14 November 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. Senior Airman (E-4), PATRICK A. SHEA, USAF, *Appellant.*	) FINAL BRIEF ON BEHALF OF) THE UNITED STATES)) USCA Dkt. No. 16-0530/AF)) Crim. App. No. S32225))

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Senior Airman (E-4), PATRICK A. SHEA, USAF, *Appellant.*	)	Crim. App. No. S32225

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

ISSUES PRESENTED

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 [H.] FROM THIS CASE ON REMAND FOLLOWING THE GOVERNMENT'S ALLEGATIONS THAT HER IMPARTIALITY HAS BEEN IMPAIRED BY 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

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE & STATEMENT OF FACTS

Appellant's timeline laid out within his Statement of the Case and Statement of Facts is generally accepted; we add the following to clarify the current posture of this case. First, the United States agreed with Appellant's general argument and position in his initial petition to this Court in July 2015. (J.A. at 12-18; 19-23.) Specifically, in its first review of Appellant's case, AFCCA set aside one of the specifications of assault because the military judge did not disclose potentially exculpatory information from evidence that he reviewed *in camera*. (J.A. at 6-10.) Then, within their broad discretion to reassess a sentence, AFCCA appropriately concluded that the set aside specification had no impact on the military judge's sentence in this case. (J.A. at 10-11.) The Court did not provide an explanation for reassessing the sentence as the "adjudged" sentence rather than the "approved" sentence, but it appeared to have been a typographical error.[1] As Appellant noted

[1] Appellant could have, but did not, bring this typographical error to the attention of AFCCA by filing a motion for reconsideration while the lower Court still had jurisdiction.

in his first supplement to his initial petition, AFCCA correctly noted the approved sentence in the beginning of its opinion. (J.A. at 15.)

The United States agreed with Appellant that Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), on its face, limited review of a Criminal Court of Appeal to the approved findings and sentence. United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013), did not and could not expand the statutory authority for a Criminal Court of Appeals to reassess a sentence as more severe than the one approved. Therefore, the United States requested that this Court affirm AFCCA's decision as to the findings, but remand the case with an order for a new sentence reassessment so that AFCCA could correct its apparent typographical error in favor of Appellant. (J.A. at 19-21.) On 22 September 2015, this Court did exactly that.

In the meantime, Judge H. was assigned by The Judge Advocate General to perform duties as the senior individual mobilization augmentee (IMA) to the military justice division (JAJM) of the Air Force Legal Operations Agency (AFLOA).

The United States does not dispute that in a completely separate case, United States v. Rivera,[2] the government filed a motion asking to clarify the status of Judge H. (J.A. at 25.) In the Rivera case, in which Counsel for Appellant was also

[2] On 20 October 2016, this Court issued an order in Rivera concluding that it had no jurisdiction over that case. United States v. Rivera, __ M.J. __, No. 16-0501/AF (C.A.A.F. 20 October 2016) (summary disposition).

the assigned appellate defense counsel, the appellant "join[ed] the government in its request that [AFCCA] clarify whether each of the commissioned military officers assigned to serve as appellate military judges…have been properly 'assigned to a Court of Criminal Appeals.'" (J.A. at 32.) Counsel for Appellant went much further than the United States, though, and went on to explain that his client Rivera was

> concerned that the duties [Judge H.] performs in [JAJM] may be inconsistent with requirements of the Air Force Uniform code of Judicial Conduct…Canon 1 of the Code of Judicial conduct requires the appellate judiciary to maintain independence. According to its Senior Ranking Officer, [JAJM] 'provides fair and responsive counsel on military justice to senior leaders and guidance on military justice policy and process to legal offices at every level of command.'
>
> [AFCCA] is often called upon to rule on matters of procedural regularity in the processing of courts-martial. That duty to review cases for procedural regularity is really a duty to review the work of individuals and organizations that [JAJM], and therefore [Judge H.], apparently advises. Given that dynamic, [Judge H.]'s presence on this [c]ourt creates the appearance that this [c]ourt's independence is compromised. Such an appearance is intolerable because 'maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. This is even more important, and difficult, in a judicial system such as the court-martial system because it is within the executive branch.' AFI 51-201, Atch. 5, Canon 2B, Commentary.

(J.A. at 33.)

AFCCA responded to the parties' filings with an Order on 18 February 2016 (hereinafter "Clarification Order") explaining that Judge H. became attached to JAJM as a Senior IMA effective 15 October 2015. (J.A. at 42-46.)[3] Additionally, the Court stated "[T]he Judge Advocate General also elected to continue [Judge H.]'s appointment as an appellate military judge on this Court…In that capacity, [Judge H.] serves as an appellate military judge on an occasional and intermittent basis, and is placed on Special Panels by the Chief Judge." (J.A. at 42.) The 26 October 2015 Order stated that any party may file a motion to recuse or disqualify Judge H. "within 7 days of receiving notice of the panel composition." (J.A. at 45.) The same day that the Clarification Order was transmitted, AFCCA provided its decision in United States v. Rivera. (J.A. at 59, 88-94.)

As explicitly permitted in the 26 October 2015 Order that was actually received on 18 February 2016, the United States did file a motion for recusal in Rivera. The United States precisely stated, "[t]o be clear, the United States is not alleging actual impartiality on behalf of Judge H. Nor does it contend that she has advised or acted on Appellant's case in her capacity with JAJM." (J.A. at 68.) In fact, the United States argued that due to Judge H.'s assignment to JAJM, a

[3] The 26 October 2015 order had apparently been transmitted by electronic mail to the Air Force Appellate Government and Appellate Defense Divisions, however, the email address for the Appellate Government Division was incorrect and the order was never received by the Appellate Government practitioners until provided in the 18 February 2016 Order in United States v. Rivera. (J.A. 44, 58.) The Clarification Order is not dated, but it appears that Appellant's Counsel also agrees the Order was dated 18 February 2016. (App. Br. at 3.)

division aligned with the United States Government that provides direction and guidance on prosecuting cases, a reasonable observer might question whether Judge H. was partial to the Government. (J.A. at 78-79.) Certainly, Appellant's counsel questioned and challenged Judge H.'s impartiality and independence. (J.A. at 33.)

In a complete reversal from his earlier challenge citing to the Judicial Canons, Appellant's Counsel then opposed the motion for recusal and reconsideration in Rivera, "asserting that a reasonable observer who knew of all the facts and circumstances would not question Judge [H.]'s impartiality in this case." (J.A. at 79.)[4]

The United States never filed a motion for recusal or disqualification of Judge H. in Appellant's case. AFCCA, *sua sponte*, issued a Special Panel notice. (J.A. 80.) After the United States' denied motion to recuse Judge H. in the Rivera case, Judge H. participated in several decisions, including United States v. Crowell, ACM S32267, (A.F. Ct. Crim. App. 19 April 2016) (unpub. op.) (J.A. at 95-99); United States v. Richards ACM 38346 (A.F. Ct. Crim. App. 2 May 2016) (unpub. op.) (J.A. at 100-84); United States v. Grenald, ACM S32283 (A.F. Ct. Crim. App. 14 July 2016) (unpub. op.) (J.A. at 185-95.); United States v. Carter

[4] Presumably, the appellant in Rivera would not want a new panel to consider his case because AFCCA, in a panel that included Judge H., issued a favorable ruling in his case, setting aside an Article 120 conviction for factual insufficiency.

ACM 38708 (A.F. Ct. Crim. App. 21 July 2016) (unpub. op.) (J.A. at 196-213); and United States v. Richards, ACM 38346 (Special Panel Notice & Order on Motion for Reconsideration, 14 June 2016) (Appendix). In fact, the CCA decision under review in this case, issued on 6 May 2016, predated the decisions in Grenald, Carter, and the reconsideration in Richards.

In its 6 May 2016 decision, AFCCA reassessed the sentence to a "bad-conduct discharge, 4 months of confinement, reduction to E-1, and a reprimand." (J.A. at 3.) The only evidence that Judge H. is no longer available for assignment to a special panel as an appellate military judge by the Chief Judge is the footnote in the Carter opinion indicating that "Judge [H.] participated in this decision prior to [her] reassignment."

SUMMARY OF THE ARGUMENT

AFCCA did not err when it denied Appellant's objection to the assignment of the case on remand to a special panel of qualified and properly appointed appellate military judges. Contrary to his assertion and reliance on case law dealing with reconsiderations, Appellant was not entitled to a panel on remand that was composed of the same appellate military judges that first decided his case. He has also not challenged or complained that the panel that decided this case on remand was improperly constituted under AFCCA Rules or the law, nor can he demonstrate that he suffered any prejudice when three qualified and properly

appointed military judges complied with this Court's remand in reassessing Appellant's sentence, and fixing their typographical error in their first decision.

Additionally, Appellant has provided no evidence of unlawful command influence. A reasonable observer, fully informed of all the facts and circumstances, would not question the fairness of the proceeding. Appellant is attempting to use facts from an entirely different case that are not properly on this record to support his allegation of apparent unlawful command influence. The United States appropriately and lawfully moved for recusal of Judge H. in a different case after the appellant's own counsel alleged that her presence on AFCCA was improper. The United States never moved for recusal of Judge H. in this case, and Appellant cannot meet his burden in showing what facts, if true, constitute unlawful command influence such that they caused his proceeding on remand to be unfair.

ARGUMENT

I.

APPELLANT'S PANEL ON REMAND WAS A PROPERLY CONSTITUTED PANEL, AND APPELLANT HAD NO RIGHT ON REMAND TO A PANEL THAT WAS COMPOSED OF THE SAME THREE JUDGES WHO ISSUED THE ORIGINAL DECISION.

Standard of Review

Whether a service court of criminal appeals panel is properly constituted is a question of law review *de novo*. *See* United States v. Jones, 74 M.J. 95 (C.A.A.F. 2015); United States v. Lane, 64 M.J. 1 (C.A.A.F. 2006). Jurisdiction is a question of law that this Court reviews de novo. United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2011). The standard of review for forfeited issues is plain error. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). To constitute plain error, Appellant must demonstrate that a clear or obvious error had an unfairly prejudicial impact on the case. United States v. Olano, 507 U.S. 725, 733-34 (1993). In the context of a plain error analysis, Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012).

Law and Analysis

At the outset, Appellant does not challenge the three military appellate judges who considered his case on remand as being disqualified, partial, not properly appointed, or in conflict in any way with Article 66, UCMJ, 10 U.S.C. § 866. *See* United States v. Schwarz, 45 C.M.R. 852, 855 (N.M.C.M.R. 1971). Furthermore, although Appellant objected to the change in panel in this case, he did not do so on the basis that he raises before this Court. (J.A. at 81-82.) In his

written objection, Appellant argued that Article 66 prohibited a change in the panel composition, quoting language dealing with a *reconsideration* of a decision of one panel by another panel. (Id.) Appellant never raised this particular issue to AFCCA – that the Chief Judge was purposely and improperly removing Judge H. from this case because of the litigation over Judge H. in Rivera. Therefore, Appellant at the very least forfeited the issue.[5] As will be discussed further, there was certainly no error in that Appellant's case on *remand* was heard by a properly constituted panel, and undoubtedly no prejudice when AFCCA followed this Court's order on remand.

"The assigning of cases to panels is a procedural, not a substantive, matter which falls within the prerogative of the Judge Advocate General, and as delegated the Chief Judge and Clerk of the Court." United States v. Vines, 15 M.J. 247, 249 (C.M.A. 1983). Additionally, an appellant "has no right to select the panel to which his case is to be assigned for decision." Id. *citing* Western Pac. R. Corp. v. Western Pac. R. Co., 347 U.S. 247 (1953); Schact v. United States, 398 U.S. 58, 64

[5] Although a party does not have to "present every argument in support of an objection," he must make the specific ground for the objection "if the specific ground was not apparent from the context." United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005). In determining whether a right has been forfeited or waived, the reviewing court must consider whether the trial defense counsel's failure to object "constituted an intentional relinquishment of a known right." United States v. Campos, 67 M.J. 330, 332 (2009).

(1970) ("The procedural rules adopted by the Court for the orderly transaction of business are not jurisdictional.")[6]

This Court and others have declined to provide relief to an appellant when a court of criminal appeals follows its rules of procedure. *Compare* United States v. Sapigao, 11 M.J. 535 (A.C.M.R. 1981) and United States v. Witt, 75 M.J. 380 (C.A.A.F. 2016). Here, Rule 2.2 of AFCCA's rules provides that "[w]hen a case is remanded directly to the Court by the United States Court of Appeals for the Armed Forces…it shall, **when practical**, be referred to the same numbered panel that last decided the case." (United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, effective 11 October 2010, amended 20 May 2016, http://afcca.law.af.mil, hereinafter "AFCCA Rules") (emphasis added).

As noted in Vines, "[m]any reasons exist for change of assignment of cases ranging from workload of particular panels to reassignment of judges from a panel." Vines, 15 M.J. at 249. Here, following proper procedure, the case was initially referred to the same numbered panel that last decided it. Then, the Chief Judge provided a Special Panel notice informing the parties that the Record was withdrawn from Panel 2 and referred to a Special Panel for appellate review. (J.A. at 80.) While it is true that AFCCA did not explain why it took such action,

[6] Schact v. United States, 398 U.S. 58 (1970) would suggest that Appellant does not have standing to contest this issue since the rules on which panel a case is assigned are procedural, not jurisdictional. However, without conceding jurisdiction and standing, the United States is addressing the substance of the granted issue.

withdrawing a case from one panel and reassigning it is neither unusual nor improper, and sometimes even required by this Court. In fact, in its Clarification Order, AFCCA noted that Judge H. was a reservist who served "as an appellate military judge on an occasional and intermittent basis." (J.A. at 42.) Upon Appellant's objection to the panel change, AFCCA issued an Order observing that even this Court has remanded cases and required that they be heard by a new panel, and as such, Appellant's argument that consideration by the same panel upon remand was statutorily mandated, was foreclosed. (J.A. at 87.)

As recognized by AFCCA, none of the cases cited by Appellant apply to a case on remand. (J.A. at 87.) Simply put, reconsideration of a decision is not the same thing as a remand. A reconsideration implies a court will "think carefully about something again especially in order to change a choice or decision already made." (Merriam-Webster Dictionary, available online at http://www.merriam-webster.com.) AFCCA Rules set out detailed requirements for motions for reconsideration, including that:

> reconsideration will not be granted without a showing that one of the following grounds exists:
>
> (1) A material legal or factual matter was overlooked or misapplied in the decision;
>
> (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;

> (3) The decision conflicts with a decision of the Supreme Court of the United States, CAAF, another service court of criminal appeals, or [AFCCA]; or
>
> (4) New information is received which raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused's mental capacity to stand trial.

(AFCCA Rules 19.2(b)).

In contrast, in a case on remand, a court of criminal appeals, "can only take action that conforms to the limitations and conditions prescribed by the remand." United State v. Riley, 55 M.J. 185, 188 (C.A.A.F. 2001); United States v. Montesinos, 28 M.J. 38, 44 (C.M.A. 1989). This was exactly the issue in Riley, where CAAF remanded a case to the court of criminal appeals and then the court of criminal appeals improperly engaged in a reconsideration, which was not authorized by the remand. Riley, 55 M.J. at 188.

Just as in his objection to the panel change to AFCCA, the cases cited by Appellant in his brief to this Court all deal with reconsideration and are not applicable. *See* United States v. Robertson, 38 C.M.R. 402 (C.M.A. 1968) (reconsideration permissible by board of review even though one of the three judges was no longer able to participate); United States v. Chilcote, 43 C.M.R. 123 (C.M.A. 1971) (reviewing whether the prior version of Article 66 permitted *en banc* reconsideration of a board of review); United States v. Wheeler, 44 C.M.R.

25 (C.M.A. 1971) (also reviewing whether the prior version of Article 66 permitted *en banc* reconsideration of a decision from a panel of the board of review).

Taking Appellant's argument to the extreme, no judge on the court of criminal appeals could ever be reassigned. In the alternative, then, this Court could never remand a case if the original members of the panel were no longer present on the court of criminal appeals. Appellant's suggestion would therefore preclude future assignments and promotion, retirement, and even death. Even this Court's predecessor in Robertson recognized that "whenever possible, an appellant should receive review [on reconsideration] of the case by a board of review constant in membership, [but] circumstances may…dictate otherwise…" Robertson, 38 C.M.R. at 404.

Finally, it was appellant's counsel who first challenged Judge H. as a member of the court of criminal appeals and who alone invoked the Judicial Canons. (J.A. at 32-33.) As detailed above in the statement of the case and facts, the United States, without knowledge and receipt of the 26 October 2015 Order, sought clarification, and nothing more, of Judge H.'s status. (J.A. at 24-25.) Upon receipt of the Clarification Order, and after Appellant's Counsel firmly challenged Judge H.'s presence on AFCCA, the United States did challenge Judge H.'s participation in United States v. Rivera, and we invite this Court to examine the pleading for any evidence of impropriety. (J.A. at 54-71.) Appellant's complaint

as to the appearance of her "unexplained removal from this case" is dissipated, if not destroyed, by three important facts. First, it was appellant's counsel who initially challenged her presence on AFCCA as creating the "appearance that [AFCCA's] independence is compromised." (J.A. at 33.) Second, the United States never moved to recuse or disqualify Judge H. in Appellant's case. Third, Judge H. continued to participate in decisions both before and after the Special Panel notice in this case.

As Appellant did not (and has not) challenged the qualifications of the appellate military judges who reviewed and decided the case on remand, Appellant also struggles to demonstrate prejudice, and simply asserts relief in the form of a "rehearing before a Court of Criminal Appeals that is 'constant in membership.'" (App. Br. at 9.) The United States believes that unquestionably Appellant should be required to demonstrate prejudice, particularly when Judge H., as a member of the original panel, reassessed the sentence as "adjudged." Appellant was afforded three qualified appellate military judges on remand, two of whom were part of his panel that set aside a specification for assault. AFCCA correctly found no law or rule requiring the composition of the panel on remand to remain the same as the initial panel. Lastly, the panel on remand acted within the bounds of this Court's

remand when it corrected their original typographical error, which was precisely the relief Appellant sought and the relief conceded by the United States.[7]

In sum, Appellant has failed to demonstrate that he was entitled to a panel on remand that was composed of the same appellate military judges that first decided his case. He has also not challenged or complained that the panel that decided this case on remand was improperly constituted under AFCCA Rules or the law. AFCCA did not err when it denied Appellant's objection to the assignment of the case on remand to a special panel of qualified and properly appointed appellate military judges.

II.

A REASONABLE OBSERVER, FULLY INFORMED OF ALL THE FACTS AND CIRCUMSTANCES, WOULD NOT QUESTION THE FAIRNESS OF THE PROCEEDING.

Standard of Review

Questions of unlawful command influence are reviewed *de novo*. United States v. Argo, 46 M.J. 454 (C.A.A.F. 1997). Failure to make a timely objection constitutes waiver ("forfeiture") in the absence of plain error. United States v. Gilley, 56 M.J. 113 (C.A.A.F. 2001) (citation omitted); United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998); United States v. Ramos, 42 M.J. 392, 397 (C.A.A.F.

[7] In Vines, where there was an administrative error and the incorrect panel number decided the case, the C.M.A. recognized the futility of remanding the case. Vines, 15 M.J. at 250. Here, there was no administrative error. AFCCA followed its rules of procedure and gave notice of the panel change.

1995); *see also* United States v. Weasler, 43 M.J. 15 (C.A.A.F. 1995) (holding that claims of unlawful command influence may be waived). The standard of review for forfeited issues is plain error. Gladue, 67 M.J. at 313. To constitute plain error, Appellant must show that a clear or obvious error had an unfairly prejudicial impact on the case. Olano, 507 U.S. at 733-34. Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. Humphries, 71 M.J. at 209.

Law and Analysis

The statutory prohibition against unlawful command influence reads, in relevant part, that "[n]o person . . . may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case." Article 37(a), UCMJ. Appellant has the initial burden of raising the issue of unlawful command influence. United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994). Appellant must: "(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness." United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003) (Citations omitted).

a. Appellant Forfeited this Claim by Not Specifically Raising it When He Objected to the Panel Change.

Although AFCCA was considering this case on remand, Appellant objected to the change in panel and never raised unlawful command influence. Therefore, Appellant forfeited any claim regarding unlawful command influence in the panel composition by failing to raise it. Gladue, 67 M.J. at 313. As this was a properly constituted panel and the law has never required the composition of a panel on remand to be the same as the initial panel that considered the case, there was no error, and certainly no plain or obvious error. Humphries, 71 M.J. at 209.

b. Appellant Has No Standing to Assert Unlawful Command Influence When the United States Never Moved for the Recusal or Disqualification of Judge H. In This Case.

"[T]he defense must show 'that the alleged unlawful command influence has a logical connection to [his] court-martial, in terms of its potential to cause unfairness in the proceedings.' On appellate review, the defense must show that the proceedings appeared to be unfair and that the unlawful command influence was the cause of the appearance of unfairness." United States v. Ayers, 54 M.J. 85, 95 (C.A.A.F. 2000), (*citing* United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999)). Appellant has also failed to show how his own appellate counsel's actions in firmly questioning and challenging Judge H.'s continued participation as an appellate military judge, and the lawful motion to recuse and disqualify Judge H. in a different case, amount to facts that constitute unlawful

command influence in his own case. Appellant conclusively alleges that because Judge H. was ultimately not part of the Special Panel that considered the case on remand, then the appearance of unlawful command influence exists, and he therefore is entitled to the windfall benefit of a sentence to no punishment. (App. Br. at 10-12.)

As in Ayers, there is no dispute that the government lawfully moved for recusal in a different case, but that action had nothing to do with Appellant. In short, Appellant's entire argument is based on "facts" that have nothing to do with his case. Appellant has plainly failed to meet his unlawful command influence burden.

c. Even Assuming the Issue is Not Forfeited and Appellant Has Standing, Appellant Fails to Meet the Three-Prong Stombaugh Test.

As addressed in the argument relating to the first issue, the United States does not dispute that it moved for recusal of Judge H. in Rivera following its motion to clarify her status. As provided in AFCCA's 26 October 2015 order, which was received by the Appellate Government Division on 18 February 2016, the United States had reason to believe that Judge H. was disqualified from serving in the Rivera case and filed a motion for appropriate relief with AFCCA. (J.A. at 45; 54-71.) Those reasons are thoroughly identified in the pleading, and as recognized by AFCCA, the United States was concerned that Judge H.'s position could create the appearance that she was partial to the **government**. The United

States reasonably sought to avoid an appellate issue by filing the motion previously embraced and initially raised by the appellant in that case. Additionally, R.C.M. 902, states that **upon motion of any party**, a military judge shall decide whether he or she is disqualified. R.C.M. 902(c)(3)(1) (emphasis added).[8] Ultimately, the motion in Rivera was denied, and Judge H. participated in that case. (J.A. at 78-79.) The United States never filed a motion for recusal or disqualification of Judge H. in Appellant's case.

The facts of what occurred in this case stand in stark contrast to those in United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013). In Salyer, the legal office initially questioned the military judge's ruling regarding the age of consent. Salyer, 72 M.J. at 419. Later, the military justice officer heard a rumor that the military judge may have had a young wife who he married when she was around the age of seventeen. Id. at 420. The military justice officer decided to access the military judge's official personnel record to determine how old his wife was when they were married. Id. In the interim, the Officer-in-Charge of the base legal office contacted the military judge's supervisor and informed the supervisor of the feeling that the military judge made his ruling on the age of consent because he had married his wife when she was under the age of eighteen. Id. The military judge learned of this phone call. Id. Later, he disqualified himself in part because of the

[8] R.C.M. 902 defines a proceeding under the Rules as including "pretrial, trial, post-trial, appellate review, or other stages of litigation." R.C.M. 902(c)(1).

"inappropriate method for addressing a disagreement" by calling his supervisor. Id. at 421-22. This Court found that the totality of the circumstances caused the

> appearance in this record that the Government sought, through inappropriate means, disqualification of the military judge because it did not agree with the military judge's ruling. An objective disinterested observer, fully informed of these facts and circumstances, might well be left with the impression that the prosecution in a military trial has the power to manipulate which military judge presides in a given case depending on whether the military judge is viewed as favorable or unfavorable to the prosecution's cause based on the Government's access to a military judge's personnel file and through access to the military judge's chain of command. This, in our view, would foster the 'intolerable strain on public perception' of the military justice system which the proscription against unlawful command influence and this Court guard against.

Id. at 427. Although Appellant's claim rests almost entirely upon Salyer, (App. Br. at 10-11), Appellant's case cannot be reasonably compared to that inapt case.

Appellant has not shown how the United States' motion for recusal of Judge H. in Rivera was improper. Certainly, AFCCA did not find it improper; AFCCA simply disagreed and Judge H. remained on the case. Most importantly, though, Appellant has not shown how the motion for recusal constituted unlawful command influence in this case.

Second, Appellant has not shown how the remand proceedings in his case were unfair. He simply forecloses the possibility that the Court of Criminal Appeals could ever appear to be independent and impartial. (App. Br. at 11.)

Third, Appellant has also failed to meet the third prong of the Stombaugh test because he cannot show any unlawful command influence or any unfairness, or how the supposed unlawful command influence caused the unfairness. Appellant's reliance on the facts of the Rivera case are also not properly on this record to support his allegation of apparent unlawful command influence.

Finally, Appellant appears to argue that the United States can never move for recusal or disqualification of a military judge when it was The Judge Advocate General who assigned this particular judge to perform simultaneous duties at both JAJM on behalf of the government and as an appellate military judge. (App. Br. at 10.) While the Appellate Government Division reports to and represents The Judge Advocate General, the Appellate Government Division has a responsibility as officers of the court to protect the judicial process, and the right, as provided in R.C.M. 902, AFCCA Rules, and the 26 Ocotober 2015 Order, to move for the recusal of a military judge when appropriate.

In fact, several issues have come before this Court over the years, and are even currently pending, when our superiors appoint individuals to the appellate courts who may not have been qualified, or were also members of Congress, or were serving on multiple judicial bodies at one time. *See* United States v. Janssen, 73 M.J. 221 (C.A.A.F. 2014); Lane, 64 M.J. at 1; and United States v. Dalmazzi, No. 16-0651/AF, 2016 CAAF LEXIS 698 (C.A.A.F. 2016).

The United States has a responsibility and a right to bring what appears to be an issue to a court's attention as it did in the Rivera case. There was no "attack" on Judge H., especially not one instigated by the United States.

As Appellant has fallen well short of meeting his burden of establishing any "facts" that constitute unlawful command influence, or that his remand proceeding was unfair, there was absolutely no error or unlawful command influence, and this Court should affirm the conviction and sentence as reassessed by AFCCA on remand. The typographical error in the original AFCCA decision has been corrected, and this Court should affirm AFCCA's decision.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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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 Appellate Defense Division on 14 November 2016.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

☒ This brief contains 5,317 words,

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with 14 characters per inch using Times New Roman.

/s/_____

MEREDITH L. STEER, Major, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 14 November 2016

APPENDIX

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**ACM 38436**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF SPECIAL PANEL**
Lieutenant Colonel (O-5)	)	
JAMES W. RICHARDS, IV,	)	
USAF,	)	
Appellant	)	

It is by the Court on this 14th day of June 2016,

ORDERED:

That the Record of Trial in the above styled matter is withdrawn from the previous Panel and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

MITCHELL, MARTIN T., Colonel, Senior Appellate Judge
HECKER, KAREN L., Colonel, Senior Appellate Judge
MAYBERRY, KAREN E., Colonel, Appellate Judge

FOR THE COURT

LEAH M. CALAHAN
Clerk of the Court

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**ACM 38346**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Lieutenant Colonel (O-5)	)	
JAMES W. RICHARDS, IV,	)	
USAF,	)	
Appellant	)	**Special Panel**

On 2 May 2016, a special panel of this court issued its decision in this case.[1] On 18 May, Appellant's counsel requested additional time to file a motion for reconsideration, a motion opposed by the government. The court granted the extension of time until 10 June 2016.[2]

Reconsideration Motion Filed by Appellant's Counsel

On 10 June 2016, Appellant's counsel filed a motion for reconsideration and reconsideration en banc regarding three issues:

> (1) Whether Appellant was denied his right to freedom from unreasonable search and seizure under the Fourth Amendment when the government placed a global positioning system (GPS) tracking system on his car without a warrant, issued a search warrant that was overbroad in that it lacked particularity with respect to the things to be seized, conducted a warrantless search of Appellant's hard drives; exceeded the scope of the warrant in executing its search of Appellant's hard drives and the warrant was no longer valid.

[1] On 27 May 2016, Appellant's counsel filed a motion to vacate the decision based on Judge Mitchell's participation and his appointment to the United States Court of Military Commission Review. The government opposed the motion. This court addresses and denies this motion in a separate order.

[2] Due to the retirement of one of the judges who served on the panel that initially ruled on Appellant's case in May 2016, a special panel was created, which replaced the now-retired judge with another judge. Colonel Mitchell was on both panels that heard oral argument and this recent panel. He participated in this decision prior to his reassignment.

(2) Whether Appellant as denied his Sixth Amendment right to effective assistance of counsel when his attorney disclosed confidential information to the government that led directly to the discovery of evidence that was used against Appellant at trial.

(3) Whether the military judge erred in denying the defense motion to dismiss for violation of Appellant's right to speedy trial under R.C.M. 707

The motion for reconsideration en banc filed by Appellant's counsel is DENIED.

The panel has considered the issues raised regarding these three issues. The motion for reconsideration filed by Appellant's counsel is DENIED.

We note that Appellant challenges the court's statement in our analysis of the R.C.M. 707 speedy trial issue that he hired new civilian defense counsel during the scheduling of the Article 32. Even if this was an error, we determine that is not a material factual error and the reasoning expressed in the opinion is still sound and thus reconsideration is not appropriate. (See Court Rule 19.2(b))

Motions Filed by Appellant

Also on 20 June 2016, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant's counsel filed, on his behalf, a motion to attach a variety of motions and requests. This voluminous filing, which is over 100 pages, included motions to attach documents, motions for reconsideration (and reconsideration en banc) of multiple issues, and "various other requests for relief." We caution counsel against submitting omnibus motions that include a variety of related motions, even when filed under the guise of *Grostefon. See, United States v. Bell*, 34 M.J. 937 (A.F. Ct. Crim App. 1992).

Appellant's motions for en banc reconsideration of the issues discussed in his *Grosetfon* submission are DENIED.

The panel has considered ALL of Appellant's requests for reconsideration. The motions for reconsideration of the issues discussed in his *Grosetfon* submission are DENIED. We typically do not provide further explanation or justification when denying motions for reconsideration, however, in the case, we choose to address one of those motions for reconsideration below.

Because some of the other motions within the omnibus motion are appropriate for discussion, we also address those below.

Motion for Reconsideration regarding Supplemental Assignments of Error

Appellant asks for reconsideration of an Assignment of Error (AOE) submitted on 27 February 2015 and two submitted on 24 July 2015. Much like this current omnibus *Grostefon* motion, these supplemental AOEs were contained in Appendix attachments to motions filed on Appellant's behalf. Our May 2016 opinion stated there were 31 assignments of error; Appellant contends there were actually 34 and thus this Court failed to consider these supplemental assignments of error.

This court performed a complete review as required by Article 66, UCMJ. This included a review of all 16 volumes of the record of trial for the original proceedings, the 7 volumes containing the appellate records[3], and the 2 volumes of *Dubay* hearing materials. This review included all the AOEs that were filed by Appellant and his counsel.

Appellant is correct that our summary of the procedural history did not explicitly include a reference to these three AOEs, however it did state that we allowed additional appellate submissions from the parties after the first oral argument in August 2015. It also stated that our opinion explicitly discussed many of the AOEs and summarily rejected the remaining issues with no additional analysis or relief citing *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

We also note the following history of the AOEs. On 26 Sep 2014, this court issued an order that no further *Grostefon* submissions would be accepted absent a compelling showing of good cause. Appellant filed the motion with a single supplemental AOE on 27 Feb 2015. In April 2015, this Court granted that motion over government objection. The government then filed a motion for en banc reconsideration of that order, which we denied. On 24 July 2015, Appellant filed two more supplemental AOEs. The court found Appellant's argument as to why the AOEs were not filed earlier to sufficiently establish compelling good cause and granted the motion to file them on 4 August 2015. The government filed their response to these AOEs and correctly argued that the court could reject the IAC complaints without receiving responsive affidavits. *See, United States v. Melson*, 66 M.J. 346 (C.A.A.F. 2008). We did not order such affidavits. This history convincingly demonstrates that the Court was aware of the three supplemental AOEs at issue and found them to be without merit, as generically expressed in the opinion.

Motion for Recusal

The motion for leave to file a motion for recusal of appellate judges and the motion to attach seven related attachments is GRANTED. Having granted the motion to file, we now consider the merits of the motion. The motion for recusal is DENIED.

[3] This is the number of volumes prior to the recent additions of the motions for reconsideration and motion to vacate.

On 5 December 2014, via a notice of special panel, counsel for both sides were informed that the panel consisted of Judges Karen Hecker, Martin Mitchell and Jeremy Weber. Oral argument before those judges was held on 17 February 2015. Subsequently, this panel ordered a post-trial hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967). On 7 August 2015, a change of panel order was issued, informing the parties that Judge Peter Teller was now on the panel in place of Judge Weber (who had recently been reassigned to another position). Oral argument was held on 29 September 2015 before these three panel members and these three judges were on the panel that issued the 2 May 2016 decision.. In his 10 June 2016 filing, Appellant moved to recuse them.

We note that Appellant had written notice of the panel composition and his counsel personally saw the panel composition during the two oral arguments. Appellant did not challenge the composition of the panel until AFTER the decision was issued. We consider the timing of this challenge informative. *See United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000) ("Failure of the defense to challenge the impartiality of a military judge may permit an inference that the defense believed the military judge remained impartial.") Appellant's motion to recuse the three panel members based on actual and/or implied bias is DENIED.

Appellant's related requests that our prior decision be vacated and that a separate panel reconsider the 2 May 2016 decision are also DENIED.

Motion to Compel Discovery of Law Enforcement Records and to Stay Proceedings

Appellant filed a "Motion for leave to file Motion to Compel and Motion to Stay Proceedings." The Motion to Compel concerns redacted records recently received in response to a May 2015 Freedom of Information Act request submitted by Appellant for all communications between any USAF law enforcement personnel and and state or federal law enforcement personnel in connection with any criminal investigation of Appellant. Appellant asks this Court to compel the Government to provide him with unredacted versions of these documents.

We DENY the motion for leave to file the motion to compel. We note that Appellant has filed this as a motion to compel appellate discovery and not as an appeal of a decision at the court-martial regarding the production of discovery. We see no reason why these records were not potentially discoverable at the court-martial, or could not have been subject to a motion to compel discovery at that earlier stage in the proceedings. We find Appellant has not made a colorable claim at this stage for appellate discovery. *See United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002).

The associated Motion to Attach is DENIED.

The associated Motion to Stay is DENIED.

Motion to Compel Discovery of Professional Misconduct Information and Motion to Stay

Appellant filed a "Motion for leave to File Motion to Compel and Motion to Stay Proceedings" requesting that this Court order the Government to provide the Appellant with all records relating to any reports of professional misconduct by certain attorneys, based on his claims that those attorneys violated the Rules of Professional Conduct by providing ineffective assistance of counsel, withholding information and/or made misrepresentations to the court. Appellant asserts Rule 9.3 of this Court's rules of practice and procedure mandate the referral of all such claims to the Air Force Legal Operations Agency Commander. Appellant further claims that any failure by this Court to refer his claims is relevant to the motion to recuse (addressed above) and shows a failure of this Court to perform a complete review as required by Article 66, UCMJ.

We DENY the motion for leave to file the motion to compel. We find Appellant has not made a colorable claim under the applicable standards. *See United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002).

The associated Motion to Stay is DENIED.

Motion to Attach Documents relating to No-Contact Orders

One of Appellant's motions for reconsideration was on the issue of whether the orders of which Appellant was convicted of violating were lawful. As part of that motion, he moved to attach a memorandum regarding the extension of the no contact orders. That motion is DENIED.

Motion to Attach Records regarding regarding Medical Care

One of Appellant's motions for reconsideration relates to our denial of his claim that he was denied appropriate and necessary medical care. Appellant concedes "The Court [in its May 2016 decision] is correct in that the record is devoid of information from which the Court could find th[e] element [of unncesary and wanton infliction of pain was] satisfied."

Appellant seeks to now supplement the record to fill this gap. His motion to attach those documents is DENIED. These records were available to Appellant prior to the May 2016 decision being issued. Reconsideration should not be a time for either side to

supplement the record after the Court has highlighted failures in the burdens of proof or production. Furthermore, even if the records were attached, we would still deny the motion for reconsideration.

Motion to Attach Documents relating to Appellate Delay

One of Appellant's motions for reconsideration was on the issue of appellate delay. He filed an associated motion to attach certain documents he claims are related to the reconsideration motion. That motion is DENIED.

Accordingly, it is by the Court on this 14th day of July 2016,

ORDERED:

The motions for en banc reconsideration are DENIED.

The motions for reconsideration are DENIED.

The motion for recusal is DENIED.

The motions to compel and stay proceedings are DENIED.

The motions to attach and motions for leave to file are GRANTED in part and DENIED in part, as explained above.

FOR THE COURT

LEAH M. CALAHAN
Clerk of the Court