Evidence 502. This appointment is at no cost to the Government. If Dr. Moran is required to travel as part of his duties as a Defense expert consultant, he will be reimbursed at the Government rate and total cost of travel will not exceed \$10,000.00.



ROBERT B. ABRAMS
GEN, USA
Commanding



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
FORT BRAGG FIELD OFFICE
BUILDING 2-1133, MACOMB STREET
FORT BRAGG, NORTH CAROLINA 28310-5000

AFZA-JA-T

2 May 2016

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

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

SUBJECT: Request for Designation of Expert Assistance in the Area of Survival, Evasion Resistance and Escape (SERE) Psychology for the Defense, United States versus Sergeant Robert Bergdahl

1. Purpose. Pursuant to R.C.M. 703(d), Sergeant Robert Bergdahl by and through his counsel, requests that you appoint MAJ Joseph H. Afanador as an expert consultant in the field of SERE Psychology for the defense to assist in preparation of its case in accordance with R.C.M. 703, and *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994). Sergeant Bergdahl further requests that MAJ Afanador be designated as a member of the defense team bound by the attorney-client privilege, in accordance with M.R.E. 502(a).

2. Facts. Sergeant Bergdahl is charged with two specific intent offenses at a general court martial where he faces the possibility of life imprisonment as a maximum punishment if convicted. These offenses stem from a deployment to Afghanistan where Sergeant Bergdahl spent a total of five years in captivity by the Haqqani network where he was subjected to extensive physical, mental and emotional torment. Upon Sergeant Bergdahl's return from captivity he was subjected to a reintegration process to aide and assist in his transition back to life from captivity. In addition, an RCM 706 Board conducted by Dr. Christopher Lange concluded that SGT Bergdahl suffers from the severe mental diseases or defects of schizotypal personality disorder and post-traumatic stress disorder and he suffered from the first of these disorders was at the time of the alleged misconduct.

3. Law. Article 46, UCMJ, provides that the Defense and the Government should have equal opportunity to obtain witnesses. A military Accused is "entitled to investigative or other expert assistance when necessary for an adequate defense." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citations omitted); see also R.C.M. 703(d), *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994) (quoting *United v. Allen*, 31 M.J. 542, 623 (N.M.C.M.R. 1990) aff'd, 33 M.J. 209 (C.M.A. 1991)). The Accused has the burden of establishing that "a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a

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SUBJECT: Request for Employment of Expert Assistance in the Area of Survival, Evasion Resistance and Escape (SERE) Psychology for the Defense, United States versus Sergeant Robert Bergdahl

fundamentally unfair trial. *Freeman*, 65 M.J. at 458 (citations omitted). To establish the first prong, the Defense must show:

(a) Why the expert is needed,

(b) What the expert assistance would accomplish for the Accused, and

(c) Why the Defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop.

a. Why Expert Assistance is Needed. Expert assistance is needed in this case for a number of reasons. First, evaluation into the psychological culture of military service members serving in a deployed environment and the potential difficulties that might be faced by an individual suffering from schizotypal personality disorder in that environment are potentially relevant to a defense for any of the charged offenses;

Second, the effects of captivity upon an individual's mental health are often profound and should be taken into account in any subsequent evaluation of the individual. SERE psychologists are specialists in understanding this factor and the precautions needed in subsequent evaluations. This will help the Defense understand the results of SGT Bergdahl's R.C.M. 706 evaluation in light of the potentially distorting effect of five years of enemy captivity.

Third, expert assistance is needed in order to evaluate the full range of physical, mental and emotional torment experienced by Sergeant Bergdahl and the impact of these experiences on his current and future mental state. This is relevant for consideration not only in mitigation but also in contemplating punishment and its potential impact upon him, should this become necessary.

b. What Expert Assistance Would Accomplish for the Accused. MAJ Afanador can assist the Defense in evaluating, understanding, and reviewing the evidence regarding the ways Sergeant Bergdahl's mental illness may have affected his ability to cope with deployment and the unique demands of that environment on a service member who has great difficulty navigating interpersonal demands; the physical, mental and emotional torture of Sergeant Bergdahl and how this impact his current mental state with regard to potential evidence for mitigation. He can materially assist in these areas by evaluating the available evidentiary data including all records of Sergeant Bergdahl's conduct prior to leaving OP MEST, his reintegration, the RCM 706 evaluation, and any other mental health treatment data since his recovery from captivity. He will be able to apply his specialized understanding and knowledge gained through his familiarity with the military deployment environment, as it is relevant to the demands it might place on a soldier suffering from a major mental disorder. MAJ Afanador will also be able to conduct interviews of those who were deployed with Sergeant Bergdahl and apply his

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SUBJECT: Request for Employment of Expert Assistance in the Area of Survival, Evasion Resistance and Escape (SERE) Psychology for the Defense, United States versus Sergeant Robert Bergdahl

knowledge of the psychological culture of military service members in a deployed environment and assist the Defense in understanding of Sergeant Bergdahl's mental state at the time of the alleged offenses.

MAJ Afanador's specialized understanding in SERE Psychology would allow him to evaluate the notes from the SERE Psychologists who worked with Sergeant Bergdahl through the reintegration process and understand any potential information gleaned regarding his mental state and educate the defense team on what these mean. Further, MAJ Afanador can consult with these providers to determine whether or not there was additional data observed during their time with Sergeant Bergdahl that may be relevant for the Defense. He will be able to then assist the current Defense Expert in Forensic Psychology, Dr. Connell in understanding the critical impacts of captivity, particularly here, as SERE psychology is a specialized area and different from ordinary psychological assessment and treatment.

Should Sergeant Bergdahl be convicted of any offenses, MAJ Afanador would be able to consult with the Defense in making a decision as to whether or not to call him to testify about the impact of the mental, physical and emotional torture endured during captivity with regard to the effects these things have had on Sergeant Bergdahl's mental state. MAJ Afanador will be able to utilize his experiences of the physical and mental strain and understanding and knowledge of the impact of extensive torture in an environment of captivity to have a better understanding of the effects experienced by Sergeant Bergdahl. Based on this specialized knowledge and training, he will further be able to consult with regard to any resources needed to ensure that Sergeant Bergdahl is not re-traumatized mentally and emotionally.

c. Why the Defense is Unable to Gather and Present this Evidence. The Defense is unable to gather and present this evidence because it requires expertise well beyond the capabilities of counsel. No member of the Defense with the exception of Dr. Mary Connell, possesses any kind of scientific background or practical experience or credentials in psychology. Further, While Dr. Connell possesses a scientific background, practical experience and credentials in psychology, she does not possess credentials in the area of SERE Psychology. MAJ Afanador possesses expertise and knowledge that Dr. Connell does not have in the evaluation of factors surrounding captivity as he, himself has attended the Army's SERE School as part of his training to become qualified as a SERE Psychologist. While the Defense has conducted some inquiry into SERE Psychology, becoming familiar with this complex area of science would require specialized training and access to resources the Defense does not have and it would not be possible for the Defense to accomplish such training. MAJ Afanador is qualified for this appointment as evidenced by his enclosed curriculum vitae.

4. Cost to the Government. The Defense has found a SERE psychologist within the DoD in an effort to keep Government costs to a minimum. The Defense requests that

AFZA-JA-T

SUBJECT: Request for Employment of Expert Assistance in the Area of Survival, Evasion Resistance and Escape (SERE) Psychology for the Defense, United States versus Sergeant Robert Bergdahl

the Government provide MAJ Afanador, who has the requisite qualifications and is a DoD employee, making him significantly less expensive than requesting a civilian expert with the requested qualifications. MAJ Afanador currently serves as the USASOC Command Forensic Psychologist and is available and willing to assist the Defense upon his designation as an expert consultant to the defense team.

5. The point of contact for this memorandum is the undersigned at 910-396-9685 or nina.s.banks.mil@mail.mil.

Enclosure:
MAJ Afanador Curriculum Vitae
RCM 706 "Short Form"

NINA STRICKLAND BANKS
CPT, JA
Defense Counsel



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

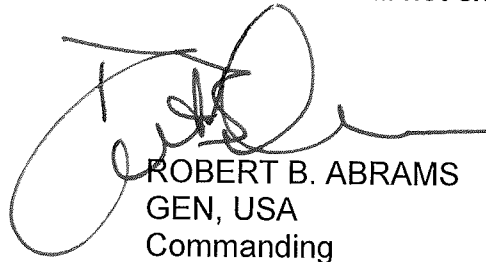
AFCG

MAY 09 2016

MEMORANDUM FOR MAJ Jason Thomas, Defense Counsel, United States v.
Bergdahl

SUBJECT: Approval of Dr. (MAJ) Joseph H. Afanador as a Defense Expert Consultant

On 2 May 2016, the Defense submitted a request to appoint Dr. (MAJ) Joseph Afanador as a Defense expert consultant. The request is granted, and Dr. Afanador is appointed as an expert consultant with privilege to the Defense team under Military Rule of Evidence 502. This appointment is at no cost to the Government. If Dr. Afanador is required to travel as part of his duties as a Defense expert consultant, he will be reimbursed at the Government rate and total cost of travel will not exceed \$10,000.00.



ROBERT B. ABRAMS
GEN, USA
Commanding