IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim.App. Dkt. No. 201300341
Christopher A. QUICK, Sergeant (E-5) U.S. Marine Corps Appellee	)	USCA Dkt. No. 15-0347/MC

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FOR THE ARMED FORCES:

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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 had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a bad-conduct discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A general court-martial comprised of officer and enlisted members convicted Appellee, contrary to his pleas, of conspiracy to distribute indecent material, wrongfully viewing indecent material, and indecent conduct, in violation of Articles 81, 120c, and 134, UCMJ, 10 U.S.C. §§ 881, 920c, 934 (2012). The Members sentenced Appellee to six months of confinement, reduction to pay grade E-3, and a bad-conduct discharge. The

Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. The Record of Trial was docketed with the lower court on September 3, 2013.

On October 31, 2014, the United States Navy-Marine Corps Court of Criminal Appeals affirmed the guilty findings of conspiring to distribute an indecent visual recording and indecent conduct in violation of Articles 81 and 134, UCMJ, 10 U.S.C. §§ 881 and 934. *United States v. Quick,* 74 M.J. 517 (N-M. Ct. Crim. App. 2014). However, the court set aside and dismissed the guilty finding of wrongfully viewing an indecent visual recording in violation of Article 120c, UCMJ, 10 U.S.C. § 920c. *Id.* The court set aside the sentence and remanded the case for a sentence rehearing. *Id.* at 524. Appellee moved the court to reconsider its decision affirming the conspiracy charge, which was denied. The United States moved the court *en banc*, to reconsider its decision to remand for a sentence rehearing, which was denied on December 4, 2014.

Statement of Facts

A. Congress made no provision for sentence-only rehearings prior to 1983.

Unlike the current Uniform Code of Military Justice ("the Code"), Congress made no provision for the convening authority

or the Judge Advocates General to order sentence-only rehearings in versions of the Code prior to 1983. (J.A. at 59, 60, 62.)

When the Code was first adopted, the only rehearing powers granted by Congress were given in virtually identical grants of power to the boards of review and the convening authorities. In Article 63, the provision entitled "Rehearings," Congress spoke to convening authority powers:

> If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing. In such a case he shall state the reasons for disapproval. If he disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges.

Art. 63(a), 10 U.S.C. § 863(a) (1951); (J.A. at 59.) And:

> If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

Art. 66(d), 10 U.S.C. § 866(d) (1951); (J.A. at 60.)

B. <u>In 1983, Congress granted sentence rehearing powers in three different parts of the Code: court-martial convening authorities; the Judge Advocates General; and in cases requiring judge advocate review</u>.

In the Military Justice Act of 1983, Congress amended Article 60 specifically to permit convening authorities to order sentence rehearings: "A rehearing as to the sentence may be

ordered if the convening authority or other person taking action under this subsection disapproves the sentence." (J.A. at 69.)

Congress likewise amended Article 64, in cases of judge advocate review, to enable the general court martial convening authority, "except where the evidence was insufficient at the trial to support the findings, [to] *order a rehearing* on the findings, *on the sentence*, or on both..." (J.A. at 70-1 (emphasis added).)

Congress amended Article 69 to permit the Judge Advocates General to order sentence-only rehearings: "If the Judge Advocate General sets aside the findings *or sentence*, *he may*, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, *order a rehearing*." (J.A. at 72 (emphasis added).)

Congress did not amend Article 66 to add the power to order sentence-only rehearings to the Courts of Criminal Appeals. To date, Article 66(d) remains nearly identical to its original enactment:

> If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

Art. 66(d), 10 U.S.C. § 866(d) (2012).

C. The Navy Marine Corps Court of Criminal Appeals remanded Appellee's case for a sentence-only rehearing.

Appellee and a former Marine, JM, simultaneously engaged in sexual acts with TR, a civilian, in Appellee's barracks room. (J.A. at 24-5, 32-3.) During this sexual encounter, Cpl H used his smart phone to surreptitiously video record the three of them for a few seconds until TR saw what he was doing. (J.A. at 35-8.) After the encounter, Cpl H showed Appellee the video recording and, at Appellee's request, Cpl H forwarded the video to Appellee. (J.A. at 39-42, 45-9.)

Appellee originally faced thirteen years of confinement, a dishonorable discharge, total forfeitures, and reduction to paygrade E-1. (J.A. at 43.) He was sentenced to six months of confinement, reduction to pay grade E-3, and a bad-conduct discharge. (J.A. at 44.)

Based on the lower court's action, Appellee faced twelve years of confinement, a dishonorable discharge, total forfeitures, and reduction to paygrade E-1. *Quick,* 74 M.J. at 524. The lower court found that its action created "a dramatic change in the penalty landscape" necessitating a sentence-only rehearing. *Id.*

Summary of Argument

Based on the plain text of Article 66(d), when read in the context of the overall statutory scheme of the Uniform Code of

Military Justice, Congress has not granted the Courts of Criminal Appeals the authority to order sentence-only rehearings. Furthermore, this Court is bound by the precedent in *Jackson v. Taylor*, which concluded that the then-boards of review had no authority to order sentence-only rehearings. Therefore, *Miller* was wrongly decided and this Court should overturn both it and its progeny.

Argument

> THE PLAIN TEXT OF ARTICLE 66(d), CONGRESS' STATUTORY SCHEME, LEGISLATIVE HISTORY, AND THE SUPREME COURT'S RULING IN *JACKSON V. TAYLOR,* GRANT NO POWER TO THE COURTS OF CRIMINAL APPEALS TO ORDER SENTENCE-ONLY REHEARINGS. *MILLER* AND ITS PROGENY SHOULD BE OVERTURNED.

A. The plain language of Article 66(d) and provisions in the surrounding Code limit Courts of Criminal Appeals to ordering rehearings only when "the findings *and* sentence" are set aside.

1. Statutes are reviewed *de novo.* When interpreting statutes, this Court looks first to the plain and unambiguous meaning of the statute and then to the statutory scheme as a whole.

This Court reviews issues of statutory interpretation *de novo*. *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014).

> In all statutory construction cases, the court begins with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Id., (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

"Where the language of the statute is clear and Congress has directly spoken to the precise question at issue," this Court must "give effect to the unambiguously expressed intent of Congress." *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014)(internal quotation marks and citations omitted). When the statute's language is plain, the sole function of the courts is to enforce it according to its terms. *Id.* "There is no rule of statutory construction that allows for a court to append additional language as it sees fit." *Id.* (quoting *Fides, A.G., v. Comm'r*, 137 F.2d 731, 734-35 (4th Cir. 1943)).

"In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McPherson*, 73 M.J. at 398-399 (Baker, C.J., dissenting) (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). This Court "must presume that a legislature says in a statute what it means and means in a statute what it says there." *McPherson*, 73 M.J.

at 395 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

2. When read as a whole, the Code grants only convening authorities and the Judge Advocates General the power to order sentence-only rehearings.

"When a statute is a part of a larger Act . . . the starting point for ascertaining legislative intent is to look to other sections of the Act *in pari materia* with the statute under review." *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

There is no reference to sentence-only rehearings in the Code until 1983. (J.A. 59-62.) Congress then specifically granted the sentence-only rehearing power to the Judge Advocates General and convening authorities. 10 U.S.C. §§ 860(f)(3), 864(c)(1), 869(c) (2012).

Article 60(f)(3) states that a rehearing on sentence may be ordered if the convening authority, or another person taking action in place of the convening authority, disapproves the sentence. 10 U.S.C. § 860(f)(3). But the phrase "rehearing as to sentence" only appears in this Article and nowhere else in the Code.

Article 64 addresses review by a judge advocate. 10 U.S.C. § 864. Congress again used specific language to allow for the "person to whom the record of trial and related documents are sent" to "order a rehearing on the findings, *on the sentence*, or on both." 10 U.S.C. § 864(c)(1) (emphasis added). The "person" who received the record is identified as the one "exercising general court-martial jurisdiction over the accused at the time the court was convened." 10 U.S.C. § 864(b).

And in Article 69(c), Congress permits the Judge Advocate General to order a rehearing when she has set aside "the findings *or sentence*." 10 U.S.C. § 869(c) (emphasis added).

However, Congress never amended Article 66(d) to include such language. 10 U.S.C. § 866(d). The only way to construe Article 66(d) as allowing the service courts to order sentence-only rehearings, is to "read in" certain language not present in the statute.

3. Courts may not "read language" from one section of a statutory scheme into another section of the same statutory scheme, when that language was specifically excluded from the section of the statute by Congress.

In *United States v. Naftalin*, the Supreme Court reversed the Eighth Circuit, which vacated the respondent's conviction under the Securities Act because the Government failed to prove respondent's fraudulent short-selling scheme also injured "investors" which, the Circuit held, was required by the

statute. 441 U.S. 768, 770 (1979). The Court held that the Securities Act applied to frauds against brokers as well as investors. *Id.* at 771. Specifically, the Court rejected the respondent's argument that the phrase "upon the purchaser" found in one subsection of the statute, should be "read into" the other two subsections of the same statute. *Id.* at 773. The Court responded to this argument succinctly by stating "Congress did not write the statute that way." *Id.*

"Where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)(quoting *City of Burbank v. General Electric Company*, 329 F.2d 825 (9th Cir. 1964)). This Court should not "read in" words that would impute the power expressly granted by Congress to the convening authorities and Judge Advocates General to the Courts of Criminal Appeals.

Therefore, *United States v. Miller*, 10 C.M.A. 296 (C.M.A. 1959) is even less viable today than it was at the time of its holding, because it now requires the power to order a sentence-only rehearing be "read into" Article 66(d). But this power was expressly granted to other actors in other portions of the Code by Congress. The Supreme Court rejects the practice of reading some language used in one part of a statute into another part of

the same statutory scheme where it has been excluded. So too should this Court.

4. Congress' lack of action in not overturning *Miller* is irrelevant, but Congress' decision to not amend Article 66, but rather to continue to reaffirm the statutory scheme, is binding.

In *Miller*, the Court of Military Appeals found the "literal" reading of Article 66(d) to be "unreasonable" and instead read the "and" as an "or" to avoid imputing an "unlikely intent" to Congress. *Miller*, 10 C.M.A. at 299. The *Miller* court ruled that boards of review could order sentence-only rehearings, construing Article 66(d) to read, "If the board of review sets aside the findings or sentence, it may . . . order a rehearing." *Id.* at 299.

Notwithstanding *Miller*, Congress never changed Article 66(d) to mirror the Court of Military Appeals' replacement of the word "and" with "or," despite having amended Article 66(d) twice since *Miller*. (J.A. at 64-65, 74.)

One could read this as Congress simply overlooking *Miller* if it had not also made significant changes to other portions of the Code to allow for other actors to order sentence-only rehearings. But Congress made these other changes, establishing a statutory scheme in which certain actors, such as the convening authority and the Judge Advocates General, may order

sentence-only rehearings. This power is not meant to extend to the Courts of Criminal Appeals.

5. When considered in the context of the powers granted to the convening authority and the Judge Advocates General, the plain meaning of Article 66(d) does not permit the Courts of Criminal Appeals to order sentence-only rehearings.

"If the Court of Criminal Appeals sets aside the findings and sentence, it may order a rehearing." 10 U.S.C. 66(d). By utilizing this sentence structure, Congress made the service courts' ability to order a rehearing conditional.

Particularly in light of the remainder of the Code, the key word in the rehearing power granted in Article 66(d), as pointed out in *Miller*, is the conjunction "and." *Miller*, 10 C.M.A. at 299. The word "and" makes the phrase conjunctive, *requiring* the setting aside of both the findings and the sentence in order to allow a Court to order a rehearing. *See Zorich v. Long Beach Fire Dep't & Ambulance Serv.*, 118 F.3d 682, 684-685 (9th Cir. 1997) (reversing District Court ruling that statute was inapplicable, reasoning the relevant statute "separates these two categories with the disjunctive 'or' rather than with 'and,' indicating that Congress intended the Act to apply to an employee either individually or through his employer."). *See also United States v. O'Driscoll*, 761 F.2d 589, 597-98 (10th Cir. 1985) ("When the term 'or' is used, it is presumed to be used in

the disjunctive sense unless the legislative intent is clearly contrary.").

As the *Miller* court pointed out, it was necessary to change the word "and" to "or" in order to read Article 66(d) as allowing the then boards of review to order sentence-only rehearings. *Miller*, 10 C.M.A. at 299. The *Miller* court avoided this "literal" reading of Article 66(d) to allow the boards of review to order sentence-only rehearings. *Id.* This implies the "literal," plain text reading of Article 66(d) requires the setting aside of both the findings and the sentence before the Courts of Criminal Appeals may order a rehearing.

Congress also used the definite article "the" to modify "findings," because it particularizes the subject. *American Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000)("it is a rule of law well established that the definite article 'the' particularizes the subject which it precedes."); *see also Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004) ("because Congress used the definite article 'the,' we conclude that . . . there is only one order subject to the requirements"); *Warner-Lambert Corp. v. Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) (reference to "the" use of a drug is a reference to an FDA-approved use, not to "a" use or "any" use).

Congress did not authorize the Courts of Criminal Appeals to order a sentence-only rehearing if it set aside "a finding

and the sentence", "some findings and the sentence", or "any finding and the sentence." Congress did not draft the Article to read "If the Court of Criminal Appeals sets aside findings and sentence, it may order a rehearing." Rather, it used "the" to particularize "findings" to refer to an integrated whole, requiring a rehearing on both the findings and the sentence.

6. Congress uses the phrases "the findings and sentence" or "the findings or sentence" in different parts of the Code to convey different meanings.

"A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007). Likewise, "it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002). When Congress uses different words and phrases throughout a statute, courts should not ordinarily equate the two phrases. *Id.*, *See also Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same

meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").

Congress does not use the phrase "the findings and sentence" consistently throughout the Code. Rather, in one notable example, Congress uses the phrase "the findings or sentence" instead of "the findings and sentence."

When referring to the authority of the Judge Advocates General, Congress used the phrase "the findings or sentence" as the condition precedent to the Judge Advocate General's authority to order a sentence-only rehearing. 10 U.S.C. § 869(c). This was a deliberate word choice of Congress, which modified this section of the Code after *Miller*, yet declined to make such a change to Article 66(d).

The only way to read these different sections today and conclude that they both confer the power to order a sentence-only rehearing on these respective actors, is to assume Congress used these phrases interchangeably. This Court should not disregard this difference as a "mistake in draftsmanship." *Russello*, 464 U.S. at 23. Such a conclusion is not consistent with the Supreme Court's application of statutory construction. Here, this Court should not assume these two different phrases have the same meaning in both Articles 66(d) and 69(c). Rather, this Court should give these words their plain meaning.

Here, Congress "said what it meant and meant what it said." *McPherson*, 73 M.J. at 395. This Court must "assume Congress used different language for a reason." *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010).

The phrase "the findings and sentence" utilized in Article 66(d) has a plain and unambiguous meaning, particularly when considering its context within the overall statutory scheme of the Code, and the use of the phrase "the findings or sentence" in another Article in the Code.

B. This Court is bound by *Jackson v. Taylor*.

The Court of Criminal Appeals is not free to ignore this Court's precedent. *United States v. Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996). The same principle applies to this Court as to Supreme Court precedent. "A precedent-making decision may be overruled by the court that made it or by a court of a higher rank." *Id*. (internal citations omitted). "That discretion, however, does not reside in a court of a lower rank." *Id.*

Even if the plain text of Article 66(d), the overall statutory scheme, and the distinct uses of "the findings and sentence" and "the findings or sentence" within the Code did not bar the service courts from ordering sentence-only rehearings, this Court is still bound by *Jackson v. Taylor*. 353 U.S. 569 (1957). In *Jackson*, the Supreme Court found that no such authority exists. 353 U.S. at 579-580.

The Supreme Court decided *Jackson* in 1957. 353 U.S. at 569. In *Jackson*, three soldiers were sentenced to life in prison for the attempted rape and murder of a Korean woman. *Id.* at 570; (J.A. at 91.) The board of review set aside the finding on the murder charge and reassessed the sentences to twenty years of confinement for the attempted rape charge. (J.A. at 93.) The petitioner sought relief via habeas corpus arguing that "the action of the Review Board in reserving twenty years of the life sentence imposed by the Court-Martial for the crime of murder, even though it had reserved and set aside the conviction, was null and void." *Jackson*, 353 U.S. at 571.

Long before Congress specifically granted the power to order sentence-only rehearings to the convening authority and the Judge Advocates General in 1983, the petitioner in *Jackson* and the Solicitor General considered the possibility of a sentence-only rehearing. The petitioner specifically argued as an alternative that his case "should be remanded for a rehearing before a new court-martial." *Id.* at 580.

The Solicitor General considered this argument through the prism of then-Articles 62 and 63. (J.A. at 143.) He first argued that the case could not be considered a mere action in revision pursuant to Article 62, because it would be impossible to comply with that Article's requirement that such a proceeding could only be taken up by the original members of the court-

martial. (J.A. at 143.) Solicitor General Rankin then considered the classification of this hypothesized remand as a "limited hearing" pursuant to Article 66(d), but immediately argued that this would make little sense. (*Id.*) This is because such a rehearing would have to be before different court-martial members pursuant to Article 63 and, as Solicitor General Rankin aptly argued, the very same thing could be done by the boards of review "more expeditiously, more intelligently, and more fairly." (*Id.*) He finished by arguing that this would also allow for more uniformity of sentence, which was a "major consideration of Congress." (*Id.*)

Justice Clark was clear when expressing the Court's specific rejection of the petitioner's argument. *Jackson*, 353 U.S. at 580. But the Court also refused to in any way endorse even the Solicitor General's intimation that, despite the statutory scheme, perhaps a "limited rehearing" accomplished by a creative reading of Article 66(d) might be possible to accomplish the sentence reassessment power explicitly granted to the boards of review. *Id.* The Supreme Court found no such authority existed.

> *We find no authority in the Uniform Code for such a procedure* and the petitioner points to none. The reason is, of course, that the Congress intended that the board of review should exercise this power. [T]he nature of a court-martial proceeding makes it impractical and unfeasible to remand for the purpose of sentencing alone . . . Congress thought the board

> of review could modify sentences when appropriate more expeditiously, more intelligently, and more fairly [then a sentence rehearing]. . . . 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. (emphasis added).

This explicit rejection of the possibility of sentence-only rehearings under virtually identical language to today's Article 66(d) is neither confusing, nor is it mere dicta. *United States v. Winckelmann,* 73 M.J. 11, 17 (C.A.A.F. 2013) (Stucky, J. and Ryan, J., concurring). Rather, "it is a core holding that this Court is required to follow." *Id.* Indeed, the Supreme Court explicitly considered whether Congress intended, and the statutory text permitted, the boards of review to conduct both sentence reassessments *and* order sentence-only rehearings. The *Jackson* case is squarely about the lower courts' scope of authority when reviewing court-martial sentences after the board of review has set aside a finding of guilty but affirmed another.

Despite the Supreme Court's clear language, this Court's predecessor rejected both *Jackson* and the clear statutory text two years later in *Miller*. *Miller*, 10 C.M.A. at 299. The *Miller* court did not disregard the precedent in *Jackson* because it was "dicta," nor did it do so because it was confusing,

notwithstanding what this Court stated in *Winckelmann*. Rather, the *Miller* court simply changed the words in the statute to avoid a "literal" reading of Article 66(d). *Id.* The *Miller* court reasoned that to read the statute literally would lead to "an entirely unreasonable construction" and therefore changed the word "and" to "or." *Id.*

But as the Supreme Court has recently stated about itself: "this Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that Congress must have intended something broader." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014)(internal quotations omitted). Nor could the *Miller* court disregard the word "and" and substitute the word "or" in order to effectuate its desired outcome and allow the boards of review broader powers than they were granted by Congress. *Miller* was wrongly decided and should be overturned.

C. To the extent *Miller* and subsequent cases authorize service courts to order sentence-only rehearings, that interpretation of the Code should be abandoned.

The doctrine of stare decisis is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). However, "stare decisis is a principle of decision

making, not a rule, and need not be applied when the precedent at issue is unworkable or badly reasoned." *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003). This Court has previously overruled precedents not found to be "unworkable." *Id.*

The Supreme Court has provided factors for considering whether to overturn precedent: (1) workability; (2) the antiquity of the precedent; (3) the reliance interests at stake; and, (4) whether the decision was well-reasoned. *Citizens United v. FEC*, 558 U.S. 310, 362-363 (2010). These factors favor overturning *Miller*.

1. The judicial grant of authority to service courts to order sentence-only rehearings in *Miller* is at odds with the history, purpose, text, and structure of the Code.

In *Miller*, the Court of Military Appeals answered the Army Judge Advocate General's certified issue of "whether a board of review has legal authority to order a rehearing limited to the sentence only." *Miller*, 10 C.M.A. at 298. The *Miller* court's interpretation of the Code is wholly inconsistent with a plain text reading of both Article 66(d) and *Jackson*.

As discussed *supra*, the *Miller* court declined to read the statute literally and instead rewrote the operative phrase "findings and sentence" to its opposite "findings or sentence." *Id.* at 299. The *Miller* court erroneously made the policy

determination that "there is no legitimate reason why a valid conviction must be overturned and a rehearing on findings ordered, merely to purge an error that infests only the sentence and requires a rehearing thereon." *Id.*

The *Miller* court further reasoned that:

> The provisions of the Code do not deny the authority to order rehearings limited to sentence only, and, in fact, a construction granting that power is dictated by rudimentary logic, for the express authority to grant the more extensive relief——a complete rehearing ——impliedly authorizes a grant of a separate and divisible part thereof——a rehearing on sentence only.

Id. This argument is flawed for two reasons.

First, that Congress did not specifically state "the boards of review have no authority to order a sentence rehearing" does not support the *Miller* court's position. Congress is empowered under Art. I, § 8 of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces." *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975). All powers under the Code emanate from Congress. Without a statutory grant of power, no such power exists. Any express statement prohibiting the service courts from ordering sentence rehearings would have been surplusage.

Second, it is incorrect to presume that the authority to order total rehearings of both the findings and sentence implicitly includes the power to order sentence-only rehearings. This justification by the *Miller* court is presumably based on

the idea that the lesser power of ordering a rehearing as to only one portion of the case must be included within the greater power to order a complete rehearing of the entire case. To put it another way, "the board of review can order a rehearing on the findings and the sentence, therefore it is implied that it can order a rehearing on just the sentence when only a portion of the case has been set aside."

However, this construct only works if this broader power also includes the power to order a "findings-only" rehearing when the sentence has otherwise been affirmed. After all, the findings are only one portion included in the overall case and if the board can order a rehearing of the overall case, it certainly can order a rehearing on this one portion of it.

But such a result is nonsensical because if the findings have been set aside, the sentence is null and void. To put it another way, an accused's punishment cannot be affirmed when his convictions have been set aside. Therefore, the *Miller* court's reliance on "rudimentary logic" is inapt.

Finally, the *Miller* court relied on the fact that the Court of Military Appeals had previously ordered sentence only-rehearings. *Miller*, 10 C.M.A. at 299. Though this may have been a compelling argument for the petitioner in *Jackson*, it lacks merit when applied to a Supreme Court decision. Simply put, the Supreme Court was superior to the then Court of

Military Appeals. *See Allbery*, 44 M.J. at 228. Regardless of what that Court had previously done, the ruling of the Supreme Court still prospectively applies until and unless the Supreme Court overrules its own precedent. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("For it is this Court's prerogative alone to overrule one of its precedents.").

None of the justifications put forward by the *Miller* court can explain away the plain text of Article 66(d), the overall statutory scheme of the Code, or the decision in *Jackson*. *Miller* was poorly reasoned and wrongly decided.

2. There are no reliance interests at play based on *Miller* and its progeny.

"Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828. Here, there are no such reliance interests.

The only possible contract interests that could be implicated in sentence-only rehearings would be within the context of pretrial agreement cases. But surely no accused would decide to enter, or not enter, such an agreement in reliance on an expectation that the Court of Criminal Appeals would remand his case for a sentence-only rehearing. This lack of reliance interests cuts in favor of the reversal of *Miller*.

3. The antiquity of *Miller* cuts against reversal.

Miller is admittedly several decades old, so this factor cuts against reversal.

4. Sentence-only rehearings are inefficient.

Sentence rehearings are inefficient and costly. Sentence-only rehearings can create a "considerable societal cost in time, money, and emotional investment." *United States v. Moffeit*, 63 M.J. 40, 42-43 (C.A.A.F. 2006) (Baker, J., concurring). Though the *Moffeit* concurrence cited scenarios "when a sentence is reassessed by a Court of Criminal Appeals and then overturned by this Court——sending it back years later for a sentence rehearing," the same practical concerns apply in all sentence-only rehearings:

> Finality is lost. Sentencing witnesses must be recalled to testify about events long since past. Military members must also be pulled from the line of duty.

Id. "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth v. Quarles*, 350 U.S. 11, 17 (1955). Every moment spent conducting judicially-created, but not Congressionally-enacted or even authorized, sentence-only rehearings is time servicemembers detailed to these proceedings are unable to carry out duties otherwise assigned them by superiors in the chain of command.

Though sentence-only rehearings may not be totally "unworkable," they conflict with mandates of the Code. *See Curry v. Secretary of Army*, 595 F.2d 873, 877 (D.C. Cir. 1979) (discussing need for military justice system to be efficient). This factor favors reversing *Miller*.

D. Congress reasserted its original intent by twice declining to change the word "and" to "or" in Article 66(d) or grant sentence-only rehearing authority to the Courts of Criminal Appeals. Furthermore, Congress specifically empowered convening authorities and Judge Advocates General to order sentence-only rehearings.

Stare decisis considerations have "special force in the area of statutory interpretation" because "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter" what the courts have done. *Winckelmann*, 73 M.J. at 22 (Ryan, J., concurring) (quoting *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). However, danger lies in relying primarily on legislative inaction to affirm wrongly decided precedent, even those based on statutory interpretation.

Justice Thomas has recently noted:

> Arguments from legislative inaction are speculative at best. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of one of this Court's decisions. Congressional inaction lacks persuasive significance because it is indeterminate; several equally tenable inferences may be drawn from such inaction. Therefore, it does not follow . . . that Congress' failure to overturn a . . . precedent is reason for this Court to adhere to it.

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) (Thomas, J., concurring) (internal citations and quotation marks omitted). The indeterminate nature of legislative inaction is particularly evident in this case given the frankness of the *Miller* court and the subsequent actions of Congress.

1. Congress has not amended Article 66(d) to reflect the *Miller* court's reading, despite the fact that it has twice amended Article 66(d) in other ways.

Since *Miller*, Congress has amended Article 66(d) twice. (J.A. at 64-65, 74.) Both times Congress changed the name of the now Courts of Criminal Appeals, first from "board of review" to "Court of Military Review" and then to the current title. (*Id.*)

Miller construed the reading of Article 66(d) from the phrase "the findings and sentence" to "the findings or sentence." *Miller*, 10 C.M.A. at 299. When considered together, these facts illustrate how utilizing legislative inaction to discern legislative intent can be misleading.

Here, one of two possibilities is true. Either Congress is simply unaware of the action of the *Miller* court or Congress is aware of the *Miller* court's action and has affirmatively declined to adopt its re-writing of the statute, even when it has twice amended Article 66(d).

If the former is true, this Court can lend no weight to the contention that Congressional "inaction" is an endorsement of the *Miller* court's reasoning. If the latter is true, then Congress has affirmatively declined to adopt the *Miller* court's reasoning. For if Congress agreed with the *Miller* court's position that reading Article 66(d) literally would lead to "an unreasonable construction," it would have adopted the Court's re-writing of the statute. But Congress has declined to do so.

It is illogical to claim that Congressional inaction is an endorsement of the *Miller* court's action. Congress may be unaware of the Court's action in *Miller*. Or, far from Congressional inaction, there may have been two re-affirmations of Congress' original intent.

2. Congress has changed other portions of the Code to grant the Judge Advocates General and convening authorities the power to order sentence rehearings, but has not done so with the courts.

Articles 60, 64, and 69 allow the convening authorities and the Judge Advocates General to order sentence-only rehearings. *Supra* at 8-9. But these Articles did not contain such language at the time of *Miller.* (J.A. at 69-72.) Indeed, the only reference to "rehearings" in the Code prior to 1983 came in Article 63, which gave no support for the concept of sentence-only rehearings. (J.A. at 59-60.)

This shows that Congress took the affirmative step to specifically authorize convening authorities and the Judge Advocates General to order sentence-only rehearings, but did not make any similar changes to Articles 66 or 67 to allow the courts that same power.

Congress' failure to specifically overturn *Miller* does not serve as a legislative imprimatur. On the contrary, if any "Congressional inaction" is elucidative of Congressional intent, it is Congress' refusal to specifically allow the courts to order sentence-only rehearings, as it did convening authorities and the Judge Advocates General.

E. The *Miller* grant of authority to service courts breeds judicial and warfighting inefficiency, and serves to reduce uniformity of sentences.

The Supreme Court has "long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). This is because the primary business of the military is "to fight or be ready to fight wars should the occasion arise." *Toth*, 350 U.S. at 17. As the D.C. Circuit observed:

> Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be *practical, efficient, and flexible*.

Curry, 595 F.2d at 877 (emphasis added).

1. Sentence rehearings are costly and time consuming.

The plain text meaning of Article 66(d), the statutory scheme of the Code, and the binding interpretation of the Supreme Court make even more sense when considering these interests of practicality, efficiency, and flexibility. As the Supreme Court noted and this Court recently reaffirmed, remanding a case for a sentence rehearing "to a new court-martial 'merely substitute[s] one group of nonparticipants in the original trial for another.'" *Winckelmann*, 73 M.J. at 13 (quoting *Jackson*, 353 U.S. at 580).

The Courts of Criminal Appeals can modify sentences "more expeditiously, more intelligently, and more fairly" than a new court-martial. *Id.* (quoting *Jackson*, 353 U.S. at 580). As Chief Judge Baker has explained, "there is considerable societal cost in time, money, and emotional investment" when a case is remanded for a sentence rehearing. *Moffeit*, 63 M.J. at 42-43 (Baker, J., concurring). "Finality is lost. Sentencing witnesses must be recalled to testify about events long since past. Military members must also be pulled from the line of duty." *Id.*

This case is a good example of the administrative challenges of holding a sentence rehearing. Appellee was

sentenced on April 29, 2013, nearly two years ago. Holding a sentence rehearing will require calling him back onto active duty from appellate leave and finding a unit to place him with until his rehearing can be held. It is likely that every participant in this case has since been reassigned to a new billet. An entirely new panel of members, presumably with enlisted representation, must be convened, pulling several Marines from their duties for at least a day. A new voir dire must take place. Finally, the Victim in this case, a civilian, must be recalled to testify about her experience again.

All of this must be done to hold a rehearing on sentence where the Appellee was originally sentenced to six months, reduction to E-3, and a bad-conduct discharge. Surely the Court of Criminal Appeals could have reassessed this sentence and cured any prejudice to Appellee, while at the same time saving time, money, and aggravation to the Victim. Instead, this process must repeat itself. This is "impractical, inefficient, inflexible," and not what Congress intended.

2. The *Miller* framework has created inconsistency in both appellate sentence remedies and court-martial sentences. Courts of Criminal Appeals now order sentence-only rehearings for some cases, but reassess for others. This undermines Congress' goal of sentence uniformity, and creates post-trial delay.

Not only do time, money, and military readiness matter——so does uniformity of sentences. In its report on the proposed

bill creating the Code to the full Senate, the Armed Services Committee recommended that the board of review have the power to "set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate." (J.A. at 76.) The Committee stated specifically "it is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces." (*Id.*)

Solicitor General Rankin argued, "only the board of review is in a position to have in mind the sentences imposed in similar cases when determining sentence appropriateness, a major consideration in the eyes of Congress." *Id.* The Supreme Court adopted the Solicitor General's argument that the boards of review could reassess sentences "more expeditiously, more intelligently, and more fairly" verbatim. *Jackson*, 353 U.S. at 580. The Court went on to clearly state Congress' intent on this matter:

> 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.

The practice of remanding some cases for sentence-only rehearings and reassessing others has thwarted Congress' express

intent for uniformity as well as this Court's preference for consistency as articulated in *Winckelmann*. The Courts of Criminal Appeals have been unpredictable in which cases will be remanded and which will be reassessed.

Here, Appellee originally faced thirteen years of confinement, a dishonorable discharge, total forfeitures, and reduction to paygrade E-1. (J.A. at 43.) After direct review, he now faces twelve years of confinement, a dishonorable discharge, total forfeitures, and reduction to paygrade E-1. *Quick,* 74 M.J. at 524. This is a negligible difference of one year of confinement, but the lower court found this to be a "dramatic change in the penalty landscape," under the equally novel precedent created post-*Miller* to help military appellate courts analyze their sentence-rehearing powers created out of whole cloth. *Id. See, e.g., United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000) ("The elimination of the rape and maltreatment charges drastically changed the penalty landscape in this case."); *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990) ("there are occasions when the only fair course of action is to have an accused resentenced at the trial level.").

But compare this case with another recent case in which the lower court found a confinement variance of one year to not be "a dramatic change" in the sentencing landscape. *United States v. Solomon*, No. 201100582, 2014 CCA LEXIS 599 (N-M. Ct. Crim.

App. Aug. 21, 2014). In yet another recent decision by the Court of Criminal Appeals, no dramatic change was found when the appellant's overall confinement exposure was reduced from twenty-five years and three months to eighteen years and three months. *United States v. Pearce*, No. 201100110, 2015 CCA LEXIS 46 (N-M. Ct. Crim. App. Feb. 12, 2015).

In *Pearce*, the court relied on the fact that "both punishments are so far removed from the six months of confinement actually awarded by the members as to render the difference legally insignificant." *Id.* However, this was not a factor considered by the same court in this case, where Appellee received the same six months of confinement which was "far removed" from the potential punishments of thirteen and twelve years of confinement. *Quick,* 74 M.J. at 524. It is notable that these cases were decided very close in time, so the inconsistencies cannot be written off as outliers based on changes in times, attitudes, and personnel.

Sentence-only rehearings cost money, undermine case finality, frustrate uniformity of sentence, significantly inconvenience victims, and pull service members away from their duties. This is not what Congress intended when enacting the Code. In addition to the language of Article 66(d), the statutory scheme, and the interpretation of the Supreme Court, these policy concerns also reveal Congressional intent.

Conclusion

Wherefore, the Government respectfully requests that this Court reverse the decision of the lower court and order the lower court to conduct a sentence reassessment.

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on March 2, 2015.

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