

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

UNITED STATES)	
)	
v.)	Defense Response to
)	Government Motion to Compel
)	Discovery IAW M.R.E. 302,
SGT Robert B. Bergdahl)	M.R.E. 513(d)(7), and M.R.E. 705
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	24 September 2017

RELIEF SOUGHT

The government requests the court take the following three actions:

- 1.) Compel the defense to produce “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.) Compel the defense to produce “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”; and
- 3.) 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.

Defense objects to government’s request for production of mental health records, and to the government’s request for an *in camera* review of redactions. The Government already has in its possession all records upon which Dr. Charles A. Morgan III relied in forming his expert opinion. Oral argument is requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

Defense agrees with the Government’s statement of burdens.

FACTS

Defense agrees with the Government’s recitation of relevant facts, with the following additions:

1. On 24 September 2017, undersigned Defense Counsel sent an email to Trial Counsel acknowledging one redaction error, as previously pointed out by the Trial Counsel, on page 22 of the redacted R.C.M. 706 Sanity Evaluation Board Report (“706 Report”) long form. A corrected copy of the redacted 706 Report will be provided to Trial Counsel on 25 September 2017.

2. On 21 September 2017, undersigned Defense Counsel provided the psychiatric evaluation report of Dr. Charles A. Morgan III to Trial Counsel. This report lists the documents Dr. Morgan reviewed in forming his opinion. On 22 September 2017, undersigned Defense Counsel spoke with Trial Counsel regarding disclosure or production to the Government of those documents that Dr. Morgan reviewed. That conversation was subsequently followed up with an e-mail on 24 September 2017.

EVIDENCE AND WITNESSES

In addition to the evidence listed in the Government’s Motion to Compel, Defense also includes the first page of Dr. Morgan’s expert report (at Encl. 1).

LEGAL AUTHORITY

1. R.C.M. 705
2. R.C.M. 706
3. M.R.E. 302
4. M.R.E. 513

LAW AND ARGUMENT

A. The Accused is not required to release his mental health records.

Military Rule of Evidence 513 creates a psychotherapist-patient privilege. This rule states:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition.

M.R.E. 513(a). The Accused, through his defense counsel, claims this privilege with respect to his behavioral health treatment records from May 2014 through the present.

None of the exceptions to this rule have been triggered. The Government seeks to compel production of these records under M.R.E. 513(d)(7), which states:

[W]hen an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302 ... the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice[.]

First, the Defense has not yet offered any evidence concerning the Accused's mental condition. To comply with the Pre-Trial Order, defense listed Dr. Charles A. Morgan, III, a forensic psychiatrist, as a possible expert witness to provide testimony at trial; the final witness list indicates Dr. Morgan will only testify during the pre-sentencing phase. Defense also provided Dr. Morgan's report to Trial Counsel, as required by the Pre-Trial Order. Neither of these acts amounts to "offering statements or other evidence", and therefore, the exception carved out by M.R.E. 513(d)(7) is not yet triggered. If and when the Defense actually offers "statements or other evidence" of SGT Bergdahl's mental condition, it is at that time that Trial Counsel can ask this Court to order disclosure of the limited parts of the mental health records as required by M.R.E. 513(d)(7).

Furthermore, Dr. Morgan has not reviewed any behavioral health records of the Accused. As indicated in his report, which has not yet been offered into evidence, Dr. Morgan reviewed SGT Bergdahl's *medical* records, the 706 Report, and the transcripts of SERE debriefings. He also had a telephone conversation with Dr. Pennie Hoofman, SGT Bergdahl's psychotherapist. To our knowledge, Trial Counsel has not attempted to interview Dr. Hoofman.

If Dr. Morgan deems it necessary to review the Accused's mental health records in support of his opinion testimony during pre-sentencing, then the Trial Counsel can request that this Court order production of such records. Until then, the Government's request is premature.

B. The Government already has in its possession all records upon which Dr. Morgan relied in forming the opinion expressed in his report.

Dr. Morgan reviewed only those documents that had previously been provided during discovery by the Government. He also reviewed the full 706 Report, but did not rely upon such report in forming his opinion. Trial Counsel has in its possession all records that Dr. Morgan reviewed, and therefore, there are no further records of which this Court must compel production.

C. An in camera review of the redactions in the 706 Report is unnecessary and improper.

M.R.E. 302 provides a privilege with respect to portions of the 706 Report. It states:

The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings.

M.R.E. 302(a). Defense counsel has provided a copy of the full 706 Report to Trial Counsel, with all statements made by the Accused and any derivative evidence obtained through such statements redacted. Defense acknowledges it made one error in redacting the 706 Report, in which a single word that was set off in quotation marks, but was not a statement of the Accused, was redacted. This is no more than a scrivener's error, and within a reasonable time after such error was brought to Defense Counsel's attention, it was corrected. This minor, non-substantive error does not warrant an *in camera* review of the entire 706 Report. Undersigned Defense Counsel has since reviewed all redactions and hereby represents to this Court that they all constitute a statement or derivative evidence from such a statement. A corrected redacted copy of the 706 Report will be provided to Trial Counsel by the end of the day on 25 September 2017.

CONCLUSION

The Government has not met its burden on any of the issues presented in its Motion to Compel. Therefore, this Court should deny the motion in whole.

JENNIFER D. NORVELL
CPT, JA
Defense Counsel

With the defense team

EUGENE R. FIDELL
LTC FRANKLIN D. ROSENBLATT
MAJ OREN GLEICH
MAJ JASON D. THOMAS
CPT NINA S. BANKS

I certify that I caused a true copy of the above to be served on the Trial Counsel on 24 September 2017.

JENNIFER D. NORVELL
CPT, JA
Defense Counsel

M-3 Forensic Consulting, LLC.

CA Morgan III MD, MA
Forensic Psychiatrist
234 Church Street, Suite 301
New Haven, CT 06511
[REDACTED]

To: CPT Jennifer Norvell, Trial Defense Service
Re: Psychiatric Evaluation of **Bowe Bergdahl**
DOB: March 28, 1986

As per your request for a psychiatric evaluation of SGT Bowe Bergdahl, I reviewed the materials you provided to me,¹ conducted a psychiatric evaluation (October 24-26, 2016; August 10, 2017 for 3 hours). Prior to writing this report, I spoke with his current therapist, Dr. Pennie Hoofman, regarding SGT Bergdahl's mental health treatment and also spoke Dr. Janyna Mercado about the neuropsychological testing she conducted with SGT Bergdahl. Finally, I spoke with Dr. Mary Connell while writing the historical background section of this report because she had conducted several interviews with members of SGT Bergdahl's family and also with several people who knew Bowe prior to his enlistment in the Army. After speaking with the above noted professionals and after reviewing the information you provided to me, I prepared this report. The opinions articulated in this report represent my own views.

The purpose of this evaluation is to provide you with a psychiatric assessment to address: 1) whether SGT Bergdahl suffers from a psychiatric condition or conditions, and if so, the nature and severity of the condition(s); 2) whether SGT Bergdahl suffered from a psychiatric condition prior to the event in 2009 when he left his Observation Post (OP) located in Afghanistan and whether said condition, if present, was likely to have been in effect at the time surrounding his departure from the OP; 3) the degree to which his psychiatric condition(s), if present, are amenable to treatment.

¹ The CDs containing SGT Bergdahl's medical records, 706 Sanity Board Report, SERE debriefing interviews.