

12/08/2015

CLERK OF THE COURT

8 December 2015

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

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|                           |   |                             |
|---------------------------|---|-----------------------------|
| <b>UNITED STATES,</b>     | ) | <b>APPELLEE'S MOTION TO</b> |
| <i>Appellant,</i>         | ) | <b>DISMISS</b>              |
|                           | ) |                             |
|                           | ) |                             |
| v.                        | ) | USCA Dkt. No. 16-           |
|                           | ) | 0053/AF                     |
| Senior Airman (E-4),      | ) |                             |
| <b>SHELBY L. WILLIAMS</b> | ) |                             |
| United States Air Force,  | ) | Crim. App. No. 38454        |
| <i>Appellee.</i>          | ) |                             |

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

COMES NOW undersigned counsel, on behalf of Appellee, Senior Airman Shelby L. Williams, pursuant to Rule 30 of this Honorable Court's Rules of Practice and Procedure, and files this motion to dismiss.

A panel of the Air Force Court of Criminal Appeals (Air Force Court) decided Appellee's case on 19 June 2015, setting aside Appellee's conviction but permitting a rehearing. J.A. 1-14. The government filed a motion for *en banc* reconsideration on 20 July 2015. J.A. 299-322. The Air Force Court denied that motion for reconsideration on 24 July 2015.

The government filed a second motion for *en banc* reconsideration and a motion to attach a declaration to the record from a medical professional that did not testify at trial, but who conducted a post-trial evaluation of the evidence

and offered an expert opinion regarding that evidence. J.A. 323-50. The Air Force Court denied the second motion to reconsider and motion to attach on 10 August 2015.

Thereafter, the Judge Advocate General, United States Air Force, certified the case for review under Article 67(a)(2), UCMJ. The certificate for review was filed under Rule 22 of this Court on 7 October 2015, 110 days after the Air Force Court's decision had been issued, 75 days after the government's first motion for reconsideration was denied, and 58 days after the government's second motion for reconsideration was denied.

This Honorable Court's Rules 19(b)(3) and 22(b)(3) both provide that the Judge Advocate General was required to file a certificate for review "no later than 60 days after the date of the decision of the Court of Criminal Appeals[.]" The government presumably believes its two motions for reconsideration, filed with the Air Force Court on 20 July 2015 and 3 August 2015 (J.A. 299-347), re-started the time period in which The Judge Advocate General could file a certificate for review. Even if the government's first motion to reconsider restarted the government's time for submitting a certificate for review, the second motion to reconsider did not necessarily have the same effect. *United States v. Sparks*, 5 U.S.C.M.A. 453, 459 (C.M.A. 1955). This Court's predecessor explained in *Sparks*:

[A] second motion for reconsideration by a board will have no effect in expanding the period in which an accused may petition this Court for review, nor will it expand the jurisdiction of the board - unless the motion is granted prior to the filing of a petition or a certificate in this Court.

*Id.*

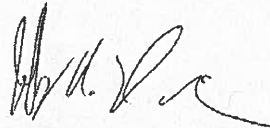
This Court's handling of this question is not unique among the federal appellate courts. The United States Court of Appeals for the Tenth Circuit has similarly held that "[g]enerally, the thirty day period is not tolled by a successive motion for reconsideration that raises the same issue as the first motion." *United States v. Cos*, 498 F.3d 1115, 1120 (10th Cir. N.M. 2007). The Tenth Circuit explained, in *United States v. Marsh*, 700 F.2d 1322, 1324-28 (10th Cir. 1983) that "[t]he reasoning behind the general rule is that the opposite interpretation would permit unlimited extension of time to appeal. One party could theoretically postpone indefinitely the appeal of his adversary by filing motions for reconsideration[.]" This was the same rationale this Court's predecessor used in *Sparks*.

The government made a strategic decision to seek a second motion to reconsider, in an attempt to attach new evidence to the record of trial, in the hope of convincing the Air Force Court to reverse itself. Moreover, the government was also hoping to get new evidence attached to the record of trial prior

to filing a certification with this Court, knowing that this Court lacked the fact finding power required to attach the new evidence to the record of trial. Even with the second motion to reconsider and the motion to attach denied, the government still could have met the 60-day deadline to file the certification but they failed to do so. The government's successive motions for reconsideration on the same issue did not toll the time period for certifying this case to this Court, and consequently, this case was not timely certified for review before this Court.

**WHEREFORE,** this Court should dismiss the case.

Very Respectfully Submitted,



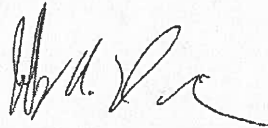
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 8 December 2015.

Very Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Jeffrey A. Davis', is written over the typed name.

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