IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States, Appellee, v. Andrew Witt Senior Airman (E-4) U.S. Air Force, Appellant.	APPELLANT'S REPLY BRIEF ON SPECIFIED ISSUES USCA Dkt. No. 15-0260/AF Crim.App. No. 36785

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

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COMES NOW Appellant, and offers the following reply to the government's Answer:

STATEMENT OF THE CASE

"A rose by any other name would smell as sweet." *U.S. v. Williams*, 43 M.J. 348 (C.A.A.F. 2005) (citation omitted). Nevertheless, the government doubles down on the argument made in its Answer to Appellant's opening Brief that the lower court's "original decision was in fact not considered en banc." Answer 1; Government Brief on Specified Issues (hereinafter "Specified Answer") 1-2.

After it filed its Answer, but before the government filed its Specified Answer, Lexis followed West in correcting the typographical error omitting the *en banc* caption from the lower court's first *en banc* decision. *U.S. v. Witt*, 72 M.J. 727, 736 (A.F. Ct. Crim. App. 2013) (*en banc*). Appellant will not recite the litany of evidence referenced in his Reply indicating the lower court was sitting *en banc* when it issued its initial decision, but will stress again that captions are irrelevant when both the polling in the opinion and the record itself indicate the court was sitting as a whole. Reply 3-4. The government's argument now rests primarily on a typographical error in the printed edition of the Military Justice Reporter, which will certainly be corrected in a forthcoming pocket part.[1]

[1] Despite all evidence to the contrary, the government asserts the omission was "[c]learly, editorial correction [which]

ARGUMENT

I.

A COURT OF CRIMINAL APPEALS SITTING EN BANC CANNOT RECONSIDER A PREVIOUS EN BANC DECISION OF THAT COURT PURSUANT TO STATUTORY AUTHORITY, APPLICABLE PRECEDENT, OR INHERENT AUTHORITY.

In addition to its reliance on a subsequently corrected scrivener's error, the government argues the lower court's initial decision was not *en banc* because Rule 17 of the Courts of Criminal Appeals Rules of Practice and Procedure (hereinafter "Joint Rules") require all members "present for duty" to "participate in the original decision." Specified Answer 9. Rule 17 contains no such language: "The suggestion of a party for consideration or reconsideration by the Court as a whole shall be transmitted to each judge of the Court present for duty[.]" 44 M.J. LXX.

The government suggested consideration by the whole court on February 1, 2008. On April 21, 2010, presumably all judges "present for duty" voted on that suggestion, which is all Rule

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included changing the final and official reported decision to one not issued en banc." Specified Answer 2 n. 1. It's publisher, West, disagrees. *Witt*, 72 M.J. at 727. But even if the government's assertion is true, and the second *en banc* court attempted to erase the first court's *en banc* status in an effort to evade the limitations imposed upon the court by Article 66, UCMJ, this Court has rejected similar efforts to circumvent Article 66 by placing form over substance. *U.S. v. Chilcote*, 20 U.S.C.M.A. 283 (C.M.A. 1971); *U.S. v. Wheeler*, 20 U.S.C.M.A. 595 (C.M.A. 1971); *Coleman v. U.S.*, 21 U.S.C.M.A. 171 (C.M.A. 1972).

17 requires. Order Granting *En Banc* Consideration (April, 21, 2010) (*en banc*). Despite the plain language of Rule 17, the government argues the Rule applies not only to the initial "suggestion", but also to the "decision" until the very moment it is formally issued. Specified Answer 9.

According to this theory, after the case was submitted to the *en banc* court following oral argument on October 11, 2012, Rule 17 required the court to hold a series of rolling votes as Judge Saragosa and the majority drafted their sixty-three-page opinion. They were required to vote again when Judge Soybel joined the court 127 days later on February 15, 2013.[2] Another vote was required when Judge Mitchell joined the court 246 days later on June 13, 2013. Just three days later, another vote was required when Judge Helget joined the court on June 17, 2013, 249 days after submission of the case. Another vote was required when Judge Wiedie joined the court 284 days after submission on July 22, 2013, which was just eighteen days before the issuance of the court's decision. Still another vote was required when Judge Peloquin joined the court, which still remains to be determined according to the lower court's website. And this only accounts for the lower court's arrivals.

[2] United States Air Force Court of Criminal Appeals Past Judges (hereinafter, "AFCCA Judicial Roster"), dated November 4, 2014, http://afcca.law.af.mil/content/afcca_data/cp/past_judges_-_alphabetical_rev._04_nov_14.pdf (last visited January 6, 2016).

Needless to say, it is not Appellant's interpretation of the applicable statutes and rules that would cause "[m]ilitary justice at the appellate level [to] come to a halt[.]" Specified Answer 15. The decision of five judges not to participate in a case long after it had been argued and submitted to the *en banc* court does not violate the plain language of Rule 17, and is entirely consistent with federal practice. *See, e.g., Bahlul v. U.S.*, 767 F. 3d 1 (D.C. Cir. 2014) (*en banc*); *Spencer v. U.S.*, 773 F. 3d 1132 (11th Cir. 2014) (*en banc*); *McBride v. Estis Well Serv., L.L.C.*, 768 F. 3d 382 (5th Cir. 2014) (*en banc*).

It is also consistent with the practice of *this* Court. During this Court's 2007, term, Judges Ryan and Stucky declined to participate in no fewer than nineteen cases that were argued and submitted to this Court before their accession to this Court on December 20, 2006. The first of these, *U.S. v. Lee*, 64 M.J. 213 (C.A.A.F. 2006), was decided seven days later and, notably, involved government counsel in this case. Indeed, the government is undoubtedly aware of this precedent having been represented by counsel of record in this case in four additional cases where Judges Stucky and Ryan declined to participate. *See, U.S. v. Cossio*, 64 M.J. 254 (C.A.A.F. 2007); *U.S. v. Briggs*, 64 M.J. 285 (C.A.A.F. 2007); *U.S. v. Terry*, 64 M.J. 295 (C.A.A.F. 2007); *U.S. v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007).

Instead, the government invites this Court's attention to

U.S. v. Curtis, 44 M.J. 106 (C.A.A.F. 1996) as precedent supporting its argument that Courts of Criminal Appeals have authority to conduct reconsideration after a change in court composition. Specified Answer 15. First, neither *Weiss v. U.S.*, 510 U.S. 163 (1994), which is cited by the government, nor *Edmond v. U.S.*, 520 U.S. 651, 664 (1997), which is not, support the government's assertion that this Court and the Courts of Criminal Appeals are judicial analogs and therefore must have similar inherent powers. Specified Answer 15.

Additionally, *Curtis* involved the unusual circumstance where a judge of this Court died in active service nearly a year after oral argument in a capital case. 43 M.J. CLXIII. Such a situation may indeed justify a Court of Criminal Appeals, when sitting as a panel, to invoke the exception to *U.S. v. Robertson*, 17 U.S.C.M.A. 604, 606 (C.M.A. 1968) that "generally, and wherever possible, an appellant should receive review of his case by a board of review constant in membership." *Id.* But there is no need to alter the composition of a five-member, *en banc* court merely because one member retires as happened below.

Regardless, Judge Effron was not *required* to participate in the reconsideration following his accession to the Court on August 1, 1996. Instead, he exercised his judicial discretion to do so. And this Court's previous decision, in which only four judges participated, would not have been statutorily infirm had

he not done so.

Further, unlike the judges of the lower court, Judge Effron was not appointed to the Court by the Judge Advocate General of the Navy as the Court was considering *Curtis*, much less directed to participate in reconsideration like Judge Helget below. It was this concern over the unlawful influence of the Courts of Criminal Appeals by the Judge Advocates General that drove Congress to statutorily restrict the power of the lower courts to reconsider. Brief on Specified Issues 19; Brief 223-26.

Of course, if the government is correct, and Rule 17 renders any purported *en banc* decision a panel decision by operation of law when a judge joins the court after oral argument and submission of the case, but declines to participate after joining the court, Chief Judge Allred's identical declination renders the court's second *en banc* decision a panel decision as well. *U.S. v. Witt*, 73 M.J. 738 (A.F. Ct. Crim. App. 2014). Whether this Court is reviewing two conflicting panel decisions or two conflicting *en banc* decisions does not matter because neither is permitted by Article 66, UCMJ. *U.S. v. Chilcote*, 20 U.S.C.M.A. 283 (C.M.A. 1971).

The government's argument that Rule 19 of the Joint Rules vests the lower court with authority "to reconsider ***any decision*** of the Court" was rejected forty-five years ago this month. Specified Answer at 11-12; *Chilcote*, 20 U.S.C.M.A. at 286 ("In

our view the authority contained in Article 66(a) is not substantively enlarged by the provisions of Article 66(f), which permit the Judge Advocates General to prescribe uniform rules of procedure for proceedings in and before courts of military review.")

The government attempts to avoid *Chilcote* by citing language in *U.S. v. Henderson*, 52 M.J. 14, 21 (C.A.A.F. 1999) indicating Congress intended to "overrule" that decision in the Military Justice Act of 1983. Specified Answer 10-11. More accurately, as noted two years later by this Court in *U.S. v. Riley*, 55 M.J. 185, 189 (C.A.A.F. 2001), *Chilcote* was partially superseded by statute. "In response to the *Chilcote* decision, Article 66 was amended to specifically authorize *en banc* reconsideration of a panel decision, but it does not authorize reconsideration by one panel of another panel's decision." *Id.*

II.

A DECISION OF A COURT OF CRIMINAL APPEALS SITTING EN BANC CANNOT BE RECONSIDERED EN BANC WHEN THE COMPOSITION OF THE EN BANC COURT HAS CHANGED.

The government correctly notes Joint Rule 17 states suggestion for reconsideration by the Court as a whole "shall be transmitted to each judge of the Court who is present for duty[.]" 44 M.J. LXX. Accordingly, pursuant to Rule 17, the government's suggestion for reconsideration was required to be

transmitted to the five judges who declined to participate in the court's original *en banc* decision. *Id.* Notably, Rule 17 requires transmission, not participation, which is presumably left to judicial discretion.

Regardless, Rule 17 cannot enlarge the lower court's jurisdiction to conduct *en banc* reconsideration of *en banc* decisions, which is expressly limited to panel decisions. 10 U.S.C. § 866 (2012); *Chilcote*, 20 U.S.C.M.A. at 286. Nor can the Judge Advocates General promulgate rules that overrule this Court's precedent interpreting Article 66, UCMJ, and its legislative history, as prohibiting a case from being "decided by two different groups of judges within a Court of Military Review." *U.S. v. Wheeler*, 20 U.S.C.M.A. 595, 598 (C.M.A. 1971).

The Courts of Criminal Appeals cannot be effectively reduced to judicial lotteries by sanctioning the constant change in composition until the very moment a decision is formally issued. Moreover, the government it is not entitled to a new deck of cards on reconsideration if it is initially dealt a losing hand. "Unless pleadings, briefs, and arguments are directed to the group of judges that decides the case, some of the normal attributes of appellate review are missing." *Wheeler*, 20 U.S.C.M.A. at 598.

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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on January 7, 2016, pursuant to this Court's order dated July 22, 2010, and that a copy was served via electronic mail on the Air Force Appellate Government Division on January 7, 2016.

Respectfully Submitted,

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