UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Colonel MICHAEL D. MURPHY
United States Air Force

Misc. Dkt. No. 2007-03

22 December 2008

GCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Stephen R. Henley.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Colonel James C. Sinwell, Major Amy M. Jordan, Major John N. Page III, Captain Gwendolyn M. Beitz, Captain Phillip T. Korman, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Christopher C. Van Natta, Major Jeremy S. Weber, and Captain Coretta E. Gray.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

This case is before us after extensive motion practice resulted in a 5 September 2008 ruling by the military judge holding that as a result of the government's failure to release classified information, the maximum punishment to which the appellee could be sentenced, if convicted, is a sentence of no punishment. On 8 September 2008, the government appealed the military judge's decision under Article 62(a)(1)(D), UCMJ, 10 U.S.C. § 862(a). The appellee, in his Answer, questioned the jurisdiction of this Court to review the issue.

The parties have thus raised two matters on appeal. The first issue is whether this Court has jurisdiction under Article 62(a)(1)(D), UCMJ, to review a military judge's imposition of a sanction arising from the government's refusal to provide classified information for review by the military judge *in camera* pursuant to Mil. R. Evid. 505. The second issue is whether the military judge committed reversible error in ordering that the maximum punishment the members may adjudge is a sentence of no punishment.

Background

The appellee is currently pending trial by general court-martial for three specifications of conduct unbecoming an officer, three specifications of larceny, and one specification of violating a lawful order, in violation of Articles 133, 121, and 92, UCMJ, 10 U.S.C. §§ 933, 921, 892.

From 13 December 2001 to 30 June 2005, the appellee was assigned as General Counsel at the White House Military Office (WHMO). During this period, he worked on several classified programs. The appellee was required to sign nondisclosure agreements prohibiting the unauthorized disclosure of his work in the Special Access Programs (SAPs) and agreed to never divulge anything about the SAPs to anyone not authorized to receive the information without prior written authorization from the WHMO.

The appellee's Officer Performance Reports (OPRs) during his time at the WHMO did not speak to the specifics of his work involving the SAPs but made general comments regarding the appellee's duty performance, such as:

> As WHMO General Counsel, immediately became vital linchpin for oversight and operation of the most critical contingency programs ensuring the uninterrupted function of the Presidency and Executive Branch.
>
> Spectacular year of performance and dedication by any measure—from combat zone to the White House.
>
> Entrusted with the Nation's "crown jewels"—the most critical contingency programs in the federal government.
>
> Few will ever know the contributions he has made to the security and continuity of our Nation, but I do.
>
> Every once in a while, one is privileged to encounter an officer so uniquely gifted that the overworked superlatives commonly used on evaluation reports are inadequate to effectively describe his duty performance.

> This officer's contributions to the Nation and to the Presidency must and will remain unknown except to a very few, but those contributions are known and deeply appreciated by the highest levels in the White House.

On 14 December 2004, the appellee was awarded the Defense Superior Service Medal. The citation accompanying the award contains the following language:

> Colonel Murphy oversaw the programming, budgeting, and execution of a multi-million dollar classified and unclassified mission support to the President, the Vice President, and senior White House staff.
>
> His role in the classified arena proved indispensable after 9-11, as Emergency Response Funding was allocated for immediate action in heightened security surrounding the War on Terrorism.
>
> Colonel Murphy's contributions will endure well into the 21st Century, bringing safety and security to millions of Americans who will never know of his efforts.

Since the summer of 2007, the appellee's trial defense team has attempted, without success, to obtain approval to discuss the specifics of his work involving the SAPs with the appellee. On 15 July 2007, the trial defense team requested that the appellee be released from his nondisclosure agreements or given authorization to discuss the reasons behind the narrative statements in his OPRs with his defense counsel. On 24 August 2007, the lead trial defense counsel, Colonel (Col) JS, was provided a classified briefing from the WHMO. Col JS is currently subject to a nondisclosure agreement regarding the briefing he received. On 5 September 2007, the defense requested that Col JS be released from his nondisclosure agreement and renewed their request that the appellee be released from his nondisclosure agreement so they could discuss these matters between themselves. Additionally, the defense requested that the appellee's Top Secret clearance be reinstated. On 9 April 2008, the appellee's Top Secret clearance was reinstated but Col JS was not released from his nondisclosure agreement.

On 10 April 2008, the convening authority requested that the appellee be "read-in"[1] to the WHMO SAPs. On 14 April 2008, the WHMO disapproved the convening authority's request. On 28 April 2008, the convening authority requested that trial counsel, defense counsel, the court reporter, and the military judge all be "read-in" to the SAPs. This request was denied by the WHMO on 5 May 2008.

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[1] "Read in" is the phrase used to describe the process by which an individual receives access to Special Access Programs (SAPs). SAPs impose safeguards and additional access requirements than those normally required for information at the same security level. *See* Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (amends Exec. Order No. 12,958 and defines "special access program").

On 9 May 2008, the defense filed a notice pursuant to Mil. R. Evid. 505(h)(1) that it intended to introduce classified information on the merits and during pre-sentencing. The notice did not "state, with particularity, which items of classified information [the accused] reasonably expects to be revealed"[2] because: (1) the appellee "is subject to a [n]on-[d]isclosure [a]greement and cannot currently discuss these matters with his [d]efense team;" (2) the lead trial defense counsel, who had received one briefing on the SAPs "is currently under a [n]on-[d]isclosure [a]greement . . . and may not discuss these matters with either co-counsel or [the appellee];" and (3) the lead trial defense counsel "is not permitted to disclose these matters to the court in order to provide more detailed notice at this time."

On 2 June 2008, the defense filed a pleading entitled "Motion for Appropriate Relief: Compel Information Regarding [the Appellee's] Participation in Special Access Programs and Programs relating to Specialized Compartmentalized Information during his tenure at the White House Military Office." The written motion's focus was on the appellee's right to discovery. The focus of the motion changed as time passed. The defense argued that they needed the details of the SAPs on which the accused worked at the WHMO in order to sufficiently present matters in mitigation and extenuation, present a good military character defense, and defend against a charge of conduct unbecoming an officer by wrongfully and dishonorably accepting the position and performing duties as General Counsel for the WHMO and providing legal advice without a license.[3]

An Article 39(a), UCMJ, 10 U.S.C. § 839(a), session was held on 23 June 2008 on this motion and other matters before the court. At the time of this hearing, the classified materials had not been claimed as privileged pursuant to Mil. R. Evid. 505. Further, all three trial defense counsel had the appropriate clearances to discuss the pertinent classified material with the appellee although it appears from the record that only the lead trial defense counsel had been "read-in" to portions of one of the SAPs. The appellee would also have to be "read" back into the programs. However, the nondisclosure agreements precluded any discussion regarding the appellee's involvement with the SAPs between the appellee and his counsel.

Trial defense counsel called Rear Admiral (RADM) MM, the appellee's supervisor and rater at the WHMO, to testify about the appellee's service during that assignment. RADM MM's testimony went to the relevance of permitting the trial defense team access to the SAPs pursuant to their discovery request. RADM MM was himself subject to a nondisclosure agreement and could not provide specifics of the appellee's service. However, RADM MM was able to provide general statements such

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[2] Mil. R. Evid. 505(h)(3).

[3] Specification 1 of original Charge I alleged that the appellee wrongfully competed for promotion between on or about 31 May 2002 and 30 Nov 2006 knowing he did not possess the qualifications of a Judge Advocate. Specification 2 of original Charge I alleged that the appellee wrongfully accepted the position and performed duties as General Counsel at the WHMO and provided legal advice without a license.

as: the comments in the appellee's OPRs "understated" his contributions; that the appellee "did incredible things after 911;" and there was no "unclassified" way to obtain the specifics of the appellee's contributions.

The military judge determined it premature to rule on the defense motion. However, the judge did determine that it was "relevant and necessary to prepare for his defense" for the appellee to be able to talk with his defense counsel about his work on the SAPs. Trial counsel was to engage the WHMO about releasing the appellee and his counsel from the nondisclosure agreements. The judge stated that if Specifications 1 and 2 of the original Charge I were not "withdrawn and/or dismissed"[4] or the appellee and his counsel were not released from the nondisclosure agreements, the trial scheduled for 21 July 2008 would be continued. The court recessed until the next day to enable the trial counsel to engage the WHMO on releasing the appellee and his counsel from the nondisclosure agreements.

On that day, trial counsel submitted a letter to the WHMO, detailing the WHMO's pervious denial of the convening authority's request to "read" the appellee into the appropriate SAPs. Trial counsel informed the WHMO that the military judge had determined that the SAPs to which the appellee had access were potentially relevant to the original Charge I, Specifications 1 and 2; may be relevant for the defense of good military character; and, if the information was not provided, could negatively impact the government's sentencing case. Trial counsel asked that the appellee be released "from all special access program non-disclosure agreements; . . . be ["read"] into all WHMO [SAPs] to which he had previously had access; and [t]hat the defense team be ["read"] into the same programs." Trial counsel concluded that if the WHMO denied the requests, the military judge would determine "that you have effectively invoked the privilege regarding protection of classified information under Military Rule of Evidence 505."

The court reconvened the next day, and the military judge began the proceedings by stating:

> Finally, . . . since June 2007, the defense has sought information regarding the accused's participation in classified Special Access Programs while assigned as the White House Military Office General Counsel. The appropriate classification authority has consistently refused to allow any party to these proceedings to be ["read-in"] to the programs, notwithstanding having the requisite security clearances. The White House has also refused to modify in whole or in part the accused's nondisclosure

[4] Trial defense counsel had argued that appellee's specific contributions while serving in the WHMO were exculpatory in determining whether appellee's actions, as alleged in these specifications, were dishonorable pursuant to Article 133, UCMJ, 10 U.S.C. § 933. They maintained, for example, that assuming appellee may not have been a properly licensed attorney, his assignment as the WHMO General Counsel may not have been dishonorable based on the totality of his service.

> agreements to allow him to discuss with his defense counsel his work on the programs. As such, through no fault of its own, the defense is unable to provide a description of the classified information to satisfy its obligations under MRE 505(h) to provide notice of its intent to disclose classified information at trial.

Further, the trial judge found "the classified information regarding the accused's work on the Special Access Programs while at [t]he White House apparently contains evidence that is relevant and necessary to Specifications 1 and 2 of [the original] Charge I."

Trial counsel then informed the court of the following: no claim of privilege had been made by the WHMO pursuant to Mil. R. Evid. 505(f); a request had been made to the WHMO to release the appellee and his counsel from the nondisclosure agreements but the WHMO had not yet acted on the request; the WHMO had extended an invitation to "read-in" the military judge on the SAPs to the extent that the trial counsel and defense counsel had been read-in; and the convening authority had "instituted action to obtain the classified information in order for the court to examine the evidence *in camera*" so the military judge could determine whether the evidence was "relevant and necessary."

The military judge, a member from the government trial team, and a member from the defense trial team attended the WHMO briefing on 26 June 2008. The immediate result of the briefing was an understanding that the trial of the case would not proceed on 21 July 2008.

On 1 July 2008, the military judge issued a Show Cause Order that stated:

> [I]f the accused has not been authorized to speak about the specifics of his work in the SAPs with his lead defense counsel by 1200 hours 10 July 2008, the government should be prepared to show cause at the 18 July 2008 Article 39(a) session why the Court should not dismiss specifications 1 and 2 of [the original] Charge I and proceed to trial on the remaining charges and specifications.

In response, on 1 July 2008, the convening authority dismissed Specifications 1 and 2 of the original Charge I of conduct unbecoming an officer.

On 21 July 2008,[5] the trial counsel informed the military judge at an Article 39(a), UCMJ, session that the WHMO had not agreed to release the appellee from his nondisclosure agreement but had agreed that the appellee could meet with a staff member from the WHMO in order to inform the WHMO of the information the appellee wished

[5] On 2 July 2008, the parties made a joint motion to continue the trial from 21 July 2008. The trial judge approved the motion and continued the trial to 15 September 2008.

to disclose. The WHMO would then conduct a classification review of that information. Once that was accomplished, the parties could then proceed to the next step, which was dependent on the classification applied to the information requested. Discussion ensued as to the timing of this meeting and classification process, resulting in the military judge directing that the WHMO determine by 5 August 2008 whether it would assert "privilege" pursuant to Mil. R. Evid. 505.

The parties and the military judge, during the various Article 39(a), UCMJ, sessions, discussed the refusal of the WHMO to act on any of the defense and government requests as that failure related to: 1) the defense discovery rights; 2) the appellee's Sixth Amendment right to counsel; and 3) Mil. R. Evid. 505. Understandably, no focus could be taken on these issues until the WHMO took some action, or clearly indicated it would take no action, on the requests. The military judge's imposition of a deadline was an attempt to move the case forward.

The military judge concluded the session by reviewing the course of action that would be followed:

> It's my understanding, on 29 July, [the appellee] will meet with the appropriate individual at the White House Military Office to discuss his work on the Special Access Programs. Not later than 31 July, the White House Military Office will let the trial counsel know whether they will allow [the appellee] to discuss his work on the Special Access Programs with his defense counsel, under any appropriate limitations or requirements they see fit. Not later than 1 August,[6] the government will inform the court whether they will ask for an *in camera* review of any classified information. If such a request is forthcoming, the court is available the week of 4 – 8 August. On 19 August at 0800 hours, I've scheduled an Article 39(a) session to address this issue, and that being the Special Access Programs and [Mil. R. Evid.] 505.

On or about 29 July 2008, the appellee was read-in to the SAPs and provided the WHMO a three and a half page hand written memorandum detailing the information he wanted to disclose to his defense counsel, including specific examples of the work he accomplished and descriptions of the quality of that work and performance while assigned to the WHMO. This memorandum was classified as Top Secret by the classification authority. The WHMO subsequently performed a classification review of the three and a half page memorandum. On 31 July 2008, the appropriate classification authority, RADM RS, Deputy Assistant to the President and Director, WHMO, determined disclosure of the memorandum and the information contained therein would

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[6] The military judge moved the deadline date from 5 August to 1 August in an attempt to "expedite The White House in making a determination."

be detrimental to the national security and asserted the classified information privilege under Mil. R. Evid. 505.

At this point, the convening authority had withdrawn the original Charge I and its specifications and the military judge had discussed a proposed resolution of difficulties involving the defense presentation of a "good character" defense. The remaining issue for the court to act upon was the refusal of the WHMO to release the trial defense counsel and the appellee from their respective nondisclosure agreements as that matter related to presentencing in the event the appellee was convicted of any or all charges and specifications.

On 19 August 2008, the court held an Article 39(a), UCMJ, session to deal with, in part, the privilege claimed by the WHMO. Trial counsel submitted a one page document prepared by Lieutenant Colonel (Lt Col) JH, Director of Security, WHMO, who testified that it was the:

> . . . unclassified version of the accused's classified work during his time at the White House Military Office. It is a compilation of the three-and-a-half page classified document that he provided, as well as other information that we had access to, including his OPRs, DSSM [Defense Superior Service Medal], the job description that dated back to 2001, as well as an organizational chart.

This document was relevant based upon the language in Mil. R. Evid. 505(i)(4)(B), which states: "In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available." The document prepared by Lt Col JH reads as follows:

> From on or about December 2001 to January 2005; [the appellee] was assigned to the White House Military Office (WHMO), where he performed duties as the General Counsel. [The appellee's] work involved advice and counsel related to WHMO's administrative support to the Office of the Presidency as well as classified matters related to WHMO's overarching mission: ensuring the uninterrupted functioning of the Presidency – including Presidential Succession, Continuity of the Presidency, and Continuity of Government. In both unclassified and classified matters, [the appellee's] support pertained to operations, planning, budgetary, communications, logistics, and transportation issues. In addition, [the appellee] participated in Special Access Program (SAP) development, interagency discussions and coordination, and the drafting of implementing documents for these programs.

The government also submitted an unclassified job description of the legal advisor position to the WHMO and an unclassified WHMO mission description and organizational chart. On cross examination, Lt Col JH admitted that the purported unclassified compilation "might not even be accurate for what [the appellee] did when he was at the WHMO."

The military judge asked Lt Col JH whether he (the military judge) could review the appellee's three and a half page memorandum *in camera*. Lt Col JH responded that RADM RS "indicated that he is willing to entertain that request." The trial counsel then formally requested through Lt Col JH that the military judge be permitted to conduct the *in camera* review. The military judge informed Lt Col JH that such a review "would certainly appear to be helpful in determining whether the unclassified version provided is an accurate summary of the three and a half page memo." The military judge asked Lt Col JH whether the answer could be obtained "expeditiously" in view of the scheduled trial date of 15 September 2008. Lt Col JH responded, "It could potentially be done today, Sir. I can make a couple of phone calls. The Admiral is in town. I'll ask him if he's considered that issue any further. It is something that was discussed, but a decision hadn't been made."

The military judge next heard argument on the defense's motion to compel production of the classified information. Argument from the parties focused on the appellee's Sixth Amendment and Article 27, UCMJ, 10 U.S.C. § 827, right to effective assistance of counsel in preparing a defense as it pertained to the appellee's ability to discuss his work on the SAP's with his defense counsel. Trial defense counsel cited guidance on the issue from *United States v. Schmidt,* 60 M.J. 1 (C.A.A.F. 2004). *Schmidt* also involved a case in which the accused possessed classified information that may have been relevant to the charges against him but was hamstrung in his ability to discuss classified matters with his counsel. Our superior court in that case said: "The Government must also respect the important role of the attorney-client relationship in maintaining the fairness and integrity of the military justice system." *Schmidt*, 60 M.J. at 3. Trial defense counsel sought an order from the court to discuss the classified matters with their client. As an alternative remedy, trial defense counsel asked that all charges and specifications be dismissed or the case be held in abeyance until such time as counsel was permitted to discuss the classified matters with the appellee.

The military judge immediately ruled on the motion as it pertained to the merits phase of the court-martial. The judge found that the classified information requested by the appellee was not relevant and necessary to an element of any remaining offense; to any legally cognizable defense; or otherwise admissible in evidence. Further, the military judge precluded the government from cross-examining any character witness called by the defense as that witness's testimony pertained to the appellee's work at the WHMO and prohibited the government "from arguing that the accused's duty at The White House

was anything but exemplary."[7] The military judge concluded his ruling by stating: "Depending on the outcome of the *in camera* review of the three and a half page memo, I'll provide additional guidance . . . with regard to sentencing."

On 20 August 2008, the military judge was informed of the decision regarding trial counsel's request for an *in camera* review by the military judge of the three and one half page memorandum prepared by the appellee. The e-mail said, "I spoke with COL [P]T and Lt Col [J]H late yesterday. They had a discussion with the Director of WHMO, [RADM] [R]S. He has decided WHMO will not provide the 3 ½ page memo prepared by [the appellee] for your *in camera* review."

On 20 August 2008, the military judge asked the parties to provide briefs on two issues no later than 26 August 2008. The issues were:

> [1] Must the judge determine whether an unclassified version of classified information relevant to the appropriateness of punishment is an adequate substitute under MRE 505[i]?
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> [2] If so, does the refusal of the WHMO to provide the memo to the Court for an *in camera* review to determine whether the unclassified document signed by LTC [J]H is an adequate substitute affect the maximum punishment, if any, the Court can adjudge?

Trial counsel submitted a well-reasoned eight page response to the military judge's questions. They argued that the appellee's OPRs, Defense Superior Service Medal citation, unclassified job description, and summary of the three and one half page memo are reasonable substitutes for the classified information. They further argued that the remedies already imposed by the military judge limiting the government's prerogatives on the merits could be buttressed with an order from the court requiring the government to enter into a stipulation of fact regarding the appellee's service at the WHMO. The government believed that these matters, remedies, and proposed remedy, taken as a whole, would adequately insure the appellee received a fair trial.

Trial defense counsel submitted an equally compelling brief arguing that the military judge was required to determine whether an unclassified version of the memorandum was available; that there was no unclassified version available; and the appropriate remedy was a ruling from the court that the classified information was admissible evidence. Trial defense counsel continued that in the event the government refused to submit the classified information, the military judge should dismiss all charges and specifications or abate the proceedings until such time as the government submitted

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[7] This ruling is not before this Court on this Article 62, UCMJ, 10 U.S.C. § 862 appeal. The attorney-client privilege issue as it pertains to the appellee's ability to discuss the classified information with his counsel remains undecided and is similarly not before this Court.

the classified information to the military judge for an *in camera* review pursuant to Mil. R. Evid. 505.

On 5 September 2008, the military judge issued his decision concerning the defense motion to compel classified information. The military judge ruled that the maximum punishment that could be imposed for conviction of any or all charges and specifications was a sentence to no punishment. The military judge imposed this sanction pursuant to Mil. R. Evid. 505(i)(4)(E) for the government's failure to provide the classified information for an *in camera* review in order to insure a fair trial for the appellee.

Military Rule of Evidence 505

Mil. R. Evid. 505 was implemented by the President to deter a practice referred to as "graymail."[8] "Graymail" occurs when a litigant seeks to obtain classified information the release of which would or could be detrimental to national security interests. Prior to implementation of this rule, the government, in the appropriate case, faced the dilemma of either producing the classified information or withdrawing the charges. As noted in the Drafter's Analysis, "The [R]ule attempts to balance the interests of an accused who desires classified information for his or her defense and the interests of the government in protecting that information." *Manual for Courts-Martial, United States (MCM)*, A22-40 (2005 ed.).

Just as cases in the Federal District Courts involving executive privilege[9] and classified materials[10] rely on the trial judge to be the "guard" against improper disclosure, the President determined that military judges were equal to that task in cases involving national secrets. The Rule anticipates that classified material may be sought to be introduced during both the findings and sentencing portion of a court-martial. Indeed, Mil. R. Evid. 505(i)(4)(B) states, in part: "In presentencing proceedings, relevant and material classified information pertaining to *the appropriateness of*, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available." (Emphasis added). However, the decision to release the classified material always belongs to the "head of the executive or military department or government agency concerned"[11] and the military judge may not compel the release of the information.[12]

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[8] *Manual for Courts-Martial, United States (MCM)*, A22-40 (2005 ed.). The Court notes that an updated version of the *Manual* was published in 2008; however, the appellee's court-martial began prior to its publication.
[9] *United States v. Nixon*, 418 U.S. 683, 714 (1984) (citing *United States v. Burr*, 25 F. Cas. 30, 34 (D.Va. 1807).
[10] *Classified Information Procedure Act*, 18 U.S.C. Appx. §§ 1 – 16.
[11] Mil. R. Evid. 505(c).
[12] *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989).

Mil. R. Evid. 505 establishes procedures to be followed when dealing with the issue of privileged classified information.

Mil. R. Evid. 505(h)(1) requires an accused to notify the trial counsel and military judge of his intent to disclose classified information. The appellee complied with this requirement with his 9 May 2008 notice that he intended to introduce classified information on the merits and during presentencing.

Mil. R. Evid. 505(h)(3) requires an accused to specify the classified information he intends to disclose with some specificity. Although not provided to the Court for review per the WHMO's decision, the appellee's three-and-one-half page memorandum identifying the classified information he wished to discuss with his defense counsel complied with this requirement.

Mil. R. Evid. 505(c) identifies the authority who may claim that disclosure of classified material would be detrimental to the national security and therefore privileged. RADM RS properly asserted as privileged the information contained in the memorandum prepared by the appellee.

Mil. R. Evid. 505(i)(1)-(3) establishes procedure to be followed leading to an *in camera* review of the privileged information if the trial counsel wishes to contest the information's entry into evidence. These procedures were not followed as RADM RS refused to provide the information for an *in camera* review.

Mil. R. Evid. 505(i)(4)(A) establishes the procedure to be used for conducting the *in camera* review. The rule states, in part, "Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the judge shall conduct an *in camera* proceeding." The government did not meet "the standard set forth in subdivision (i)(3)" and no *in camera* proceeding was conducted.

Mil. R. Evid. 505(i)(4)(B) establishes the legal standards the military judge will use in determining whether release of the privileged information is permitted. The information will only be released if it is "relevant and necessary" for findings purposes and "relevant and material" for presentencing purposes. The drafters of the rule anticipated that there would be situations wherein "the head of the executive or military department or government agency concerned" would refuse to release the privileged information for an *in camera* review. Mil. R. Evid. 505(c). They said:

> If the defense requests classified information that it alleges "is relevant and material" . . . and the government refuses to disclose the information to the military judge for inspection, the military judge may presume that the information is in fact "relevant and material. . . . ."

MCM, A22-40. The military judge did presume the privileged information in question was "relevant and material" for sentencing purposes, otherwise he could not have imposed a sanction.

Mil. R. Evid. 505(i)(4)(C) requires the military judge make "a written determination" that the privileged information is "relevant and material" for sentencing purposes. The military judge failed to comply with this portion of the rule and should do so upon return of this case to this Court.

Mil. R. Evid. 505(i)(4)(D) establishes a rule prohibiting full or partial disclosure of the privileged information if there is an unclassified alternative to the disclosure. The rule states:

> The military judge shall order that such statement, portion, or summary by [sic] used by the accused in place of the classified information unless the military judge finds that the use of the classified information itself is necessary to afford the accused a fair trial.

The military judge rejected the proffer that the one page summary prepared by Lt C JH was an adequate substitute for the three and one half page privileged memorandum prepared by the appellee.

The military judge then analyzed the government's argument "that a job description, organization chart, performance reports, award citation, witness testimony, stipulation of fact, and like evidence" would suffice as an adequate substitute for the privileged memorandum. The judge determined that although these matters in combination may very well be an adequate substitute, without having access to the memorandum itself, he could not conclude that they, in combination, were an adequate substitute for the classified material.

Mil. R. Evid. 505(i)(4)(E) provides for imposition of sanctions by the military judge if he "determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information." The rule permits the judge to impose sanctions "that the interests of justice require" and provides a non-exhaustive list of possible sanctions including dismissal of all charges and specifications.

The military judge noted in his ruling that Rule for Courts-Martial (R.C.M.) 1001(c)(1)(B) permits an accused to enter into evidence, during the sentencing phase of the court-martial, specific acts of good conduct, bravery, or duty performance, including those that are classified, in an attempt to mitigate the sentence to which the sentencing body may impose. The judge concluded:

> Therefore, given that the ability to present relevant mitigation evidence is a substantial right of a military Accused which should be limited only in rare circumstances, and given the apparent inspired quality of the Accused's SAP work while assigned to the WHMO, and given that the Court can not [sic] determine with any certainty as to the severity of the sentence that the court members'[13] would adjudge if given the classified information, the Court finds the appropriate remedy is that the maximum punishment the members may adjudge is a sentence of no punishment.

Jurisdiction

The first issue to be resolved is whether this Court has jurisdiction under Article 62(a)(1)(D), UCMJ, to review a military judge's imposition of a sanction arising from the refusal of the United States to provide classified information to the military judge for an *in camera* review pursuant to Mil. R. Evid. 505. Article 62,(a)(1), UCMJ provides:

> (1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):
>
> . . . .
>
> (D) An order or ruling which imposes sanctions for nondisclosure of classified information.

The appellee argues that this Court does not have jurisdiction under Article 62(a)(1)(D), UCMJ, to hear this case because, "the military judge's remedy was not imposed for 'nondisclosure of classified information,' which is a term of art that applies to a refusal to allow the defense to receive or divulge classified information but does not apply to a refusal to provide classified information to a military judge for an *in camera* review." The appellee points out that "Article 62 was 'designed to apply to courts-martial the same protections with regard to classified information as apply to orders or rulings issued in Federal District Courts under the Classified Information Procedures Act, (18 U.S.C. App 7).'" Section Seven of the Classified Information Procedures Act authorizes the government to submit an interlocutory appeal from a decision or order that imposes sanctions for nondisclosure of classified information. The appellee goes on to argue that the government is authorized to appeal a military judge's decision imposing sanctions after it has complied with the Mil. R. Evid. 505 procedures for reconciling the government's interests in protecting classified information and the appellee's interest in a

[13] At the time of the judge's ruling, the appellee had elected to be tried by members. Under some circumstances, an accused may change his forum selection as a court-martial progresses. For purposes of this decision, we will assume appellee has not made his forum election.

fair trial. The appellee argues that the government should not be allowed to appeal a sanction if it has not complied with the procedures of Mil. R. Evid. 505.

The government argues that a plain reading of Article 62(a)(1)(D), UCMJ, applies to the circumstances of this case. The government acknowledges that the typical case involving classified information occurs when the accused provides notice of his intention to disclose classified information, as occurred in this case, and the military judge then performs an *in camera* review, which did not occur sub judice. If the military judge determines that there are no alternatives to full disclosure of the classified information and the government continues to object to the disclosure of the information, the military judge could sanction the government by issuing an order that the interests of justice require. Although this process did not occur in this case because the WHMO refused to release the classified three and one half page document to the trial counsel and an *in camera* review could not and did not take place, the government argues that its appeal is still based on the military judge's imposition of sanctions due to the nondisclosure of classified information.

The drafters of Mil. R. Evid. 505 anticipated that there would be occasions when the classifying agency would refuse to submit the classified information for review and intended the rule to apply in those situations. If "the government refuses to disclose the information to the military judge for inspection, the military judge may presume that the information is in fact 'relevant and material.'" *MCM*, A22-40. While Mil. R. Evid. 505 predates R.C.M. 908, the codification of Article 62, UCMJ, the drafters of R.C.M. 908 certainly were aware of the language from the Analysis quoted above and its logical application, and made no attempt to exempt either the language or logical application from R.C.M. 908.

We hold that although an *in camera* review under Mil. R. Evid. 505(i) did not occur in this case, and the military judge used Mil. R. Evid. 505(i)(4)(E) to impose sanctions in the same way as if he had determined that alternatives to full disclosure could not be used and the government continued to object to disclosure of the information, Article 62(a)(1)(D), UCMJ, applies in this case. Accordingly, this Court has jurisdiction to review the military judge's remedy issued on 5 September 2008.

Military Judge's Ruling

The second issue is whether the military judge committed reversible error in ordering that the maximum punishment the members may adjudge is a sentence of no punishment.

The appellee argues that the military judge's choice of remedy was within the range of available remedies and was not an abuse of discretion. The appellee relies on *United States v. Dooley*, 61 M.J. 258 (C.A.A.F. 2005), wherein our superior court held

the military judge did not abuse his discretion in dismissing the appellant's case with prejudice based on a speedy trial violation.

The government's position is that the military judge erred by failing to adequately account for the government's legitimate interests in protecting national security secrets and in punishing the serious misconduct in this case, thereby creating the kind of "graymail immunity" Congress sought to avoid with Mil. R. Evid. 505. The government also argues that the military judge placed too much emphasis on his inability to review the classified evidence *in camera* to compare it to the unclassified alternatives. The government asserts that Mil. R. Evid. 505 does not require the military judge to compare the classified and unclassified versions; that this was strictly the military judge's self-imposed requirement. The standard under Mil. R. Evid. 505 is whether or not the unclassified documents (the OPRs, the citation accompanying the Defense Superior Service Medal, and the one page document submitted by Lt Col JH) are a reasonable alternative to afford the appellee a fair trial. The government opines that these documents adequately reflect the appellee's duty performance at the WHMO.

The standard of review in this case is abuse of discretion. *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008); *United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998). In contrast with our powers of review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we may only act "with respect to matters of law" in this appeal pursuant to Article 62, UCMJ. In applying the abuse of discretion standard of review, we are not free to substitute our judgment for that of the military judge. *United States v. Burris,* 21 M.J. 140, 144 (C.M.A. 1985).

A military judge abuses his discretion when "his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Webb*, 66 M.J. at 93 (citing *United States v. Gore,* 60 M.J. 178, 187 (C.A.A.F. 2004)).

We find the facts found by the military judge in his analysis and decision were not clearly erroneous. Nor was the military judge's ruling "influenced by an erroneous view of the law." *Id.* The judge followed the dictates of Mil. R. Evid. 505 and was authorized to select an appropriate sanction. The question is, was the judge's selection of the no punishment sanction outside the range of choices "*reasonably* arising from the applicable facts and the law." *Id.*

A sentence to no punishment is an authorized punishment in every court-martial regardless of the crimes for which an accused is convicted. The crimes the appellee allegedly committed, while serious, are not the most egregious. The appellee accumulated a stellar record of accomplishment prior to serving at the WHMO as evidenced by his selection for promotion through the years. The appellee served in a

position in the WHMO that enabled him to make inputs for policy and action promulgated by "the most senior officials in our government" during a period of extreme crisis for our nation. General officers and senior civilian leaders look to senior officers filling the position of judge advocate to provide more than basic legal advice and guidance. They look to those senior officers, as they do all senior officers on their staff, to proffer ideas, engage in concept development, and provide input on plan execution beyond the realm of their respective areas of expertise. The unclassified documents we have indicate that the appellee did just that and provided remarkable service to the nation during his tenure at the WHMO. We cannot rule out that the sentencing body, be it members or military judge alone, would, against this backdrop of facts and circumstances, seriously contemplate a sentence of no punishment if provided the privileged information identifying and explaining the deeds accomplished by the appellee while serving at the WHMO.

Mil. R. Evid. 505(i)(4)(E) directs the military judge to "issue any order that the interests of justice require." Because the government failed to submit the privileged information to the military judge for an *in camera* review, it has significantly hampered the appellee's right to have the sentencing body seriously consider a sentence of no punishment.[14] The military judge did not abuse his discretion in ordering the sanction "that the maximum punishment the members may adjudge is a sentence of no punishment."

Mil. R. Evid. 505(i)(4)(E) states, in part, "Any such order [imposing a sanction] shall permit the government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding." The government may avoid the sanction imposed by the military judge by complying with Mil. R. Evid. 505.

[14] We note that the record indicates the trial counsel and convening authority took all reasonable steps to obtain compliance with the rule by the White House Military Office. However, the appellant is responsible for the White House Military Office's refusal to comply with the rule implemented by the Office of the President to "balance the interests of an accused . . . and the interests of the government."

Conclusion

The appeal by the United States under Article 62, UCMJ, is hereby **DENIED**.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court