12 March 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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

AMICUS CURIAE BRIEF OF THE AIR FORCE APPELLATE GOVERNMENT DIVISION

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,* v. Sergeant (E-5) CHRISTOPHER A. QUICK, USMC, *Appellee.*	) AMICUS CURIAE BRIEF) OF THE AIR FORCE APPELLATE) GOVERNMENT DIVISION))) USCA Dkt. No. 15-0347/MC)) Crim. App. No. 201300341)

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

CERTIFIED ISSUE PRESENTED

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.

STATEMENT OF STATUTORY JURISDICTION

The Navy-Marine Corps Court of Criminal Appeals reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF THE FACTS

Appellant's Statement of the Case is accepted.

SUMMARY OF THE ARGUMENT

Pursuant to Rule 26 of this Court's Rules of Practice and Procedure, the Air Force Appellate Government Division agrees with and supports the position taken by the Navy-Marine Corps Appellate Review Activity on behalf of Appellant in their brief on the certified issue.

Amicus also notes that the United States Air Force Court of Criminal Appeals reached a similar conclusion supported here over a decade ago in United States v. Sills, 56 M.J. 556 (A.F. Ct. Crim. App. 2001). After setting aside part of the findings as legally insufficient and affirming remaining findings, the Air Force Court addressed the issue of sentence reassessment versus ordering a sentence rehearing. Espousing many of the same compelling arguments taken by the United States and amicus in this case, the Air Force Court noted in an excellent, comprehensive, and persuasive opinion in Sills written by Judge Breslin:

> Article 66(c), UCMJ, 10 U.S.C. § 866(c), establishes this Court's authority and responsibility for reviewing the findings and sentences of courts-martial. "It may affirm only such findings of guilty and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

The legislative history of this provision makes it abundantly clear that Congress intended the service courts (then named the boards of review) to have broad powers to determine the appropriateness of courts-martial sentences.

. . . .

In *Jackson v. Taylor*, 353 U.S. 569, 77 S.Ct. 1027, 1 L.Ed.2d 1045 (1957), the Supreme Court of the United States interpreted the language of Article 66(c), UCMJ, and defined the scope of the authority of the boards of review to determine sentence appropriateness after modifying the approved findings.

. . . .

The Supreme Court squarely addressed the question of whether the language of Article 66(c), UCMJ, gave the board of review the authority to modify the life sentence to 20 years' confinement after the murder conviction was set aside. *Jackson v. Taylor*, 353 U.S. at 574, 77 S.Ct. 1027. After reviewing the plain language of the statute and its legislative history, the Supreme Court ruled, "It is manifest then that it was the intent of Congress that a board of review should exercise just such authority as exercised here." *Id.* at 577, 77 S.Ct. 1027.

. . . .

The Supreme Court specifically rejected the argument that a rehearing on sentence was required, finding "no authority in the Uniform Code for such a procedure." *Id.* at 579, 77 S.Ct. 1027. The Court noted that it would be "impractical and unfeasible to remand for the purpose of sentencing alone," because courts-martial have no continuity or situs, and the previously—detailed members would be scattered throughout the world. . . .

The Supreme Court also rejected the argument that a rehearing on sentence should be held before a new court-martial.

"Such a procedure would merely substitute one group of nonparticipants in the original trial for another. Congress thought the board of review could modify sentences when appropriate more expeditiously, more intelligently, and more fairly. Acting on a national basis the board of review can correct disparities in sentences and through its legally-trained personnel determine more appropriately the proper disposition to be made of the cases. Congress must have known of the problems inherent in rehearing and review proceedings for the procedures were adopted largely from prior law. It is not for us to question the judgment of the Congress in selecting the process it chose." *Id.* at 580, 77 S.Ct. 1027.

. . . .

. . . the plain language of the statute and the crystal-clear opinion of the Supreme Court in *Jackson v. Taylor* give this Court the responsibility and unfettered authority to reassess a sentence, even after modifying the approved findings, and provides no authority requiring a rehearing before a court-martial.

. . . .

We conclude that the will of Congress, as expressed in the plain language of the statute and applied by the Supreme Court in *Jackson v. Taylor*, is that this Court has the responsibility and authority to reassess the sentence, regardless of whether we can determine what the original trial court would have done. Furthermore, there is no statutory or regulatory requirement that we return this case or any case for a rehearing on sentencing alone.

. . . .

> As our superior court noted, "the operative language of Article 66(c) . . . has not changed a bit since the inception of the Uniform Code."
>
> . . . .
>
> Finally, as judge advocates with extensive experience with courts-martial, including rehearings on sentencing, we agree with our highest court that it would be unworkable to have a new court-martial try to decide a sentence in this case based largely upon their review of about 3,000 pages of record and exhibits. The judges of this Court can reassess sentences more expeditiously, more intelligently, and more fairly than a new group of non-participants. *Jackson v. Taylor*, 353 U.S. at 580, 77 S.Ct. 1027.

Id., 56 M.J. at 568-71.

Adhering to a "hierarchy of authority that controls this Court," the Air Force Court in Sills also fully recognized the appellate risk it was taking by choosing to adhere to Supreme Court precedent over contrary precedent of this Court when it cited to United States v. Allbery, 44 M.J. 226, 228 (C.A.A.F 1996) in their Sills opinion, Id. at 571. In an otherwise fractured decision, Allbery stands for the proposition that a court of criminal appeals is bound to follow the precedent of this Court and that a lower court's recourse to seek a change in the law concerning the "gambler's defense" established in United States v. Wallace, 15 C.M.A. 650 (C.M.A. 1966), was to urge this Court to reconsider and change its precedent. Allbery, 44 M.J. 227-28. Judge Breslin's stare decisis concern in Sills was

quickly realized when this Court reversed the Air Force Court less than three months later in a per curiam opinion in United States v. Sills, 56 M.J. 239 (C.A.A.F. 2002). This Court rejected the Air Force Court's thorough analysis on sentence-only rehearings and reaffirmed United States v. Miller's holding that the courts of criminal appeals are authorized to order them. Sills, 56 M.J. at 239.

But that did not end the discussion of Wallace and Allbery, and nor does it end the discussion here. Twelve years after Allbery, the Air Force Court's rejection of Wallace became the law of this Court in United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), where this Court overruled Wallace's gambler's defense in bad check cases on the same basis the Air Force Court previously espoused and attempted to do in Allbery.

Likewise, although the Air Force Court in Sills was required to respect the prior precedent of this Court in Miller, the Air Force Court in Sills should have urged this Court to reconsider and overrule Miller for all the compelling reasons the lower Court noted in their very persuasive opinion. For the reasons set forth in the United States' brief in this case and the rationale stated by the Air Force Court in Sills, amicus concurs that Miller should be overruled and the lower court in this case should be ordered to conduct a sentence reassessment.

CONCLUSION

Amicus respectfully requests this Honorable Court reverse the decision of the lower court and order the lower court to conduct a sentence reassessment.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, LT James M. Belforti, and Capt David Peters on 12 March 2015 via electronic filing.

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