

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

**Before  
R.E. VINCENT, J.F. FELTHAM, J.E. STOLASZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**KEVIN L. SIMON  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200500094  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 16 October 2002.

**Military Judge:** Maj Phillip Betz, Jr., USMC.

**Convening Authority:** Commanding Officer, Marine Wing Support Squadron 372, Marine Wing Support Group 37, Camp Pendleton, CA.

**Staff Judge Advocate's Recommendation:** LtCol R.M. Miller, USMC.

**For Appellant:** LT Kathleen Kadlec, JAGC, USN; LT Richard McWilliams, JAGC, USN.

**For Appellee:** LCDR G.J. Rojas, JAGC, USN; Capt Mark Balfantz, USMC; LT Jessica Hudson, JAGC, USN.

**4 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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**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:

This case is before us for the second time. A military judge, sitting as a special court-martial, convicted the appellant, in accordance with his plea, of willfully disobeying a superior commissioned officer, in violation of Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890. The adjudged and approved sentence included confinement for 45 days, forfeiture of \$700.00 pay per month for two months, and a bad-conduct discharge. A previous panel of this court affirmed the

findings and the sentence. *United States v. Simon*, No. 200500094, unpublished op. (N.M.Ct.Crim.App. 28 Apr 2005).

The Court of Appeals for the Armed Forces set aside that decision, and remanded the case for a new review under Article 66(c), UCMJ, directing this court to "expressly address the question of whether the post-trial delays in the present case warrant relief either as a matter of sentence appropriateness or due process." *United States v. Simon*, 64 M.J. 205, 208 (C.A.A.F. 2006). Noting that the appellant "suffered from a significant mental health condition" and that questions had arisen concerning whether he "was mentally competent to participate in the appellate process" before this court, the Court of Appeals for the Armed Forces included the following mandate in its remand:

At the outset of such further proceedings, the court shall determine—under the circumstances presented to the court at the time of such further proceedings—whether there is a question as to Appellant's competence to participate in the appellate proceedings. If so, the court shall take appropriate action under R.C.M. 1203(c)(5).

*Id.*

On 28 March 2007, we ordered an inquiry into the mental capacity of the appellant, in accordance with RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).<sup>1</sup> The Navy clinical psychologist who conducted the R.C.M. 706 board interviewed the appellant, the appellant's mother, and reviewed the appellant's available medical records (his military medical record was not available for review). The board concluded that, on 9 February 2005, when the record of trial was initially docketed at this court and during subsequent appellate proceedings before this court and the Court of Appeals for the Armed Forces, the appellant had a severe mental disease. LCDR B. R. Chavez, PhD., MSC, USN, Mental Health Department, Naval Branch

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<sup>1</sup> Our order directed the sanity board to make the following distinct findings:

a. On 9 February 2005, when the record of trial was initially docketed at this Court, and during the subsequent appellate proceedings before this Court and the Court of Appeals for the Armed Forces, did the appellant have a severe mental disease or defect?

b. What is the clinical psychiatric diagnosis?

c. From the date his case was initially docketed at this Court until the 27 November 2006 decision by the Court of Appeals for the Armed Forces, was the appellant suffering from a mental disease or defect rendering him unable to understand and to conduct or cooperate intelligently in his appellate proceedings?

d. Is the appellant currently suffering from a mental disease or defect rendering him unable to understand and to conduct or cooperate intelligently in his appellate proceedings?

Health Clinic Meridian memo of 4 Jun 2007 at 1. The R.C.M. 706 board report diagnosed the appellant as suffering from schizoaffective disorder, depressive type, DNEPTE, and concluded that:

From the date his case was initially docketed at [this] Court until the 27 November 2006 decision by the Court of Appeals for the Armed Forces, the appellant was suffering from a mental disease that periodically rendered him unable to understand and to conduct or cooperate intelligently in his appellate proceedings because of episodes of psychosis and impaired thought processes.

The appellant is currently suffering from a mental disease rendering him inconsistent in his ability to understand and to conduct or cooperate intelligently in his appellate proceedings in that his functioning varies from day to day based in part on his compliance with psychiatric medication and treatment.

*Id.*

On 26 June 2007, the appellant moved to dismiss the findings and sentence pursuant to *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). On 11 September 2008, in light of the findings of the R.C.M. 706 board, the record of trial, and the Court of Appeals for the Armed Forces' mandate, we denied the appellant's motion, and directed him to file a brief on the following specified issue:

WHETHER THE FACT THAT THE APPELLANT "IS CURRENTLY SUFFERING FROM A MENTAL DISEASE RENDERING HIM INCONSISTENT IN HIS ABILITY TO UNDERSTAND AND TO CONDUCT OR COOPERATE INTELLIGENTLY IN HIS APPELLATE PROCEEDINGS IN THAT HIS FUNCTIONING VARIES FROM DAY TO DAY BASED IN PART ON HIS COMPLIANCE WITH PSYCHIATRIC MEDICATION AND TREATMENT" ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE THAT THE APPELLANT LACKS MENTAL CAPACITY WITHIN THE MEANING OF RULE FOR COURTS-MARTIAL 1203(c)(5)?

We have reviewed the record of trial, our previous decision in this case, the Court of Appeals for the Armed Forces' decision, the appellant's brief on the specified issue, and the Government's answer. We have also reviewed the documents attached to the record on 6 November 2008, indicating the appellant was hospitalized in the East Mississippi State Hospital on 13 May 2008 for evaluation of symptoms of psychosis and mood disturbance, and that, as of 21 October 2008, he does not have a projected discharge date. We deny direct review at this time. Instead, in our decretal paragraph, we order that the proceedings be stayed until such time as the appellant may competently assist

in his appeal. At that time, he may submit a new brief and assignments of error.

### Standards of Proof

A person is presumed to be mentally responsible and mentally competent unless the contrary is shown. See R.C.M. 909(b), 916(k), and 1203(c)(5). The burden of proof to rebut this presumption is always on the appellant, although different standards of proof apply at each stage of the proceedings. An accused is presumed to have been mentally responsible at the time of the alleged offense; this presumption continues until the accused establishes, by clear and convincing evidence, that, as a result of a severe mental disease or defect, he or she was not mentally responsible at the time of the alleged offense. Art. 50a(b), UCMJ; R.C.M. 916(k)(3)(A).

An accused is presumed to have the capacity to stand trial. R.C.M. 909(b). After referral of the charges to trial, trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(b) and (c).

Post-trial, an appellate authority may not affirm the findings and the sentence of a court-martial if the appellant lacks the mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. R.C.M. 1203(c)(5). An appellant is presumed to have the capacity to understand and to conduct or cooperate intelligently in his or her appeal unless it is established, by a preponderance of the evidence—including consideration of matters from outside the record of trial—that the appellant lacks the requisite mental capacity. *Id.*; *cf. United States v. Murphy*, 50 M.J. 4, 15-16 (C.A.A.F. 1998); *United States v. Van Tassel*, 38 M.J. 91, 93 (C.M.A. 1993).

"If the [appellant] does not have the requisite mental capacity, [we] shall stay the proceedings until the [appellant] regains appropriate capacity, or take other appropriate action" [which may include setting aside the conviction]. R.C.M. 1203(c)(5); *see United States v. Jacks*, 25 C.M.R. 78, 79 (C.M.A. 1958)(appellate review stayed where appellant suffered from "severe personality defect secondary to chronic brain disease" which "grossly impair[ed] his ability to cooperate or participate in proceedings concerning himself[.]"); *United States v. Bell*, 23 C.M.R. 208, 211 (C.M.A. 1957)(appellate proceedings "must halt if, and when, the accused is determined to be insane"); *United States v. Korzeniewski*, 22 C.M.R. 104, 107 (C.M.A. 1956). We "cannot proceed with the review of a case of an insane accused. The appellate review of such a case is tolled. If sanity is

subsequently restored, review at that level may then be completed." *Korzeniewski*, 22 C.M.R. at 107.

### **Discussion**

We find that the appellant has met his burden of showing that he became mentally incompetent at some point after his court-martial adjourned. We find that, as a result of a severe mental disease, the appellant was unable to conduct or cooperate intelligently in his earlier appeal before this court. We also find that the appellant's severe mental disease continues to the present day and that, as a result of this infirmity, he is unable to conduct or cooperate intelligently in the present appeal. We have not been furnished with a prognosis that indicates when, if ever, the appellant will recover sufficiently to proceed with his appeal.

We find nothing in the record, however, to establish that the appellant was not mentally responsible at the time of the offense, or that he was not mentally competent at the time of trial. Therefore, we decline to set aside the findings and the sentence at this time. Since the appellant is not currently mentally competent, and was not mentally competent during his earlier appeal before this court, this issue is not foreclosed in the event he later becomes competent to conduct or cooperate intelligently in his appeal.

### **Conclusion**

The proceedings are stayed until the appellant regains the requisite mental capacity to assist in his appeal. The case is returned to the Judge Advocate General, who may remand the case to a convening authority who may (1) set aside the findings of guilty and the sentence and dismiss the charge and its specifications, or (2) resubmit the case for appellate review when competent medical authority determines that the appellant is competent to assist in his appeal. In order to evaluate the appellant's mental competence to participate in appellate proceedings, the Government is authorized to order periodic inquiries into his mental capacity, in accordance with R.C.M. 706, and to order his return to active duty in the United States Marine Corps should such action become necessary in order to conduct these R.C.M. 706 inquiries.

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL  
Clerk of Court