

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.F. FELTHAM, V.S. COUCH, R.E. VINCENT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOHN A. HALSEMA  
CAPTAIN (O-6), U.S. NAVY**

**NMCCA 200001337  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 16 August 1999.  
**Military Judge:** CAPT P.J. McLaughlin, JAGC, USN.  
**Convening Authority:** Commandant, Naval District Washington,  
Washington, DC.  
**Staff Judge Advocate's Recommendation:** LCDR A.L.  
Litchfield, JAGC, USN.  
**For Appellant:** Matthew S. Freedus; Eugene Fidell; Capt  
Sridhar Kaza, USMC.  
**For Appellee:** Capt Geoffrey Shows, USMC.

**23 December 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

FELTHAM, Senior Judge:

On 17 December 2007, the Court of Appeals for the Armed Forces (CAAF) remanded this case to us for consideration of the following assigned issue:

WHETHER THE GOVERNMENT'S REFUSAL TO PROCESS APPELLATE DEFENSE COUNSEL'S REQUEST FOR ACCESS TO CLASSIFIED INFORMATION INFRINGES ON APPELLANT'S RIGHT TO EFFECTIVE REPRESENTATION.

## Background

The appellant pled guilty to offenses that occurred in 1997. On 4 August 1998, a forensic psychiatrist, Commander Kevin D. Moore, of the National Naval Medical Center, Department of Psychiatry, Bethesda, Maryland, issued a report on a preliminary inquiry he conducted into the appellant's mental state on behalf of the convening authority. In order to complete his examination of the appellant, Dr. Moore was granted a Top Secret (TS) security clearance, and given access to Sensitive Compartmented Information (SCI) regarding the appellant's past assignments, classified missions, and accomplishments. He was also allowed to review the after-action reports from those missions. Dr. Moore concluded that the appellant had a severe mental disease or defect at the time of the alleged criminal conduct and, as a result of such mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his conduct. However, Dr. Moore concluded that the appellant had sufficient mental capacity to understand the nature of the proceedings against him and to cooperate in his own defense. *See United States v. Halsema*, No. 200001337, unpublished op. at 2 (N.M.Ct.Crim.App. 30 Nov 2006).

After charges were preferred against the appellant, the convening authority ordered an inquiry into his mental competency and mental responsibility, in accordance with RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). The R.C.M. 706 board, consisting of three forensic psychiatrists stationed at Walter Reed Army Medical Center, convened on 16 November 1998, and issued its report on 1 December 1998. It concluded that the appellant had a severe mental disease or defect at the time of the alleged criminal conduct, but was able to appreciate the nature and quality or wrongfulness of his conduct, and had sufficient capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense. The board's report noted that the appellant was experiencing stresses associated with classified military operations. The appellant's counsel have asserted in their pleadings that they believe the appellant discussed TS/SCI with one of the members of this board, specifically a Dr. David T. Armitage, M.D.

On 11 December 2003, this court ordered a second inquiry into the appellant's mental capacity in accordance with R.C.M. 706. This second sanity board concluded that the appellant had a severe mental disease or defect at the time of the alleged criminal conduct, but, unlike the first board, concluded that he had been unable to appreciate the nature and quality or wrongfulness of his conduct at the time of the alleged criminal conduct.

The appellant's mental responsibility is now an assigned issue before the CAAF. In correspondence with the Government, his appellate defense counsel have identified two submarine

missions which they allege "figured" in his two pretrial psychiatric evaluations. They have requested TS/SCI access from the Government so that they may talk to the appellant about these missions, and his interactions with Dr. Moore and Dr. Armitage, and to review the after action reports. The Government has approved Top Secret clearances for both counsel, but refuses to process their applications for SCI access. On 21 March 2007, the Government counsel assigned to this case sent the following e-mail to the appellant's civilian appellate defense counsel:

Code 46 will not be able to endorse your request for access authorization to the SCI material, as we do not see it appropriate or necessary in this particular situation. There is no classified information contained in the record of trial. The nature of this case does not present any need to allow access to the N2 and SCI materials. We are making arrangements with Code 17 for you to discuss matters up to the TS level with your client.

### Security Clearance

"[I]n a classified case, the Government should not bear the full burden of obtaining a security clearance for the defense but rather, 'as a condition precedent to the performance of the Government's obligation, the lawyer must collect, compile, and furnish the Government with the information upon which to base a decision' to grant a security clearance." *United States v. Pruner*, 33 M.J. 272, 275 (C.M.A. 1991)(quoting *United States v. Nichols*, 23 C.M.R. 343, 350 (C.M.A. 1957)).

"The proper procedure . . . is for defense counsel to apply for an appropriate security clearance and to furnish the minimal information which would allow the Government to make a decision whether to grant the security clearance. . . . If the clearance is denied, then the military judge can conduct an *in camera* hearing to determine whether denial of such clearance was arbitrary or unsupportable in law. If the denial is found . . . to be arbitrary or unsupportable in law, then the judge can use his judicial power to abate the proceeding until a clearance is issued." *Id.* at 276 (citing MILITARY RULE OF EVIDENCE 505(h) and (i)(4)(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.)). "If the security clearance is granted, then the military judge, according to the remaining requirements of MIL. R. EVID. 505, should ensure proper protection of the use of classified materials by all means available to include protective orders and closed proceedings." *Id.*

Here, the appellant's military and lead civilian<sup>1</sup> appellate defense counsel have applied for a TS/SCI clearance and requested SCI access. The Government has approved TS clearances for both counsel, but claims the requested SCI access is irrelevant

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<sup>1</sup> The counsel seeking access are Mr. Freedus and Capt Kaza.

because the appellant waived the issue of his mental responsibility by pleading guilty. We reject this argument for several reasons. First, in our initial review of this case, we addressed the issue of mental responsibility on its merits and did not apply waiver. See *Halsema*, unpublished op. at 7-10. Second, the mental responsibility issue in this case is now an assigned issue before the CAAF, thereby establishing its relevance as a matter on appeal. Finally, we can discern no logical reason for the Government to have previously granted TS/SCI access to at least one, and possibly two, psychiatrists for the purpose of evaluating the appellant's mental responsibility for the alleged offenses, as well as his capacity to stand trial, but to have subsequently denied his counsel that same level of access to discuss their client's psychiatric diagnoses with him and his psychiatrists. "[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake the prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States v. Reynolds*, 345 U.S. 1, 12 (1953). Having considered the remanded issue in light of the entire record, we conclude that the Government's refusal to process appellate defense counsel's requests for access to SCI infringes on the appellant's right to effective representation.

Having considered the assigned issue, the record is returned to the Judge Advocate General for return to the Court of Appeals for the Armed Forces for further proceedings.

Senior Judge COUCH and Senior Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court