

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,)	APPELLANT'S OPPOSITION
<i>Appellant,</i>)	TO MOTION TO DISMISS
)	
v.)	
)	USCA Dkt. No. 16-0053/AF
Senior Airman (E-4))	
SHELBY L. WILLIAMS, USAF,)	Crim. App. No. 38454
<i>Appellee.</i>)	

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:**

Pursuant to Rule 30 of the Rules of Practice and Procedure of this Court, the United States opposes Appellee's motion to dismiss. This Court clearly has jurisdiction under Article 67(a) (2) to review the certificate for review filed by the Judge Advocate General in this case on 7 October 2015: "The Court of Appeals for the Armed Forces shall review the record in-- . . . (2) all cases reviewed by the Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review" There is nothing in the statute to support Appellee's mistaken claim that the certificate for review is untimely and therefore beyond this Court's jurisdiction.

The United States has complied with and made a timely filing in accordance with this Court's Rules of Practice and Procedure, the Air Force Court's Rules of Practice and Procedure, Article 67(a) (2), UCMJ, and this Court's precedent. This Court therefore has jurisdiction to review this

certification, and there is no credible basis to support Appellee's motion to dismiss.

The United States timely moved for reconsideration before the Court of Criminal Appeals on 20 July 2015. The motion for reconsideration was filed in accordance with Air Force Court of Criminal Appeal's Rules of Practice and Procedure, Rule 19 within 30 days of when the Air Force Court of Criminal Appeals issued its two-to-one decision. On 24 July 2015, AFCCA denied the motion for reconsideration. The United States moved again for reconsideration, this time with the declaration of a medical doctor, which concretely showed the "material legal or factual matter that was overlooked or misapplied" in the majority decision. The second motion for reconsideration, while stressing some of the same arguments as the first, presented new and different information and argument than the first. It is also important to note that the issues addressed in the motions for reconsideration and information contained in the doctor's declaration were never raised by Appellee to the lower Court, and so the first opportunity the United States had to defend against the majority's reasoning came only on motion for reconsideration following the issuance of the Air Force Court's decision on 19 June 2015.

After denial of the second motion for reconsideration, the United States complied with this Court's Rules of Practice and

Procedure and filed a timely certificate for review with this Court within 60 days receiving the denial of the second motion for reconsideration. This Court accepted and docketed the certificate for review by written order on 7 October 2015.

Rule 19 of this Court's rules clearly provides: "(g) Timely Motion for Reconsideration Before the Court of Criminal Appeals. . . . Following a decision by the Court of Criminal Appeals on the motion for reconsideration, review may be sought in this Court under Article 67, UCMJ." Rule 34(b) also decisively defeats Appellee's motion: "When a period of time is computed under these rules from the date of the decision of a Court of Criminal Appeals, such time is to be computed from the date of the decision, unless a petition for reconsideration is timely filed, in which event the period of time is to be computed from the date of final action on the petition for reconsideration."

Finally, and most important, there is no time limitation within Article 67(a)(2), UCMJ upon which the Judge Advocate General must file a certificate for review with this Court. The converse is not true; an accused seeking review pursuant to Article 67(b), UCMJ must file a petition for review within 60 days of receiving the decision of the court of criminal appeals. As this Court made clear in United States v. Rodriguez, 67 M.J. 110 (C.A.A.F. 2009), the time limit of Article 67(b) is

statutory and therefore jurisdictional. There is no statutory jurisdiction time bar governing when the United States may file a certification with this Court. The United States in fact filed a timely certificate for review under AFCCA rules, this Court's rules, and Article 67. There is simply no basis to question this Court's jurisdiction to review this timely invocation of Article 67(a)(2), and the motion should be denied.

Appellant's reliance upon United States v. Sparks, 5 U.S.C.M.A. 453 (C.M.A. 1955) is entirely misplaced because the Court was analyzing the impact of a reconsideration motion before a board of review upon **an appellant's** statutory deadline to file an appeal before this Court -- an appellate posture nowhere to be found in this case. Again, there is no statutory deadline at issue in this case, and Sparks provides no support to Appellee. Moreover, Sparks did not create a bar to a second reconsideration motion as long as it was timely filed, which is precisely the case here. Sparks supports the United States' position, not Appellee's.

Appellee also mistakenly relies upon United States v. Cos, 498 F.3d 111 (10th Cir. 2007) because that civilian case interpreted 18 U.S.C. § 3731, which contained a statutory deadline for government interlocutory appeals, a predicate absent in Appellee's case. Also, the Court in Cos found no jurisdictional impediment in the government's appeal even though

the government had filed three motions for reconsideration in the district court. Cos too fails to support Appellee's motion.

The United States has filed a timely certificate for review invoking this Court's jurisdiction under Article 67(a)(2). There is no factual, regulatory, statutory, or precedential support for Appellee's motion to dismiss.

WHEREFORE, the United States respectfully requests Appellee's motion to dismiss be denied.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division, on 15 December 2015.

A handwritten signature in black ink, appearing to read 'G.R. Bruce', with a long horizontal flourish extending to the right.

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