IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Robert F. BRINTON
Gunner's Mate Third Class (E-4), U. S. Navy

NMCCA 200001971 Decided 11 September 2006

Sentence adjudged 2 February 2000. Military Judge: W.J. Dunaway. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Special Boat Unit TWENTY-TWO, Stennis Space Center, Bay St. Louis, MS.

DAVID P. SHELDON, Civilian Defense Counsel
Maj A. WILLIAMS, USMC, Appellate Defense Counsel
Maj C.R. ZELNIS, USMC, Appellate Defense Counsel
LCDR JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel
LT F.L. GATTO, JAGC, USNR, Appellate Government Counsel

VOLLENWEIDER, Judge:

The appellant pled and was found guilty by a military judge sitting as a special court-martial of unauthorized absence and willful dereliction of duty in violation of Articles 86 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 892. He was convicted contrary to his pleas by officer members of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for six months, forfeiture of $754.00 pay per month for a period of six months, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged on 28 August 2000.

We (NMCCA) previously affirmed the findings and sentence in an unpublished decision issued on 19 December 2002. On 29 September 2004, the Court of Appeals for the Armed Forces (CAAF)

set aside our decision because the text of our previous opinion included verbatim replication of substantial portions of the Government's brief. The case was remanded to this court for a new Article 66(c), UCMJ, review before a panel comprised of judges who have not previously participated in this case. *United States v. Brinton,* 60 M.J. 343 (C.A.A.F. 2004).

In his original appeal, the appellant asserted four summary assignments of error.[1] After remand, the appellant asserted two additional assignments of error: that he was not mentally responsible for his offenses, and that the military judge committed plain error by failing to instruct the members regarding permissible use of uncharged misconduct evidence adduced at trial.

We have examined the record of trial, the appellant's original and supplemental assignments of error to include associated documents, and the Government's responses. We find no merit in the appellant's original four assignments of error. We address assignments 5 & 6, below. Although not assigned as error, we note that the adjudged and approved forfeitures of pay exceed the maximum amount at a special court-martial. When the case is returned to us, we will order corrective action if it is still necessary to do so.

Mental Responsibility

The appellant argues for the first time on appeal that he was not mentally responsible for his crimes. In support, he proffers a post-trial declaration by a psychiatrist, Dr. Segal, who opines that at the time of the charged offenses, the appellant suffered from a "severe psychiatric medical illness (manic phase of a manic-depressive disorder) that made him unable to appreciate the nature and quality or wrongdoing of his actions." The appellant asks this court to disapprove the findings and sentence and authorize a rehearing.

The record reflects that a pretrial RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) sanity board was conducted, which concluded that the appellant, at the time of his offenses, did not have a severe mental disease or defect, and "was able to appreciate the wrongfulness of this conduct and to appreciate the nature and quality of his behavior." The trial defense counsel, the trial counsel and the military judge

[1] Specifically, he asserted that (1) the military judge erred by failing to suppress the appellant's positive urinalysis results; (2) the military judge erred by failing to announce findings as to the specifications under Charges I and II; (3) the staff judge advocate recommendation (SJAR) erroneously stated that the appellant pled guilty to the specification under Charge II; and (4) the convening authority (CA) erroneously stated in his special court-martial order that the appellant pled guilty to the specification under Charge II. Summary assignments of error (1) and (2) were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

discussed the results of the board on the record but a copy of the board's statement or report was never attached to the record. Record at 78. There is no evidence that the military judge saw the statement or report.

This court directed the Government to produce a copy of the order referring the appellant for a mental examination pursuant to R.C.M. 706, a copy of the board's statement, and a copy of the board's full report. The appellant was directed to submit a supplemental brief addressing the issues raised in *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). The appellant was also invited to produce a copy of the relevant post-trial diagnosis by Jeffrey Ross, Ph.D.,[2] that was considered by Dr. Segal in arriving at his own diagnosis. Order of 4 Jan 2006. The Government was unable to locate *any* responsive documents. The appellant, however, provided a copy of the full pretrial R.C.M. 706 report on 1 March 2006.[3] He did not, however, provide a copy of Dr. Ross' diagnosis or any other medical records.

The Government argues that the appellant's guilty pleas, his failure to raise mental responsibility as an affirmative defense at trial and the defense counsel's colloquy with the military judge on the issue of mental responsibility results in waiver of the issue on appeal. We do not agree. Our superior court has ruled that service courts may inquire into an appellant's mental capacity at the time of the offenses, even though no mental responsibility defense was raised at trial, and we will do so. *United States v. Massey*, 27 M.J. 371, 374 (C.M.A. 1989); *United States v. Thomas,* 32 C.M.R. 163, 169 (C.M.A. 1962).

Chronology

In analyzing the issue of this appellant's mental responsibility at the time of his offenses, at the time of trial, and on appeal, a chronology is a useful tool:

DATE	EVENT
09 Aug 99 to 09 Oct 99	Unauthorized absence, misuse of government credit card, marijuana use
23 Dec 99	R.C.M. 706 Board
02 Feb 00	Trial
28 Aug 00	Convening authority's action
14 Jun 02	Appellant's 1st NMCCA brief (no mental responsibility allegation)
19 Dec 02	1st NMCCA Decision
02 Jan 03 to	Appellant mentally incapacitated (per Dr. Segal

[2] Dr. Ross appears to have treated the appellant for mental health issues after trial.

[3] The Head of the Psychiatry Department, Naval Hospital, Pensacola, Commander Heidi A. Fowler, MC, USN, conducted the R.C.M. 706 sanity board.

02 Mar 03	letter)(2 years and 5 mos. after CA action)
14 Apr 03	Dr. Segal Letter
21 Apr 03	Motion to CAAF to file petition for review out of time due to appellant's incapacitation (granted)
26 Jun 03	Civilian defense counsel retained
07 Aug 03	Appellant requests enlargement from CAAF to have mental health information reviewed by his psychologist. Continuing mental health problems noted.
20 Aug 03	Dr. Segal declaration
22 Aug 03	Appellant's petition to CAAF requesting review of issue of mental responsibility
15 Dec 03	CAAF grants review of issue of mental responsibility
29 Sep 04	Case remanded to NMCCA for a new review in light of *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004)(mental responsibility issue not addressed)
14 Mar 05	Appellant's 2nd NMCCA brief (mental responsibility issue raised)
04 Jan 06	NMCCA order for briefs in light of *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005)

Commander Fowler

Commander Fowler, a psychiatrist at Naval Hospital Pensacola, examined the appellant and wrote the R.C.M. 706 report on 23 December 1999. From the complete 706 report, it appears that she did not treat the appellant, and did not have any contact with the appellant beyond this one occasion. Beyond her grade and title as Head, Psychiatry Department, Naval Hospital Pensacola, we have no information in the record regarding CDR Fowler's qualifications and experience. CDR Fowler found that the appellant did not have a severe mental disease or defect. According to CDR Fowler, at the time of his offenses, the appellant was able to appreciate the wrongfulness of his conduct and to appreciate the nature and quality of his behavior. She found the appellant had sufficient mental capacity to understand the nature of the proceedings and to assist in his defense. She diagnosed the appellant with alcohol dependence, drug dependence/abuse, occupational problems, and a non-specific personality disorder with sadistic, antisocial, narcissistic, borderline and passive-aggressive features, severe.[4] Beyond

[4] CDR Fowler diagnosed:

1) ALCOHOL DEPENDENCE WITH PHYSIOLOGIC DEPENDENCE IN EARLY FULL REMISSION, DSM-IV 303.90.

2) CANNABIS DEPENDENCE IN EARLY FULL REMISSION, DSM-IV 304.30.

3) NICOTINE DEPENDENCE, DSM-IV 305.10.

4) COCAINE ABUSE IN FULL REMISSION, DSM-IV 305.60.

reciting a significant family history of alcohol abuse and bipolar disease, CDR Fowler did not discuss bipolar disease at all in her report as it related to the appellant.

The record contains no opinions from CDR Fowler or any other Government expert regarding the appellant's post-trial mental state or psychiatric symptoms.

Dr. Segal

Dr. Segal is a psychiatrist in private practice, with over forty years of experience.[5] According to his 20 August 2003 Declaration, Dr. Segal first saw the appellant on 25 January 2003 at the request of Dr. Ross, who apparently was the appellant's psychologist, treating him for depression. Dr. Segal interviewed the appellant ten times up to 2 June 2003, and saw him several times thereafter as part of ongoing psychiatric treatment. Dr. Segal apparently had a history, including family history, similar to that learned by CDR Fowler.[6] All of the appellant's visits

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5) HALLUCINOGEN ABUSE IN FULL REMISSION, DSM-IV 305.30.

6) OTHER SUBSTANCE ABUSE (NITROUS OXIDE), IN FULL REMISSION, DSM-IV 305.90.

7) OTHER SUBSTANCE ABUSE (OVER-THE-COUNTER DRUGS), IN REPORTED FULL REMISSION, DSM-IV 305.90.

8) OPIATE ABUSE, IN FULL REMISSION, DSM-IV 305.50.

9) SUBSTANCE INDUCED SLEEP DISORDER, INSOMNIA TYPE, DUE TO ALCOHOL, DSM-IV 292.89.

10) OCCUPATIONAL PROBLEM, DSM-IV V62.2.

11) PERSONALITY DISORDER, NOT OTHERWISE SPECIFIED, WITH SADISTIC, ANTISOCIAL, NARCISSISTIC, BORDERLINE, AND PASSIVE-AGGRESSIVE FEATURES, SEVERE, DSM-IV 301.90

[5] Dr. Segal has both BS and MS degrees from Temple University School of Pharmacy, and a MD degree from Jefferson Medical College of the Thomas Jefferson University. He performed his psychiatry residency at Walter Reed General Hospital, and a post-residency fellowship at Harvard Medical School. Dr. Segal has military experience. He was Chief, Mental Health Services, Fort Benning, Georgia, from 1967-1970. He was a staff psychiatrist, then chief, of the Department of Psychiatry in the Division of Neuropsychiatry, Walter Reed Army Institute of Research, from 1970-1971. He resigned from the Army with the grade of Lieutenant Colonel in 1971. From 1972-1977 he was the director, Bureau of Mental Health and Addictions, Howard County, Maryland Health Department. Since then he has been in private general psychiatry practice in Columbia, Maryland. Dr. Segal has been an assistant professor (clinical) at Johns Hopkins College of Medicine, Howard University College of Medicine, and the University of Maryland College of Medicine. He is a Distinguished Life Fellow of the American Psychiatric Association.

[6] Dr. Segal concluded: "Short of research studies, it is one of the more comprehensive family histories I have seen outlining the extensive family (genetic) history of bipolar disorder and alcoholism."

with Dr. Segal were post-trial. Dr. Segal found that in this post-trial period, the appellant had periods of severe depression lasting several weeks at a time, during which the appellant was virtually unable to get out of bed.[7]

Dr. Segal diagnosed the appellant as suffering, at the time of the declaration, with Bipolar Affective Disorder Type I (Depressed Phase) and Alcohol Abuse (in remission). Dr. Segal opined that in his last months in the Navy, the appellant suffered from alcohol dependence and from Bipolar Affective Disorder Type I (Manic Phase), which led to his offenses. Dr. Segal stated that the appellant, at the time of his offenses, suffered from a severe psychiatric medical illness that made him unable to appreciate the nature and quality or wrongfulness of his actions, but that he was competent at the time of trial to understand the nature of his offenses and to assist in his defense. Dr. Segal did not offer in his declaration an opinion as to whether the appellant was currently able to assist in his defense on appeal (although he did note several lengthy periods of total incapacitation).

There is no testimony from either doctor in the record of trial, and their opinions have not been subjected to cross-examination before a neutral fact finder.

Discussion

There are several striking similarities between this case and *Harris*. Both involved mixed pleas with the contested charges tried by members. In both cases, a pretrial R.C.M. 706 board found that the appellant did not suffer from a severe mental defect. Both appellants were found, post-trial, by a psychiatrist to suffer from a severe mental defect – Bipolar Disorder – at the time of their offenses.

In *Harris*, a post-trial Article 39(a), UCMJ, session was ordered by the convening authority, wherein testimony was heard from mental health care professionals and others. The military judge found that the appellant suffered from a severe mental disease or defect (Bipolar Disorder) but that he appreciated the wrongfulness of his actions. The convening authority then ordered a second R.C.M. 706 board. The new board found that the appellant suffered from Bipolar Disorder, but was able to

[7] Dr. Segal had all the information considered by CDR Fowler *plus* the record of trial, the appellant's post-trial mental health records, and observations from multiple personal visits with the appellant and his family during the post-trial period. CDR Fowler was solely an examining doctor. She did not see the appellant before or contemporaneously with his offenses. Dr. Segal was a treating physician who also first saw the appellant after his offenses. We do not have the professional expertise to determine that such additional information is irrelevant to the diagnosis of the appellant's mental problems during the pretrial, trial, and post-trial periods, and there are no expert opinions in the record of trial to guide us.

appreciate the wrongfulness of his acts. As to Harris' guilty pleas, the court stated:

> We do not see how an accused can make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense. Nor is it possible for a military judge to conduct the necessary *Care* inquiry into an accused's pleas without exploring the impact of any potential mental health issues on those pleas. Thus, we conclude that there is a substantial basis in law and fact to question Appellant's pleas of guilty.

Harris, 61 M.J. at 398. The court there set aside the findings and sentence.[8]

In regard to the not guilty plea, we note that in order to sustain a defense of lack of mental responsibility at trial, the defense has the burden of proving the elements of the defense by clear and convincing evidence. Art. 50a(b), UCMJ; R.C.M. 916(b). To prevail in a post-trial motion for a new trial based on newly discovered evidence relating to a lack of mental responsibility, the appellant must, pursuant to Article 73, UCMJ, and R.C.M. 1210(f)(2), show that (1) new evidence was discovered after the trial; (2) the evidence was not such that it would have been discovered at the time of trial in the exercise of due diligence; and (3) the new evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the appellant. The appellant must make such request within 2 years after approval of findings and sentence by the convening authority.[9]

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[8] In regard to the effect of the post-trial diagnosis on the appellant's guilty pleas, the dissent notes that the appellant knew that he had some mental issues at the time he entered his pleas, and could recall and describe events related to his unauthorized absence and some of his other offenses. The dissent, on the basis of these facts, would uphold the findings of guilty to the charges to which the appellant plead guilty, even though at the time of the trial his bipolar disease had not been diagnosed. The argument of the dissent herein in this regard essentially continues the arguments of the *Harris* dissent that were rejected by the majority in that case. Like the majority in *Harris*, we do not see how either a defendant or his lawyer can reasonably, indeed perhaps ethically, raise a defense based on severe mental disease or defect without such a diagnosis by a mental health professional or medical doctor.

[9] Our dissenting colleague implies that "newly discovered evidence" does not included new opinions of experts. The dissent offers no authority for this proposition, and we find none. We cannot agree with the dissent's approach, as opinions are indeed evidence routinely relied on by courts and is allowed by the rules of evidence. We believe our position is supported by logic and considerable case authority, including cases cited herein by the dissent (in other context). *See, e.g., Harris,* and *United States v. Van Tassel*, 38 M.J. 91 (C.M.A. 1993), which treated new psychiatric opinions based in part on post-trial observations as new evidence.

The appellant did not raise the issue of his mental competence within the two-year time period prescribed under R.C.M. 1210.[10] Trial was held on 2 February 2000. The convening authority approved the findings and sentence on 28 August 2000. The appellant first raised the issue of his mental competence with Dr. Segal's 14 April 2003 letter, in the appellant's 21 April 2003 Motion to File Petition for Review Out of Time before the Court of Appeals for the Armed Forces. According to Dr. Segal's letter, the appellant was incapacitated at least from 2 January 2003 to 2 March 2003. Our superior court has determined that an appellant may request a new trial out of time if, during the two-year period, he was not mentally competent to assist in his own defense. *United States v. Van Tassel*, 38 M.J. 91, (C.M.A. 1993).[11] In the instant case, the appellant's own expert psychiatrist opines that the appellant was competent to participate and assist in his own defense at trial, but asserts that the appellant lacked competency for two months during the appellate process. A. Carl Segal, M.D., P.A. Declaration of 20 Aug 2003. There is no explanation in the record for the delay in raising this issue, and there is no description of the appellant's mental condition between trial and his incapacitation beginning in January 2003.

Several key parts of the puzzle we must solve are missing. The appellant's mental capacity was not litigated at trial. No court has heard testimony, seen the conflicting reports, and made findings of fact as to the appellant's mental capacity at any relevant time period. We have no medical records. We do not know if the period from January through March 2003 was the only period in which the appellant was incapacitated. Unlike the appellate courts in *Harris*, we have no information with which to compare the qualifications or methodology of the psychiatrists who have seen the appellant. The Navy doctor only saw the appellant before trial and had no opportunity to learn information that developed in the post-trial period. The appellant's private physician saw him only in the post-trial period, and was not in a position to personally observe the appellant prior to trial. We do not know the circumstances under which the appellant came to see Dr. Segal, and therefore have no information on the forum shopping issue mentioned in *Harris*. We have no expert opinion or evidence of any kind for the period between CDR Fowler's 2000 pretrial report and January 2003.[12]

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[10] The appellant did not actually file an R.C.M. 1210 request for a new trial. In his initial 15 March 2005 brief on remand to this court, he asked us to disapprove the findings and sentence, and authorize a rehearing. As noted above, he raised the issue of his mental competency before the Court of Appeals for the Armed Forces two years earlier.

[11] This court stayed the appellate proceedings in *Van Tassel* for "22 of the nearly 37 months" between the date the convening authority approved his case and the day he filed a motion for a new trial under R.C.M. 1210 due to the appellant's lack of mental competency.

[12] The dissent concludes that, along with the other information in the record,

What we are left with are conflicting reports from apparently qualified experts who considered different information pertaining to different periods of time. We therefore believe it is necessary, in light of *Harris*, to return this case for further fact finding.

Uncharged Misconduct

The appellant next asserts that the military judge committed plain error by failing to instruct members regarding the permissible use of uncharged misconduct on sentencing. We disagree. The uncharged misconduct at issue involved a short unauthorized absence and a civilian charge of driving under the influence (DUI).

The record reflects that the trial counsel initially referenced the misconduct in an effort to impeach defense character witnesses on sentencing. Record at 328, 335. The appellant himself made reference to the DUI offense during his unsworn statement in the context of his ongoing alcohol problem. Record at 347. During closing argument on sentencing, the trial counsel attempted to diminish the impact of the appellant's good military character witnesses by noting that the appellant really wasn't a "good sailor" if "[h]e went UA, he got a DUI, he went to Hawaii and he smoked dope." Record at 351.

Immediately following argument on sentencing, the military judge called an Article 39(a), UCMJ, session to discuss the uncharged misconduct. The military judge expressly noted that he did not want the members to use the uncharged misconduct information "improperly." Record at 356. Following discussion, the military judge asserted that he was "going to do it properly." Record at 357. There was no agreement on the specifics of what this meant and the trial defense counsel neither requested the standard Benchbook instruction nor offered a custom instruction.

During instructions, the military judge did not give a specific limiting instruction regarding the permissible use of uncharged misconduct on sentencing. He did, however, instruct the members that:

Dr. Segal’s declaration is such that reasonable fact finders would not find by clear and convincing evidence that, at the time of the offense, the appellant suffered from a severe mental disease or defect such as to be unable to appreciate the nature and quality of the wrongfulness of his acts.

Due to the missing information listed above, the failure of the Government to question Dr. Segal’s diagnosis or methodology, the absence of data such as CDR Fowler’s qualifications, or even a indication of disagreement from CDR Fowler of the process of making a diagnosis based on all the facts, pretrial and post-trial, we do not share our colleague’s confidence, and therefore seek further development of the facts in order to provide a basis for a reasoned and fully supported final decision.

> Although you must give due consideration to all matters in extenuation and mitigation, as well as those in aggravation, you must bear in mind that the accused is to be sentenced only for the offenses for which he has been found guilty. . . .

Record at 360.

Both the decision to give an instruction and the "substance of an instruction" are reviewed *de novo*. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F 1999)(citing *United States v. Maxwell*, 45 M.J. 406, 424-25 (C.A.A.F 1996)). The failure, however, "to object to an instruction or to [the] omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error." R.C.M. 920(f). *See also United States v. Robinson*, 38 M.J. 30, 31 (C.M.A. 1993)(citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)("It is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.")).

In this case, we are not convinced the military judge erred. The uncharged misconduct evidence was properly offered to impeach defense good character witnesses. During argument, the trial counsel properly briefly mentioned the uncharged misconduct specifically to rebut the good military character opinion of one of the defense witnesses. At no time did the trial counsel remotely suggest that the members should consider the uncharged misconduct itself in determining an appropriate sentence. On the contrary, when arguing for a strong sentence, the trial counsel expressly stated that, "the accused needs to be punished for his conduct and his misconduct. For the mess he left behind, for what his command did sending out a search party looking for him, and employing NCIS when everyone thought he was dead." Record at 349. Even assuming *arguendo* that the military judge did err, we find that the error did not materially prejudice the substantial rights of the appellant.

Appellant's Remaining Assignments of Error

We have considered the appellant's remaining four assignments of error and find them without merit.[13]

[13] The appellant pled guilty to Charge II and following a detailed providence inquiry, the military judge found the appellant guilty of Charge II. Record at 49, 84. While the appellant never expressly pled guilty to the specification under Charge II and the military judge did not expressly find the appellant guilty of the specification under Charge II, the discussion during the providence inquiry makes clear the intent of both the appellant and the military judge. We find the error to be harmless.

Conclusion

The record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority who will order a *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) hearing on the appellant's mental capacity at the time of his offenses, at the time of his trial, and during all periods from the date of his trial to the present. The convening authority will also refer the matter of the appellant's mental capacity to a board that will conduct such medical investigation as it deems necessary to comply with this order, proceeding in accordance with R.C.M. 706. The board may obtain all the appellant's medical records, military and civilian, it deems necessary to accomplish its task. The board will make the following distinct findings:

a. At the time of the alleged criminal conduct, did the appellant have a severe mental disease or defect?

b. What is the clinical psychiatric diagnosis at the time of the alleged criminal conduct, at the time of trial and all periods between the date of trial and the present?

c. Was the appellant, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?

d. At the time of his trial, was the appellant suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings against him or cooperate intelligently in his defense?

e. For all periods between the date of trial and the present, whether the appellant suffered from a mental disease or defect rendering unable to understand and to conduct or cooperate intelligently in his appellate proceedings?

f. 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?

Upon completion of the investigation, a statement consisting only of the board's ultimate conclusions as to the specified questions shall be submitted to the convening authority, the military judge, and counsel for the parties. The board's full report may be released only to other medical personnel for medical purposes, but a copy of the full report will be provided to the appellant's counsel. Neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or by other medical personnel to any person not authorized to receive the full report, except by court order. No individual other than the appellant, his counsel, the military judge or this court may disclose to

Government counsel any statement made by the appellant to the board or any evidence derived from such a statement.

Upon completion of the *DuBay* hearing, the military judge assigned to conduct the hearing shall make detailed findings of fact and law encompassing items (a) through (f) above, and return the record to the Judge Advocate General for resubmission to this court for completion of appellate review.

Senior Judge CARVER concurs.

GEISER, Judge (dissenting in part and in the result):

I respectfully dissent from my colleagues' decision to authorize a *DuBay* hearing and a new R.C.M. 706 proceeding to resolve the issue of the appellant's mental capacity "at the time of his offenses, at the time of his trial, and during all periods from the date of his trial to the present." I do not find that the appellant has met his statutory burden of proof in this regard. I concur, however, with the majority's resolution of the remaining assignments of error.

Motion for New Trial

Our superior court has observed that petitions for new trials are disfavored in the law. Relief is granted only to avoid a "manifest injustice." *United States v. Harris*, 61 M.J. 391, 394 (C.A.A.F. 2005)(quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). The appellant's request for a new trial fails first because it was submitted outside the two-year time limit provided for in RULE FOR COURTS-MARTIAL 1210, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).[1] In fact, approximately three years passed before the appellant even raised mental responsibility as a possible issue and approximately four and one-half years passed until he requested a new trial. No mention of mental responsibility was made in the appellant's initial 13 Jun 2002 assignments of error to this court. Our superior court has previously tolled this two-year period in a case where an appellant was not mentally competent to assist in his own defense during some or all of the two-year period. In such cases, an appellant may file out of time if, after subtracting the period he was not competent to participate in his defense, his request would have been timely. *United States v. Van Tassel*, 38 M.J. 91 (C.M.A. 1993).[2]

[1] The convening authority approved the findings and the sentence in the instant case on 2 August 2000. The appellant filed a petition with the Court of Appeals for the Armed forces (C.A.A.F.) on 20 August 2003 raising mental responsibility as a potential issue. His R.C.M. 1210 request for a new trial was not filed with this court until 15 March 2005.

[2] This court stayed the appellate proceedings in *Van Tassel* for "22 of the nearly 37 months" between the date the convening authority approved his case and the day he filed a motion for a new trial under R.C.M. 1210 due to the appellant's lack of mental competency.

In the instant case, the appellant's own expert psychiatrist opines that the appellant was competent to participate and assist in his own defense at trial but lacked competency post-trial between the dates 2 January 2003 and approximately 2 March 2003. A. Carl Segal, Declaration of 20 Aug 2003 and A. Carl Segal ltr of 14 Apr 2003. Subtracting this two-month period still leaves the appellant far outside the statutory window for requesting a new trial. The appellant does not aver any inability to participate in his defense during any of the remaining time between his trial and his request for a new trial. By ordering a *Dubay* hearing to gather, *inter alia*, additional evidence regarding the appellant's post-trial competency, the majority effectively relieves the appellant of his statutory burden to offer sufficient evidence to justify his out-of-time filing.

Assuming, *arguendo*, that the appellant had timely requested a new trial, his request would still fail under the requirements of R.C.M. 1210(f)(2). First, the appellant is required to offer the court "new evidence" which could not have been discovered prior to trial with due diligence. The appellant rests his appeal entirely on a three-page post-trial declaration by A. Carl Segal, M.D., P.A. dated 20 Aug 2003.[3] In order to grant the appellant a new trial, his new evidence, considered in the light of all other pertinent evidence, must demonstrate that it would probably produce a substantially more favorable result for the appellant. *Harris,* 61 M.J. at 396.

Although awkward, our standard of review is that we must grant the appellant's request for a new trial unless we are convinced beyond a reasonable doubt that the addition of Dr. Segal's three-page opinion to all the other pertinent evidence, would not cause reasonable fact finders to find by clear and convincing evidence that, at the time of the offenses, the appellant suffered from a severe mental disease or defect such as to be unable to appreciate the nature and quality of the wrongfulness of his acts. *United States v. Cosner*, 35 M.J. 278, 281 (C.M.A. 1992). In my opinion, Dr. Segal's three-page opinion does not meet this burden.

Dr. Segal's Declaration

Dr. Segal opines that at the time of the charged offenses, the appellant suffered from a "severe psychiatric medical illness (manic phase of a manic-depressive disorder) that made him unable to appreciate the nature and quality or wrongdoing of his actions." As detailed in his declaration, he considered information gathered from a series of psychiatric evaluations conducted on the appellant between 25 January 2003 - 2 June 2003;

[3] Dr. Segal served as the Chief, Mental Health Services at Fort Benning, Georgia from 1967-70 and as the Chief, Department of Psychiatry in the Division of Neuropsychiatry at Walter Reed Army Institute of Research from 1970-71. Dr. Segal has been in private practice since 1972.

multiple interviews of the appellant's father; psychological tests from 1993 and 2001; speech testing done in the early 1980's; the 1999 pretrial R.C.M. 706 report concerning the appellant; and material from the appellant's court-martial. Dr. Segal fails to articulate which specific events or other relevant pretrial factors he considered that were not already considered by the pretrial sanity board. Examining both reports, substantially the same relevant factual and diagnostic material was considered both by the pretrial R.C.M. 706 sanity board and Dr. Segal. Dr. Segal, of course, also had access to parts of the record of trial and post-trial factors which by definition were unavailable to the pretrial board.

Commander Fowler, Head of Psychiatry at Naval Hospital, Pensacola, Florida conducted the initial R.C.M. 706 pretrial sanity board in this case. The majority notes with apparent concern that we have no evidence of Commander Fowler's qualifications and background. I do not share this concern. By virtue of her position as Head of Psychiatry at a major Navy medical facility we may, absent evidence to the contrary, take at face value that she is fully qualified to hold that position and to render a competent professional opinion. There will always be reasonable differences of opinion between well-intentioned and competent professionals in any field. Neither a trial court nor this court can, however, resolve such professional differences of opinion by reference to the doctors' respective curriculum vitae.

Commander Fowler's report indicates that she considered information gathered from the appellant's medical record, service record, written input from the appellant's father, and the charge sheets. Her report references specific instances from the appellant's medical, substance abuse, and psychological history; the appellant's father's alcohol and violence related incidents; and various relatives who suffered from alcohol abuse, bipolar disorder and depression. Her specific identification of relevant matters gleaned during her review is far more specific and detailed than those provided by Dr. Segal.[4]

[4] By way of example, Commander Fowler's report relates the appellant's father's DUI history, alcohol arrests, an incident when his father was shot by a civilian under circumstances involving extortion, the father's expulsion from school, his father's subsequent efforts to resolve his alcohol problem, the appellant's nocturnal enuresis up to age 18, incidents involving the appellant killing small animals "for fun," making pipe bombs, starting fires, purposefully flooding his basement and cutting up Christmas tree lights in anger, breaking and entering into vehicles, shoplifting, truancy, breaking both his thumbs in fighting and breaking another boy's nose, his own suspension and later expulsion from high school, alcohol abuse, alcohol rehabilitation treatment, cocaine and PCP use, as well as specific reference to the appellant's paternal aunt's electroconvulsive therapy for bipolar disorder and suicide attempts, his paternal uncle's bipolar depression, and two paternal aunts' bipolar disorder. Dr. Segal, on the other hand, generally referenced these disorders as "one of the most comprehensive family histories I have seen outlining the extensive family (genetic) history of bipolar disorder and alcoholism." Report of Inquiry into the Mental Capacity and Mental Responsibility of Gunner's Mate Third Class Robert F. Brinton, USN of 23 Dec 1999 and A. Carl Segal, M.D., P.A. Declaration dtd 20 Aug 2003.

There is no evidence that Dr. Segal considered any relevant facts involving the appellant's personal or family psychiatric history up to the date of the original sanity board that were not also considered by Commander Fowler at the time she made her assessment. While Dr. Segal notes the appellant's significant post-trial psychological issues, nothing in Dr. Segal's declaration reflects specifically how current psychological issues relate to those the appellant might have suffered at the time of the offenses. Dr. Segal's recitation of factors relating directly to the appellant's condition at the time he committed the charged offenses is limited to broad declaratory statements attesting to the appellant's good military service, prior treatment for alcohol abuse, commission of the offenses themselves, the fact that the appellant had been evaluated for possible learning disabilities, and that his family had a comprehensive history of alcohol and mood disorders. If additional factors exist, the burden is on the appellant to produce them. By authorizing a *DuBay* hearing to determine, *inter alia*, whether such factors existed, we are relieving the appellant of his statutory burden.

It is also here that the instant case differs significantly from *Harris*. Unlike the expert medical personnel in *Harris*, both Commander Fowler and Dr. Segal are similarly qualified and licensed. There is no evidence to suggest that they do not share a similar educational background and methodological approach. An even greater difference between the cases is that the first sanity evaluation in *Harris* concluded that the accused suffered from no mental disease or defect whatsoever. In the instant case, the pretrial sanity evaluation concluded that the appellant suffered from significant and extensive psychiatric problems which in the opinion of Commander Fowler did not affect the appellant's ability to understand the nature and quality of his actions.[5]

Thus, the only "new evidence" reflecting the appellant's mental health status up to the day of the trial that the appellant offers is Dr. Segal's psychiatric opinion. Exercising due diligence as required under R.C.M. 1210, the appellant could certainly have obtained a 2nd or even a 3rd psychiatric opinion prior to trial but he elected not to do so. Thus, his request for a new trial fails for lack of due diligence.

The only real difference between the pre and post-trial opinions regarding the appellant's mental state at the time of the offenses regards the relative significance each of the psychiatrists placed on the known psychiatric history. While Dr. Segal identifies significant additional post-trial psychiatric problems suffered by the appellant there is no evidence

[5] Another significant difference is that the appellant in *Harris* filed within the statutory deadline provided in R.C.M. 1210, while the appellant in the instant case did not.

whatsoever connecting these post-trial events to the appellant's mental state at the time of the offenses. What we are left with is a "newly discovered" *opinion* pertaining to evidence of mental illness that was already considered by the earlier sanity board.[6] Our superior court frowns on such post-trial searches for additional experts. In *United States v. Gray*, 51 M.J. 1, 14 (C.A.A.F. 1999), the court specifically observed that a post-trial opinion regarding the extent of an appellant's organic brain damage that was known to the defense prior to trial was not sufficient to warrant a new trial.

In essence, the majority focuses on what we do not know and ignores the appellant's burden to make his own case. It is incumbent on the appellant to provide sufficient new evidence that was not available with reasonable diligence at the time of trial to convince this court that he would probably get a different result at a new trial. He has not done so. I am convinced beyond a reasonable doubt that Dr. Segal's declaration, read in the context of all the other evidence in the case, is such that reasonable fact finders would not find by clear and convincing evidence that, at the time of the offense, appellant suffered from a severe mental disease or defect such as to be unable to appreciate the nature and quality of the wrongfulness of his acts. I would deny the appellant's request for a new trial as untimely filed, as failing to show due diligence to obtain a different psychiatric opinion at the time of trial, and because I believe beyond a reasonable doubt that, if given a new trial, the result would be the same.

Guilty Pleas

The appellant pled guilty to unauthorized absence and willful dereliction of duty. A plea of guilty waives a number of important constitutional rights. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). A decision to waive constitutional rights must be an informed one. *United States v. Hansen*, 59 M.J. 410, 413 (C.A.A.F. 2004). In *Harris*, our superior court could not credit how "an accused can make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense." Nor did the court believe it was "possible for a military judge to conduct the necessary *Care*

[6] The majority's view that a new opinion constitutes sufficient new evidence to warrant a *DuBay* hearing is fundamentally flawed as it admits of no finality. If a newly ordered sanity board confirms Commander Fowler's initial assessment, we are still left open to future opinions by additional psychiatric experts which were not available for consideration by earlier medical experts, the military judge, or this court. Presumably the new expert(s) will have conducted additional examination and testing of the appellant and will have considered the record and the appellant's psychiatric history since the last evaluation. These are precisely the "new" factors pointed to by the majority as justifying a new hearing and new sanity evaluation at the present time. It would be arbitrary to insist that Dr. Segal's post-trial examination and opinion warrant a new hearing if we are not willing to do so for other future experts *ad infinitum*.

inquiry into an accused's pleas without exploring the impact of any potential mental health issues on those pleas."

A plain reading of *Harris* does not require that an accused have specific knowledge of a particular diagnosis in order to providently plead guilty or that a judge needs such a specific psychiatric diagnosis to conduct an adequate *Care* inquiry. *Harris* simply requires that an accused and the military judge be on reasonable notice that the accused suffers from significant psychiatric problems. In *Harris,* there was no indication of any psychiatric issues prior to trial. In the instant case both the appellant and the military judge were fully aware of Commander Fowler's extensive psychiatric findings to include a family history of bipolar disorder and the appellant's litany of pre-service psychiatric and behavior problems. That Commander Fowler did not specifically diagnose the appellant's maladies to include a bipolar disorder is of no significance.

In the instant case, the appellant elected to plead guilty with the knowledge that he suffered from 11 separate clinical psychiatric disorders to include a severe personality disorder with sadistic antisocial, narcissistic, borderline and passive-aggressive features. While he may not have been aware that one or more psychiatrists might diagnose his psychiatric history as a manic phase of a bipolar disorder, the appellant was fully aware of the myriad psychological issues outlined in the original sanity board report to include a comprehensive family history of depression and bipolar disorder. His counsel was similarly aware of these issues and the military judge, while not privy to specific details in the full report, was aware that the appellant had undergone a pretrial sanity board which he discussed with the trial defense counsel to ensure there were no issues. It is also important to note that Dr. Segal's post-trial diagnosis regarding the appellant's competency to stand trial and to participate in and make decisions regarding his court-martial concurred with Commander Fowler's pretrial diagnosis. I would hold, therefore, that the appellant's level of knowledge regarding his own mental health problems was sufficient for him to make informed pleas. The military judge was also sufficiently aware of the appellant's psychiatric problems to permit an adequate *Care* inquiry.

It is also important to consider the various psychiatric opinions in the context of the rest of the record of trial. The record contains a wealth of evidence that the appellant could accurately recall and describe the day he commenced his unauthorized absence, could clearly recall and describe the process of how he could have requested leave or liberty and his candid admission that he knew at the time he commenced his unauthorized absence that it was against the rules for him to leave his command without permission. He related in detail where he went and what he did while an unauthorized absentee. He convincingly stated that there was nothing to prevent him from returning at any time during his absence. Of particular note is the fact that he called his commanding officer several days

before his return to let him know he was coming back. Record at 58-61.

Similarly, when discussing his use of a government credit card to purchase a personal plane ticket to Hawaii, the appellant recalled and related a briefing he'd received detailing the permissible and impermissible uses of his government credit card, how he had used it only for government purposes in the past, and that on the day in question he understood that he wasn't supposed to use the card for personal expenses. Of particular note, he related to the military judge that the only reason he used the government credit card was because he'd left his personal credit cards in his car. Record at 61-66.

During the providence inquiry into the charge of using marijuana, there was no indication that the appellant was confused or didn't understand that his use of marijuana was wrongful. The only issue that developed was his lack of specific memory of the event. Citing heavy alcoholic intoxication, the appellant candidly admitted that he could not remember actually using marijuana but stated he was convinced he had done so based on the urinalysis, the actions of the people he associated with in Hawaii, and other circumstances. Given that the appellant could not specifically recall using the drug, the military judge properly permitted the appellant to withdraw his guilty plea. Record at 68-79.

Following that withdrawal, we note that the defense vigorously litigated the impact of appellant's excessive drinking. The appellant testified under oath that he drank alcohol almost every day. Some days he drank "moderately," consuming only 6-11 drinks and on other days he drank "heavily," consuming between 12 and 18 drinks. He further testified that the effect of so much alcohol sometimes led to unconsciousness and blackouts. He indicated he had no idea how long the blackouts lasted and frankly could not account for all of his time in Hawaii. The members questioned the appellant regarding whether he would know what sort of cigarette he was picking up under such circumstances. Record at 238-60. On closing, defense counsel argued strongly that, given the appellant's routine state of heavy intoxication, it was not clear beyond a reasonable doubt that he didn't accidentally pick up someone else's marijuana cigarette by mistake. Notwithstanding the appellant's evidence and argument, he was convicted.

By sending the case back for additional psychiatric evaluation and fact-finding, the majority opinion tacitly acknowledges the appellant's failure to present sufficient new evidence to justify filing out of time or to otherwise warrant a new trial. In my opinion, this action inappropriately extends our superior court's decision in *Harris* to effectively permit an appellant to reopen a case years after trial based solely upon his ability to find at least one mental health professional whose

opinion on the ultimate R.C.M. 706 questions differs from a prior evaluation.

For the Court

R.H. TROIDL
Clerk of Court