

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
)	
<i>Petitioner</i>)	
)	ORDER
v.)	
)	Misc. Dkt. No. 2005-02
First Lieutenant)	
JOSEPH J. HARDING,)	Panel No. 3
USAF,)	
)	
<i>Respondent</i>)	

On 29 July 2005, Panel 3¹ of this Court denied the petitioner’s motion asking that we suspend Rule 21(d)(1) of the Air Force Court Rules of Practice and Procedure. This rule requires a trial counsel to forward the original record of trial to the appropriate government designee within 20 days of filing notice with the trial court of his or her intent to appeal a decision of the trial judge. This request was filed five days past the time our rules establish for enlargements of time. *See* Rule 24.1(a). Since that decision, we have received the following submissions:

1. On 1 August 2005, the respondent filed a motion to lift the stay of court-martial proceedings issued by this Court on 8 July 2005.

2. On 4 August 2005, the petitioner filed a motion asking that we reconsider our 29 July 2005 decision or, if necessary, that the Court reconsider the decision *en banc*.

3. On 4 August 2005, the petitioner filed a motion to submit an affidavit from Lieutenant Colonel (Lt Col) Jay Mounkes that is intended to “supplement the court reporter’s log” describing efforts to prepare the record of trial for forwarding.

4. On 4 August 2005, the petitioner filed: the authenticated original record of trial; the 25 June 2005 notice of its intent to appeal under Article 62, UCMJ, 10 U.S.C. § 862; and an additional four pages of the transcript that were not included in the forwarded record of trial.

¹ Panel 3 was redesignated to include Chief Judge Stone (serving as interim chief judge pursuant to Article 66(a), UCMJ, 10 U.S.C. § 866(a)), Senior Judge Orr, and Judge Mathews. Judge Stone also has been designated chief judge for purposes of this case.

5. On 4 August 2005, the petitioner filed a 22-page brief in support of its appeal under Article 62, UCMJ.
6. On 4 August 2005, the petitioner filed a motion to submit its Article 62, UCMJ, brief under seal. The petitioner stated a seal was necessary to protect the privacy of the accuser in this case and to effect the intent of the military judge's prior orders to seal portions of the record. The petitioner advised this Court it could not serve its brief on the respondent without first obtaining a protective order to seal the brief.
7. On 5 August 2005, the petitioner entered its opposition to the respondent's 1 August 2005 motion to lift the stay of the court-martial proceedings.
8. On 10 August 2005, the respondent entered its opposition to Items 2 and 3 above. The respondent also entered its opposition to Item 6, stating that the petitioner had "forfeited" its opportunity to proceed with the Article 62, UCMJ, appeal, but otherwise not opposing the brief being submitted under seal.

Because appeals by the government in criminal cases are "unusual, exceptional, [and] not favored," we strictly construe the rules authorizing the government to appeal. *See generally Will v. United States*, 389 U.S. 90, 96 (1967) (quoting *Carroll v. United States*, 354 U.S. 394, 400 (1957)). After carefully examining the parties' submissions, the record of trial, the court reporter's chronology, and Lt Col Mounkes' affidavit, we find no reason to disturb our previous decision.

Accordingly, it is by the Court, this 12th day of August 2005,

ORDERED:

1. That the petitioner's motion to submit the affidavit of Lt Col Mounkes is GRANTED.
2. That the motion for reconsideration and reconsideration *en banc* is DENIED.
3. That the petitioner's appeal under Article 62, UCMJ, is DISMISSED.

4. That pursuant to Rule 5.9 of the Air Force Court Rules of Practice and Procedure, the petitioner's brief is returned without attachment to the record of trial, and, therefore, the petitioner's request that it be sealed by order of the Court is DENIED.

5. That the respondent's motion to lift the stay is GRANTED.

FOR THE COURT

OFFICIAL

ANGELA M. BRICE
Clerk of Court