

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

UNITED STATES)	
)	
v.	)	Motion to Compel Discovery
	)	IAW M.R.E. 302, M.R.E. 513(d)(7),
BERGDAHL, ROBERT BOWDRIE	)	and M.R.E. 705
(BOWE))	
SGT, U.S Army)	
HHC, Special Troops Battalion	)	15 September 2017
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Government respectfully requests the Court compel the production of the Accused's mental health records, pursuant to Military Rules of Evidence (M.R.E.) 302, M.R.E. 513(d)(7), and M.R.E. 705. The Government is seeking production of the following records:

1. All mental health records of the Accused, including, but not limited to, records relating to any psychiatric, developmental, cognitive, or medical conditions which are present in the Accused.
2. Any records that Dr. Charles Morgan relied upon in forming an opinion regarding the Accused, including, but not limited to, the underlying testing and data used in forming his opinion.

The Government further requests that the Court conduct an *in camera* review of the previously provided long-form R.C.M. 706 report to determine if the Defense redactions are limited solely to statements of the Accused.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government, as the moving party, has the burden to produce evidence and establish facts in support of the requested relief by a preponderance of the evidence. Rules for Courts-Martial (R.C.M.) 905(c)(1)-(2) and R.C.M. 906(b)(14).

FACTS

The Accused is charged with one specification of Desertion with Intent to Avoid Hazardous Duty or to Shirk Important Service in violation of Article 85, UCMJ, and one specification of Misbehavior Before the Enemy – Endangering the Safety of the Command in violation of Article 99, UCMJ.

On 27 May 2015, the Defense requested a sanity board to be conducted under the provisions of R.C.M. 706. On 29 May 2015, LTC Peter Burke ordered the sanity board. The long-form report was previously provided directly to the Defense and has never been in the hands of, or reviewed by, counsel for the Government.

On 21 August 2017, the Defense gave notice to the Government in D APP 91 (Defense Notice of Expert Testimony) that they intend to offer expert testimony concerning the mental condition of the Accused.¹ Dr. Morgan is expected to testify regarding the Accused's "psychiatric, developmental, cognitive, medical conditions... [and his] mental health evaluations and treatment since [the Accused's] return from captivity." Dr. Morgan is also expected to testify about the Accused's "current psychological condition, treatment needs, prognosis for successful rehabilitation and adaptation, and the consequences of confinement for his mental health..."

On 22 August 2017, the Government filed a motion to compel the long-form of the sanity board in accordance with the provisions of M.R.E. 302(c). That same day, Defense Counsel responded via email and wrote that, "Defense has no objection to providing the full 706 report IAW M.R.E. 302(c). We will work on redactions this week and provide the report to the Government as soon as it is ready."

On 6 September 2017, the Government submitted a discovery request to the Defense for the Accused's mental health records and included a DD 2870 authorization for the release of medical records. On 13 September 2017 the Defense sent the Government a copy of the long-form R.C.M. 706 report. Roughly half of the 23-page report is redacted. On 13 September 2017 the Government inquired with the Defense regarding what appear to be redactions that encompassed more than the Accused's statements. As of the date of this filing, they have not responded.

EVIDENCE

1. D App 91 – Defense Notice of Expert Testimony (Redacted).
2. G App 91 – Government Motion to Compel Reports Prepared Pursuant to Rule for Court-Martial (RCM) 706.
3. Excerpts from the redacted long-form R.C.M. 706 report.

LAW AND ARGUMENT

The Government is entitled to records relating to the Accused's mental health diagnosis and treatment. Under the applicable rules, and in the interest of fairness and efficiency, the Government seeks release of these records promptly.

When "an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation... the military judge may, upon motion,

¹ Dr. Morgan's report is not due until 21 September 2017, however, in order to ensure that the Government's experts are able to adequately review the material in advance of trial, the Government seeks the underlying information as expeditiously as possible.

order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice...” See M.R.E. 513(d)(7).

M.R.E. 302(c) provides its own exceptions when considering the circumstances covered by R.C.M. 706:

If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, must order the release to the prosecution of the full contents, other than any statement made by the accused, or any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge, upon motion, may order the disclosure of such statement made by the accused and contained in the report as may be necessary in the interests of justice.

This wide exception befits the “more limited approach” the President took when adopting the psychotherapist-patient privilege. See *United States v. Rodriguez*, 54 M.J. 156 (C.A.A.F. 2000) (“When the President promulgated M.R.E. 513, he did not simply adopt *Jaffee*; rather, he created a limited psychotherapist privilege for the military.”) The exceptions were drafted to limit the privilege in order to balance the public policy goals stated in *Jaffee* with “the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.” *Manual for Courts-Martial (M.C.M.), United States*, Analysis of the Military Rules of Evidence App. 22 at A22-44 (2005 ed.). See *United States v. Jenkins*, 63 M.J. 426, 430 (C.A.A.F. 2006).

“[T]he creation of Rule 302 was purely to protect the privilege against self-incrimination of an accused undergoing a mental examination...” *MCM*, App 22, at A22-9 (2016 ed.); See also *United States v. Clark*, 62 M.J. 195, 200 (C.A.A.F. 2005). It appears that more than just the Accused’s statements were redacted from the redacted long-form 706 report provided to the Government. For example, on page 22, the redaction in the line, [REDACTED] does not appear to be a redaction of an actual statement by the Accused. Additionally, nearly the entirety of the specific criteria listed under the [REDACTED] is redacted, despite the fact that the prefatory language makes it appear that those paragraphs are explanations of how SGT Bergdahl meets each criteria, rather than simply recitations of his statements. The Government inquired with the Defense regarding the redactions, including these specific examples, but they have not responded. The Government therefore requests *in camera* review to ensure that only the Accused’s statements have been redacted from the long-form R.C.M. 706 report provided.

Defense holds the key to opening the door to these records. The Court of Appeals for the Armed Forces has applied the same analysis for disclosure regardless of whether the Defense presents mental health evidence or testimony during the merits or sentencing portion of the trial. See *Jenkins* at 429 (considering whether an exception “could properly be considered on sentencing”). By providing notice that they intend to

offer Dr. Morgan as an expert in the field of psychiatry to explain the Accused's mental health both on the merits and as mitigation or extenuation on sentencing, the Government is thus entitled to review the Accused's long-form R.C.M. 706 report correctly redacting only the Accused's statements, mental health records, and other records relied on by the Defense expert pursuant to M.R.E. 302(c), M.R.E. 513(d)(7), and M.R.E. 705.

CONCLUSION

The Government respectfully requests that the Court conduct an *in camera* review on the long-form R.C.M. 706 report and order the release of the Accused's behavioral health records and any records that Dr. Charles Morgan relied upon in forming an opinion regarding the Accused.

Nicole K. Ulrich

NICOLE K. ULRICH
CPT, JA
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 15 September 2017.

Nicole K. Ulrich

NICOLE K. ULRICH
CPT, JA
Trial Counsel

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

UNITED STATES)	
)	
v.	)	Defense Notice
	)	of Expert Testimony
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command	)	21 August 2017
Fort Bragg, North Carolina 28310)	

The defense provides notice of the following proposed expert testimony:

1. Dr. Charles A. Morgan, III, M.D., M.A., [REDACTED]. Dr. Morgan is qualified to provide expert testimony in the field of forensic psychiatry. Dr. Morgan is expected to testify regarding the existence of the psychiatric, developmental, cognitive, and medical conditions which are present in the accused. Dr. Morgan may also testify regarding mental health evaluations and treatment since SGT Bergdahl's return from captivity. Dr. Morgan will also testify regarding factors in mitigation and extenuation and 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.
2. LTC Alan R. Larsen, Madigan Army Medical Center, Joint Base Lewis McChord, WA 98431, [REDACTED]. Dr. Larsen is qualified to provide expert testimony in the field of neurology. Dr. Larsen is expected to testify regarding factors in mitigation and extenuation, specifically the neurological injuries SGT Bergdahl sustained while in captivity and the prognosis associated with such injuries.
3. Dr. Joe Gonzales, [REDACTED]. Dr. Gonzales will provide expert testimony in the field of Physical Medicine and Rehabilitation. Dr. Gonzales will testify regarding factors in mitigation and extenuation, specifically how SGT Bergdahl's conditions will affect his quality of life either as a civilian after military discharge, or during any term of confinement should the Court make such a determination.
4. Mr. Terrence Russell, Joint Personnel Recovery Agency, [REDACTED]. Mr. Russell is qualified to provide expert testimony in the fields of Survival, Evasion, Resistance, and Escape (SERE) and personnel recovery. Mr. Russell will provide expert testimony in support of factors in mitigation and extenuation.
5. An expert in Special Operations, as previously designated by the Convening Authority. Said expert is qualified to provide expert testimony in the field of special operations missions and tactics, and will provide expert testimony regarding factors in mitigation and extenuation, specifically regarding the tactics employed during the mission on which SCPO (Ret.) Hatch was wounded.

6. CPT Luke Hallsten, [REDACTED] CPT Hallsten is qualified to provide expert testimony in the field of infantry tactics. CPT Hallsten will provide expert testimony regarding factors in extenuation and mitigation, specifically regarding the tactics employed during the mission on which MSG (R) Allen was wounded.

[REDACTED]

JENNIFER D. NORVELL
CPT, JA
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I caused this pleading to be served electronically on the court and Trial Counsel on 21 August 2017.

[REDACTED]

JENNIFER D. NORVELL
CPT, JA
Defense Counsel

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

UNITED STATES)	
)	
v.	)	GOVERNMENT MOTION TO COMPEL
	)	REPORTS PREPARED PURSUANT TO
BERGDAHL, ROBERT BOWDRIE	)	RULE FOR COURT-MARTIAL (RCM) 706
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion	)	22 August 2017
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

I. RELIEF SOUGHT

The Government requests the Court order the Defense to release the full contents, other than any statements by the accused, of any report prepared pursuant to RCM 706. The Government does not request oral argument.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government, 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 27 July 2015, Dr. Christopher Lange concluded a sanity board evaluation ordered by LTC Peter Burke, the Special Court-Martial Convening Authority. In accordance with RCM 706(c)(3)(A), only a statement consisting of the board's ultimate conclusions was provided to the Government. On 21 August 2017, the Defense gave notice to the Government in D APP 91 (Defense Notice of Expert Testimony) that it intends to offer expert testimony concerning the mental condition of the accused.

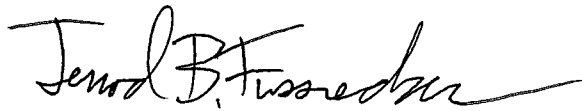
IV. LAW AND ARGUMENT

MRE 302(c) states: "If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, must order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706."

In this instance, an inquiry into the mental capacity and responsibility of the accused was concluded on 27 July 2015 and the Defense gave notice to the Government on 21 August 2017 that it intends to offer expert testimony concerning the mental condition of the accused. Therefore, the Defense is now required to disclose to the Government any reports related to the inquiry into the mental capacity and mental responsibility of the accused that were conducted according to RCM 706.

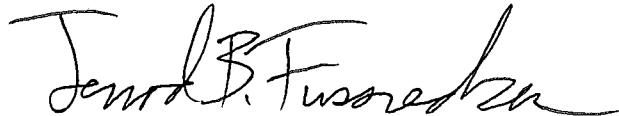
V. CONCLUSION

Based upon MRE 302(c) and RCM 706, the Government requests the Court to order the Defense to release the contents of the full report of the RCM 706 inquiry to the Government.



JERROD B. FUSSNECKER
MAJ, JA
Trial Counsel

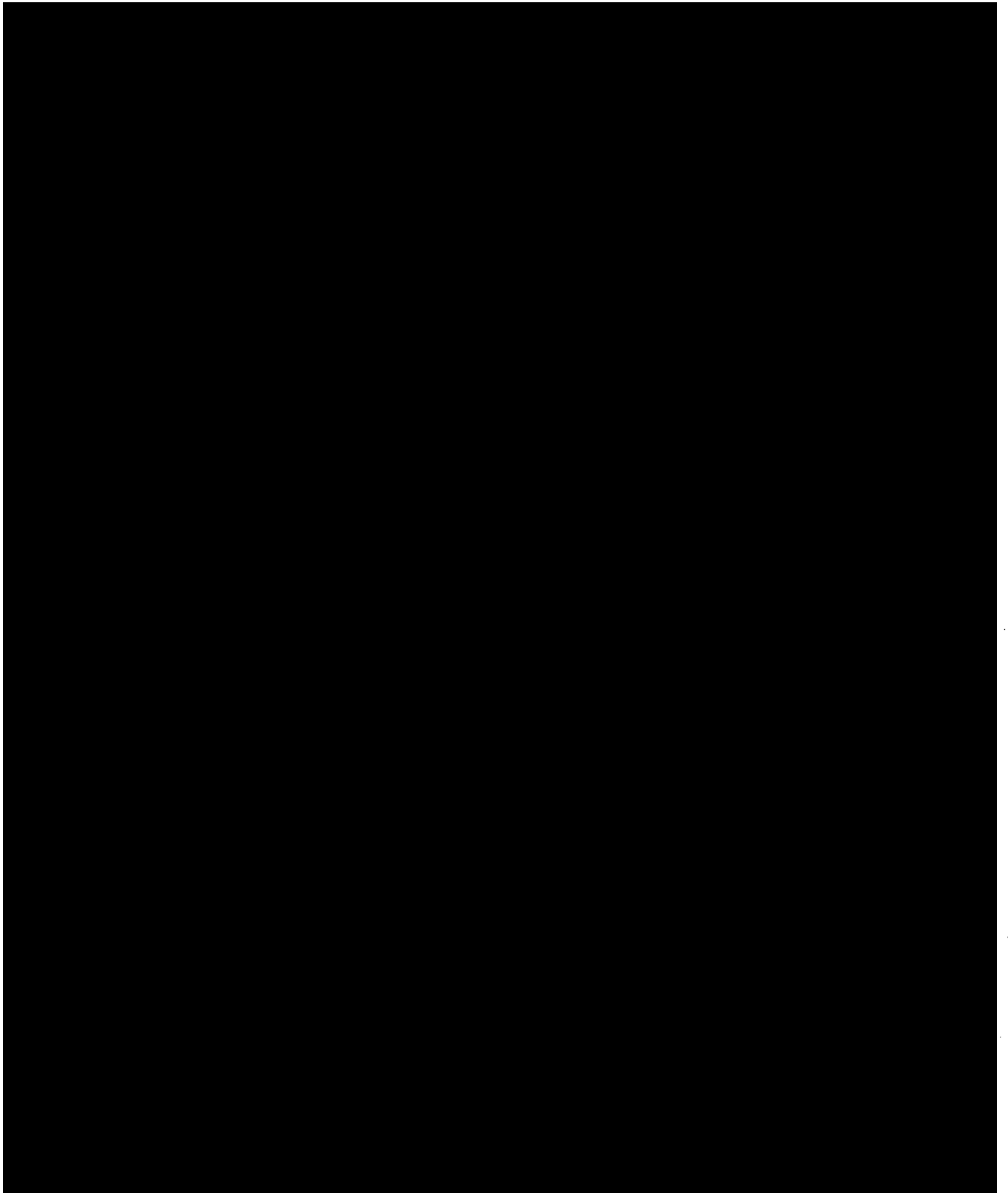
I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 22 August 2017.



JERROD B. FUSSNECKER
MAJ, JA
Trial Counsel

MCXD-DBH

SUBJECT: RCM 706 Sanity Board Evaluation (Narrative Summary) ICO Bowdrie Bergdahl,
SGT.



MCXD-DBH

SUBJECT: RCM 706 Sanity Board Evaluation (Narrative Summary) ICO Bowdrie Bergdahl,
SGT.

