IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

JAMES M. BELFORTI
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443

MARK JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 34114

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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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 the Case

On January 30, 2015, the Judge Advocate General of the Navy filed a certificate for review of the United States Navy-Marine Corps Court of Criminal Appeals' decision in this case to this Honorable Court. On March 2, 2015, Appellee filed its Brief. On April 1, 2015, Appellant filed his Answer. Appellee replies herein.

Argument

A. The United States does not contend that "all findings" must be set aside for Courts of Criminal Appeals to order a rehearing.

Contrary to Appellee's claim, the United States does not argue that a Court of Criminal Appeals must set aside "all the findings and sentence" to order a rehearing. (Appellee's Br. at 7.) A Court of Criminal Appeals cannot order a sentence-only

rehearing when it sets aside the findings. Rather, because the findings and sentence are an "integrated whole," it must also order a rehearing on any findings it sets aside.

If the Court of Criminal Appeals sets aside a finding or findings but does not authorize a rehearing on both the set-aside findings and sentence, it must reassess the sentence.

B. Appellee's argument ignores this Court's own reading of Article 66(d).

Appellee argues that since the lower court set aside and dismissed a finding and the sentence, then pursuant to 1 U.S.C. § 1, "the findings and sentence" were set aside and, therefore, the lower court was authorized to order a rehearing. (Appellee's Br. at 12.) This argument sidesteps the Court of Military Appeals' reading of Article 66(d) in *United States v. Miller*, 10 C.M.A. 296 (C.M.A. 1959).

In *Miller*, a case similar in procedural posture to Appellant's, the appellant had been convicted of two larcenies and one wrongful sale of United States military property. *Id.* at 297. The board of review set aside the larceny convictions for factual insufficiency and ordered a sentence rehearing. *Id.*

But the *Miller* court did not rely on the "clear and unambiguous" reading of Article 66(d) that Appellee adopts. (Appellee's Br. at 12.) Instead, the Court explicitly and judicially replaced the word "and" with the word "or" in Article

66(d). *Miller*, 10 C.M.A. at 299. The Court did this precisely to avoid what it considered to be an "unlikely intent" of Congress. *Id.*

Likewise in *Jackson*, the board of review set aside one finding for legal and factual insufficiency, upheld another, and reassessed the sentence. *Jackson v. Taylor,* 353 U.S. 569, 570-571 (1957). Yet the Supreme Court explicitly stated that boards of review had no authority to order sentence rehearings, clearly rejecting Appellee's claim that a sentence rehearing was the proper remedy under Article 66(d). *Id.* at 579-580.

This Court also considered this issue in *United States v. Sills*, 56 M.J. 239 (C.A.A.F. 2002). In *Sills,* the Air Force Court of Criminal Appeals set aside one specification, and ruled it had no authority to order a rehearing pursuant to *Jackson*. *Id.* Though the *Sills* court overturned the lower court, it did not utilize Appellee's reading of Article 66(d) to do so. *Id.* Rather, it relied on: (1) the routine practice of intermediate courts ordering sentence rehearings; (2) the President's creation of rules governing sentence rehearings in the Manual for Courts-Martial; and, (3) that Congress had not intervened or expressly limited intermediate courts from ordering such hearings. *Id.* at 240. The *Sills* Court did not cite or mention the statutory language of Article 66(d). *Id.*

This Court, finally, recently considered a similar

situation where the Army Court of Criminal Appeals set aside two of several convictions for legal and factual insufficiency, approved the other convictions, and reassessed the sentence. *United States v. Winckelmann*, 73 M.J. 11, 13 (C.A.A.F. 2013). Two Judges of this Court, in a concurrence, rejected Appellee's reading of Article 66(d), and agreed with the Supreme Court's reading of the statute in *Jackson*. *Id.* at 17 (C.A.A.F. 2013) (Stucky & Ryan, JJ., concurring).

And the *Winckelmann* majority did not rely on Appellee's current "clear and unambiguous" reading of Article 66(d) when discussing either *Miller* or *Jackson*. 73 M.J. at 14. Instead, the *Winckelmann* majority cited the actions of the *Miller* court and stated: "this consistent practice has stood since 1959 without legislative amendment by Congress." 73 M.J. at 14. As in *Jackson*, *Miller*, and *Sills*, the *Winckelmann* majority did not state that Article 66(d) was satisfied in that case because the lower court had set aside at least one of the findings and the sentence. *Id.*

Appellee alleges that the United States overcomplicates the issue and ignores a plain text reading of Article 66(d). (Appellee's Br. at 9.) Not so. Appellee disregards the Code's statutory scheme. If this matter were as simple as Appellee claims, the Supreme Court would have positively found the sentence rehearing authority Appellee claims, as would the

Miller court——without resorting to exchanging "and" for "or" in Article 66(d).

This Court should look to the statutory language as well as the Code's statutory scheme when determining the meaning of Article 66(d). *United States v. McPherson*, 73 M.J. 393, 398-399 (C.A.A.F. 2014) (Baker, C.J., dissenting) (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). This Court should look to Articles 60, 64, and 69, in comparison to Article 66(d), when considering Congress' statutory scheme.

C. The language of Articles 60, 64, and 69, UCMJ, differentiate rehearings from Article 66(d) and do not provide mere "explanatory language" to a term with a "common and ordinary meaning."

1. Appellee disregards the plain meaning of "rehearing" within Article 66(d).

Appellee argues that the position of the United States "requires this Court to read 'rehearing' as a synonym for 'retrial.'" (Appellee's Br. at 12-13.) Appellee dismisses the fact that Congress uses different language when referring to rehearings in different portions of the Code as merely "explanatory language." (Appellee's Br. at 14.) To justify this, Appellee conflates the definition of "rehearing" with the Black's Law Dictionary definition of "hearing" arguing that a "rehearing" refers to "a judicial session...held for the purpose of deciding issues of fact or of law." (Appellee's Br. at 13.)

Black's Law Dictionary separately defines the terms

"hearing," "sentence hearing," and "rehearing." *Black's Law Dictionary* 737, 739, 1221, 1311 (8th ed. 2004). Further, Appellee ignores the fact that Black's Law Dictionary has a separate definition for "sentencing hearing" which refers the reader to the entry for "presentence hearing." *Black's Law Dictionary* 739 (8th ed. 2004). It is Appellee, not the United States, who ignores the plain meaning of the word "rehearing" and instead adopts the definition of a different term in order to serve his own argument. (Appellee's Br. at 13.)

The definition of "rehearing" from Webster's Dictionary is "a second or new hearing by the same tribunal." *Merriam-Webster's Collegiate Dictionary* 986 (10th ed. 1998); "rehearing." Black's defines "rehearing" as:

> A second or subsequent hearing of a *case* or an appeal, usually held to consider an alleged error or omission in the court's judgment or opinion.

Black's Law Dictionary 1311 (8th ed. 2004)(emphasis added). Black's defines "sentence hearing" the same as it does "presentence hearing":

> A proceeding at which a judge or jury receives and examines all relevant information regarding a convicted criminal and the related offense before passing sentence.

Black's Law Dictionary 1221 (8th ed. 2004).

Since the tribunal at issue, the court-martial, rules on both findings and sentence, the dictionary definition indicates

that a rehearing for purposes of Article 66(d) would include the findings and sentence as an integrated whole. The Black's definition uses the word "case," which necessarily includes both findings and sentence. *Black's Law Dictionary* 228 (8th ed. 2004)(a "case" is a "civil or criminal proceeding, action, suit, or controversy at law or in equity."). Black's also defines a "sentencing hearing" differently from a "rehearing," meaning there is such a thing as a "sentencing rehearing" or a "rehearing as to sentence."

The plain and ordinary meaning of the word "rehearing" suggests the court-martial must make a determination on both the findings and sentence, as the original tribunal also ruled on both. The "clear and unambiguous" meaning of the term "rehearing" supports the United States' position, not Appellee's. And the difference of definitions among the terms "hearing," "rehearing," and "sentencing hearing" further buttresses the point that Congress did not randomly use different language throughout the Code. Rather, the statutory language has meaning and import. Appellee's conflation of terms is misleading and incorrect.

2. Congress used different language in different parts of the Code to indicate different meanings.

Appellee conflates terms that have separate meanings, but Article 66(d) does not make reference to a "hearing," a

"sentencing rehearing," or a "rehearing as to sentence." 10 U.S.C. § 866(d). It only uses the term "rehearing." The difference in definition among these different terms illustrates why Congress utilized different language in different parts of the Code to allow for the Judge Advocates General and convening authorities to order sentence-only rehearings. 10 U.S.C. §§ 860(f)(3), 864(c)(1), 869(c).

Article 60(f)(3) states that a "rehearing as to 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.

In Article 64, 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). Therefore, the language Appellee dismisses as "explanatory" is actually essential to differentiate Articles 60, 64, and 69, from Article 66.

3. Appellee's reliance on R.C.M. 810 is misplaced.

Appellee cites R.C.M. 810 to support his proposition that the word "rehearing" in Article 66(d) means that the Courts of Criminal Appeals can order sentence-only rehearings. (Appellee's Br. at 14.) But, the United States is not claiming that there are never sentence-only rehearings in military justice, nor is it claiming that this Court's precedent has not allowed the Courts of Criminal Appeals to order sentence-only rehearings in the past.

The Rules for Courts-Martial are promulgated by the President to effectuate the Code as enacted by Congress. Congress has expressly allowed for sentence rehearings in the other portions of the Code referenced *supra*. Also, *Miller* and its progeny have allowed for the Courts of Criminal Appeals to order sentence-only rehearings. *Miller*, 10 C.M.A. at 296. So naturally the Rules for Courts-Martial will have references to sentence-only rehearings. Appellee's reliance on R.C.M. 810 misses the point.

D. The Supreme Court's holding in *Jackson v. Taylor* that boards of review lack power to order sentence rehearings is not *dicta* because it addressed and rejected the petitioner's specific remedy request.

Appellee cites *United States v. Crawley*, 837 F.2d 291 (7th Cir. 1988), for his proposition that the Supreme Court's ruling in *Jackson* that boards of review lack statutory authority to order sentence-only rehearings, is *dictum* and need not be followed by this Court. (Appellee's Br. at 18-19.) In *Crawley*, Judge Posner said:

> We have defined dictum as a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—— that, being peripheral, may not have received the full and careful consideration of the court that uttered it. Dictum is a general argument or observation unnecessary to the decision. . . . The basic formula [for distinguishing holding from dictum] is to take account of facts treated by the judge as material and determine whether the contested opinion is based upon them. A dictum is any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication. It is a statement not addressed to the question before the court or necessary for its decision. As often in dealing with complex terms, the definitions (those above, and others we could give) are somewhat inconsistent, somewhat vague, and somewhat circular.

United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988).

Appellee essentially contends that Justice Clark's specific response in *Jackson* to the petitioner's suggested remedy is inessential and "peripheral" to the case and therefore "may not

have received the full and careful consideration" of the Supreme Court. (Appellee's Br. at 18-20.) But *Jackson* was not a scenario where the majority raised a hypothetical to illustrate the underpinnings of its reasoning. Rather, the *Jackson* Court gave its "full and careful consideration" to the question of whether the boards of review could order a sentence-only rehearing, because this question was put to the Court by the petitioner. *Jackson*, 353 U.S. at 579-580.

The Court answered this question clearly in rejecting petitioner's suggested remedy. *Id.* Without this portion of the opinion, the petitioner's specific question would have gone unanswered and unaddressed. Therefore, this ruling of the *Jackson* Court could not be deleted from the opinion without seriously undermining its analytical foundation. Two judges of this Court have recognized this fact and characterized this precise portion of the opinion in *Jackson* as a "core holding." *Winckelmann*, 73 M.J. at 17 (C.A.A.F. 2013) (Stucky & Ryan, JJ., concurring). This provision is not dictum and this Court is bound to uphold it. *Id.*

E. The factors in *Citizens United* are not limited to precedent involving reversal of Constitutional decisions.

Appellee argues this Court should not consider the factors the Supreme Court enunciated in *Citizens United* when determining whether to reverse its own precedent here because those factors

are limited to the overturning of Constitutional precedents. (Appellee's Br. at 21.) But the Court did not qualify or limit its use of the *Citizens United* factors to Constitutional issues. *Citizens United v. FEC*, 558 U.S. 310, 362-363 (2010). The Court actually said:

> Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.

Id. (internal citations and quotations omitted). Indeed, one of the cases the *Citizens United* Court cites for this proposition states these standards "are appropriate [to consider] when a constitutional *or statutory precedent* is challenged..." *Pearson v. Callahan*, 555 U.S. 223, 234 (2009)(emphasis added).

Citizens United is a recent decision of the Supreme Court that gives clear factors to evaluate when deciding whether to overturn a prior precedent. These factors should guide this Court in this case and cut in favor of overturning *Miller*.

F. Appellee misinterprets the inaction of Congress.

Appellee argues that the United States "conveniently omits" the possibility that, "Congress wrote Article 66(d), UCMJ, to allow sentence-only rehearings, that Congress is aware of *Miller*, and that Congress fundamentally agrees with *Miller's*

holding." (Appellee's Br. at 23-24.) But it is Appellee who is ignoring the problematic aspects of *Miller*.

The *Miller* court read the "and" in Article 66(d) as an "or" in order to rationalize its conclusion. *Miller*, 10 C.M.A. at 299. If Congress "fundamentally agree[d] with *Miller's* holding," it would have made the change that the *Miller* court did. Congress made much more drastic changes to other Articles in the Code to allow for sentence-only rehearings ordered by convening authorities or the Judge Advocates General. (J.A. 67-72.) If Appellee's contention is true, Congress would have also adjusted Article 66(d) to remove any doubt as to its endorsement of *Miller*. But Congress did not do this. Based on these circumstances, Congress' silence is deafening.

G. Appellee misunderstands the meaning of "reliance interests."

Appellee claims that the United States' statement that there are no reliance interests at play here is "demonstrably untrue." (Appellee's Br. at 24.) He then cites situations where the ordering of sentence-only rehearings by the Courts of Criminal Appeals would serve as an arguably useful remedy. (Appellee's Br. at 24-26.) But the United States' statement referred to reliance interests as defined in *Payne*, which addressed "property and contract rights." (Appellant's Br. at 24.); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Appellee is essentially arguing that sentence-only rehearings are useful in cases of post-trial delay, apparent bias, and unlawful command influence. (Appellee's Br. at 24-26.) First, any such issues can also be remedied through other means, including sentence reassessments, which is the method Congress intended. *Jackson*, 353 U.S. at 580. Second, Appellee's argument amounts to a mere policy debate, which is ironic given his other argument that the United States is asking this Court to invade the legislative province of Congress. (Appellee's Br. at 26.) The United States is not asking this Court to frustrate the intent of Congress. Rather, it is asking this Court to effectuate the will of Congress evidenced in both the statutory scheme employed in the Code and the Supreme Court's decision in *Jackson*.

Conclusion

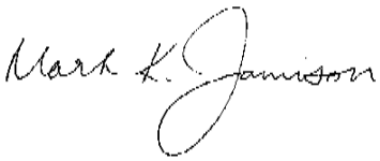
Wherefore, the Government respectfully requests that this Court reverse the decision of the lower court and order the lower court to conduct a sentence reassessment.

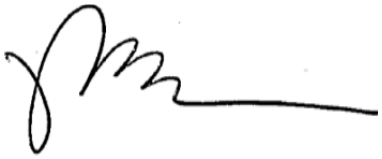
MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE

JAMES M. BELFORTI
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE

Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443





MARK JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 34114

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on April 13, 2015.

JAMES M. BELFORTI

Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
james.belforti@navy.mil
Bar No. 36443