15 January 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	UNITED STATES' REPLY BRIEF ON SPECIFIED ISSUES
v.	)	
Senior Airman (E-4) ANDREW PAUL WITT USAF, *Appellant*.	)	Crim. App. No. 36785
	)	USCA Dkt. No. 15-0260/AF

UNITED STATES' REPLY BRIEF ON SPECIFIED ISSUES

GERALD R. BRUCE
Associate Chief, Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 27428

MATTHEW J. NEIL, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

KATHERINE E. OLER, Colonel, USAF
Chief, Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 30753

15 January 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Senior Airman (E-4), ANDREW PAUL WITT, USAF, *Appellant.*	)	UNITED STATES' REPLY BRIEF ON SPECIFIED ISSUES Dkt. No. 15-0260/AF ACM 36785

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

The United States continues to maintain that Appellant is entitled to no relief on the issues specified by the Court and offers the following additional arguments in reply to Appellant's brief on the specified issues:

1. AFCCA's original decision was a panel decision, not en banc.

The Air Force Court's first decision was not conducted en banc. This is well documented in the final and official reported decision found on the shelves of this Court; *see* United States v. Witt, 72 M.J. 727 (A.F. Ct. Crim. App. 2013) and footnote 17 of that reported decision. The United States invites the Court to pull volume 72 of the Military Justice Reporter to confirm this fact. There is no "scrivener's error." (App. Rep. at 1-2.) The United States disputes Appellant's suggestion that the "typographical error" "will certainly be corrected in a forthcoming pocket part," (Id.) as the United States is unaware of any "pocket parts" to the bound, final versions of the military justice reporter.

2. This Court should reject Appellant's freshly-minted claim that AFCCA had no authority to conduct reconsideration.

Even if this Court concluded the original AFCCA decision was an en banc decision, Appellant previously conceded to AFCCA that it had authority to conduct reconsideration en banc of the lower Court's prior decision. After AFCCA granted the United States' motion for panel reconsideration and reconsideration en banc on 21 October 2013 (J.A. at 338) and issued a new decision sitting en banc affirming Appellant's death sentence on 30 June 2014 (J.A. at 1-93), Appellant filed his own motion for reconsideration and reconsideration en banc citing the same Rules 17 and 19 cited by the United States (J.A. at 353-400). Appellant extensively invoked AFCCA's reconsideration and reconsideration en banc authority in an effort to convince the lower Court to yet again reconsider its prior decision that this time did not go in Appellant's favor. In fact, Appellant began his reconsideration plea as follows: "This is not a pro forma reconsideration request. Rather, it is a sincere and respectful attempt by the defense to engage the Court concerning its reconsideration opinion." (J.A. at 353.) Clearly, on 2 September 2014, Appellant conceded that AFCCA had full legal authority to conduct the reconsideration that was conducted in his case. The United States takes Appellant at his word that he "sincerely and respectfully" believed AFCCA had lawful authority

to reconsider its prior decision. Appellant's newly-discovered position before this Court should be rejected as without merit.

3. This Court implicitly recognized AFCCA's reconsideration authority in Appellant's case when it denied Appellant's petition for review.

Even before the United States had an opportunity to request reconsideration from AFCCA on their first decision, Appellant quickly filed a petition for review and supplement brief with this Court on 21 August 2013, just 12 days after AFCCA issued its first decision that set aside Appellant's death sentence. (J.A. at 204-39.) Although Appellant now cites Judge Saragosa's original majority opinion with great authority before this Court, Appellant's supplement to his petition sought to reverse her decision and extend her ineffective assistance of counsel analysis to findings, not just sentencing. (Id.) Citing Rule 19(g) of this Court's Rules of Practice and Procedure, the United States filed a timely motion to dismiss Appellant's prematurely filed petition for review and informed this Court that the United States was preparing and would file a motion for reconsideration with AFCCA within the time provided in AFCCA's rules. (J.A. at 240-47.) The motion to dismiss the petition was expressly premised on the United States' authority and intention to file a motion for reconsideration with AFCCA. This Court then granted the United States' motion to dismiss Appellant's petition on 8 October 2013. (J.A. at 337.) It is

therefore fair for the United States to now suggest that this Court implicitly recognized AFCCA's authority to grant the reconsideration that was in fact granted.

4. Appellant's "plain language" argument lacks merit and would result in absurd outcomes if adopted.

Simply put, taken literally as this Court should, Appellant's "plain language" argument concerning Article 66 would also require this Court to hold courts of criminal appeals also have no authority to rule on motions, conduct oral arguments, or take other appellate actions inherent in any appellate court. Such an absurd argument cannot be accepted. Appellant's reliance on United States v. Reeves, 3 C.M.R. 122, 125-26 (C.M.A. 1952) is misplaced and overstated because all this Court noted over 50 years ago was that "generally, and whenever possible, an appellant should receive review of his case by a board of review constant in membership." Appellant seeks to turn this general suggestion of the Court from many years ago into a tool that would hold justice hostage to situations where no military appellate judge died, retired, or was transferred to new duties. Moreover, Appellant's claim that "[t]he government has obtained a death sentence by 'shopping around' among the various boards to obtain a decision agreeable to them" (App. Br. at 4) is false and not supported in law or fact. AFCCA upheld Appellant's death sentence because it was

correct in fact and law and AFCCA correctly found that it should be approved, as required by Article 66, UCMJ.

5. AFCCA's Rules of Practice and Procedure enjoy deference in the CFR and Supreme Court precedent.

The Code of Federal Regulations (CFR), Title 32, Subtitle A, Chapter I, Subchapter E, Part 150, Section 150.17(c) states "[a] majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered by the Court sitting as a whole. However, en banc reconsideration of an en banc decision will not be held unless at least one member of the original majority concurs in a vote for reconsideration." (emphasis added.) This section provides persuasive authority for the United States' previously asserted position that the Joint Rules of Practice for the courts of criminal appeals fully authorized the reconsideration conducted in Appellant's case.

The CFR expressly contemplate and permit reconsideration of en banc proceedings. In Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842 (1984), the Supreme Court noted that when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. Id. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress. Id. at 842-43. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[1] Id. at 843.

The United States position remains that AFCCA had statutory authority to conduct reconsideration in Appellant's case based on the statute itself and the rules mandated by the statute, and that ends the discussion. There is no need for this Court to go further in affirming the reconsideration in Appellant's case. However, further support for the reconsideration is found in the CFR and Chevron. There is no basis to disturb the reconsideration conducted in Appellant's case.

6. Appellant mistakenly suggests the original AFCCA decision was somehow final and immune to reconsideration. (App. Br. at 14.)

Appellant repeatedly relies upon United States v. Chilcote 20 U.S.C.M.A. 283 (C.M.A. 1970) in his brief on the specified issue and his reply. But, as the United States noted it its

[1] This Court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the Court would have reached if the question initially had arisen in a judicial proceeding. *See* Chevron, 467 U.S. at 843 n.11.

brief on the specified issue, this Court noted in United States v. Henderson, 52 M.J. 14, 20 (C.A.A.F. 1999) that "Article 66 was amended to specifically overrule the *Chilcote* decision by adding the following sentence: 'Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules.'" Again, AFCCA had statutory authority, both in the statute and the statutory-derived rules, to conduct the reconsideration in Appellant's case.

There is also nothing "final" about AFCCA's original decision, as made clear in United States v. Miller, 47 M.J. 352, 361 (C.A.A.F. 1997) where this Court held that decisions of the courts of criminal appeals are inchoate, without legal effect, and subject to further appellate litigation by motions for reconsideration or certificates for review.

Appellant's claim that "[w]hat occurred below was nothing more than one group of judges supplanting their judgment for that of their predecessors at the government's request" is not supported in the record. Certainly, former Chief Judge Stone and Judge Orr had retired from the Air Force and could not participate in the motion for reconsideration. *See* United States v. Janssen, 73 M.J. 221 (C.A.A.F. 2014). But Judges Saragosa, Harney[2], and Marksteiner were part of the judgments

[2] Appellant seems to gloss over the fact the Judge Harney upon reconsideration changed her original vote to set aside the death sentence to affirm Appellant's death sentence.

issued in both decisions, and in the second decision, were joined by other judges required to participate because under the rules were "present for duty." Also, Appellant's claim that the judges "present for duty" could not have participated because they were not present for the oral argument is not borne out by the practice of this Court where it is not uncommon for a judge of this Court to not participate in oral argument but still participate in the decision of the case. For example, most recently Judge Ryan did not participate in the oral arguments in United States v. Busch, Dkt. No. 15-0477/AF, and United States v. Killion, Dkt. No. 15-0425/AF, on 7 October 2015 but will be participating in the decisions of those cases.

7. Appellant fails to appreciate that AFCCA granted both the United States' motion for panel reconsideration and reconsideration en banc.

As noted previously, the United States requested both panel reconsideration and en banc reconsideration -- as did Appellant. So, as the United States has already indicated, it really does not matter whether it was panel reconsideration, en banc reconsideration, or both (the pleadings and orders prove it was both): AFCCA had statutory and inherent authority to conduct the reconsideration in Appellant's case, and there is no basis to disturb that correct decision pending before this Court.

WHEREFORE, the United States respectfully requests this Honorable Court affirm Appellant's findings and sentence.

GERALD R. BRUCE
Associate Division Chief, Government
Trial & Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
Andrews AFB MD 20762
(240) 612-4800
CAAF Bar No. 27428

MATTHEW J. NEIL, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

For

KATHERINE E. OLER, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Division
United States Air Force
(240) 612-4800
Court Bar No. 30753

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court and to the Air Force Appellate Defense Division on 15 January 2016.

GERALD R. BRUCE
Associate Division Chief, Government
Trial & Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Andrews AFB MD 20762
(240) 612-4800
CAAF Bar No. 27428