11 January 2010

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Petitioner,*	)	MOTION FOR RECONSIDERATION AND RECONSIDERATION *EN BANC*
v.	)	
	)	Misc. Dkt. No. 2009-___
Lieutenant Colonel (O-5) BETH A. TOWNSEND, USAFR, *Respondent.*	)	Panel No. ___
Senior Airman (E-4) MATTHEW D. SKREDE, USAF, *Real Party In Interest*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 19 and 19.1 of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States respectfully moves this Court to reconsider, *en banc*, its 11 December 2009 order denying the government's petition for extraordinary relief in the nature of a writ of mandamus in the above-captioned matter. Pursuant to Rule 19.1(b)(1), the government respectfully asserts that this Honorable Court overlooked and misapplied a material legal or factual matter. For the reasons outlined in the government's petition, Respondent's action in granting an indefinite stay of pr xplicitly exceeds the scope of a lower court's au er R.C.M. 908(c)(2). R.C.M. 908(c)(2) plainly reserves such authority for the Court of Appeals for the Armed

DENIED
9 March 2010

Forces (CAAF) or the Supreme Court. The fact that the real party in interest has petitioned CAAF for review of this Court's earlier decision does not alter the fact that only CAAF or the Supreme Court may grant a stay.[1] This Honorable Court cited no authority for its interpretation that despite the plain language of R.C.M. 908(c)(2), the military judge should be allowed to stay[2] the proceedings until CAAF acts upon the petition for review at some unknown and likely distant point in the future. Instead, the Rule broadly states that court-martial proceedings may proceed (pursuant to this Court's earlier order) "pending further review" by CAAF unless CAAF orders the proceedings stayed. SrA Skrede's case is now "pending further review."

This Court has remanded the case to Respondent for further proceedings. ***The government emphasizes that no stay from CAAF has been sought, let alone granted.*** Respondent is without authority to grant such a stay, regardless of the stage of CAAF's review of SrA Skrede's case.

As discussed more extensively in the government's petition, issuance of a writ of mandamus is in aid of this Court's jurisdiction, and is necessary and appropriate. Respondent's

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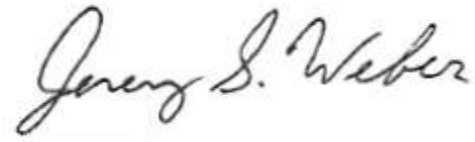
[1] Notably (and inexplicably), SrA Skrede has not asked CAAF to stay the proceedings against him.

[2] This Honorable Court's 11 December 2009 order mistakenly states that Respondent granted a "continuance." The military judge never used the term continuance in her order. SrA Skrede moved to "stay" the proceedings. Respondent's ruling stated, "I hereby grant that motion and delay the trial pending CAAF's decision regarding the petition for review."

action directly contradicted the order of this Court remanding the record for further proceedings. Respondent's action will frustrate the timely administration of justice, likely for several months. This Court has already found that Respondent abused her discretion once by refusing to follow controlling precedent from this Court and CAAF. Respondent has now flatly refused to follow the plain language of R.C.M. 908(c)(2) and the earlier order of this Court remanding the case to Respondent for further proceedings. Clearly, the catalyst for any further delay in this proceeding is the trial judge's objection to following established case law and the decision of this Court. At some point, an appellate court needs to intervene to send the appropriate message to Respondent, a subordinate trial judge.

The United States therefore respectfully requests that this Honorable Court reconsider *en banc* its 11 December 2009 order denying the government's petition for extraordinary relief, and thereafter issue a writ of mandamus, ordering Respondent to withdraw the indefinite continuance she purported to grant in this case and to schedule this case for trial at the earliest possible date.



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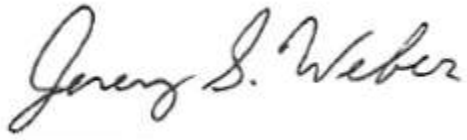
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court; to Colonel James B. Roan, Chief, Appellate Defense Division; and to Respondent at btownsend@bethtownsendlaw.com on 11 January 2010.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Petitioner*,	)	REAL PARTY IN INTEREST'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION
v.	)	Misc. Dkt. No. 2009-09
Lieutenant Colonel (O-5) BETH A. TOWNSEND, USAF, *Respondent*.	)	Before a Special Panel
Senior Airman (E-4) MATTHEW D. SKREDE, USAF, *Real Party in Interest.*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COMES NOW Real Party in Interest Senior Airman Matthew D. Skrede, by and through his undersigned counsel, and pursuant to Rule 19(c) of the Joint Courts of Criminal Appeals Rules of Practice and Procedure replies to the Government's motion for reconsideration.[1]

Both the Government's petition and its reconsideration motion are premised on a basic misunderstanding of Rule for Courts-Martial 908(c)(3).[2] The Government interprets that Rule to mean that if the Court of Criminal Appeals' decision permits it, the court-martial *must* proceed as to the affected charges and specifications unless the Court of Appeals for the Armed Forces or Supreme Court orders the proceedings stayed. But that is not what the Rule says. Rather, it

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[1] The Government moved for reconsideration under Joint Courts of Criminal Appeals Rule 19 and this Court's Rule 19.1. Joint Rule 19(c) gives a party a right to respond to a motion for reconsideration. The Government also requested that this Court reconsider en banc. Under Joint Rule 17(a), "No response to a suggestion for . . . reconsideration by the Court as a whole may be filed unless the Court shall so order." Accordingly, this reply is limited to the Government's reconsideration request and does not address the Government's request for en banc reconsideration.

[2] While the Government's motion repeatedly cites R.C.M. 908(c)(2), Motion for Reconsideration at 1-3, we assume these are typographical errors.

states that "the court-martial *may* proceed" absent a stay. Rule for Courts-Martial 908(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) [hereinafter R.C.M.] (emphasis added). The word "may" is permissive, not mandatory. *See* 10 U.S.C. § 101(f)(1), (2) (2000) ("(1) 'shall' is used in an imperative sense; (2) 'may' is used in a permissive sense'"); R.C.M. 103(20) (incorporating 10 U.S.C. § 101's definitions to construe the *Manual for Courts-Martial*). Thus, using the *Manual*'s own rule for construction, R.C.M. 908(c)(3) means that a court-martial is *permitted* to proceed absent a stay. But nothing *requires* a court-martial to do so.

As this Court held in its order denying the Government's petition, R.C.M. 906(b)(1) authorizes a military judge to grant a continuance. *See United States v. Townsend*, Misc. Dkt. No. 2009-09, slip op. at 1 (A.F. Ct. Crim. App. Dec. 11, 2009). Nothing in R.C.M. 908(c)(3) renders R.C.M. 906(b)(1) inapplicable in an Article 62 context.

The *Manual* authorized Judge Townsend to grant a continuance. While her order granting a delay does not use the word "continuance," a continuance is nevertheless what it grants. In characterizing Judge Townsend's order, the Government overlooked an important detail from her ruling. *See* Government's Motion for Reconsideration at 2 n.2. Judge Townsend noted that during an R.C.M. 802 conference, she advised the parties that she did not believe she had the authority to grant a "stay" under R.C.M. 908(c)(3), but could grant a delay. *See* Attachment 8 to Petitioner's Motion to Submit Documents (filed and granted on 11 December 2009). The ruling then noted, "Accordingly, the Defense made a Motion for Delay pending the CAAF decision." *Id.* It was "that motion," not the original defense motion for a stay, that the military judge granted. *Id.*

Judge Townsend's order granting a delay was not a "judicial usurpation of power." *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983). Accordingly, "the writ of mandamus is not available." *Id.*

This Court should, therefore, deny the Government's motion to reconsider.

Respectfully submitted,

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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically filed with the Court on January 12, 2010. I certify that a copy of the foregoing was electronically served on Colonel Douglas Cordova, Chief, Government Trial and Appellate Counsel Division, counsel for Petitioner, on January 12, 2010. I certify that a copy of the foregoing was electronically served on the Respondent, Judge Townsend, on January 12, 2010.

Dwight H. Sullivan
Attorney for Real Party in Interest Senior Airman
Matthew D. Skrede
January 12, 2010