

Here's an example of a request for expert assistance

From: Capt. James T. Kirk
To: Commanding Officer

Subj: REQUEST FOR EXPERT ASSISTANCE IN THE CASE OF UNITED STATES V.
A1C John Doe, USAF

Ref: (a) Article 46, UCMJ (10 U.S.C. § 846)
(b) Rule for Courts-Martial 703

Encl: (1) Curriculum Vitae of Dr. Simpson
(2) Fee Schedule of Dr. Simpson

1. Pursuant to references (a) and (b), I respectfully request that you authorize the employment of Dr. Paul Simpson, a forensic psychologist who regularly provides forensic psychology services in military courts-martial, for ten hours of pre-trial consultation at a cost of \$2800 (\$280/hour).

2. The purpose behind this request is to allow Dr. Simpson to assess the nature of the offenses with a goal of determining the accused's likelihood of re-offending. To this end, Dr. Simpson will review the discovery provided to the defense by the government, including the accused's cell phone extraction as well as his statements to OSI.

3. At this time, the defense is only requesting pre-trial consultation services that will include a forensic evaluation of the accused to assess his likelihood of re-offending. The defense anticipates eventually requiring Dr. Simpson to be called to provide in-person expert testimony in court during the pre-sentencing of the court-martial.

a. The employment of Dr. Simpson is relevant and necessary for preparation for trial and for assistance during trial and sentencing as it will assist the trier of fact with determining whether the behavior is indicative of a deeper sexual problem on the part of the accused. The defense anticipates that due to the nature of the alleged offense, the trier of fact may be concerned that it points to a deeper psychological problem on the part of the accused. Dr. Simpson will assist me in understanding and reviewing the evidence in the context of the accused's state of mind to determine whether this is true. For this reason, his assistance during trial on the merits is both relevant and necessary, as it will afford the defense with assistance during cross-examination of the government's witnesses, should any opine that the accused's behavior reveals deeper psychological concerns. With regard to sentencing, Dr. Simpson's testimony will be both relevant and necessary to ensure to rebut any assertion by the government or to address concerns by the trier of fact as to the degree of risk that the accused is of committing the same offense in the future. Such testimony would take the form of evidence of the accused's rehabilitative potential as well as evidence in mitigation.

b. If you do not approve this request, I will be unable to adequately represent the accused at trial since the defense lacks the necessary expertise to provide an evaluation of the accused's sexual disposition and/or risk of re-offending.

c. I can be contacted at . . .

(see the next page for the three-part Gonzalez Test)

Using an Expert Assistant in the Military

(acknowledgements to Gonzalez & Waddington @ ucmjdefense.com)

Demonstrating to a military court that the defense is entitled to a Government-funded forensics expert consultant can be difficult. According to *United States v. Short*, 50 M.J. 370 (1999), Government must provide and pay for expert assistance to an accused, only if the defense demonstrates necessity. However, merely noting that Government has employed expert assistance to help it prosecute its case or that the case is complex is not enough to show that the defense should be entitled to employ Government-funded expert assistance. *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1989).

Three-Part Gonzalez Test.

The defense must pass a three-part test to show that expert assistance is necessary. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1991). The defense must show:

1. Why expert assistance is needed,
2. What expert assistance would accomplish for the accused, and
3. Why the defense is unable to gather and present the evidence that the expert assistant would be able to provide.

Application of Gonzalez Test.

Defense counsel should include the following details when requesting forensic expert assistance.

Purpose. The name, occupation and title of the proposed forensic consultant, citing Military Rule of Evidence (M.R.E.) 502 and *U.S. v. Toledo*, 25 M.J. 270 (C.M.A. 1987)

Facts. State the specific articles of the UCMJ that the accused is charged with violating.

Law. Specify the appropriate statute or case law that establishes the accused's right to an expert assistant when necessary. *U.S. v. Garries*, 22 M.J. 288 (C.M.A. 1986); *U.S. v. Robinson*, 39 M.J. 88 (C.M.A. 1994), and *Ake v. Oklahoma*, 470 U.S. 226 (1971).

Basis.

Following the three-part test of *Gonzales*, state the specific circumstances of creating the defense that requires expert assistance. For example, if in the preparation of its case the Government is developing a complex showing of DNA evidence, defense counsel may need an forensics DNA expert to assist in understanding the Government's evidence and to assist in preparing an appropriate rebuttal to the Government's conclusions.

Why is Expert Assistance Needed?

Indicate the aspects of the case with which the forensic expert will provide the defense assistance. For example, a forensic psychiatrist could help determine the accused's competency to stand trial.

What would the Expert Assistance accomplish for the accused?

Indicate how the expert would help with those aspects of the case. For example, a psychiatrist could assist the defense in interpreting and evaluating the accused's mental health records.

Why is the defense unable to gather this evidence on their own?

Mention the lack of experience of the defense counsel and its staff in the complex areas in which the forensic consultant has experience.

Conclusion.

Request that the Court grant the request for expert assistance in accordance with the requirements of the regulation and case law, including

- Appointing the consultant as an expert,
- Designating the consultant as a part of the defense team,
- Ordering that matters related to work with the defense team remain confidential, and
- Ordering that the Government pay the consultant's fees and expenses