BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 04-CM-760 & 04-CO-1600

ELENA R. SASSOWER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEALS FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Crim. No. M-4113-03

I N D E X

TABLE OF CASES

* Cases chiefly relied upon are marked by an asterisk.

OTHER REFERENCES

ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented:

I. Whether the trial court abused its discretion in denying appellant's two motions to disqualify the trial judge, where appellant did not allege any facts which supported her contention that the judge was biased or appeared to be biased.

II. Whether appellant was "entitled" to have her case transferred to the United States District Court for the District of Columbia, where (1) the relevant statute clearly authorizes the United States Attorney to bring a misdemeanor disruption-of-Congress charge in the Superior Court of the District of Columbia, and (2) even assuming, arguendo, that the case could have been brought in either federal court or Superior Court, the decision to bring appellant's case in Superior Court was a proper exercise of prosecutorial discretion.

III. Whether the Court should exercise its discretion to hear appellant's unpreserved claim that the statute under which she was prosecuted is unconstitutional, where (1) appellant makes her constitutional challenge for the first time on appeal; and (2) the

statute is clearly constitutional, both on its face and as applied to appellant's case, so the Court has no reason to address appellant's arguments.

IV. Whether appellant's arguments challenging her sentence are moot and should be dismissed, where (1) appellant has fully served her sentence; and (2) appellant conceded in pleadings filed in the trial court and in this Court that her sentencing claims would become moot upon completion of the service of her sentence.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Following a jury trial before the Honorable Brian F. Holeman, appellant was convicted on April 20, 2004, of one count of disrupting Congress, in violation of D.C. Code § 10-503.16(b)(4). On June 28, 2004, Judge Holeman sentenced appellant to six months' imprisonment. Appellant filed a timely notice of appeal on June 29, 2004 (App. Vol. 1 at 1).[1/]

[1/] "App. Vol. __, at ___" refers to appellant's appendix, by volume and by page number. "MM/DD/YY Tr. ____" refers to the transcript of the proceedings held on the date noted.

THE TRIAL

I. The Government's Evidence

The government's evidence at trial established that on May 22, 2003, appellant disrupted a confirmation hearing for judicial nominee Richard Wesley. Wesley was a judge on the New York Court of Appeals, who had been nominated to serve on the United States Court of Appeals for the Second Circuit. The confirmation hearing was held by the Senate Judiciary Committee, in the Dirksen Senate Office Building, which is part of the United States Capitol complex (4/14/04 Tr. 217).

Two days before the hearing, on May 20, 2003, appellant left a voice-mail message with the office of Senator Hillary Rodham Clinton, stating that the Senator's office had engaged in misconduct regarding the nomination of Judge Wesley (4/14/04 Tr. 109). On that same day, appellant also sent a fax to the Senator's office, in which appellant requested an opportunity to testify at Judge Wesley's confirmation hearing (id. at 109-110). Senator Clinton's staff sent copies of the voice-mail message and fax to the United States Capitol Police, and expressed concern to the Capitol Police that appellant might attempt to disrupt the confirmation hearing (id. at 109). The staff members reported that appellant had made other phone calls and sent other faxes regarding Judge Wesley to Senator Clinton's office (id. at 185); and that

appellant had sent six boxes of documents to the Senate Judiciary Committee regarding the nomination (id. at 175-176). Senator Clinton's counsel, Leecia Eve, reported that she and another staff member, Joshua Albert, had spoken with appellant for 40 minutes, and that appellant had yelled at the staff members when they informed her that she could not meet with the Senator (id. at 185-186). Ms. Eve reported that appellant "presents herself in a professional manner but does not act in a rational manner" (id. at 175).

On May 21, 2003, appellant left another voice-mail message with Senator Clinton's office, and stated that "she wanted someone to call her back regarding this judicial nomination situation" (4/14/04 Tr. 112). Special Agent Deborah Lippay, of the Capitol Police, returned appellant's call that afternoon (id.). When Special Agent Lippay asked appellant if she planned to disrupt the confirmation hearing, appellant responded in a "loud, forceful . . . angry tone" (id. at 112-113). Appellant confirmed that she would attend the hearing, but would not state whether she planned to disrupt it (id. at 113). Appellant asked to speak to Special Agent Lippay's supervisor, so Lippay transferred her to Detective William Zimmerman (id.).

Detective Zimmerman, a 22-year veteran of the Capitol Police, spoke to appellant twice on May 21, 2003. The first conversation

lasted about an hour (4/14/04 Tr. 209). Appellant spoke "passionate[ly]" about her views on the judiciary (id. at 208). Detective Zimmerman informed appellant that she was welcome to come to the Judiciary Committee hearing, but that she had not been chosen to testify (id. at 209). A few hours later, Detective Zimmerman learned that appellant had called Senator Clinton's office again, and decided that he should return the call (id. at 210). In the second conversation, appellant reiterated that she wanted to attend the hearing and testify (id.). Appellant also told Detective Zimmerman that she did not want to be arrested (id.). The detective responded that the Capitol Police did not want to arrest her, and that it was all within her control: as long as appellant conducted herself appropriately and did nothing to disrupt the hearing, she would not be arrested (id. at 211). The second conversation lasted about an hour and a half (id.). That evening, appellant sent Detective Zimmerman a 39-page fax (id. at 212-213; 4/15/04 Tr. 272, 284-285).

In response to the reports about appellant from Senator Clinton's staff, Special Agent Lippay prepared a security bulletin that contained a photograph of appellant, and certain information about her (4/14/04 Tr. 111).[2/] The bulletin was distributed to

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[2/] The Capitol Police had a photograph of appellant on file, (continued...)

Capitol Police officers on the morning of the confirmation hearing, to make them aware that appellant might disrupt the hearing (4/15/04 Tr. 298-299).

The hearing was held by the Senate Judiciary Committee, at the Dirksen Building, Room 226, on May 22, 2003, at 2:00 p.m. (4/15/04 Tr. 300, 330, 369-370). Officer Roderick Jennings of the Capitol Police entered the room while the hearing was in progress, and observed appellant sitting in the back row at approximately 2:45 p.m. (id. 305-306, 329). The room was full, containing about 50 or 60 people, and it was very quiet (id. at 305, 336, 374, 376). At about 3:30 p.m., Senator Saxby Chambliss, who was acting as the Chairman of the Committee, began to "wrap up" the hearing by thanking people for attending (id. at 310, 377). As Senator Chambliss was speaking, appellant stood up and "screamed out, 'Judge Wesley, look into the corruption of the New York Court of Appeals'" (id. at 378, 380). Appellant began screaming, in a "very loud" tone, before the Chairman banged the gavel to officially end the hearing (id. at 311, 378, 411). Appellant then stated that she

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[2/] (...continued)
from her 1996 arrest for disorderly conduct in the Dirksen Senate Office Building (4/14/04 Tr. 188, 190). The 1996 arrest was based on appellant's conduct in being "very disruptive" and "cursing out loud, saying 'fuck you . . . fuck these people'" in a hallway in the Dirksen Building, after being removed from an office by the Capitol Police (4/15/04 Tr. 401-403).

wished to testify (id. at 311, 378). She seemed "very agitated" and "very upset," and appeared to have "the intent to disrupt the committee" (id. at 378). Chairman Chambliss brought down his gavel twice, and told everyone to remain seated while the Capitol Police restored order (id. at 313, 378). Appellant then rose to her feet and again "shouted towards the front of the room . . ., 'Judge Wesley, look into the corruption of the New York Court of Appeals'" (id. at 311, 380). As Capitol Police officers approached appellant, she called out, "Senator, are you asking that I be arrested? Senator, do you want me arrested?" (Id.)

Officer Jennings and Sergeant Kathleen Bignotti attempted to escort appellant out of the hearing room, but appellant resisted by holding on to a chair and stiffening her body (4/15/04 Tr. 312-313, 379-380). Appellant continued to "yell" about corruption in the New York Court of Appeals and to insist that she wanted to testify (id. at 313, 380). The officers guided appellant by her elbow and arm to remove her from the room (id. at 312). As they took appellant away, she "scream[ed] in loud language, . . . 'Am I under arrest, am I under arrest?'" (id. at 380).

II. The Defense Evidence

The defense called three witnesses: Joshua Albert, a legislative correspondent employed by Senator Clinton; Leecia Eve, Senator Clinton's counsel; and appellant herself.

Joshua Albert testified that appellant had contacted Senator Clinton's office to express her views about the nomination of Richard Wesley (4/16/04 Tr. 501-502). Appellant had sent e-mails and documentation to the Senator's office regarding the nomination (id. at 503-504). Because appellant was a constituent of the Senator's, Mr. Albert felt obligated to hear her concerns (id. at 502). Accordingly, he scheduled a conference call with appellant not long before the confirmation hearing for Judge Wesley (id. at 501-502). The participants in the conference call were appellant, Mr. Albert, and Leecia Eve (id. at 502, 511). During the call, which was "very lengthy" and exceeded 30 minutes, appellant "became very worked up and emotional," and "became difficult to reason with" (id. at 505, 508). Appellant requested that Senator Clinton oppose the nomination, but the staff members informed appellant that the Senator would not do so (id. at 507-508). Appellant also wanted to testify at the confirmation hearing. The staff members told her, however, that the Senator was not a member of the Judiciary Committee and therefore was not involved in deciding who would testify at the hearing (id. at 508).

Leecia Eve, Senator Clinton's counsel, testified that she recalled receiving phone messages from appellant, and knew that appellant had sent documents to the Senator's office regarding the nomination of Richard Wesley (4/16/04 Tr. 534, 540). Ms. Eve spoke

to appellant only once, however, in the phone conversation with appellant and Joshua Albert (id. at 534-535, 536, 542). During that phone conversation, appellant expressed her views about Judge Wesley's "unfitness for the bench;" asked to testify at his confirmation hearing; and requested that Senator Clinton oppose the nomination (id. at 542-543). Ms. Eve told appellant that neither the Senator nor her staff makes decisions about who testifies at Judiciary Committee hearings, and stated that the Senator was planning to support the nomination (id. at 543).

After the phone conversation with appellant, Ms. Eve informed the Secret Service that appellant was a New York constituent who was "upset" about the nomination, and might try to approach the Senator at the confirmation hearing (4/16/04 Tr. 546). Ms. Eve's purpose in speaking to the Secret Service was actually to protect appellant, to make sure that the Secret Service officers did not misinterpret appellant's actions and jump to the conclusion that appellant might try to physically harm the Senator (id. at 546-547). Ms. Eve also contacted the Capitol Police to relay the same information (id. at 547-548). Ms. Eve informed the Capitol Police that appellant had requested to testify at the hearing, but that her request had been denied by the Judiciary Committee; and that appellant nevertheless had expressed an intention to come to the hearing and seek to speak (id. at 580).

Appellant testified in her own defense. In relevant part, appellant explained that she is the co-founder and coordinator of a non-profit organization called the Center for Judicial Accountability, which attempts to "document how judges break the law and get away with it" (4/19/04 Tr. 625). In March 2003, President Bush nominated Richard Wesley to the Second Circuit Court of Appeals (id. at 637). On March 14, 2003, appellant wrote a letter to the Senate Judiciary Committee, in which appellant voiced her "strenuous opposition" to the nomination, requested to testify at the confirmation hearing, and asked for information regarding the "confirmation process" (id. at 637-638). On April 23, 2003, appellant hand-delivered to the offices of New York Senators Chuck Schumer and Hillary Rodham Clinton identical packages of information concerning alleged misconduct by Judge Wesley (id. at 640, 642).

Appellant made repeated calls to Senator's Clinton's office to confirm that Leecia Eve had received the package, but received no satisfactory response (4/19/04 Tr. 644). So on May 5, 2003, appellant drove from New York to Washington, D.C., to meet with Leecia Eve and Josh Albert in person (id. at 644, 646). Appellant was 45 minutes late, however, and missed her appointment (id. at 647). Appellant nevertheless left another memo with Senator Clinton's office, dated May 5, 2003 (id.). On that same day,

appellant "transmitted" five boxes of materials to the Senate Judiciary Committee (id. at 648, 649).

After making repeated calls to the Judiciary Committee to determine whether it had received and reviewed her materials (4/19/04 Tr. 649-650), appellant spoke to a clerk on May 13, 2003. The clerk told appellant that Committee counsel had reviewed the materials, but did not understand appellant's accusations (id. at 650). In another phone call with the clerk on May 15, 2003, the clerk stated that reviewing counsel considered appellant "'a disgruntled litigant' who saw conspiracies and corruption everywhere" (id. at 651). Appellant then spoke to Leecia Eve and Josh Albert on May 20, 2004, for approximately 40 minutes (id. at 652).

As part of her testimony, appellant provided her own analysis of a videotape of the confirmation hearing, which had been admitted into evidence during the government's case-in-chief (4/19/04 Tr. 653-657, 672-675). Appellant's "analysis" of the videotape substantially corroborated the government's evidence. Although appellant initially asserted that she began speaking at the hearing only "upon its being adjourned" (id. at 654), she later admitted that she started speaking "as Chairman Chambliss was saying ['thank you very much']," and that their words were "simultaneous" (id.). According to appellant, her exact words at

the hearing were "Mr. Chairman, there's citizen opposition to Judge Wesley based on his documented corruption as a New York Court of Appeals judge. May I testify?" (Id. at 655.) Chairman Chambliss responded, "I will issue a warning that we will have order" (id.). Appellant contended that she remained silent as the Chairman then stated, "The Committee will stand in recess until the police can restore order. Everyone remain seated." (Id. at 655-656.)

Appellant then asked Chairman Chambliss whether he was directing that she be arrested because, she believed, "it was for the presiding chairman to decide whether a respectful request to testify should be punished by arrest" (4/19/04 Tr. 673). The Chairman responded, "I am directing that the police restore order" (id.). At that point, Sergeant Bignotti demanded that appellant step out of the hearing room, "prompting [appellant] to again ask Chairman Chambliss[,] ['A]re you directing that I be arrested[?']" (id. at 673). Appellant conceded that after she was removed from the hearing room, the videotape showed Chairman Chambliss speaking further before concluding the hearing (id. at 656, 674).

ARGUMENT

I. THE COURT CORRECTLY DENIED APPELLANT'S TWO MOTIONS TO DISQUALIFY THE TRIAL JUDGE.

Appellant asserts that Judge Holeman, who presided over her case in the Superior Court, was biased against her, and that his

many rulings in the case demonstrate that bias (Appellant's Brief at 2-35). According to appellant, the actual bias of the judge tainted her trial, and entitles her to a reversal of her conviction and sentence (id. at 3). In fact, however, appellant's allegations of bias are based solely on dissatisfaction with reasonable rulings and procedures established by Judge Holeman in appellant's case. Because there is no evidence that the judge was biased or appeared to be biased, appellant's claim clearly must fail.

A. Background.

Appellant filed two pre-trial motions, dated February 23, 2004, and March 22, 2004, seeking to disqualify Judge Holeman on grounds of alleged bias.[3/]

Appellant's February 23 motion alleged that Judge Holeman was biased merely because his administrative assistant and law clerk

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[3/] Appellant has made accusations of bias against virtually every judge who has come in contact with her case. See 8/20/03 Tr. 6 (referring to appellant's motion to disqualify Senior Judge Eilperin on grounds of bias); Id. at 16-20 (appellant makes oral motion to disqualify Senior Judge Abrecht on grounds of bias); App. Vol. 1 at 272 (appellant accuses Senior Judge Milliken of bias because he did not "throw the book" at an Assistant United States Attorney), and 280-283 (appellant further accuses Judge Milliken of bias based on his rulings regarding appellant's discovery requests); Appellant's Brief at 1-2 (referring to appellant's motion to disqualify the judges of this Court on grounds of bias). Appellant appeared before several different Superior Court judges because her case was initially assigned to the misdemeanor calendar of Judge Abrecht, who retired and took senior status. Thereafter, various senior judges shared responsibility for presiding over that calendar until it was assigned to Judge Holeman (8/20/03 Tr. 5-6).

had asked appellant not to call chambers for updates regarding her case (App. Vol. 1 at 269-271); and because the judge had failed to respond to two subsequent letters from appellant, complaining about that request (id. at 272-275). According to appellant's own documentation of what transpired, appellant had called to inquire about the status of a discovery motion, and to determine whether the government had responded to that motion. Judge Holeman's administrative assistant had conveyed to appellant the judge's request that she refrain from calling chambers. In response, appellant had faxed an irate letter to the judge. In the letter, appellant complained that the request did not "reflect a fair and impartial tribunal" (id. at 269). Judge Holeman's law clerk then called appellant and left her a voice-mail message, which reiterated the judge's request, but politely suggested that appellant could call the clerk's office or the U.S. Attorney's Office to obtain the desired information (id. at 270-271).

Thereafter, appellant had faxed two more letters to the judge, which also complained about the request that she not call chambers (App. Vol. 1 at 270-273). In those letters, appellant characterized her interaction with chambers staff as "wholly unwarranted, invidious mistreatment," and reiterated her accusation that the court was not "a fair and impartial tribunal" (id. at 271). Appellant demanded a response from the judge, asking whether

he had "a policy to request attorneys and pro se litigants not to call chambers with their inquiries regarding procedural, non-substantive matters pertaining to cases before [him]" (id. at 271, 272 (emphasis in original)). Appellant assumed that the court had no such policy, and that she was being treated "differently" and "invidious[ly]" (id. at 274).

Appellant's phone calls to chambers were her very first "interactions" with Judge Holeman and his staff (App. Vol. 1 at 274). Thus, the first motion to recuse Judge Holeman was filed solely in response to the court's reasonable and unremarkable request that appellant direct her administrative calls elsewhere. In her motion, appellant also complained about a previous ruling, made by Senior Judge Milliken, regarding appellant's discovery requests in the case; and alleged that the government had not complied with Judge Milliken's directives with respect to discovery (id. at 276-283). Appellant asserted that Judge Holeman's failure to address those discovery issues, sua sponte, was further evidence of his bias (id. at 275, 285).

Judge Holeman issued a series of orders on February 25, 2004, denying several of appellant's requests. One order denied appellant's motion to disqualify the judge, stating that appellant had "established no facts that the trial judge's impartiality might reasonably be questioned" (App. Vol. 1 at 407). Another order

denied appellant's request for a change in venue to a court outside of the District of Columbia (id. at 411), citing a memorandum issued on September 4, 2003, by Senior Judge Abrecht (id. at 460-463), which explained a previous denial of an identical venue motion. (Appellant's motions to change venue are discussed in detail infra.)[4/]

On March 22, 2004, appellant made a motion to vacate all orders by Judge Holeman due to his alleged bias, and to transfer the case to the United States District Court for the District of Columbia (App. Vol. 1 at 377-463).[5/] In the March 22 motion, appellant argued that her February 23 request to disqualify Judge

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[4/] Additional orders issued that same day denied appellant's request for a continuance of her trial date, noting that appellant had "failed to establish that a continuance of the trial date is necessary to prevent manifest injustice" (App. Vol. 1 at 409); granted the government's motion in limine to preclude reference to appellant's political motivations and beliefs at trial (id. at 413); and authorized the release to appellant of an ex parte and in camera submission by the government, regarding evidence related to bias cross-examination of government witnesses (id. at 414). On February 26, 2004, the court also issued an order denying appellant's request "for written adjudication of her discovery rights," noting that appellant's discovery motion had been addressed by Judge Milliken at a previous status hearing (id. at 433).

[5/] In reaction to Judge Holeman's February 25 orders, appellant also made phone calls and sent memoranda to the Chief Judge of the Superior Court, to the presiding judge of the Criminal Division, and to the Director of the Criminal Division, requesting "immediate supervisory oversight" of Judge Holeman (App. Vol. 1 at 370-388, 393-394).

Holeman had been wrongfully denied, and that all of Judge Holeman's subsequent orders in the case should be vacated because the judge was biased and therefore "without authority to 'proceed'" (id. at 395-399). Appellant further asserted that all of the court's February 25 orders that were unfavorable to her were "without basis in fact and law" (id. at 379 (emphasis in original)). In addition, appellant contended that she was "entitled" to a change of venue to the United States District Court for the District of Columbia (id. at 399-402).

The government filed an opposition to appellant's March 22 motion (App. Vol. 1 at 464-465); and the court subsequently denied appellant's motion to disqualify the judge, in a written order dated April 6, 2004 (id. at 468-471).

In denying appellant's second motion to disqualify, the court noted that appellant's motion was "procedurally deficient," and that appellant's asserted grounds for disqualification merely reflected appellant's "dissatisfaction with this Court's orders." (App. Vol. 1 at 469.) The procedural deficiency arose from appellant's failure to comply with Super. Ct. R. Civ. P. 63-I(b) - which governs motions to disqualify a judge on grounds of bias, and is made applicable to criminal cases by Super. Ct. R. Crim. P. 57(a) - by including a certificate stating that the affidavit accompanying the motion was "made in good faith" (id. at 469). In

addressing the merits of appellant's claim, the court observed that appellant had failed to allege bias that was personal, rather than judicial, and which originated from sources outside of court proceedings (id. at 469-470).

On April 6, 2004, six days before appellant's trial was to commence, appellant filed a "Petition for Writ of Mandamus, Prohibition, Certiorari, and/or Certification of Questions of Law," and a "Motion for Stay Pending Adjudication of Mandamus Petition for Judicial Disqualification, Etc.," in this Court. In those two pleadings, appellant requested that this Court grant her a stay of the proceedings in the Superior Court, and grant her a writ of mandamus to disqualify Judge Holeman and to transfer her case to the United States District Court for the District of Columbia. This Court denied the requested relief in an order dated April 8, 2004.

When appellant's trial commenced on April 12, 2004, appellant asserted at the outset that she objected to being tried by Judge Holeman, due to his alleged "actual bias" (4/12/04 Tr. 3, 4).

B. Standard of Review.

The denial of a motion to disqualify a trial judge on grounds of alleged bias is reviewed for abuse of discretion. Anderson v. United States, 754 A.2d 920, 923 (D.C. 2000); United States v.

Pollard, 295 U.S. App. D.C. 7, 27, 959 F.2d 1011, 1031, cert. denied, 506 U.S. 915 (1992).

C. Analysis.

Appellant argues that her February 23 and March 22, 2004, motions to disqualify Judge Holeman should have been granted (Appellant's Brief 4-12); and that subsequent pre-trial rulings by Judge Holeman "further confirm[] . . . his pervasive actual bias" (id. at 16-35). Although appellant writes at length about her disagreement with the trial judge's rulings, she has not alleged any facts which show that the judge was biased or appeared to be biased.

Under Rule 63-I of the Superior Court Rules of Civil Procedure, which is made applicable to criminal cases by Rule 57 of the Superior Court Rules of Criminal Procedure, a judge must recuse himself "whenever a party to any proceeding makes and files a sufficient affidavit that the judge . . . has a personal bias or prejudice either against the party or in favor of any adverse party." Super. Ct. R. Civ. P. 63-I(a). An affidavit filed pursuant to the rule must "state the facts and the reasons for the belief that bias or prejudice exists and shall be accompanied by a certificate of counsel of record stating that it is made in good

faith." Super. Ct. R. Civ. P. 63-I(b).[6/] The requirement of a "sufficient" affidavit, accompanied by a certificate of good faith, is intended to "eliminate what may be frivolous claims." York v. United States, 785 A.2d 651, 654 (D.C. 2001). "'Because the disqualification of a trial judge may disrupt and delay the judicial process, affidavits of bias are strictly scrutinized for form, timeliness and sufficiency.'" Id. (quoting In re Evans, 411 A.2d 984, 994 (D.C. 1980)).

A "sufficient" affidavit must set forth "'reasons and facts . . . [which] must give fair support to the charge of a bent mind that may prevent or impede impartiality of judgment.'" In re Bell, 373 A.2d 232, 233 (D.C. 1977) (quoting Berger v. United States, 255

[6/] Rule 63-I, in its entirety, reads as follows:

Rule 63-I. Bias or Prejudice of a Judge.

(a) Whenever a party to any proceeding makes and files a sufficient affidavit that the judge before whom the matter is to be heard has a personal bias or prejudice either against the party or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned, in accordance with Rule 40-I(b), to hear such proceeding.

(b) The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be accompanied by a certificate of counsel of record stating that it is made in good faith. The affidavit must be filed at least 24 hours prior to the time set for hearing of such matter unless good cause is shown for the failure to file by such time.

U.S. 22, 33-34 (1921)).[7] Furthermore, the alleged "bias or prejudice must be personal in nature and have its source beyond the four corners of the courtroom. . . . The bias or prejudice must have its basis in other than what the judge learned from his participation in . . . the pending case . . . . " Gregory, 393 A.2d at 142 (internal quotations and citations omitted); see also Bell, 373 A.2d at 233 ("alleged bias and prejudice 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case'") (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)). Indeed, Rule 63-I itself specifies that the bias must be "personal."[8]

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[7] Bell cites the Supreme Court's decision in Berger, which interprets 28 U.S.C. § 144, a federal statute pertaining to judicial bias. Because Rule 63-I is "substantially identical to 28 U.S.C. § 144," this Court "look[s] to decisions of the federal courts interpreting [that] section . . . for guidance in determining the legal sufficiency of [a] motion for recusal." Gregory v. United States, 393 A.2d 132, 142 (D.C. 1978); see also Bell, 373 A.2d at 233.

[8] Appellant argues that the Supreme Court's decision in Liteky v. United States, 510 U.S. 540 (1994), does not require that the alleged prejudice or bias stem from a source "outside court proceedings" (Appellant's Brief at 8). Liteky, however, interprets a federal statute that is different from Rule 63-I, 28 U.S.C. § 455(a) (requiring a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). Section 455(a) does not include a specific requirement that the bias be "personal," as Rule 63-I does. Moreover, the Court in Liteky in fact held that the "extrajudicial (continued...)

Also relevant to appellant's claim of judicial bias is Canon 3(C)(1) of the Code of Judicial Conduct, which provides, in relevant part, "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." This

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[8/](...continued)
source" doctrine, which is applicable to 28 U.S.C. § 144 (the federal statute that is "substantially identical" to Rule 63-I), does generally apply to Section 455(a). 510 U.S. at 554. The Court noted, however, that there might be "rare" instances in which a "predisposition developed during the course of a trial will sometimes suffice." Id. The Court emphasized that an "extrajudicial source" is the only "common basis" for establishing disqualifying bias or prejudice, but a bias or prejudice may also be improper where, "even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment." Id. at 551. Section 455(a) is analogous to Canon 3(C)(1) of the Code of Judicial Conduct, which is applicable to Superior Court Judges and is discussed infra. Clearly, however, this case does not present that "rare" instance of "extreme" bias.

Appellant's assertion that this Court "recognized Liteky as the 'governing standard[]' for disqualification motions for bias under Rule 63-I" in Fischer v. Estate of Flax, 816 A.2d 1, 12 n.14 (D.C. 2003), is inaccurate. In the footnote cited by appellant, the Court acknowledged that a motion to disqualify the judge had been made under Rule 63-I. In a different sentence, the Court noted that the judge's decision not to recuse himself was "unassailable" under "governing standards," and cited Liteky. Liteky is certainly applicable as a "governing standard" in considering bias motions (because it interprets a statute that is similar to Judicial Canon 3(C)(1), which applies to Superior Court judges), but the Court did not specifically incorporate Liteky into the analysis of claims under Rule 63-I. Moreover, in that same footnote, the Court cited Dupont Circle Citizens Association v. District of Columbia, 766 A.2d 59, 65 (D.C. 2001), which specifies that a party seeking recusal on grounds of bias must allege facts which "show [that] the bias is personal, as opposed to judicial, in nature" (citation and internal quotation omitted).

Court has interpreted that canon to require the recusal of a judge "from any case in which there is 'an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question the judge's impartiality.'" Scott v. United States, 559 A.2d 745, 749 (D.C. 1989) (emphasis in original) (quoting United States v. Heldt, 215 U.S. App. D.C. 206, 239, 668 F.2d 1238, 1271 (1981), cert. denied, 456 U.S. 926 (1982)); see also Anderson, 754 A.2d at 923. Under this judicial canon, as discussed supra n.8, it appears that there may be "rare" instances in which judicial bias or prejudice, "even though it springs from the facts adduced or the events occurring at trial, . . . is so extreme as to display clear inability to render fair judgment." Liteky, 510 U.S. at 551.

Here, appellant's affidavits alleging bias were obviously insufficient to require the judge's recusal, under both Rule 63-I and Judicial Canon 3(C)(1). The February 25 affidavit alleged that the judge was biased merely because he had, through his staff, requested that appellant refrain from calling his chambers to make routine procedural inquiries about her case; and because he had not responded to each of appellant's repeated demands for him to justify that request (App. Vol. 1 at 268-275). Those facts did not "give fair support to the charge of a bent mind;" and no "average citizen" would reasonably interpret the judge's actions to prove, or to even suggest, a personal bias against appellant -

particularly where, as here, the judge's law clerk politely suggested that the information sought by appellant in her telephone calls could be obtained from the clerk's office or from the U.S. Attorney's Office. Clearly, the court was not required or obligated to allow appellant to call chambers whenever she pleased; and the court acted perfectly reasonably in declining to respond to appellant's last two letters on this subject, after having already responded to the first one.[9/] Thus, the court did not abuse its discretion when it denied appellant's first motion to disqualify, and the court's explanation for the ruling - that appellant had "established no facts that the trial judge's impartiality might reasonably be questioned" - was adequate and correct.

The March 22 affidavit was even less specific than the first one, in terms of "stat[ing] the facts and the reasons for the belief that bias or prejudice exists," as required by Rule 63-I. The second affidavit referred to the series of orders issued by the court on February 25, stating generally that the orders that were unfavorable to appellant were "without basis in fact and law" (App. Vol. 1 at 379 (emphasis in original)). The affidavit then proceeded to document correspondence that appellant had faxed to

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[9/] As noted supra, the judge's law clerk responded to appellant's first letter by calling appellant and leaving her a voice-mail message. Appellant subsequently faxed two more letters to chambers that received no response.

the Chief Judge of the Superior Court and others, requesting "supervisory oversight" of Judge Holeman, and to document procedural developments in the case concerning the selection of a trial date (id. at 379-394). Appellant alleged no additional facts to support her contention that the judge was biased, instead merely making a general complaint about his rulings in the case. In sum, the second affidavit relied on the sufficiency of the first one, and argued that the court's subsequent "dishonest, insupportable Orders" "supplemented" the showing of bias (id. at 398). But, as discussed supra, the first affidavit was clearly insufficient, and appellant's reliance on conclusory assertions about the alleged "baselessness" of the subsequent orders added nothing to the analysis. See Liteky, 510 U.S. at 555 ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). Appellant did not allege how the court's rulings might support a finding of bias, and did not even include any substantive argument as to why she thought the rulings were erroneous on their merits. Accordingly, Judge Holeman again did not abuse his discretion in deeming appellant's March 22 affidavit insufficient to require his recusal.[10/]

[10/] Arguably, appellant's failure to attach certificates of good faith to her affidavits was a "procedural deficiency" that was, "in and of [itself] sufficient reason for a trial judge to (continued...)

Although appellant contends that other pre-trial rulings by the court "confirm" her allegations of bias (Appellant's Brief at 16, 17-35), her discussion of those rulings fails to illuminate the issue at hand. As the Supreme Court observed in Liteky,

> In and of themselves (i.e., apart from surrounding comments or accompanying opinion), [judicial rulings] cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are grounds for appeal, not recusal.

Liteky, 510 U.S. at 555. Here, none of the court's rulings cited by appellant show any particular favoritism or antagonism, and appellant's pejorative characterizations of the of the rulings - e.g., as "superficial, inconsistent, often bullying pronouncements" (Appellant's Brief at 18) - do not change that fact. Appellant has established only that she disagreed with the court's decisions, not that they were motivated by bias, or that they even gave the appearance of bias. As suggested in Liteky, appellant should have

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[10/](...continued)
deny [her] recusal motion." York, 785 A.2d at 654 (citations omitted). Although Rule 63-I provides that the certificate of good faith should be signed by "counsel of record," the trial court held that appellant, acting pro se, should have signed and filed such a certificate (App. Vol. 1 at 469). This Court need not reach the question of whether a pro se defendant is required to file a certificate of good faith in this context, however, because appellant's affidavits were so clearly deficient in other respects.

appealed the rulings on their merits, instead of arguing that the court's alleged errors prove bias.[11/]

II. APPELLANT HAD NO RIGHT TO HAVE HER CASE REMOVED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Appellant argues, erroneously, that she was "legally entitled" to have her case brought in the United States District Court for the District of Columbia, under D.C. Code § 10-503.18 (Appellant's Brief at 36). Appellant's argument is meritless because the statute cited does not confer any right on a criminal defendant to choose the court in which her case will be brought. Moreover, even assuming that appellant's case could have been brought in either federal court or Superior Court, the choice of forum was a matter of properly exercised prosecutorial discretion.

A. Background.

Appellant first moved for a change of venue in a motion that was faxed to Senior Judge Abrecht, but apparently was never filed (8/20/03 Tr. 6; App. Vol. 1 at 18-19). Appellant argued the motion

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[11/] Even in appellant's original, non-conforming brief on the merits, which was 119 pages long, appellant did not challenge the trial court's rulings on their merits. Rather, appellant discussed numerous unfavorable rulings by the court in the context of asserting that such rulings were "confirmatory" of the judge's "pervasive actual bias," because they were "factually and legally unsupportable." See Appellant's Brief at ii-iv (retaining table of contents from appellant's original, non-conforming brief, and listing unfavorable rulings only in support of claim of actual bias).

at a pre-trial hearing before Judge Abrecht, on August 20, 2003. In her oral argument, appellant asserted that her case should be heard in a court outside of the District of Columbia because the Superior Court "gets its funding from Congress," and appellant's case would have "ramifications" that would be "seriously detrimental to some of the most influential members of the Senate, the very Senators who vote on the appropriation of [the Superior Court]" (id. at 21). According to appellant, there was an "appearance that [the court] would be subjected to substantial pressures as a result of the ramifications of this case on the senators, [and] on [Capitol] police that take[] orders, perhaps, from senators" (id. at 22).

Judge Abrecht denied appellant's motion orally at the hearing, and subsequently issued a memorandum explaining her ruling on September 4, 2003 (App. Vol. 1 at 460-463). In the memorandum, the court explained that a change of venue to a court outside of the District of Columbia was not possible because the District of Columbia is a single unitary district, with no trial court other than the Superior Court (id. at 460). Moreover, the court noted that even if there were a way to obtain jurisdiction over appellant's case in another state, the cost and disruption would not be justified because appellant had not shown any justification

for her fear that she could not receive a fair trial in the District of Columbia (id. at 461).

As noted supra, appellant renewed her request for a change of venue to a court outside of the District of Columbia in her February 23, 2004, motion; and that request was denied by Judge Holeman, based on the prior ruling of Judge Abrecht (App. Vol. 1 at 411).

In appellant's March 22, 2004, motion, appellant requested that the case be transferred to the United States District Court for the District of Columbia (App. Vol. 1 at 399-402). Appellant first reiterated her argument that her case was "politically explosive" and therefore should be moved to a court outside of the District; and asserted that unfavorable rulings by various Superior Court judges "reinforce[d] [her] 'entitlement to change of venue.'" (Id. at 399.) Appellant then argued that the language of D.C. Code § 10-503.18 - which states that a disruption-of-Congress prosecution for conduct that constitutes a felony "shall" be in the United States District Court for the District of Columbia, but all other prosecutions for that offense "may" be in the Superior Court of the District of Columbia - "legally entitled" her to have her case brought in federal court, "with no special showing by [her] required for that venue" (id. at 402 (emphasis in original)).

The trial court denied appellant's motion for removal of the case to federal court, in an order dated March 29, 2004. The court noted that appellant's latest motion presented no new facts or law on the issue of venue, and did not cite any legal authority to support the requested relief (App. Vol. 1 at 466-467).

B. Standard of Review.

A trial court's denial of a motion to change venue is reviewed for abuse of discretion. Jones v. Gasch, 131 U.S. App. D.C. 254, 265, 404 F.2d 1231, 1242 (1967) ("Motions for change of venue invoke the sound discretion of the trial court, which should not be overturned where there is no clear showing of abuse.") (internal quotations and citations omitted), cert. denied, 390 U.S. 1029 (1968); Natvig v. United States, 98 U.S. App. D.C. 399, 403, 236 F.2d 694, 698 (1956), cert. denied, 352 U.S. 1014 (1957). As explained infra, however, the government's decision to bring appellant's case in the Superior Court was a proper exercise of prosecutorial discretion that is "rarely" subject to review. Marrow v. United States, 592 A.2d 1042, 1047 (D.C. 1991) ("[A] function of the United States Attorney's prosecutorial discretion . . ., under constitutional principles of separation of powers, is rarely subject to judicial review."); see also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed

an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

C. Analysis.

Appellant relies solely on the language of D.C. Code § 10-503.18(c) to support her claim that she was "legally entitled to have the U.S. Attorney prosecute the 'disruption of Congress' charge against her in the U.S. District Court for the District of Columbia, with no special showing by her required for that venue" (Appellant's Brief at 36 (emphasis in original)). The statute, however, does not in any way suggest that a defendant charged with a misdemeanor violation of disruption of Congress may select the court in which she is prosecuted. The portion of Section 10-503.18(c) that is cited by appellant merely provides, in relevant part, that

> [p]rosecution for any violation of § 10-503.16(a) or for conduct which constitutes a felony under the general laws of the United States or the laws of the District of Columbia shall be in the United States District Court for the District of Columbia. All other prosecutions for violations of this part may be in the Superior Court of the District of Columbia.[12/]

[12/] In its entirety, Section 10-503.18(c) provides:

(c) Violations of this part, including attempts or (continued...)

Appellant was prosecuted for a misdemeanor violation, under Section 10-503.16(b)(4), and thus was not subject to the mandatory provision that applies to violations of subsection (a) or to felony offenses. Rather, the statute explicitly provides that cases such as appellant's "may be in the Superior Court for the District of Columbia." Thus, based on the plain language of the statute, the case was properly brought in Superior Court.

Clearly, nothing in the statute "entitled" appellant to have her case brought in the United States District Court, or to have the case transferred to the District Court upon her request. At

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[12/](...continued)
conspiracies to commit such violations, shall be prosecuted by the United States Attorney or his assistants in the name of the United States. None of the general laws of the United States and none of the laws of the District of Columbia shall be superseded by any provision of this part. Where the conduct violating this part also violates the general laws of the United States or the laws of the District of Columbia, both violations may be joined in a single prosecution. Prosecution for any violation of § 10-503.16(a) or for conduct which constitutes a felony under the general laws of the United States or the laws of the District of Columbia shall be in the United States District Court for the District of Columbia. All other prosecutions for violations of this part may be in the Superior Court of the District of Columbia. Whenever any person is convicted of a violation of this part and of the general laws of the United States or the laws of the District of Columbia, in a prosecution under this subsection, the penalty which may be imposed for such violation is the highest penalty authorized by any of the laws for violation of which the defendant is convicted.

most, the permissive wording of the statute - that all other cases "may" be brought in Superior Court - allows prosecution of misdemeanor disruption-of-Congress charges either in the United States District Court or in the Superior Court.

Assuming that the case could have been brought in either court, the choice of forum would have been a matter of prosecutorial discretion. In an analogous context, "there is no doubt that the United States Attorney for the District of Columbia enjoys free rein in deciding whether to prosecute in federal or in Superior Court, where the facts support a violation of both local and federal law." United States v. Clark, 303 U.S. App. D.C. 435, 438, 8 F.3d 839, 842 (1993); see also United States v. Mills, 288 U.S. App. D.C. 224, 230, 925 F.2d 455, 461 (1991) ("It is established . . . that the U.S. Attorney for the District of Columbia may elect to prosecute a given criminal defendant on federal rather than District charges, even though the former carry stiffer penalties.") (citation omitted), superseded on other grounds, 296 U.S. App. D.C. 65, 964 F.2d 1186, cert. denied, 506 U.S. 977 (1992). Although a prosecutor is constitutionally prohibited from basing such charging decisions on a defendant's "race, sex, religion or previous exercise of a legal right," an exercise of prosecutorial discretion that is "rational and nondiscriminatory" is generally not subject to review. Mills, 288

U.S. App. D.C. at 224, 925 F.2d at 461-462; see also United States v. White, 689 A.2d 535, 538 (D.C. 1997) (citing United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (en banc) ("courts are not to interfere with the free exercise of the discretionary powers of the [prosecuting authority in its] control over criminal prosecutions"), cert. denied, 381 U.S. 935 (1965)).

Accordingly, appellant's claim that she was "entitled" to have the government bring the disruption-of-Congress charge against her in federal court, instead of Superior Court, is unsupportable and should be rejected.

III. THE COURT SHOULD DECLINE TO HEAR APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF THE STATUTE PROHIBITING DISRUPTION OF CONGRESS.

Appellant and amicus curiae, the District of Columbia National Lawyers Guild, argue for the first time on appeal that the statute under which appellant was prosecuted, D.C. Code § 10-503.16(b)(4), is unconstitutional - both on its face, and as applied to appellant's case (Appellant's Brief at 37-46; Brief of D.C. National Lawyer's Guild at 2-3). Because this claim was not properly preserved and the statute is clearly constitutional, this Court should exercise its discretion to decline to address this claim.

A. Standard of Review.

Where an appellant challenges the constitutionality of a statute for the first time on appeal, this Court's review of the issue is "entirely discretionary." In re S.K., 564 A.2d 1382, 1384 n.2 (D.C. 1989) (citations omitted); see also Tucker v. United States, 708 A.2d 645, 646 n.2 (D.C. 1998). "Ordinarily, the [C]ourt has declined to exercise its discretion to consider constitutional challenges raised for the first time on appeal unless 'the statute is so clearly unconstitutional that it should have been ruled upon by the trial court despite the failure of appellant to raise the point below . . .'" In re S.K., 564 A.2d at 1384 n.2 (quoting In re W.E.P., 318 A.2d 286, 289 (D.C. 1974)); cf. Hart v. United States, 863 A.2d 866, 872 (D.C. 2004) (where no objection raised at trial to alleged constitutional error, this Court applies "plain error" review, under which Court has discretion to correct "obvious or readily apparent" errors that are "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial") (quoting and citing Foreman v. United States, 633 A.2d 792, 795 (D.C. 1993)).

B. Analysis.

This Court should decline to exercise its discretion to hear appellant's challenge to the constitutionality of Section 10-

503.16(b)(4)[13] because that claim has not been properly preserved, and because the statute is not "so clearly unconstitutional that it should have been ruled upon by the trial court despite the failure of appellant to raise the point below."

1. Appellant failed to preserve her claim.

It is clear that appellant has raised her constitutional claim for the first time on appeal. In the numerous and voluminous pleadings filed by appellant in the court below, there is no argument that the disruption-of-Congress statute is unconstitutional. It appears that appellant first mentioned a constitutional challenge to the statute in a "Supplemental Brief of Elena Sassower in Support of Motion for Bail Pending Appeal," which was filed in this Court on July 2, 2004, after appellant had

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[13] The statute provides:

> (b) It shall be unlawful for any person or group of persons willfully and knowingly:
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> * * *
>
> (4) To utter loud, threatening, or abusive language, or to engage in any disorderly or disruptive conduct, at any place upon the United States Capitol Grounds or within any of the Capitol Buildings with intent to impede, disrupt, or disturb the orderly conduct of any session of the Congress or either House thereof, or the orderly conduct within any such building or any hearing before, or any deliberations of, any committee or subcommittee of the Congress or either House thereof.

already commenced serving her sentence.[14/] Thus, appellant never raised the issue in the trial court, and this Court's review is "entirely discretionary." In re S.K., 564 A.2d at 1384 n.2.

2. The statute is not "clearly unconstitutional."

The Court need not exercise its discretion to address the arguments raised by appellant and by amicus because the constitutionality of the statute in question previously has been upheld, both on its face, and as applied to conduct similar to appellant's. See Smith-Caronia v. United States, 714 A.2d 764, 767 (D.C. 1998) (holding that identically worded predecessor statute "comfortably" meets standards of constitutionality because "[i]t is viewpoint-neutral on its face and imposes reasonable time, place, and manner restrictions on speech consistent with the significant government interest it serves, while leaving open ample means of communication not calculated to disrupt the orderly conduct of the legislature's business"); Armfield v. United States, 811 A.2d 792, 798 (D.C. 2002) (upholding application of statute to defendant who spoke out while House of Representatives was in session, despite defendant's claim that he waited for "pause" in

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[14/] Appellant again discussed the constitutionality of the statute in a "Motion for Reargument, Reconsideration, Renewal and Other Relief," which was filed in this Court on or around July 16, 2004. Attached to that motion was a memo which argued that Section 10-503.16(b)(4) was unconstitutional.

proceedings and thus did not intend to "impede, disrupt or disturb" the session). Accordingly, the statute is constitutional, and certainly is not "so clearly unconstitutional" that the Court should exercise its discretion to grant review.

Even if the Court decides to hear appellant's arguments, they should be rejected on their merits. Appellant's contention that her facial challenge to Section 10-503.16(b)(4) is not governed by precedents of this Court because the prior decisions do not consider conduct at committee or subcommittee hearings (Appellant's Brief at 39) is frivolous. The statute plainly applies to "any hearing before . . . any committee or subcommittee of the Congress or either House thereof." D.C. Code § 10-503.16(b)(4). And, contrary to appellant's contention, the fact that some members of the public are sometimes invited to testify at committee or subcommittee hearings obviously does not entitle any member of the public to interrupt such a hearing to speak at will.

Appellant's and amicus's claim that the statute was unconstitutionally applied in this case rests on factual assumptions that are not supported by the record - i.e., that appellant made a "respectful request to testify" after the hearing had been "adjourned" or "wrapped up" (Appellant's Brief at 41;

Brief of D.C. National Lawyer's Guild at 3-4).[15] As this Court noted in Armfield, such allegations, "at best . . . present[] an issue for the jury," which was entitled to disregard appellant's interpretation of what transpired,[16] and to "base its verdict on what [appellant] actually did." Armfield, 811 A.2d at 798 (addressing Armfield's claim that he waited for a pause in the proceedings to speak, and that the waiting negated his intent to "impede, disrupt, or disturb" the session). The uncontested evidence established that appellant loudly interrupted the Chairman

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[15] Amicus misstates the record in asserting that the government "conceded" that the proceedings were "wrapped up" by the time appellant made her comments (Brief of D.C. National Lawyers Guild at 3 (citing the government's opening statement)). In fact, the prosecutor's words in the government's opening statement were that Senator Saxby Chambliss "was beginning to wrap up the hearing" and that "[j]ust before Senator Saxby Chambliss adjourned the hearing, the defendant began to shout" (4/14/04 Tr. 83). The testimony of Roderick Jennings was consistent with the government's opening statement (4/15/04 Tr. 310).

[16] The jury was instructed that appellant's "theory of the case" was that she "did not willfully and knowingly engage in disorderly and disruptive conduct;" that she "had no intent to impede or disrupt or disturb the orderly conduct of a session of Congress;" and that her conduct "did not hinder or interfere with the peaceful conduct of governmental business and her manner of expression was not incompatible with the normal activity of that particular place at a particular time." (4/16/04 Tr. 756.) In closing argument, appellant argued, without objection, that she did not disrupt the hearing because she did not stand up until it was adjourned (id. at 775); that she merely "requested politely and respectfully to be heard" (id. at 778); and that "a citizen's respectful request to testify at a public Congressional hearing is not, is not, it can never be deemed to be a disruption of Congress" (id. at 780).

of the Senate Judiciary Committee, before the hearing was actually over. Appellant conceded in her testimony that she spoke "simultaneous[ly]" with the Chairman, and that after her interruption, he twice directed the Capitol Police to "restore order" (4/19/04 Tr. 654-656, 673). Indeed, because appellant's acknowledged purpose was to testify at the hearing, it would have been pointless for her to wait until after the hearing was over to make her request. Appellant also conceded that she expressed herself loudly because she wanted to be heard by the Chairman (id. at 776). As in Armfield, appellant's personal belief that she interjected at an appropriate time gives the Court no basis to conclude that the time chosen "was available to appellant for [her] own petitioning activity." Armfield, 811 A.2d at 798.

Appellant also errs in arguing that she was given "no effective alternative means of communication" (Appellant's Brief at 40). Appellant's own testimony established that she exchanged e-mails and faxes with Josh Albert, a legislative correspondent employed by appellant's home-state Senator, Hillary Rodham Clinton (4/19/04 Tr. 644, 692); that Josh Albert and Leecia Eve spoke to appellant for 40 minutes (id. at 652); and that documents submitted by appellant to the Judiciary Committee were reviewed by committee counsel (id. at 650).

Finally, to the extent that appellant suggests that she did not have the requisite intent to disrupt the hearing (Appellant's Brief at 42-43), the record reflects otherwise. After appellant made clear to Senator Clinton's staff and to Detective Zimmerman that she wished to testify at the hearing, Detective Zimmerman told appellant that she had not been selected to testify, and that she would be subject to arrest if she disrupted the hearing (4/14/04 Tr. 209, 211). Appellant contends that she had a "good faith belief" that a request to testify during the hearing would be lawful, and that her belief was supported by a 39-page fax that she sent to Detective Zimmerman, which documented a previous attempt to testify that did not result in an arrest (Appellant's Brief at 43). In fact, however, appellant's sending of the fax only proves that she was aware that Detective Zimmerman and other members of the Capitol Police were likely to view her conduct as disruptive; and that appellant was seeking to dissuade them from arresting her for that conduct. Where, as here, appellant knew that she had not been chosen to testify, but nevertheless shouted during the hearing, and then resisted being removed from the hearing room after the Chairman had asked the Capitol Police to "restore order," the evidence clearly established the requisite intent to disrupt.[17/]

[17/] Amicus also suggests that the evidence was insufficient (continued...)

IV. THE ARGUMENTS OF APPELLANT AND OF AMICI CURIAE REGARDING APPELLANT'S SENTENCE ARE MOOT AND SHOULD BE DISMISSED.

Appellant and amici curiae - Professor Andrew Horwitz and the District of Columbia National Lawyers Guild - argue that the six-month sentence imposed by Judge Holeman was illegal and unconstitutional (Appellant's Brief at 47-50; Brief of D.C. National Lawyers Guild at 4-5; Brief of Professor Andrew Horwitz at 4-25). Because appellant has already served her sentence in its entirety, however, those arguments are moot. Accordingly, the Court should dismiss all claims related to appellants' sentencing.

A. Background.

At the sentencing hearing on June 28, 2004, the trial court initially was inclined to impose a suspended sentence of 92 days' incarceration, with credit for time served (6/28/04 Tr. 15-16). Under this proposed sentence, appellant was to pay a $500 fine, and $250 to the Victims of Violent Crimes Compensation Fund (VVCCF).

[17/] (...continued)
to establish that appellant actually disrupted the hearing (Brief of D.C. National Lawyers Guild at 4). Viewing the evidence in the light most favorable to the government, Gibson v. United States, 792 A.2d 1059, 1065 (D.C.), cert. denied, 536 U.S. 972 (2002), appellant "screamed" and "yelled" during the hearing, prompting the Chairman of the Committee to ask the Capitol Police to restore order (4/15/04 Tr. 378, 380; 4/19/04 Tr. 655-656). She then resisted being removed from the hearing room (4/15/04 Tr. 312-313, 379-380). That evidence was clearly sufficient to support appellant's conviction for disruption of Congress.

In addition, appellant was to be placed on probation for two years, with several conditions of probation (id. at 16). Specifically, appellant would be required to obey the law, maintain appointments with her probation officer, abstain from illegal drug use, notify the probation officer of any change in address, and obtain permission from the probation officer before leaving her home jurisdiction for more than two weeks (id. at 16-17). She also would be required to work a minimum of forty hours per week, and, because she was self-employed, document her work activities and times (id. at 17). The court also would require appellant to perform 300 hours of community service, with 200 hours in her home state of New York, and an additional 100 hours in the District of Columbia (id. at 17-18).

As additional conditions of probation, appellant would be required to submit to substance-abuse, medical and mental-health assessments, and to comply with any testing or treatment deemed appropriate (6/28/04 Tr. 18). She also would be required to attend anger-management counseling every six months, and to stay away from the United States Capitol complex and several Senators (id. at 18-21). Finally, the court would require appellant to write letters of apology to several senators "which state the fact of [her] conviction . . . and [her] remorse for any inconvenience caused . . . by [her] action" (id. at 21). As the trial court was stating

this last condition, appellant interrupted to say, "I am not remorseful and I will not lie," and, "[The letters] will not be sent because they will not be written" (id.).

The trial court explained that the sentence of probation could not be imposed unless appellant agreed to the proposed conditions of probation, and asked appellant if she agreed to the proposed conditions (6/28/04 Tr. 21-22). See D.C. Code § 16-710(a) ("A person may not be put on probation without [her] consent."). Appellant responded, "I am requesting a stay of sentence, pending appeal. This case will be appealed." (Id. at 22.) The court again asked if appellant accepted the proposed conditions of probation, and she - after consulting with her attorney advisor - answered, "No" (id.). The trial court then sentenced appellant to six months' incarceration, a $500 fine, and a $250 payment to the VVCCF (id.). Appellant's oral motion for release pending appeal was denied by the court, which stated that it had never previously granted any such request by a convicted criminal defendant (6/28/04 Tr. 23-24). Appellant was "stepped back" and immediately began serving her sentence.

On September 23, 2004, appellant, through counsel, filed an "Unopposed Emergency Motion for Defendant's Release to Preclude Mootness of Appellate Issue" in the trial court (App. Vol. 3 at 1732-1737). In that motion, appellant conceded that any appeal of

her sentence would become moot if she served the entire sentence before her appeal was resolved:

> It seems clear that, unless Ms. Sassower is released pending appeal, she will serve all or a substantial portion of her entire six-month sentence before her appeal is resolved on the merits. If that happens, one substantial issue she will present on appeal - whether a sentence in excess of the 92 days initially announced is lawful - will become moot. (Id. at 1736.)

The court denied appellant's motion by order dated September 24, 2004 (id. at 1738). In a pleading in support of an "emergency appeal" of that ruling, appellant again conceded that her sentencing issues would become moot if she served her full sentence. This Court denied appellant's appeal on October 14, 2004.

On October 26, 2004, appellant, through counsel, filed a "Motion Pursuant to D.C. R. Crim. P. 35(a) and D.C. Code § 23-110(a) to Correct an Illegal Sentence" (App. Vol. 3 at 1739-1755). In that motion, appellant argued (1) that the proposed condition of probation that required appellant to write letters of apology to certain senators was unconstitutional (id. at 1748-1752); (2) that the sentence ultimately imposed was illegal because the court increased appellant's sentence for violating a condition of probation (id. at 1752-1753); (3) that the increased sentence unlawfully "punished" appellant for not consenting to the probation

that had been offered (id. at 1753-1754); and (4) that the court illegally revised his original, orally pronounced sentence for "purely punitive" reasons (id. at 1754). The government filed an opposition to appellant's motion (id. at 1756-1765); and the trial court denied the motion, without a hearing, on November 23, 2004 (App. Vol. 1 at 10-15).

In denying appellant's motion to correct illegal sentence, the court first noted that the motion was time-barred under Rule 35(a) of the Superior Court Rules of Criminal Procedure, which requires the correction of a sentence imposed in an illegal manner within 120 days after sentence is imposed (App. Vol. 1 at 11).[18/] The court also held that relief under D.C. Code § 23-110 was unavailable because appellant's motion was, in substantial part, a critique of proposed conditions of probation that were never actually imposed (id. at 12). Moreover, to the extent that appellant's motion was a collateral attack of a sentence imposed in an allegedly "illegal manner" under Section 23-110, that claim was time-barred because such challenges are also subject to the 120-day

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[18/] To the extent that appellant's motion alleged that the sentence was illegal, as opposed to "imposed in an illegal manner," Rule 35 permits the correction of an "illegal sentence" "at any time." Super. Ct. R. Crim. P. 35(a). Given, however, that the court also based its denial of appellant's motion on adequate alternative grounds, and that the sentencing claims are now moot, this Court need not address this issue.

jurisdictional limitation of Rule 35(a). Finally, the court held that appellant's motion should be rejected because it reiterated issues raised in previous pleadings, and thus was a "successive motion" for similar relief on behalf of the same prisoner (id. at 12-13). Appellant's appeal of the trial court's ruling (No. 04-CO-1600), has been consolidated with her direct appeal (No. 04-CM-760), in the instant case.

B. Analysis.

As amicus curiae concedes, appellant has fully served her six-month sentence of incarceration (Brief of Professor Andrew Horwitz at 3). Thus, appellant's sentencing arguments are moot and should be dismissed by this Court. Marshall v. District of Columbia, 498 A.2d 190, 192 (D.C. 1985) (where appellant challenged constitutionality of condition of probation, court held that "because appellant has already served his full sentence, . . . this claim is . . . moot"); Smith v. United States, 454 A.2d 1354, 1356-1357 (D.C. 1983) (where appellant served full sentence imposed after revocation of probation, appeal of decision to revoke probation deemed moot). In addition, appellant may not contest the mootness of the sentencing claims because she conceded, in pleadings filed in this Court and in the trial court, that these claims would become moot if she completed service of her sentence. See Butts v. United States, 822 A.2d 407, 416 (D.C. 2003)

(appellant may not take one position at trial and a contrary position on appeal); Brown v. United States, 627 A.2d 499, 508 (D.C. 1993) (same). Accordingly, the Court should dismiss all claims related to appellant's sentencing, including the separately filed appeal of appellant's sentence in Case No. 04-CO-1600.[19/]

[19/] Because appellant's sentencing claims are so obviously moot, and because appellant has previously conceded their mootness, we do not address the merits of appellant's sentencing arguments on appeal.

CONCLUSION

WHEREFORE, the government respectfully submits that this Court should affirm the judgment of the trial court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two copies of the foregoing Brief for Appellee to be served by mail on (1) appellant, pro se, Elena R. Sassower, 16 Lake Street, Apt. 2C, White Plains, NY 10603, (2) Professor David M. Zlotnick, Counsel for Professor Andrew Horwitz, Roger Williams University School of Law, 10 Metacom Avenue, Bristol, RI 02809, and (3) Jonathan L. Katz, Esq., Counsel for the District of Columbia National Lawyers Guild, 1400 Spring Street, Suite 410, Silver Spring, MD 20910, on this 10th day of March, 2006.

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