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and the *favoured position occupied by the insanity defense*. If an accused could place a defense expert on the stand to testify to his lack of mental responsibility and yet refuse to cooperate with a Government expert, it would place the prosecution in a disadvantageous position. The courts have attempted to balance the competing needs and have arrived at what is usually, although not always, an adequate compromise; *when an accused has raised a defense of insanity* through expert testimony, the prosecution may compel the accused to submit to Government psychiatric examination on pain of being prevented from presenting any defense expert testimony (or the striking what expert testimony has already been presented). However, at trial the expert may testify *only* as to his or her conclusions and their basis and not as to the contents of any statements made by the accused during the examination.

Analysis to M.R.E. 302 (some emphasis added). It is clear that the entire rule was promulgated to deal with competing interests presented by the accused's use of the insanity defense. The analysis goes on to discuss in detail the purposes behind the policy of not permitting Government counsel to have access to the full sanity board report (i.e. to encourage the accused's full and frank disclosure of all relevant evidence to the sanity board).

5. M.R.E. 302 contemplates, however, that there may be instances where the Government is entitled to the full report. M.R.E. 302(c) reads:

(c) *Release of evidence*. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall 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. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

The Government would like to rely on this to say that because the defense is offering testimony regarding PFC Manning's mental state in sentencing, the Government is entitled to the full R.C.M. 706 report. It is critical to read M.R.E. 302 in conjunction with the M.R.E. analysis. The analysis provides:

(c) *Release of evidence*. Rule 302(c) is new and is *intended to provide the trial counsel with sufficient information to reply to an insanity defense raised via expert testimony*. The Rule is so structured as to permit the defense to choose how much information will be available to the prosecution by determining the nature of the defense to be made. *If the accused fails to present an insanity defense or does so only through lay testimony, for example, the trial counsel will not receive access to the report*. If the accused presents a defense, however, which includes specific incriminating statements made by the accused to the sanity board, the military judge may order disclosure to the trial counsel of "such statement. . . as may be necessary in the interest of justice." Inasmuch as the revision of paragraph 121 and the creation of Rule 302 were intended primarily to deal with the situation in

which the accused denies committing an offense and only raises an insanity defense as an alternative defense, the defense may consider that it is appropriate to disclose the entire sanity report to the trial counsel in a case in which the defense concedes the commission of the offense but is raising as its sole defense the mental state of the accused.

6. It is clear from the Analysis that the rule applies only when the accused presents an insanity defense—not every time and in every instance where the accused’s mental health might be in issue. Indeed, the wording could not be more clear: “If the accused fails to present an insanity defense ... the trial counsel will not receive access to the report.” *Id.* Indeed, this very line is repeated in the case that the Government cites as somehow supporting its position. *See United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005) (“M.R.E. 302 was specifically drafted to allow the defense to control whether an accused’s statements to a sanity board would be released to the prosecutors and presented at the court-martial. If the defense does not allege insanity at court-martial, or does so only through lay testimony, the sanity board report will not be provided to the prosecution.”).

7. The limitation captured in M.R.E. 302 is a common sense proposition. Various entities have the ability to compel the accused to undertake an R.C.M. 706 examination (the Government, the Military Judge, the Investigating Officer). *Clark*, 62 M.J. at 198 (“M.R.E. 302 does not distinguish between a psychiatric evaluation ordered by the Government and an evaluation requested by the defense.”). If it were the case that the accused would be compelled to share the entire R.C.M. 706 Board report any time the accused wanted to raise any “mental health” issue, this would put the Government in an incredibly powerful position: it could always order an R.C.M. 706 Board, secure in the knowledge that if the accused raises any mental health issues, broadly construed, it could get access to the R.C.M. 706 report in order to fish for potentially damaging evidence.¹ In turn, the accused is placed in a very difficult position. The accused is forced to decide between raising mental health issues in merits or mitigation and disclosing to the Government unrelated information which the Government will undoubtedly attempt to capitalize on.

8. The purpose of the R.C.M. 706 investigation is to inquire into whether the accused has the capacity to stand trial. Here, the R.C.M. 706 Board determined that PFC Manning did have the capacity to stand trial. PFC Manning has not raised insanity as a defense. Accordingly, the Defense should not have to disclose the R.C.M. 706 Board results to the Government.

9. Further, the connection between an R.C.M. 706 Board and “any mental health issue” is too attenuated to warrant production of the report. For instance, if in sentencing, the accused presents evidence through a medical expert that at the time of the offense, he was depressed and suffered from dependency upon alcohol, how does this relate to the 706 Board’s mandate to determine competency? Simply raising *any* of a spectrum of hundreds, if not thousands, of

¹ The potential for abuse is ripe. If the Government wanted access to the R.C.M. 706 Board results, it could introduce evidence to suggest that the accused did not have any mental issues, essentially forcing the Defense to respond in some way. When the Defense did so, the Government could then, under the guise of the Defense placing “mental condition” at issue, insist on full access to the R.C.M. 706 report.

mental health issues should not put the accused at risk of having to disclose the entire R.C.M. 706 report which would not have to be otherwise disclosed.

10. The case relied on by the Government, *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005), wholly supports the Defense's position. There, the Government was seeking access to the R.C.M. 706 report, in the *context of an insanity defense*. The Court decided that because the Defense's expert did not rely on the report, the Government was not entitled access to the report in its entirety. Far from supporting the Government's position, *Clark* undermines it, as it discusses access to the R.C.M. 706 Board report solely in the context of an insanity defense. Nothing in C.A.A.F.'s decision or reasoning supports the view that anytime the Defense brings up anything broadly related to mental health, the Government is then entitled to access to the report.

11. The Defense is unaware of any case that would support the Government's position of being entitled to the R.C.M. 706 report whenever the Defense offers mental health testimony in sentencing. The lack of support for the Government's position is not surprising since R.C.M. 706 and M.R.E. 302 are designed to deal with mental responsibility issues during the merits phase of the trial and whenever the accused is introducing mental health testimony to negate the *mens rea* for an offense.

12. Moreover, the Defense expert, Dr. David Moulton, did not rely on the R.C.M. 706 Board results or report in any way in coming to any of his conclusions about the gender identity issues and other stressors that PFC Manning was struggling with during deployment. The fact Dr. Moulton did not consider the 706 report is yet another basis to deny the Government's request. Ultimately, this is nothing more than a fishing expedition by the Government—and one that is clearly not permitted by the rules or by common sense.

13. The Government also seeks the following additional relief in its motion which the Defense asserts is not at issue for this Court to decide:

a) Basis of Opinion: The Government requests access to the facts or data underlying Dr. Moulton's expert opinion. The Defense has already complied with this request and has given the Government access to the facts or data underlying Dr. Moulton's expert opinion. As such, the Defense does not believe there is any remaining issue for the Court to resolve.

b) Inadmissible Basis for Opinion: The Government also requests that the Court, under M.R.E. 703, restrict Dr. Moulton from disclosing "facts or data that are otherwise inadmissible" unless the Court determines that the probative value of this information "to evaluate the expert's opinion substantially outweighs their prejudicial effect." M.R.E. 703. The Defense does not intend to elicit any facts or data that are not otherwise admissible. Dr. Moulton, however, will be prepared to discuss facts or data that are otherwise inadmissible should the Court desire to hear this information in assisting the Court to evaluate Dr. Moulton's expert opinion.

c) R.C.M. 914 Statements: The Defense does not have any material that would qualify as a statement under R.C.M. 914.

CONCLUSION

14. In light of the foregoing, the Defense requests this Court to address the only remaining issue by denying the Government's request for access to the R.C.M 706 report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Coombs', with a stylized flourish extending to the right.

DAVID EDWARD COOMBS
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