#04-CM-760
#04-CO-1600

DISTRICT OF COLUMBIA COURT OF APPEALS

ELENA RUTH SASSOWER,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING & REHEARING *EN BANC*, MOTION TO VACATE FOR FRAUD & LACK OF JURISDICTION, DISQUALIFICATION/DISCLOSURE, & TRANSFER

On Appeal from D.C. Superior Court [#M-4113-03]
Judge Brian F. Holeman

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INTRODUCTION

Pursuant to this Court's Rules 40 and 35, appellant *pro se* Elena Ruth Sassower hereby petitions for rehearing and rehearing *en banc* of the unsigned December 20, 2006 Memorandum Opinion and Judgment of Judges Vanessa Ruiz, Noel Anketell Kramer, and Frank Q. Nebeker, constituting a three-judge appellate panel.

This Court's Rule 40 requires that such petition "state with particularity each point of law or fact" that the panel has "overlooked or misapprehended". Rule 35 requires that the petition state that the decision "conflicts with controlling authority", necessitating consideration by the full court "to secure and maintain uniformity of the court's decisions" or that the case involves "questions of exceptional importance".

The panel's Memorandum Opinion and Judgment violates ALL cognizable adjudicative standards and is, in every sense, a judicial fraud, being insupportable factually, legally, and knowingly so. It affirms Sassower's conviction and sentence for "disruption of Congress" by materially falsifying her four appellate issues[1] and then disposes of each by false factual and legal assertions that are completely conclusory and which ignore ALL the contrary specific facts, law and legal argument she presented, because they are dispositive of her rights. This is accompanied by the panel's own fictionalized account of the "disruption of Congress" incident – for which it provides no record reference and whose fraudulence is verifiable from the videotape of the incident, in the possession of the Court. The dispositive nature of the videotape in establishing that what Sassower did at the U.S. Senate Judiciary Committee's May 22, 2003 judicial confirmation hearing could not constitute "disruption of Congress", *as a matter of law*, and that she was prosecuted on materially false and misleading prosecution documents – which any fair

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[1] The "exceptional legal and constitutional importance" of these four appellate issues – each of "first impression", as to which the Court had the obligation to "make law" – was the basis for Sassower's August 4, 2005 petition for *en banc* initial hearing of the appeals.

and impartial tribunal would have thrown out, "on the papers" – was centrally presented by Sassower's appeal, but is concealed, without adjudication, by the Opinion and Judgment.

Such Opinion and Judgment, making NO claim that Sassower had due process either before Judge Holeman or before this Court in any of the prior related proceedings is the latest unconstitutional manifestation of the actual bias and interest of the panel, whose disqualification Sassower had sought by an October 16, 2006 letter-application – the existence of which the Opinion and Judgment also conceals, without adjudication. Consequently, Sassower combines with this petition a motion to vacate the Opinion and Judgment for fraud and lack of jurisdiction. She additionally reiterates and renews her October 16, 2006 letter-application for disqualification of the panel and the Court, for transfer of these consolidated appeals to the U.S. Circuit Court of Appeals for the District of Columbia, and for disclosure, if such are denied.

THE PANEL ACTED UNCONSTITUTIONALLY & WITHOUT JURISDICTION IN RENDERING THE DECEMBER 20, 2006 OPINION AND JUDGMENT WHERE IT HAD NOT ADJUDICATED SASSOWER'S OCTOBER 16, 2006 LETTER-APPLICATION FOR ITS DISQUALIFICATION, DISCLOSURE, & TRANSFER OF THE APPEALS

A fair and impartial tribunal is the constitutional entitlement of every litigant and "a basic requirement of due process", *In re Murchison*, 349 U.S. 133, 136 (1955), *Holt v. Virginia*, 381 U.S. 131, 136 (1965), *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), with the appearance of impartiality a requisite for public confidence in the judiciary, *Scott v. United States*, 559 A.2d 745 (*en banc* 1989). It should be obvious that when judges conceal and disregard the existence of an application for their disqualification and for disclosure, they are conceding, by such conduct, that they cannot dispute the facts and law presented in support of the relief.

The specific facts as to the disqualification of all three panel members for demonstrated actual bias and interest, pursuant to Canon 3E of the Code of Judicial Conduct for the District of Columbia Courts, were particularized by Sassower's October 16, 2006 letter-application – four copies of which were received by the Clerk's Office on October 17, 2006 for distribution to Chief

Judge Washington and the three panel members to whom it was addressed[2]. Such letter-application expressly substituted for the oral application Sassower would have made had the panel not denied her a right of oral argument, which it did *without reasons*.

The October 16, 2006 letter-application highlighted (at p. 5) that each of the panel members had an "interest in the outcome of each of [her] four appellate issues" in that they could NOT adjudicate the facts and law on which these four appellate issues rested without exposing the fraudulence of their prior orders – and those of the Court – in denying Sassower relief to which she had been entitled, *as a matter of law*. Additionally, the letter-application identified (at pp. 5-7) a "breathtaking extrajudicial fact" further establishing the bias and interest of the Court's judges, of which Sassower had only just learned because they had wilfully ignored all her many requests for disclosure, beginning in April 2004, when she had first sought the Court's protection from Judge Holeman's lawless conduct by her petition for mandamus, prohibition, certiorari, &/or certification of questions of law.

Treatise authority holds:

> "So long as the affidavit [to disqualify] is on file, and the issue of disqualification remains undecided, the judge is without authority to determine the cause or hear any matter affecting the substantive rights of the parties", 48A Corpus Juris Secundum §145.
>
> "As a general rule...once a challenged judge has...been made the target of a timely and sufficient disqualification motion, he immediately loses all jurisdiction in the matter except to grant the motion and in some circumstances to make those orders necessary to effectuate the change.", §22.1, Judicial Disqualification: Recusal and Disqualification of Judges, Richard E. Flamm, Little, Brown & Company.

As set forth by the October 16, 2006 letter-application (at p. 2), this Court does not release the identities of the appellate panel until the Thursday before the scheduled calendar date – which

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[2] For the convenience of the Court, the original of this petition annexes, in addition to the December 20, 2006 Opinion and Judgment, a full copy of Sassower's October 16, 2006 letter-application, and the last page of the docket sheets for appeals #04-CM-760 and #04-CO-1600 reflecting the Clerk's Office's receipt of the letter-application and its submission to Judges Ruiz, Kramer, and Nebeker.

was October 12, 2006. Nor does it have any procedure for securing the disqualification of the appellate panel, as for instance formal motion, as opposed to a letter-application.

Consequently, Sassower's October 16, 2006 letter-application was, in every respect, timely and sufficient – and especially as it rested on the succession of her prior motions for the disqualification of this Court's judges and for disclosure by them, each supported by her sworn affidavits. As highlighted by her letter-application (at pp. 3-5), none of these was more dispositive than her all-encompassing October 14, 2005 motion, on which she expressly rested, and as to which she called upon the panel to make disclosure pursuant to Canon 3F.

By reason thereof, the panel was without authority to render its December 20, 2006 affirmance, which must be vacated for lack of jurisdiction. If, not, the affirmance must be vacated for fraud, since, as hereinafter shown[3], it is, from beginning to end, a judicial fraud. Such Opinion and Judgment [hereinafter "Opinion"], rendered by a biased, self-interested tribunal, is utterly unconstitutional.

THE PANEL'S DECEMBER 20, 2006 OPINION AND JUDGMENT IS A JUDICIAL FRAUD, FURTHER DEMONSTRATING ITS PERVASIVE ACTUAL BIAS, BORN OF INTEREST

The panel's Opinion appears to be modeled on the U.S. Attorney's March 10, 2006 opposing brief, whose fraudulence was particularized by Sassower's April 4, 2006 reply brief, with a request (at p. 20) for sanctions and disciplinary and criminal referrals against him – a request reiterated by her October 16, 2006 letter-application (at p. 8, fn. 9).

Like the U.S. Attorney's opposing brief, which had improperly transmogrified Sassower's four appellate issues and then fashioned its deceitful argument, including false supporting facts, the Opinion employs the same tactic – disregarding Sassower's reply brief, as if it does not exist .

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[3] The showing herein in necessarily limited by this Court's Rule 40(b), restricting petitions to 10 pages. Suffice to say, there is a great deal additional that would otherwise have been particularized as evidencing both the fraud and sloppiness of the panel's Opinion.

Sassower's first appellate issue is NOT that "the trial court erred in denying her motion for recusal based on bias" – which is an even more extreme falsification than the U.S. Attorney's opposing brief, which had presented the denial of her TWO disqualification motions as the first appellate issue.

As pointed out by Sassower's reply brief (at p. 1), the sufficiency of her two disqualification motions is "subsumed within a larger question":

> **"1. As evidenced from the course of the proceedings before Judge Holeman, was appellant entitled to his disqualification for pervasive actual bias meeting the 'impossibility of fair judgment' standard articulated by the U.S. Supreme Court in *Liteky v. United States*, 510 U.S. 540?***
>
> A. Were appellant's February 23 and March 22, 2004 pretrial motions to disqualify Judge Holeman sufficient, as a matter of law, to require his disqualification for pervasive actual bias, divesting him of jurisdiction to 'proceed...further', pursuant to D.C. Superior Court Civil Procedure Rule 63-I – and was there any basis in fact and law for Judge Holeman's conduct and rulings challenged therein?
>
> B. Were Judge Holeman's subsequent pretrial, trial, and post-trial rulings further confirmatory of his pervasive actual bias – and were they factually and legally supported?" .
>
> The asterisk to this first issue further specified that it encompassed
>
> > "whether Judge Holeman's rulings, individually and collectively, were so egregiously 'erroneous' and prejudicial as to require reversal".

This first appellate issue – going directly to Sassower's unequivocal and repeated assertions before this Court that Judge Holeman had denied her due process – is concealed by the panel and not adjudicated. And the reason is obvious. Appellate review of Judge Holeman's conduct and rulings[4] is completely dispositive of her right to reversal, *as a matter of law*, as they are factually and legally insupportable and so multitudinous and egregious as to meet the *Liteky* standard for disqualification for "pervasive actual bias". Indeed, as explicitly identified by Sassower's briefs, any one of a myriad of Judge Holeman's rulings would suffice for reversal, *as a*

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[4] These rulings are itemized by the Table of Contents of both Sassower's original June 28, 2005 appellant's brief and her November 6, 2005 "conforming brief on the merits".

matter of law – as, for instance, his denial of Sassower's right to testify at trial as to the purported "disruption of Congress" incident and her intent (reply brief, at p. 8).

Having thus obliterated that Sassower's first appellate issue seeks adjudication as to whether Judge Holeman's conduct and rulings over the course of the proceeding are factually and legally supportable and meet the *Liteky* standard for disqualification – which is precisely what the U.S. Attorney had done – the panel does not even confront the factual and legal basis of ANY of the conduct and rulings challenged by Sassower's two motions for Judge Holeman's disqualification, or even Judge Holeman's grounds for denying the motions – again, reflective of its knowledge that even as so-limited his rulings cannot be justified.

Nonetheless, the Opinion devotes four paragraphs to affirming Judge Holeman's denial of Sassower's "motion for disqualification" (at pp. 2-3), the last sentence of which uses the plural "motions". Acknowledging Sassower's reliance on *Liteky*, the panel does not identify her stated basis for such reliance – as, for instance, this Court's decision in *Fischer v. Estate of Flax*, 816 A.D.2d 1, 12 (2003), recognizing *Liteky* as the "governing standard[]". This permits the panel to falsely purport, "it is not clear that the extrajudicial source reasoning from *Liteky* would apply to judicial recusal in D.C. Superior Court." – which it does by simplifying the false and nonsensical arguments in the U.S. Attorney's opposing brief (fn. 8). The panel then avoids "reach[ing] that question" of the applicability of *Liteky* to judicial recusal in D.C. Superior Court by falsely pretending that Sassower's allegations "were insufficient to warrant disqualification…under the standard set forth in *Liteky*." In so doing, the panel does not identify a single one of Sassower's supposedly "insufficient" allegations. Rather, it rests on a bald claim that her "motion for disqualification was wholly lacking in merit, as her allegations focused almost exclusively on unfavorable rulings made by the trial judge." This is false. Sassower's February 23, 2004 motion [A-265] was not about rulings at all, as Judge Holeman had then made none. Nor was her March

22, 2004 motion [A-375] about "unfavorable" rulings, but about rulings she showed to be "outright judicial lies", being factually and legally unsupported and insupportable

It is based on this total falsification and concealment of what Sassower's disqualification motions had presented that the panel asserts she made "No...showing" of Judge Holeman's "deep-seated favoritism or antagonism that would make fair judgment impossible" (at p. 3), as *Liteky* requires. Indeed, the panel goes further: proclaiming that Sassower failed to provide "any reason to question the impartiality of the trial judge" Both declarations – echoing those made in the U.S. Attorney's opposing brief – are utter frauds, which is why the panel does not substantiate them in any way. Thus it does not identify any of the specifics of Sassower's two pretrial disqualification motions[5] or the discussion of these motions in her briefs (brief: at pp. 4-15; reply: at pp. 8-10). This includes what Sassower's motions and briefs recited as to the "extrajudicial source" of Judge Holeman's demonstrated bias, "beyond the four corners of the courtroom", even while the Opinion falsely purports it to be the essence of what is required to disqualify a judge (at p. 2).

Sassower's second appellate issue is NOT that "the trial judge erred in holding that she was not entitled to have her case removed to the United States District Court for the District of Columbia", but whether the venue provision of the "disruption of Congress" statute, D.C. Code §10-503.18, entitled her to removal/transfer,

> "where, additionally, the record establishes a pervasive pattern of egregious violations of her fundamental due process rights and 'protectionism' of the government.".

The panel's obliteration of this added factor replicates precisely what the U.S. Attorney did in his opposing brief, exposed by Sassower's reply (at pp. 2, 11-13). The Opinion's one-paragraph adjudication (at p. 3) does NOT adjudicate whether such additional factor entitled Sassower to the requested removal/transfer – here, too, because it is dispositive of her right to

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[5] The Opinion – in addition to not supplying the dates of either disqualification motion – falsely purports in its brief paragraph devoted to the proceedings (at p. 2) that they were made "At trial". This, despite the fact that Sassower's first issue had expressly identified them as "pretrial".

reversal. Indeed, the significance of the record in establishing the disqualifying actual bias and interest of both Judge Holeman and this Court was highlighted by her reply brief (at pp. 36-7) in response to the U.S. Attorney's deceit on the subject.

Sassower's third appellate issue is NOT that "this court should hold in the first instance that D.C. Code §10.503.16(b)(4) is unconstitutional both as written and as applied to her case". It was the U.S. Attorney – not Sassower – who contended that she had not raised the issue before Judge Holeman.

The Opinion's two-paragraph adjudication (at pp. 3-4) replicates the U.S. Attorney's bald claim in asserting "Nowhere in the copious proceedings at the trial court did she challenge the constitutionality of D.C. Code §10-503.15(b)(4) or its application to her situation" (at p. 3) – ignoring completely Sassower's contrary presentation in her reply brief (at pp. 13-15) that she had sufficiently raised such constitutional challenges and that it was Judge Holeman's misconduct that interfered with and precluded further exposition and his appropriate adjudications with respect thereto. Likewise, the panel regurgitates the U.S. Attorney's deceit in claiming "it is patently clear that this statute is constitutional on its face" – citing to its cases of *Armfield v. United States*, 811 A.2d 792 (2002), and *Smith-Caronia v. United States*, 714 A2d 764 (1998) – also ignoring completely Sassower's contrary presentation, both in her brief (at pp. 36-41) and reply (at pp. 15-16), as to the inapplicability of *Armfield* and *Smith-Caronia* to the very different constitutional challenge which her case presents to the statute, *as written*.

Only in upholding the constitutionality of D.C. Code §10-503.15(b)(4), *as applied*, does the Opinion allude to any "suggestion" or "argument" Sassower made – and such is wholly deceitful, as examination of her reply brief resoundingly shows (at pp. 15-18). Indeed, the panel's pretense that because the statute "clearly applies to 'any hearing...before any committee...of the Congress", therefore, Sassower's "suggestion that the statute was unconstitutionally applied because of the difference between a committee hearing and a session of Congress does not create a

viable distinction" is even more fraudulent than the U.S. Attorney's similar deceit, as even the U.S. Attorney's deliberate garbling of Sassower's challenge had recognized that it was addressed to the statute, *as written.*

As to the true grounds for Sassower's challenge to the statute, *as applied* (Br. 41-46), the Opinion entirely conceals them as it purports that they rest "on factual assertions that were properly presented to the jury, which was "'entitled to disregard what [s]he said in the courtroom and base its verdict on what [s]he actually did'" – repeating, including by its quote from *Armfield*, the U.S. Attorney's identical claim, resoundingly rebutted by her reply brief (at pp. 16-18). As stated by her reply:

> "Because what occurred at the Senate Judiciary Committee's May 22, 2003 hearing is videotaped – and therefore incontrovertible – the U.S. Attorney conceals the very existence of the videotape…
>
> His argument then rests on discounting the existence of what the videotape documentarily establishes. Thus he states that the jury 'was entitled to disregard appellant's interpretation of what transpired' (at p. 38) – never identifying that that 'interpretation' rested on the videotape, for which Sassower had provided a written analysis [A-1574, A-1565, A-1604] whose accuracy was uncontested by the U.S. Attorney…
>
> The videotape is not supplanted by the adverse jury verdict. It is dispositive proof that what Sassower actually did could never support a 'disruption of Congress' charge – without rendering it unconstitutional *as applied*. This is why, at every stage of this case, the U.S. Attorney has concealed what it shows…". (at p. 17, underlining in the original).

The panel, which has had the videotape, does not deny or dispute this. Nor Sassower's further assertion, also from her reply brief, that.

> "The videotape is 'celluloid DNA' as to the events at issue in the 'disruption of Congress' charge. It establishes that the prosecution's case was bogus, malicious, and brought on materially false and misleading prosecution documents – an assertion Sassower explicitly made in her October 30, 2003 discovery/disclosure/sanctions motion [A-47-8], without contest from the U.S. Attorney. Such uncontested assertion itself required any fair and impartial tribunal to throw out the case on the papers, *as a matter of law*. Specifically, the videotape establishes that the so-called 'disruption' consisted of Sassower's respectful request to testify in opposition to Judge Wesley's confirmation – a request not made until after the presiding chairman, Senator Saxby Chambliss, had already announced the hearing 'adjourned'." (at p. 7, underlining in the original).

Instead, the panel commits outright fraud at the outset of its Opinion (at p. 1) by its unsourced recitation of the "disruption of Congress" incident – completely belied by the videotape, stenographic transcript [A-1552-3, A-564], and Sassower's analysis of each [A-1574].

Sassower's fourth appellate issue is NOT that "the trial court erred in denying her motion under D.C. Code §23-110, which challenged her sentence as illegal and unconstitutional". The denial of that motion is not Sassower's fourth appellate issue, but part of her first – being among Judge Holeman's post-trial rulings which are insupportable factually, legally and demonstrative of his "pervasive actual bias". The fourth issue was:

> **"Whether, when Judge Holeman suspended execution of the 92-day jail sentence he imposed upon appellant, his terms of probation were appropriate and constitutional and whether, when appellant exercised her right to decline those terms, pursuant to D.C. Code §16-760, it was legal and constitutional for him to double the 92-day jail sentence to six months?"**

Such concealment of this explicit issue resembles the U.S. Attorney's reframing of this fourth issue as Sassower's "challenging her sentence". The Opinion's devotes one paragraph (at p. 4) to the issue, asserting that because Sassower "has completed serving her six-month sentence, her sentencing claims are now moot". Such boilerplate is altogether insufficient – as is evident from the panel's own cited decision of *McClain v. United States*, 601 A.2d 80 (1992), as likewise the *en banc* decisions to which it refers, *United States v. Edwards*, 430 A.2d 1321 (1981), *Lynch v. United States*, 557 A.2d 580 (1989). Indeed, such caselaw establishes the deceitfulness of the U.S. Attorney's argument as to mootness, objected-to by Sassower's reply brief (at pp. 18-20), to which, here too, the Opinion makes no mention or adjudication.

CONCLUSION

This Court's judges, both individually and collectively, are responsible for ensuring the vacatur of the panel's December 20, 2006 Opinion and Judgment and transfer of the appeals to the U.S. Circuit Court of Appeals for the District of Columbia for adjudication consistent with constitutionally-required due process.