IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellant, v. Christopher A. QUICK, Sergeant (E-5) U.S. Marine Corps, Appellee.	))))))))	**BRIEF OF AIR FORCE APPELLATE DEFENSE DIVISION AS AMICUS CURIAE IN SUPPORT OF APPELLEE** Crim. App. No. 201300341 USCA Dkt. No. 15-0347/MC

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW the Air Force Appellate Defense Division, pursuant to Rule 26(a)(1) of this Honorable Court's Rules of Practice and Procedure, as Amicus Curiae in Support of Appellee in the above-captioned case.

Certified Issue

I

WHETHER PRECEDENT AUTHORIZING COURTS OF CRIMINAL APPEALS TO ORDER SENTENCE-ONLY REHEARINGS SHOULD BE OVERRULED BASED ON: (A) *JACKSON V. TAYLOR*, 353 U.S. 569 (1957), WHICH STATED "NO [SUCH] AUTHORITY" EXISTS; (B) THE PLAIN LANGUAGE OF THE STATUTE INCLUDING THE CONJUNCTIVE "FINDINGS AND SENTENCE" IN ARTICLE 66(d) IN CONTRAST TO AUTHORITY GRANTED THE JUDGE ADVOCATES GENERAL IN ARTICLE 69(a) TO ACT WITH RESPECT TO "FINDINGS OR SENTENCE OR BOTH" AND THE CONVENING AUTHORITY IN ARTICLE 60(f)(3) TO ORDER SENTENCE REHEARINGS; AND, (C) JUDICIAL ECONOMY.

Argument

IN THE MILITARY JUSTICE ACT OF 1983 CONGRESS AMENDED ARTICLES 60, 64, AND 69, UCMJ, TO AUTHORIZE CONVENING AUTHORITIES AND THE JUDGE ADVOCATES GENERAL TO ORDER SENTENCE-ONLY REHEARINGS. IN DOING SO, CONGRESS INTENDED TO GRANT "POWERS SIMILAR TO THOSE EXERCISED UNDER ARTICLE 66 BY THE COURT OF MILITARY REVIEW[.]"[1] CONGRESSIONAL REPLICATION OF THE AUTHORITY OF THE COURTS OF CRIMINAL APPEALS TO ORDER SENTENCE-ONLY REHEARINGS PROVIDES NO BASIS TO ABANDON THIS COURT'S LONG-STANDING PRECEDENT IN *UNITED STATES V. MILLER*, 10 C.M.A. 296 (C.M.A. 1959).

The central premise of the government's argument, which is not surprisingly incorporated directly into the issue specified by the Judge Advocate General of the Navy, is that only convening authorities and the Judge Advocates General have the statutory authority to authorize sentence-only rehearings. Brief of Appellant at 2, 4, 8-9, 11-12, 15-16, 17, 28-29. This argument ignores the legislative history behind the Congressional grants of authority at issue, which this Court recognized in a previous ill-fated attempt to jettison *United States v. Miller*, 10 C.M.A. 296 (C.M.A. 1959).

In *United States v. Sills*, 56 M.J. 556, 571 (A.F. Ct. Crim. App. 2001) the Air Force Court of Criminal Appeals declared it "[couldn't] follow" this Court's precedent, and instead adopted an interpretation of *Jackson v. Taylor*, 353 U.S. 569 (1957),

[1] S. REP. NO. 98-53, at 29 (1983).

which had been advanced by the Judge Advocate General of the Army in *Miller* in 1959, and is now advanced here by the Judge Advocate General of the Navy. In declaring the lower court bound by *Miller*, this Court noted "Congress revised the statutory authority for rehearings subsequent to *Miller*, but it did not seek to limit the authority of the intermediate courts to order sentence-only rehearings." *Sills*, 56 M.J. at 240. Indeed, this Court noted the legislative history described the "power of the Judge Advocates General under the legislation as similar to the powers exercised by the intermediate courts." *Id.*

But the Military Justice Act of 1983 was not the first Congressional recognition of the authority of the Courts of Criminal Appeals to authorize sentence-only rehearings. A subcommittee summary of military justice during Congressional hearings on military justice in 1966, described the powers of the boards of review under Article 66, UCMJ:

> 5. If board sets aside findings or sentence—
> (a) if because of insufficient evidence in record, charges must be dismissed.
> (b) if for reason other than insufficiency of evidence, may order rehearing or may dismiss charges.

Military Justice: Joint Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and Special Subcomm. of the Comm. on Armed Services, 89th Cong. 662

(1966)(Three kinds of courts-martial under the UCMJ (subcommittee summary)).

In the Military Justice Act of 1983, Congress conferred the same authority of the Courts of Criminal Appeals to order sentence-only rehearings on both convening authorities and the Judge Advocates General. In his congressional testimony, the General Counsel for the Department of Defense, the Honorable William H. Taft IV, explained the need to revise Article 69, UCMJ:

> When the judge advocate general reviews such cases at the request of the accused or under his own motion under article 69, present law limits his review to questions of law. Moreover, he cannot review the case for sentence appropriateness and he is not authorized to order a rehearing.
>
> Our bill recognizes that the foregoing powers which are exercised by the Courts of Military Review should be available to the judge Advocate [sic] general when he acts as appellate authority in cases that are not subject to consideration in a Court of Military Review.

The Military Justice Act of 1982: Hearing on S. 2521 Before the Subcomm. on Manpower and Personnel of the S. Comm. on Armed Services, 97th Cong. 19 (1982)(statement of Hon. William H. Taft IV, General Counsel, DoD).

"Both bills will permit [The Judge Advocate General] to order a rehearing or dismiss the charges when he sets aside the findings or sentence. This is consistent with the powers of the Courts of Military Review under Article 66." *Id.* at 36; *The*

Military Justice Act of 1983: Hearing on S. 974 Before the Subcomm. on Military Personnel and Compensation of the H. Comm. on Armed Services, 98th Cong. 41 (1983)(statement of Hon. William H. Taft IV, General Counsel, DoD)("The bill recognizes that the powers exercised by the Courts of Military Review should be available to The Judge Advocate General when acting as an appellate authority.")

The Senate adopted these recommendations. S. REP. NO. 98-53, at 29 (1983)("In addition, the amendment gives the Judge Advocate General powers similar to those exercised under Article 66 by the Court of Military Review with respect to rehearings, dismissal of charges, and review of cases for sentence appropriateness.") They were later adopted by the House of Representatives:

> [The Judge Advocate General] cannot exercise the powers of a Court of Military Review in terms of review for sentence appropriateness or the authority to order a rehearing. This deprives the accused, in a case reviewed by the Judge Advocate General, of the type of appellate review that is available when more serious cases are before the Courts of Military Review.
>
> The amendment recognizes that the powers exercised by the Courts of Military Review with regard to both findings and sentence should be available to the Judge Advocate General when acting as an appellate authority.

H.R. REP. NO. 98-549, at 16 (1983). And Appellant correctly notes the proposed revisions to Articles 60, 64, and 69, UCMJ, became

law. Brief of Appellant at 8-9; 10 U.S.C. §§ 860, 864, 869 (2012).

Although Appellant asserts its reading of Article 66, UCMJ, is supported by "legislative history"[2], Appellant makes no reference to the legislative history of the statutory amendments it cites extensively in its pleadings or this Court's discussion of that history in *Sills*.[3] Given that the only intervening change in the relevant law since *Miller* was decided has involved the Congressional reaffirmation of the authority of the Courts of Criminal Appeals to authorize sentence-only rehearings, and specifically a desire to replicate that authority elsewhere within the UCMJ, Appellant cannot satisfy the "severe burden" to overrule a point of statutory construction that has stood for more than half a century. *Thomas v. Wash. Gas Light Co.,* 448 U.S. 261, 272 (1980)(plurality opinion); *Busic v. United States*, 446 U.S. 398, 404 (1980)("This result is supported not only by the general principles underlying the doctrine of *stare decisis*—principles particularly apposite in cases of statutory construction—but also by the legislative history and relevant cannons of statutory construction. The government has not persuaded us that this result is irrational or depends upon

[2] Brief of Appellant at 6.
[3] *Sills* is, however, acknowledged by Amicus Curiae, the Air Force Appellate Government Division. Brief of Amicus Curiae at 5-6.

implausible inferences of congressional intent.")(superseded by statute).

Conclusion

"The end of litigation, so much to be desired, is not fully satisfied by the close of the particular law suit, but implies that the question involved therein is settled, that all parties may adjust their dealings and conduct accordingly. A change in the personnel of a court should not mean a shift in the law. Stare decisis is the rule, and not the exception." *Hartranft v. Meyer*, 149 U.S. 544, 547 (1893)(Brewer, J., dissenting). The Navy has now joined the Army and Air Force in presenting the same question to this Court in 1959, 2002, and 2015. This Court must end this litigation in accordance with *Miller* and *Sills*.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on April 8, 2015, pursuant to this Court's order dated July 22, 2010, and that a copy was also electronically served on the Navy-Marine Corps Appellate Government and Defense Divisions.

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