IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

PATRICK A. SHEA,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 16-0530/AF

Crim. App. Dkt. No. ACM S32225

BRIEF IN SUPPORT OF PETITION GRANTED

ISAAC C. KENNEN,
Major, United States Air Force
U.S.C.A.A.F. Bar No. 34153
2901 Falcon Lane
Joint Base McGuire-Dix-Lakehurst,
New Jersey 08641
(609) 754-3121
isaac.c.kennen.mil@mail.mil

PATRICK A. CLARY,
Captain, United States Air Force
U.S.C.A.A.F. Bar No. 35634
1500 West Perimeter Road, Suite 1100
Joint Base Andrews Naval Air Facility
Washington, Maryland 20762
(240) 612-4770
patrick.a.clary.mil@mail.mil

Counsel for Appellant

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES,	)	**BRIEF IN SUPPORT OF**
Appellee,	)	**PETITION GRANTED**
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v.	)	
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PATRICK A. SHEA,	)	
Senior Airman (E-4),	)	USCA Dkt. No. 16-0530/AF
United States Air Force,	)	
Appellant.	)	Crim. App. Dkt. No. ACM S32225

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

Issues Granted

I. WHETHER THE COURT OF CRIMINAL APPEALS ERRED ON REMAND WHEN, OVER APPELLANT'S TIMELY OBJECTION, THIS CASE WAS ASSIGNED TO A PANEL THAT DID NOT INCLUDE ALL THREE OF THE JUDGES FROM THE ORIGINAL DECISION.

II. WHETHER A REASONABLE OBSERVER WOULD QUESTION THE IMPARTIALITY OR INDEPENDENCE OF THE COURT OF CRIMINAL APPEALS AFTER WITNESSING THE REMOVAL OF JUDGE HECKER FROM THIS CASE ON REMAND FOLLOWING THE GOVERNMENT'S ALLEGATIONS THAT HER IMPARTIALITY HAS BEEN IMPAIRED BY THE DECISION OF THE JUDGE ADVOCATE GENERAL, WHO IS HIMSELF PART OF THE GOVERNMENT, TO ASSIGN HER TO PERFORM NON-JUDICIAL ADDITIONAL DUTIES WITHIN THE GOVERNMENT.

Statement of Statutory Jurisdiction

On May 6, 2016, the Court of Criminal Appeals rendered a decision on remand. This Court therefore has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case and Statement of Facts

A special court-martial comprised of a military judge sitting alone convicted Appellant of violating Articles 90, 128, and 134, UCMJ. The adjudged sentence included a bad conduct discharge, four months of confinement, forfeitures, reduction to E-1, and a reprimand. The convening authority granted clemency by disapproving the adjudged forfeitures and waiving mandatory forfeitures under Article 58b, UCMJ. J.A. 4-5.

On May 21, 2015, a three-judge panel of the Court of Criminal Appeals consisting of Chief Judge Allred, Senior Judge Teller, and Judge Hecker set aside one of Appellant's convictions for assault consummated by a battery and reassessed the sentence to the sentence adjudged by the court-martial rather than the more lenient sentence approved by the convening authority. J.A. 11. On September 22, 2015, on a petition for grant of review, this Court remanded to the Court of

Criminal Appeals for a new sentence reassessment. *United States v. Shea*, 75 M.J. 49 (C.A.A.F. 2015).

On October 15, 2015, while this case was waiting to be re-docketed with the Court of Criminal Appeals, the Judge Advocate General reaffirmed Judge Hecker's assignment as an appellate military judge, and also assigned her to perform duties as the senior individual mobilization augmentee (IMA) to the military justice division (JAJM) of the Air Force Legal Operations Agency (AFLOA). J.A. 42. On October 26, 2015, in an unpublished order, the Court of Criminal Appeals notified the AFLOA's appellate government and appellate defense divisions of Judge Hecker's dual-appointment status. J.A. 42.

On January 13, 2016, 113 days after this Court ordered a remand, this case was re-docketed with the Court of Criminal Appeals. J.A. 47. Less than a month later, in a different case to which Judge Hecker was also assigned, *United States v. Rivera*, the government filed a pre-decision motion impugning Judge Hecker's status and asking the Court of Criminal Appeals to provide "clarification in order to ensure proper detailing to the Court and to avoid any potential appellate issues in that regard." J.A. 25. In a February 18, 2016 unpublished order, the

Court of Criminal Appeals responded to the government's pre-decision motion in *Rivera* by chronicling the matters Judge Hecker had worked on while assigned to JAJM, J.A. 42, and by assuring the parties that "in her capacity as an appellate judge, Colonel Hecker will not be involved with any cases that involve issues she worked on during her Senior IMA duty." J.A. 42.

On February 18, 2016, in an unpublished decision that was not authored by Judge Hecker, the Court of Criminal Appeals reversed Rivera's conviction of a sexual offense for factual insufficiency, leaving only a conviction for dereliction of duty. The court then reassessed the sentence, setting aside Rivera's punitive discharge and all confinement. J.A. 93.

Faced with that loss, on March 11, 2016, the government filed a "motion for recusal of appellate judge and motion for reconsideration" in *Rivera*. J.A. 54. In its motion, the government claimed "a material legal or factual matter was overlooked or misapplied in the decision." J.A. 55, Namely, in the government's view, "recusal is necessary as Judge H[ecker]'s concurrent position as the Senior IMA for JAJM might cause a reasonable person to question her impartiality." J.A. 66. Further, the

government asserted that the other two judges who served with Judge Hecker on the *Rivera* decision should also be removed on reconsideration because they had been subject to Judge Hecker's influence. J.A. 69. The government's reconsideration and recusal motion in *Rivera* acknowledged that its allegations against Judge Hecker would implicate "approximately 13 other decisions." J.A. 58 at n. 5.

On March 28, 2016, the Court of Criminal Appeals denied the government's motion for reconsideration and recusal in *Rivera*, and noted that "the Government's argument is that a reasonable observer might question whether Judge Hecker was partial to them – the Government." J.A. 78-79.

On April 8, 2016, despite having rebuffed the government's attack on Judge Hecker in *Rivera*, in this case the Court of Criminal Appeals instead announced in an unpublished order that Judge Hecker would not be part of the panel on remand. J.A. 80. No basis for her removal or self-recusal was articulated in the order. Accordingly, on April 16, 2016, Appellant objected to the panel change. J.A. 81-82, 87. That objection was overruled in an unpublished order. J.A. 87. On May 6, 2016, a new

Court of Criminal Appeals decision in this case was issued by a panel that did not include Judge Hecker. J.A. 1-3. This appeal follows.

Argument

I. THE COURT OF CRIMINAL APPEALS ERRED ON REMAND WHEN, OVER APPELLANT'S TIMELY OBJECTION, THIS CASE WAS ASSIGNED TO A PANEL THAT DID NOT INCLUDE ALL THREE OF THE JUDGES FROM THE ORIGINAL DECISION.

Standard of Review

Whether the Court of Criminal Appeals panel that heard Appellant's case on remand was properly constituted is a question reviewed *de novo*. *See United States v.* Jones, 74 M.J. 95 (C.A.A.F. 2015), *see also United States v. Robertson*, 38 C.M.R. 402, 403-404 (C.M.A. 1968).

Law and Analysis

The Court of Criminal Appeals was one "of limited jurisdiction. [It] possessed only that power authorized by Constitution and statute." *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015). In turn, Congress has enacted Article 66(a), UCMJ, which occupies the field on the question of the Court of Criminal Appeals' power to reconsider a

panel decision: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules."

Congress' intent to prohibit having a Court of Criminal Appeals panel decision reviewed by another panel is "'implicitly contained in [Article 66(a)'s] structure and purpose.'" *See generally, Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (discussing this principle of statutory interpretation in another context). Congressional intent is also evident in the legislative history. Article 66 was enacted amid "a background of congressional opposition to the reversal of a panel decision favorable to an accused by another panel of the same court." *United States v. Wheeler*, 44 C.M.R. 25, 26 (C.M.A. 1971). It was intended "generally, and whenever possible, [that] an appellant should receive review of his case by a [court] constant in membership." *Robertson*, 38 C.M.R. at 404.

Congress' opposition to having a Court of Criminal Appeals panel decision reviewed by another panel was noted by this Court's predecessor in *United States v. Chilcote*, 43 C.M.R. 123 (C.M.A. 1971). As *Chilcote* explains, proposed language which would have allowed the Judge Advocates General to have a panel decision reviewed by another

panel was rejected by the legislature because "[t]he possibility of such a result apparently was regarded as unfair to an accused, and the objective of avoiding that possibility overrode suggestions about the desirability of uniformity on questions of law among the several boards within the services." 43 C.M.R. at 125. In that way, Article 66(a)'s requirement that an accused receive review by a Court of Criminal Appeals that is "constant in membership," *Robertson*, 38 C.M.R. at 404, appears to be a measure designed to meet Congress' concern that the government, through its Judge Advocates General, might seek to influence those courts to the detriment of the accused.

The government's actions against Judge Hecker prove that Congress' concerns regarding the vulnerability of the Court of Criminal Appeals to government pressure remain valid. A reasonable observer would question the impartiality and independence of the Court of Criminal Appeals after having witnessed Judge Hecker's otherwise unexplained removal from this case mere days after the government's illogical attack on her in *Rivera*. To a reasonable observer, the government's attack on Judge Hecker, one it acknowledged would

implicate cases beyond *Rivera*, caused her removal in this case. That is, at the least, an apparent, if not actual, violation of Article 37.

Accordingly, relief would be more properly granted under Issue II. However, if no relief is granted under Issue II, then this case should be remanded for a rehearing before a Court of Criminal Appeals that is "constant in membership." *Robertson*, 38 C.M.R. at 404.

II. A REASONABLE OBSERVER WOULD QUESTION THE IMPARTIALITY OR INDEPENDENCE OF THE COURT OF CRIMINAL APPEALS AFTER WITNESSING THE REMOVAL OF JUDGE HECKER FROM THIS CASE ON REMAND FOLLOWING THE GOVERNMENT'S ALLEGATIONS THAT HER IMPARTIALITY HAS BEEN IMPAIRED BY THE DECISION OF THE JUDGE ADVOCATE GENERAL, WHO IS HIMSELF PART OF THE GOVERNMENT, TO ASSIGN HER TO PERFORM NON-JUDICIAL ADDITIONAL DUTIES WITHIN THE GOVERNMENT.

Standard of Review

Allegations of unlawful command influence are reviewed *de novo*. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

Law

"Allegations of unlawful command influence are reviewed for actual unlawful command influence as well as the appearance of unlawful command influence. Even if there was no actual unlawful

command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *Id.*, *citing United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). An appearance of unlawful influence arises "where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Salyer*, 72 M.J. at 423, *citing Lewis*, 63 M.J. at 415.

The government may not, through "inappropriate actions cause[] the disqualification of a military judge." *Salyer*, 72 M.J. at 428. Appellant did not have a right to any particular judge, "but he did have a right to have the military judge detailed to the case be free from inappropriate attempts to remove [her]." *Id.* at 428, n.15.

Analysis

The circumstances in this case would cause a reasonable observer to believe that the government succeeded in having Judge Hecker removed by illogically attacking her performance of additional non-judicial duties that the government itself, through its Judge Advocate General, ordered her to perform. A reasonable observer who saw the government obtain the removal of an appellate judge under such

dubious circumstances would harbor doubt about whether the Court of Criminal Appeals is impartial and independent. In inspiring that doubt, the government has caused an "'intolerable strain on public perception of the military justice system.'" *Id.* at 423 (internal citation omitted).

This Court must be the one to dispel the appearance of unlawful influence created by the government's actions. Given the circumstances surrounding Judge Hecker's attack and removal, the public would question whether the Court of Criminal Appeals is independent and impartial. In turn, the public would doubt any sentence reassessment the Court of Criminal Appeals renders in this case. In the public's eye, even a reassessment favoring Appellant would not be seen as an effort to dispel the appearance of impropriety the government has created rather than an impartial and independent adjudication of this case.

Conclusion

Appellant has not yet received a legally-sufficient sentence reassessment under Article 66(c) by a properly-constituted Court of Criminal Appeals. He objected in a timely manner to the change in panel composition and, by doing so, avoided forfeiting his statutory entitlement to receive such a review. However, the Court of Criminal

Appeals did not heed his objection and, apparently bowing to an illogical and far-reaching government attack, removed Judge Hecker without otherwise providing an explanation. As such, the court below no longer appears impartial and independent. A court has nothing if it does not have the public's trust. Such a court cannot competently conduct the necessary sentence reassessment. Unfortunately, this Honorable Court cannot provide Appellant the sentence reassessment he did not receive below because this Court lacks the power to conduct such a review under Article 66(c). Therefore, there is no sentence this Court may lawfully affirm because no impartial and independent Court of Criminal Appeals remains to give Appellant the sentence reassessment that he is entitled to receive.

Accordingly, to save Appellant from a sentence that has not been properly reviewed under Article 66(c), and to remedy the appearance of unlawful influence the government has created by manufacturing the removal of an appellate military judge, this Honorable Court should affirm a sentence of no punishment.

Very Respectfully Submitted,

ISAAC C. KENNEN,
Major, United States Air Force
U.S.C.A.A.F. Bar No. 34153
2901 Falcon Lane
Joint Base McGuire-Dix-Lakehurst
New Jersey 08641
(609) 754-3121
isaac.c.kennen.mil@mail.mil

PATRICK A. CLARY,
Captain, United States Air Force
U.S.C.A.A.F. Bar No. 35634
1500 West Perimeter Road, Suite 1100
Joint Base Andrews Naval Air Facility
Washington, Maryland 20762-6604
(240) 612-4770

Counsel for Appellant

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 October 14, 2016.

ISAAC C. KENNEN,
Major, United States Air Force
U.S.C.A.A.F. Bar No. 34153
2901 Falcon Lane
Joint Base McGuire-Dix-Lakehurst
New Jersey 08641
(609) 754-3121
isaac.c.kennen.mil@mail.mil

Counsel for Appellant