



DEPARTMENT OF THE AIR FORCE
AREA DEFENSE COUNSEL (AFLOA)

15 July 2011

MEMORANDUM FOR 7 BW/JA
ALL REVIEWING AUTHORITIES
IN TURN

FROM: AFLOA/ADC (Capt Doser-Pascual) and
Mr. Neal Puckett, Esq. and Mr. Haytham Faraj, Esq.
The Law Firm of Puckett and Faraj, PC
1800 Diagonal Road, Suite 210
Alexandria, VA 22314

SUBJECT: Request for Expert Consultant – Forensic Psychologist
United States v. 1Lt Patrick Burke

1. Pursuant to Article 46, UCMJ, Rule for Court-Martial (R.C.M.) 703, *U.S. v. Garries*, 22 M.J. 288 (CMA 1986), *U.S. v. Gonzalez*, 39 M.J. 459 (CMA 1994) and *U.S. v. Tornowski*, 29 M.J. 578 (AFCMR 1989), the defense respectfully requests that you appoint and provide any necessary funding, at government expense, for the employment of COL David M. Benedek, as a confidential expert consultant in the field of forensic psychology to assist the defense in the case of *U.S. v. 1Lt Burke*. Based on receipt of the preferred charges, dated 21 March 2011, which were investigated at an Article 32 hearing on 11 April 2011 and referred to trial by general court-martial on 13 May 2011, the following charges and specifications against 1Lt Burke are anticipated to be brought before a trial by general court-martial: one charge and one specification in violation of Article 111, UCMJ, alleging operating a vehicle while drunk; one charge and one specification in violation of Article 121, UCMJ, alleging wrongful appropriation of a vehicle; one charge and one 2 specifications in violation of Article 128, UCMJ, alleging an assault and battery against two separate individuals; and one charge and one specification in violation of Article 134, UCMJ, alleging unlawfully leaving the scene of an accident.

2. The prosecution has provided the investigation file which includes a 911 call made by one of the complaining witnesses, Ms. Wendy No Moccasin. This is not a request for an expert witness, although information discovered by the expert may result in the expert becoming a witness at a later time. The defense has contacted COL Benedek and is satisfied he possesses the necessary qualifications to assist us. Attached is COL Benedek's CV, and below is his contact information. A fee schedule is not included since COL Benedek is active duty United States Marines.

David M. Benedek, M.D.
COL, MC, USA
**Professor/Deputy Chair & Assoc. Director/Senior Scientist, Center for the Study of
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3. **Law:** As a matter of due process, service members are entitled to expert assistance when necessary to ensure an adequate defense and a fundamentally fair trial. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), *cert. denied* 479 U.S. 985 (1986). The defense must, of course, demonstrate the necessity for the services. In doing so, the defense must explain why a consultant is needed, what the consultant will do, and why defense counsel and defense staff could not perform the services sought through the consultant. *U.S. v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994). "An expert may be of assistance in two ways. The first is as a witness to testify...[A]n expert may also be of assistance to the defense as a consultant to advise the accused and his counsel as to the strength of the government's case,...to suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made." *U.S. v. Turner*, 28 MJ 487 (CMA 1989). "Necessary" means reasonably necessary, and an adequate defense includes, among other things, preparation for cross-examination of the government witnesses and any government expert. *U.S. v. Durant*, 545 F.2d 823 (2d Cir. 1976). The defense must be specific enough in defining the issues it hopes to develop with expert assistance and must demonstrate that we have sufficiently educated ourselves as to such potential issues. A defense counsel who seeks the services of an expert consultant cannot play coy. The defense must show whatever cards it either thinks it holds or may acquire with such expert assistance. *United States v. Tornowski*, 29 M.J. 578, 580-81 (A.F.C.M.R. 1989). Further, Article 46 of the Uniform Code of Military Justice provides that trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence. In accordance with R.C.M. 703(d) of the Manual for Courts-Martial, the defense counsel may request the convening authority authorize the employment and fix a limit of compensation for expert witnesses. This includes employment of a defense investigator or consultant according to *United States v. Garries*, 22 M.J. 288, 291 (CMA 1986) and *United States v. Tornowski*, 29 M.J. 578 (AFCMR 1989). The defense understands it is not entitled to an expert of its own choosing but does stress that competent assistance must be made available. *United States v. Burnette*, 29 M.J. 473, 475 (CMA 1990). The defense respectfully requests you appoint COL David Benedek as an expert consultant in the field of forensic psychology and provide any necessary funding, at government expense, to consult with and assist 1Lt Burke's defense counsel including traveling him to Dyess Air Force Base, TX to consult at the trial.

4. The employment of a forensic psychologist expert to consult with 1Lt Burke and his defense counsel is both necessary and relevant to the preparation of the Defense case for the rationale previously identified and because a R.C.M. 706 exam conducted on 1Lt Burke determined that 1Lt Burke had a severe mental disease or defect at the time of the alleged offenses and therefore was not able to appreciate the nature and the consequences of his conduct.

a. The defense specifically requests a forensic psychologist because of the critical distinction between a clinician and a forensic psychologist. Forensic psychology is a recognized specialty area in the practice of psychology that involves the interface between psychology and the law. It involves a corpus of knowledge combining behavioral sciences and the law. Forensic experts possess an extensive knowledge of the law and psychology including rules of evidence for the particular forum where services will be provided. Moreover, it is *per se* unethical for a clinical psychologist to practice in an area outside of his or her expertise. Because we are in a criminal setting where forensic expertise is required and due to the extensive overlap between psychology and the law, especially in charges of this nature, expert assistance from a qualified

forensic psychologist is absolutely necessary. COL Benedek has performed numerous evaluations over years of practice in a forensic setting. Please reference COL Benedek's attached CV (Attachment 1).

b. Expert assistance in forensic psychology is necessary for the defense. It is necessary for a number of reasons. This includes assessing what factors – vis-à-vis forensic psychology – may be relevant to the charges in this case. In addition, it includes assessing the defense's strategy while conducting witness interviews.

(i) COL Benedek's forensic skills are necessary to the fair defense of 1Lt Burke in the area of mitigation and extenuation. COL Benedek is needed to do complex psychological testing on 1Lt Burke to include, but not limited to, personality testing, competency testing, and various other tools that will help the defense to understand 1Lt Burke and his defense. COL Benedek will accomplish complex psychological and psychometric testing on 1Lt Burke to explore not only extenuation and mitigation but also possible defenses. It is imperative we have the assistance of a trained, board certified forensic psychologist such as COL Benedek to consult with on this testing and to consequently enable the defense to determine if anything of importance about the testing needs to be brought to the attention of the court. COL Benedek will also accomplish an in-depth personal interview with 1Lt Burke, which always provides excellent evidence for both the findings and potential sentencing portions of trial. A forensic psychologist is necessary to assist the defense in developing a strategy to promote the best defense possible for 1Lt Burke.

(ii) **Mental Health & Potential Impact of Incident on Complainant for Findings & Sentencing:** The Defense needs the help of an expert to understand and identify any mental health issues that could impact the findings phase in this case. Additionally, if 1Lt Burke is convicted, it is important that the Defense be able to assess the true nature of any impact this incident has had on the complainant in this case – specifically, Wendy No Moccasin, one of the alleged victim's.

(iii) It cannot be overstated that 1Lt Burke faces considerable punitive exposure in this case. 1Lt Burke faces up to nine and a half years in prison and a possible Dismissal. Therefore, an experienced and qualified forensic psychologist such as COL Benedek – as opposed to a life skills or mental health doctor with limited experience, if any – is necessary for the defense in a case with complex issues such as this.

c. Second, given the foregoing discussion, it is clear COL Benedek will accomplish much for 1Lt Burke in the area of forensic psychology, which is the second prong of the required analysis. COL Benedek will accomplish complex psychological and psychometric testing on 1Lt Burke to explore not only extenuation and mitigation but also possible defenses. It is imperative we have the assistance of a trained, board certified forensic psychologist such as COL Benedek to consult with on this testing and to consequently enable the defense to determine if anything of importance about the testing needs to be brought to the attention of the court. COL Benedek will also accomplish an in-depth personal interview with 1Lt Burke, which always provides excellent evidence for both the findings and sentencing portions of trial.

5. Defense counsel are unable to gather and present evidence that the expert assistant would be able to develop.

a. Defense counsel are not trained in forensic psychology or in the use of psychological instruments, testing or tools. Similarly, the defense counsel are not trained in the complex psychological issues such as rehabilitative potential. No member of the Defense trial team holds a degree or certification in forensic psychology. Without a psychological academic and professional background, the Defense is unable to adequately determine the validity of this evidence and/or the relevance of this evidence to the alleged charges. An expert is necessary to assist the defense in vetting certain complex psychological legal issues in the case and developing a strategy to promote the best defense possible. As expert consultant in forensic psychology could review the factual evidence supporting the charges as well as 1Lt Burke's records and offer an opinion as to the findings as well as to the rehabilitation and mitigation factors in the event of a conviction for the allegations. 1Lt Burke, with all that he has done to serve his country and the significant consequences he faces at a General Court-Martial, deserves such expert assistance so that he may present what he is constitutionally entitled to – the best defense possible.

b. The defense could not render such an opinion or complete the necessary analysis without expert assistance because no member of the defense has any training in the fields of forensic psychology or forensic medicine and cannot hope to perform the required analysis on our own. No member of the defense could attain, in a reasonable time period, the necessary level of professional certification to render such an opinion. The defense has, however, sufficiently educated ourselves to recognize the importance of this analysis to this case. COL Benedek can currently evaluate 1Lt Burke and help the defense address any psychological issues that might affect findings and possible presentencing as well as the credibility of the witnesses. Simply put, a defense attorney does not know how the mind works in the same way a trained, educated, published, and board certified forensic psychologist such as COL Benedek does. Therefore, the defense cannot adequately prepare for its case without the assistance of COL Benedek, a trained, qualified, and experienced expert consultant in the field of forensic psychology.

6. The Defense respectfully requests COL Benedek be employed as a Defense consultant and potential expert witness at trial. As COL Benedek is active duty, the Defense understands that funding for pre-trial review of the case file is not necessary. The Defense requests COL Benedek travel at least six days prior to trial allowing COL Benedek to be present for five days prior to trial and the duration of trial. This will allow COL Benedek the time to complete any and all psychological testing upon 1Lt Burke, which is anticipated to take three full workdays, and to assist the defense in its case preparation. The defense is amenable to sending 1Lt Burke TDY for the testing, and in that event would only require COL Benedek's presence for 2 days prior to trial.

7. In essence, the Defense specifically requests a forensic psychologist who has specialized training in criminal cases – not just an individual who may have read a relevant article or attended a relevant workshop. This is a specialized area of study involving intimate knowledge of the applicable literature and studies. The defense is unable to adequately prepare our case without an expert consultant because we simply do not have the adequate knowledge of this area.

The Defense has no specialized training in psychology and cannot qualify as an expert in any related field of psychology. Further, we cannot develop and fully understand this area without the assistance of a trained consultant. The Defense requires an expert's assistance in explaining several hypotheticals the Defense wishes to pursue and to be prepared for any government expert testifying on behalf of the government in its case in chief or during sentencing. Only an expert – specializing in the field of forensic psychology – would be able to fully explain these hypotheticals. Therefore the assistance of an expert consultant is vital to the preparation of 1Lt Burke's defense – both on findings and possible sentencing.

8. The defense requests COL Benedek be appointed as a representative of the defense; so that, any communications between the expert and 1Lt Burke and/or defense counsel will be privileged within the attorney-client privilege outlined in M.R.E. 502. See *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989), *Toledo*, supra. The defense needs to explore these issues in a confidential setting and to critically assess the issues presented in this case. This process will expedite the case, will lead to the fair administration of justice and will be critical to the decision making for strategic issues in this case.

9. The defense believes that the expert analysis will not only provide valuable information to be used in formulating a Defense in this case but is absolutely vital. The Defense has explained why a consultant is needed and what the consultant would do. Furthermore, the Defense has explained that counsel and staff cannot perform the review due to inadequate scientific and technical background. The Defense believes we have established the necessity of COL Benedek to ensure the proper representation of 1Lt Burke. Your favorable consideration of this request is greatly appreciated. If you elect to deny this request, please notify the defense team so that we can take appropriate action. If you have any questions, please contact Capt Ranae Doser-Pascual at DSN 612-4794 (please note that I will be in the process of PCSing to AFLOA/JAJD at Andrews AFB the week of 18 July 2011). You may also contact Mr. Puckett or Mr. Faraj at 703-706-9566.

For the Defense,



RANAE L. DOSER-PASCUAL, Capt, USAF
Defense Counsel

Attachments:

- CV for COL David M. Benedek, M.D., MC, USA, 23 pages

CERTIFICATE OF SERVICE

I certify that I served a copy of this request for an expert in Forensic Psychology on the Government on 15 July 2011 via email.

For the Defense,

A handwritten signature in blue ink, appearing to read "Ranae L. Dosier-Pascual", with a long horizontal flourish extending to the right.

RANAE L. DOSER-PASCUAL, Capt, USAF
Defense Counsel