rec'd 9/7/04

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 04-CM-760
(Crim. No. M-4113-03)

ELENA RUTH SASSOWER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPELLEE'S OPPOSITION TO APPELLANT'S "MOTION FOR REARGUMENT, RECONSIDERATION, RENEWAL AND OTHER RELIEF"

Appellee, the United States of America, respectfully opposes appellant's motion for reconsideration of the Court's July 7, 2004, order denying appellant's motion for a stay and for release from incarceration pending disposition of her appeal. Because appellant's motion fails to raise any new argument warranting reconsideration of the order denying the stay, her motion for reconsideration should be denied.

Procedural Background

On April 14-20, 2004, appellant, who was charged with one count of disrupting Congress on May 20, 2003 (D.C. Code § 10-503.16(b)(4) (1981)), was tried by a jury before the Honorable Brian Holeman. On April 20, 2004, the jury found appellant guilty, and on June 28, 2004, Judge Holeman sentenced her (Tr.6/28/04 at

2).[1] The court initially sentenced appellant to 92 days' incarceration, gave her credit for the time she had served, and suspended the remaining period (id. at 15-16). In addition, the court imposed a $500 fine and a payment of $250 to the Victims of Violent Crimes Compensation Fund ("VVCCF"), and proposed to place appellant on probation for two years (id. at 16). The conditions of probation imposed by the court included standard probationary terms, such as, inter alia, obeying the law, meeting with her probation officers, and abstaining from illegal drug use (id. at 16-17), as well as specific conditions involving employment (id. at 17), performing community service (id. at 17-18), submitting to substance abuse, medical and mental health assessments and complying with any testing or treatment deemed appropriate (id. at 18), attending periodic anger management counseling, and staying away from the United States Capitol Complex and certain United States Senators (id. at 18-21).

In addition, the court stated that as a condition of probation, appellant would be required to write letters of apology to several Senators informing them of her conviction and expressing her remorse for any inconvenience she caused them (Tr.6/28/04 at

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[1] "Tr.6/28/04" refers to the transcript of appellant's sentencing hearing on June 28, 2004. "Tr.4/19/04" refers to the transcript of appellant's trial on April 19, 2004.

21). Appellant refused to write the letters (id.). When specifically asked by the court if she agreed to the terms of probation,[2/] appellant requested a stay of sentencing pending her appeal. The court did not answer appellant, but pressed appellant for a response to the court's question. Appellant told the court that she did not accept the terms of probation (id. at 21-22). The trial court then sentenced appellant to serve a term of six months' incarceration, to pay a $500 fine, and to pay $250 to the VVCCF (id.). The court also ordered appellant "stepped back" to begin serving her sentence (id. at 22).

Later that day, appellant, through her attorney advisor, Mark Goldstone, filed in this Court a "Motion for Stay And For Appellant's Release Pending Appeal" ("Stay Motion"). In the motion, appellant argued that the stay should be granted and she should be released from incarceration because she would prevail on appeal by showing that her sentence constitutes an abuse of the trial court's discretion. She asserted that the sentence reflected the anger and abuse of Judge Holeman and that the terms of probation originally set by the court infringed her constitutionally protected freedoms of speech, association, and the right to petition the government for redress (Stay Motion at 2).

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[2/] See D.C. Code § 16-710(a) ("A person may not be put on probation without [her] consent").

On July 2, 2004, appellant, through attorneys Fatima Goss and Andrew L. Frey, filed the "Supplemental Brief of Elena Sassower in Support of Motion for Bail Pending Appeal" ("Supplemental Motion"). In this motion, appellant asserted that if she was not released pending appeal, she would serve the entirety of her six-month sentence before her appeal was decided. She also argued that her appeal would challenge her conviction and sentence by showing that (1) the disruption-of-Congress statute was unconstitutional because it violated appellant's First Amendment right to petition the government for redress, and even if it was not, appellant's conduct did not violate the statute, and (2) the terms of probation initially imposed by the court would have restricted her constitutional rights to free speech and association (Supplemental Motion at 2-3).

This Court considered appellant's Stay Motion and her Supplemental Motion, and the government's opposition, and by order filed July 7, 2004, denied appellant's request for a stay and for release pending appeal.

On August 12, 2004, appellant apparently filed a pro se motion entitled "Motion for Reargument, Reconsideration, Renewal and Other Relief" ("Reconsideration Motion")[3/] We were served with this

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[3/] By order filed July 29, 2004, the Court granted Mr. (continued...)

motion on August 27, 2004. In the motion, appellant requests the Court to reconsider its July 7, 2004, order denying her a stay and release pending appeal. The gravamen of this motion is twofold. First, appellant challenges the denial of a stay on procedural grounds, alleging that her sentence will be served before her appeal can be decided if she is not released on bail pending appeal (Reconsideration Motion at 1), and that she did not have the opportunity before this Court ruled on her two stay motions, either to submit a completed affidavit in support of her stay motions or to respond to appellee's opposition (id. at 9-12). Second, appellant asserts that the denial of a stay should be reconsidered because the government's opposition concealed relevant facts (id. at 1-2, 8-9, 19-27), because the judges on the panel denying appellant's stay motions were or may have been biased against appellant because they participated in or had knowledge of appellant's prior mandamus petition which sought to disqualify Judge Holeman (id. at 2-3, 28-40), or because they worked in the same courthouse as Judge Holeman (id. at 3, 40-43).[4/] Appellant

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[3/](...continued)
Goldstone's motion to withdraw and appellant's motion to proceed on appeal pro se.

[4/] Based on appellant's original stay motion and her motion to reconsider, it appears that a key ground for attacking appellant's conviction is her claim that Judge Holeman was biased against her (continued...)

asks the court to sanction the government, disqualify one judge on the panel and compel the other judges to disclose certain information, and asks the court to transfer the case to the United States Court of Appeals for the District of Columbia Circuit so that appellant may get an unbiased ruling.

## ARGUMENT

### Appellant Has Failed To Demonstrate That Reconsideration Of The Denial Of Her Motion For A Stay And For Release Pending Appeal Is Warranted.

Because none of appellant's contentions support the conclusion that the Court should reconsider its July 7, 2004, denial of the stay and release from incarceration, appellant's motion should be denied.

Appellant first challenges this Court's July 7, 2004, order on procedural grounds, alleging that she did not get an opportunity

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[4/] (...continued)
(Stay Motion at 2 (appellant likely to succeed on appeal by showing her sentence was abuse of discretion because trial judge was angry at appellant for seeking his recusal); Reconsideration Motion at 16, 17 ("the record [contains evidence] of Judge Holeman's virulent and pervasive actual bias").

As evidence of bias, appellant asserts that Judge Holeman refused to permit her to testify at trial (Reconsideration Motion at 16). However, as the trial transcript reveals, appellant took the stand, testified in her own behalf, and was cross-examined by the prosecutor (Tr.4/19/04 at 624-682). The court did limit the time appellant could testify on direct examination and precluded her from testifying as to certain irrelevant evidentiary matters (id. at 658-682).

either to submit a completed affidavit in support of her stay motions or to respond to the government's opposition before this Court denied her a stay or release pending appeal (Reconsideration Motion at 9-12). These arguments are meritless. The Court's procedural rules explicitly provide that appellant's affidavit should have been filed with her stay motions filed June 28 and July 2, 2004. See D.C. App. R. 27(a)(3)(B)(i) (2004).[5/] Moreover, nothing in her Stay Motion or her Supplemental Motion suggested to the Court that appellant was preparing an affidavit to submit in support of her motions and that such would be forthcoming. Thus, appellant failed in her burden of providing the Court with all pertinent records.[6/] See Shehyn v. District of Columbia, 392 A.2d 1008, 1012 (D.C. 1978) (appellant, as movant, has burden of proving her case).

With regard to appellant's argument that she was denied the time to file a reply to the government's opposition, appellant's Stay Motion and Supplemental Motion both sought a swift response by this Court. Indeed, both motions informed the Court that unless the Court granted appellant bail, she would serve her entire

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[5/] D.C. App. R. 27(a)(3)(B)(i) provides that "[a]ny affidavit or other paper necessary to support a motion must be served and filed with the motion."

[6/] Appellant admits in her Reconsideration Motion that she had three attorneys assisting her (Reconsideration Motion at 7).

sentence before her appeal was decided (Stay Motion at 1 (stay is necessary to prevent irreparable injury); Supplemental Motion at 4 ("[u]nless bail pending appeal is granted . . . [appellant] will serve her entire sentence before the appeal can be briefed and decided"). Thus, the speed with which the Court ruled was based in large measure on the nature of the relief appellant sought.[7/] In addition, neither of appellant's two stay motions, on their face, established any entitlement to relief. Thus, issuance of a prompt ruling by the Court was understandable.

Appellant next contends that reconsideration is warranted because the government's opposition concealed pertinent facts (Reconsideration Motion at 7, 13).[8/] This assertion fails because

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[7/] D.C. App. R. 27(a)(5) provides that "[a]ny reply to a response must be filed within 3 days after service of the response. A reply must not present matters that do not relate to the response." Although Rule 27(a)(5) permits a party to file a reply to an opposition, nothing in the rule requires the Court to await such a filing.

[8/] The fact that the government did not mention these facts in its opposition is of little import. Indeed, carefully scrutinized, the "pertinent facts" identified by appellant as having been concealed by the government simply are not relevant for consideration of appellant's motion for a stay or release pending appeal. This includes the fact that appellant previously moved to disqualify Judge Holeman (Reconsideration Motion at 13), the assertion that appellant's conduct in Congress involved a "respectful request to testify" (id. at 7, 13-15), the fact that the government recommended that appellant be sentenced to a five-day suspended sentence, and the fact that appellant is a co-founder of the Center for Judicial Accountability, Inc. (id. at 8-9).

it involves facts that were before the Court by virtue of appellant's Stay Motion and Supplemental Motion. For example, appellant alleges that the government failed to note in its opposition that appellant previously moved to disqualify Judge Holeman (id. at 13). However, this information was before the Court in appellant's Stay Motion ("defendant . . . moved for the trial judge's recusal based on his demonstrated bias against her"). Appellant's contention that the government failed to mention that her conduct in Congress involved a "respectful request to testify" (id. at 7, 13-15)) was made in appellant's Stay Motion ("Appellant argued that she spoke after the hearing was adjourned and respectfully requested to testify in opposition to Judge Wesley."). [9/] Lastly, the fact that appellant is a co-founder of the Center for Judicial Accountability, Inc. (id. at 8-9) was contained in appellant's Stay Motion (appellant "co-founde[d] the Center for

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[9/] The trial court gave the jury a defense theory-of-the-case instruction. The court instructed the jury as follows:

> The defendant's theory of the case is that the defendant did not willfully and knowingly engage in disorderly and disruptive conduct within a United States Capitol Building. Defendant had no intent to impede or disrupt or disturb the orderly conduct of a session of Congress. Ms. Sassower's 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.

(Tr.4/19/04 at 755-756.)

Judicial Accountability").[10/] Because these facts all were before the Court in appellant's two motions, appellee had no obligation to mention them. In any event, these facts did not furnish a basis for granting the original motion nor do they provide any new basis for this Court to reconsider its July 7, 2004, ruling.

Appellant's Reconsideration Motion also rehashes arguments raised in her two motions for a stay and for release pending appeal. Specifically, appellant reiterates her arguments that (1) unless she is released on bail, she will complete service of her sentence before her appeal is decided (compare Reconsideration Motion at 1, with Supplemental Motion at 4); (2) Judge Holeman was biased against her (compare Reconsideration Motion at 12-13, 16-17, with Stay Motion at 2); and (3) the disruption-of-Congress statute is unconstitutional and does not apply to appellant's conduct (compare Reconsideration Motion at 13, with Supplemental Motion at 2).

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[10/] Appellant's Reconsideration Motion also alleges that the government's opposition failed to mention that Judge Holeman made "no findings denying [appellant] release pending appeal" (Reconsideration Motion at 24). However, Judge Holeman did not explicitly grant or deny appellant's hastily made motion during the sentencing proceedings (Tr.6/28 at 22). Nor was the trial court technically required to address the motion. D.C. Code § 23-1325(c) permits the trial court to grant release pending appeal where the defendant has been convicted and "has filed an appeal." At the time of appellant's verbal motion, she had not been sentenced and had not filed an appeal.

Finally, appellant's contention that the Court should reconsider her motion for a stay and for release pending appeal because Judge Nebeker was on the panel that denied appellant's petition for a writ of mandamus, which sought disqualification of Judge Holeman (Reconsideration Motion at 28-37), and because Judge Steadman and Judge Reid may have had some knowledge of appellant's mandamus petition when they, along with Judge Nebeker, denied appellant's stay motions (id. at 37-38), is unavailing. In appellant's view, her mandamus petition was erroneously denied by this Court, albeit by a different panel of judges. She further contends that any knowledge of the petition or involvement in its denial serves to disqualify the judges who denied her motion for a stay and for release pending appeal. Appellant is mistaken. Canon 3(E)(1) of the Code of Judicial Conduct for the District of Columbia Courts provides that disqualification or recusal is required "in a proceeding in which the judge's impartiality might reasonably be questioned." See Liteky v. United States, 510 U.S. 540, 548 (1994) (disqualification of recusal required "whenever [the judge's] impartiality might reasonably be questioned."); York v. United States, 785 A.2d 651, 655 n.8 (D.C. 2001) (same) (quoting Canon 3(E). Impartiality might reasonably be questioned where, for example, a judge has a "personal bias or prejudice concerning a party . . . or personal knowledge of disputed evidentiary facts

concerning the proceeding." Canon 3(E)(1)(a) (emphasis added). However, "adverse rulings, without more, certainly do not establish that a judge lacked . . . impartiality." Dancy v. United States, 745 A.2d 259, 267 n.13 (D.C. 2000).

Here, appellant has failed to articulate a ground for Judge Holeman's disqualification. As the Supreme Court in Liteky stated, "[t]he judge who presides at trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produces were properly and necessarily acquired in the course of the proceedings." 510 U.S. at 550-551. See Fischer v. Flax, 816 A.2d 1, 12 n.14 (D.C. 2003) ("occasional remarks by the judge evincing displeasure with [litigant] or his attorney do not come close to demonstrating partiality in the forbidden sense") (citing Liteky, 510 U.S. at 551-552); Gregory v. United States, 393 A.2d 132, 143 (D.C. 1978) ("[a]ppellant's allegation that he was prejudiced by having to appear before the same judge against whom he had sought a writ of mandamus, and who had held him in contempt in a prior proceeding" not legally sufficient to justify recusal); see also Barry v. Sigler, 373 F.2d 835, 836 (8th Cir. 1967) ("[m]erely because a . . . judge is familiar with a party and his legal difficulties through prior

judicial hearings, or has found it necessary to cite a party for contempt, does not automatically or inferentially raise the issue of bias").

Appellant has also failed to articulate a basis for the Court of Appeals judges who denied appellant's stay motions to disqualify themselves.[11/] As the Supreme Court stated in Liteky, "[a]lso not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case . . . [or] in successive trials involving the same defendant." 510 U.S. at 551.

We note for the record that based on statements contained in appellant's motion for reconsideration, it appears that appellant is severely handicapped by the fact that she has chosen to represent herself on appeal. Although the Court granted appellant's motion to proceed pro se when her attorney withdrew his representation, given appellant's difficulties in self-

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[11/] Appellant requests the Court to transfer her case to the United States Court of Appeals for the District of Columbia Circuit. That court, however, does not have jurisdiction over appellant's appeal of her conviction in the District of Columbia Superior Court. See 28 U.S.C. § 1291 (1982) (Court of Appeals for the District of Columbia Circuit has jurisdiction over appeals "from all final decisions of the district courts of the United States"); D.C. Code § 11-721 (this Court has jurisdiction of appeals from the Superior Court).

representation, we raise the question of whether both appellant and this Court should reconsider appellant's self-representation on appeal. In Martinez v. Court of Appeal of California, 528 U.S. 152 (2000), the Supreme Court addressed the question of whether a criminal defendant has the right to represent himself on appeal. The Court held that although a defendant has the constitutional right to conduct his own defense at trial, id. at 154, there was "[no] historical consensus establishing a right of self-representation on appeal." Id. at 159. Thus, the Court held that California was not required "to recognize a constitutional right to self-representation on direct appeal from a criminal conviction." Id. at 163. Here, given the nature of appellant's contentions, i.e., judicial bias and the constitutionality of a statute on its face and as applied to appellant, and her difficulties prosecuting her appeal, appellant may require legal assistance to pursue her claims on appeal.

We also note that appellant's motion for reconsideration requests this Court to reinstate the 92-day sentence originally imposed by Judge Holeman. We also note that appellant's sister has recently sent a letter to Judge Holeman requesting that he reduce appellant's sentence. Although appellant's sister apparently has discussed this matter with appellant, it is unclear from the letter whether appellant is willing to agree to probation. Because this

Court lacks jurisdiction to alter the six-months' sentence imposed by Judge Holeman, which is within statutory limits, see Johnson v. United States, 628 A.2d 1009, 1015 (D.C. 1993) ("in the absence of a fundamental defect in a sentence, this [C]ourt may not reduce a sentence within statutory limits"), because appellant has requested reinstatement of the original 92-day sentence, and because Judge Holeman has authority to reduce the June 28, 2004, sentence regardless of whether appellant files a motion pursuant to Super. Ct. Crim. R. 35(b),[12/] Judge Holeman is the proper person to address the question of appellant's immediate release from incarceration.

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12/ Super. Ct. Crim. R. 35(b) provides, in pertinent part:

> After notice to the parties and an opportunity to be heard, the Court may reduce a sentence without motion, not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 120 days after entry of any order or judgment of the Supreme Court, denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this paragraph.

## CONCLUSION

**WHEREFORE, it is respectfully requested that appellant's motion for reconsideration be denied.**

**Respectfully submitted,**

Kenneth L. Wainstein /sd

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2004, I caused a copy of the foregoing Appellee's Opposition to Appellant's Motion for Reargument, Reconsideration, Renewal and Other Relief to be served by first-class mail, postage prepaid, to appellant Elena R. Sassower, #301340, Unit 2DA, Correctional Treatment Facility, 1901 E Street, S.E., Washington, D.C. 20003. On the same date, a copy of Appellee's Opposition also was sent via facsimile to Jennifer M. O'Connor, Counsel, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, 2445 M Street, N.W., Washington, D.C., who has stated that she would attempt to deliver a copy of the opposition to appellant on a more expedited basis.

Susan A. Nellor

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