

**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 FOR NEW
BERGDAHL, ROBERT BOWDRIE)	PRETRIAL ADVICE
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	6 MAY 2016
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Government requests the Court deny the Defense Motion for New Pretrial Advice.

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 by a preponderance of the evidence. Rule for Courts-Martial 905(c).

FACTS

On 17 and 18 September 2015, an Article 32 Preliminary Hearing was held at Joint Base San Antonio, Texas in United States v. Bergdahl. The Preliminary Hearing Officer issued his findings and recommendations on 5 October 2015, in a Report of Preliminary Hearing with a DD Form 457. On 14 December 2015, the General Courts-Martial Convening Authority referred the matter to a General Court Martial.

LAW

Rule for Courts-Martial 601(e)
Rule for Courts-Martial 705
Rule for Courts-Martial 1107

WITNESSES/EVIDENCE

1. Report of Preliminary Hearing
2. DD Form 457
3. Staff Judge Advocate Memorandum dated 14 December 2015 (Pretrial Advice)

These documents were included as enclosures to the Defense Motion.

The Government has no witnesses.

ARGUMENT

I. The Preliminary Hearing Officer did not recommend a Special Instruction

The Preliminary Hearing Officer's (PHO) language that he "did not believe that confinement was warranted in this case" was not a recommendation to the convening authority for a special instruction on sentence limitation. The Defense is parsing the PHO's report too closely. The language cited by the Defense in their motion is extrapolated from supporting comments made in the PHO's memorandum attached to the DD Form 457, and is only auxiliary language by the PHO explaining his decision making process. The statements are in separate sentences from the PHO's recommendation of trial by a Special Courts-Martial not empowered to adjudge a Bad Conduct Discharge in the formal action document, DD Form 457. It is correct that the PHO does repeat, on three separate occasions, that he does not believe that confinement or a discharge is warranted in this case. (Paragraph 1, 3b and 3e). However, the plain reading of the report is that the 'no confinement' language is supporting reasoning to his ultimate recommendation of a Special Courts-Martial not authorized to adjudge a Bad Conduct Discharge.


The formal recommendation is found in DD Form 457. In the DD Form 457, the PHO checked the block recommending a Special Courts-Martial, and specified in block 23 of the form, that the recommendation was for a "Special Courts-Martial not empowered to adjudge a Bad-Conduct Discharge." Had the PHO intended to include a recommendation for a special instruction to the convening authority limiting confinement as part of the referral, he certainly would have done so explicitly on the DD Form 457, either by checking the "other" in block 21 and specifying his recommendation or by including additional language in his remarks in block 23. He further would have mentioned the need for a special instruction in the body of his memorandum. The PHO, an O-5 Judge Advocate, who also had a detailed legal advisor when he served as PHO, was arguably deliberate in his language and well-versed in the Rules for Courts-Martial.

II The Staff Judge Advocate's Advice was Correct


As the language was explanatory in nature and not part of the formal recommendation, the SJA had no duty to translate the auxiliary language from the PHO into part of the formal recommendation and include it in the Pretrial Advice to the convening authority. The SJA's advice addressed the recommendation accurately, and plainly, as required by the MCM. In addition, a full copy of the Article 32 Report of Preliminary Hearing was enclosed with the pretrial advice and was provided to the General Courts-Martial Convening Authority when he made his referral decision.

CONCLUSION

The Government requests the Court deny the Defense Motion for new Pretrial Advice.


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 6 May 2016.


MARGARET V. KURZ
MAJ, JA
Trial Counsel