IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Christopher A. Quick Sergeant (E-5) U.S. Marine Corps, Appellant	ANSWER ON BEHALF OF APPELLEE Crim.App. Dkt. No. 201300341 USCA Dkt. No. 15-0348/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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

Appellant's approved court-martial sentence included a punitive discharge. Accordingly, his case fell within the Article 66(b), Uniform Code of Military Justice (UCMJ), jurisdiction of the Navy-Marine Corps Court of Criminal Appeals.[1] This Court now has jurisdiction under Article 67(a)(2), UCMJ.[2]

Statement of the Case

Contrary to his pleas, a mixed panel of officer and enlisted members convicted Sergeant (Sgt) Christopher Quick of conspiracy to distribute indecent material, wrongfully viewing a video depicting the private areas of another, and indecent conduct, pursuant to Articles 81, 120c, and 134,

[1] 10 U.S.C. § 866(b) (2012).
[2] 10 U.S.C. § 867 (2012).

UCMJ. The members acquitted Sgt Quick of fraternization and three specifications of rape by force.

The panel sentenced Sgt Quick to be reduced to pay-grade E-3, to be confined for six months, and a bad-conduct discharge. The Convening Authority (CA) approved the sentence as adjudged. He also noted that as a result of the adjudged bad-conduct discharge, Sgt Quick was, as a matter of law under Article 58(a), UCMJ, reduced to pay grade E-1. With that change, and except for the bad-conduct discharge, the CA ordered the adjudged sentence executed.

On October 31, 2014, the Navy-Marine Corps Court of Criminal Appeals unanimously set aside and dismissed Sgt Quick's conviction for wrongful viewing under Article 120c, UCMJ, but affirmed his remaining convictions under Article 81 and 134, UCMJ.[3] The lower court further found that it could not reliably determine an appropriate sentence and remanded his case to the CA for a rehearing on the sentence.[4]

On November 5, 2014, Sgt Quick moved the lower court for panel reconsideration of his conviction under Article 81, UCMJ. Arguing the lower court did not properly analyze

[3] *United States v. Quick*, 74 M.J. 517, 523 (N-M. Ct. Crim. App. Oct. 31, 2014) (published).
[4] *Id*.

the issue, Sgt Quick again asked the lower court to reconsider its affirmation of his conviction for conspiracy to distribute indecent material because the alleged victim did not have a reasonable expectation of privacy at the time she was recorded. On November 17, 2014, the lower court denied Sgt Quick's motion.

On December 1, 2014, the Government moved for *en banc* reconsideration of the panel's decision to remand the case for a rehearing on sentencing. The lower court denied that motion on December 4, 2014.

On February 1, 2015, the Judge Advocate General of the Navy granted a Government request to certify the issue now before this Court.

Statement of Facts

On July 30, 1947, Congress proposed general provisions to assist readers in understanding its acts.[5] This provision was adopted and became 1 U.S.C. § 1. It states, in pertinent part, "In determining the meaning of any act of Congress, except where the context indicates otherwise . . . words importing the plural include the singular . . . [.][6] 1 U.S.C. § 1 has remained unchanged and in effect through the present day.

[5] 80 P.L. 278 (1947).
[6] 1 U.S.C. § 1 (2012).

On June 28, 2012, Congress promulgated the most recent revision to the UCMJ. Therein, Congress did not change any portion of Article 66(d), UCMJ. It states:

> If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on a lack of sufficient evidence, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order the charges be dismissed.[7]

Congress did however amend Article 120, UCMJ, by splitting it into three separate sections. On May 15, 2013 the President amended Paragraph 45 of Part IV of the Manual for Courts-Martial, and established maximum punishments for the new Article 120c, UCMJ.[8]

Sgt Quick's case arose from an allegation that, on July 1, 2012, he and others raped a civilian--TR--in the barracks onboard MCAS Miramar, California.[9] The sex took place in Sgt Quick's barracks room with the doors and window open while, with TR's invitation, several Marines watched.[10] One of these Marines recorded the group-sex on his cell phone.[11] That video was presented as evidence at trial.[12] It showed what reasonably appeared to be

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[7] 10 U.S.C. § 866(d) (2012).
[8] Executive Order 12643 of May 15, 2013.
[9] J.A. at 10.
[10] J.A. at 10, 50, 159-60.
[11] J.A. at 50.
[12] *Id*.

consensual group-sex involving Sgt Quick, TR, and JM--a civilian and former Marine. Sgt Quick was acquitted of rape, but convicted of three lesser offenses.[13]

Summary of Argument

This Court should adhere to *United States v. Miller* for several reasons.

First, the plain language of Article 66(d), UCMJ, unambiguously permits rehearings for sentencing. The Government's reading of the text fails to account for a statutorily mandated canon of construction, relies on irrelevant references to legislative intent and other portions of the UCMJ, and renders the second sentence of Article 66(d), UCMJ, meaningless surplusage.

Second, *United States v. Miller* does not conflict with the holding in *Jackson v. Taylor*. *Jackson* was limited to whether boards of review--now Courts of Criminal Appeal--had the statutory authority to reassess sentences; not whether the UCMJ permitted them to order sentence-only rehearings.

Third, *United States v. Miller* has prompted more than sixty years of appellate precedent allowing sentence-only rehearings. In that time, Congress has never revised Article 66(d), UCMJ, to prohibit this practice. There is

[13] J.A. at 155-56.

no reason to assume Congress is unaware of *United States v. Miller*, or sentence-only rehearings, nor is it this Court's responsibility to amend legislation. Therefore, this Court should also continue to adhere to *United States v. Miller* based on *stare decisis* and respect for separation of powers.

Argument

THIS COURT SHOULD ADHERE TO *UNITED STATES v. MILLER* FOR THREE REASONS. FIRST, ARTICLE 66(d), UCMJ, PERMITS SENTENCE-ONLY REHEARINGS. SECOND, *MILLER* DOES NOT OFFEND *JACKSON V. TAYLOR* BECAUSE *JACKSON'S* HOLDING WAS LIMITED TO WHETHER BOARDS OF REVIEW HAD THE AUTHORITY TO INDEPENDENLY REASSESS SENTENCES. THIRD, RESPECT FOR SEPARATION OF POWERS AND *STARE DECISIS* COUNSELS IN FAVOR OF ADHERENCE TO *MILLER*.

Standard of Review

This Court reviews matters of statutory interpretation *de novo*.[14]

Discussion

When reviewing statutory construction cases, this 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

[14] *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014).

language is unambiguous and the statutory scheme is coherent and consistent."[15]

A. The plain language of Article 66(d), UCMJ, allows Courts of Criminal Appeal to remand for sentence-only rehearings because "the findings" includes individual findings, and because "rehearing" includes sentencing hearings.

1. "the findings and sentence"

The Government has completely misinterpreted Article 66(d), UCMJ. It states:

> If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on a lack of sufficient evidence, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order the charges be dismissed.[16]

The Government argues "the findings and sentence" means *all the findings* and sentence.[17] It contends that setting aside one finding among several does not meet the statute's initial requirement that "the findings" be set aside.[18] That interpretation is wrong because in the United States Code and in the Manual for Courts-Martial it is "self-

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[15] *Id*. (quoting *Barnhart v. Sigmon Coal Co. Inc.,* 534 U.S. 438, 450 (2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statute language is unambiguous and '**the statutory scheme is coherent and consistent**.'") (emphasis added)).
[16] 10 U.S.C. § 866(d) (2012).
[17] Appellant's Br. at 13-14.
[18] *Id*.

explanatory"[19] that words of plurality include singular components of the group.

Congress anticipated the Government's present confusion and resolved it through 1 U.S.C. § 1. It states, "In determining the meaning of any act of Congress, except where the context indicates otherwise . . . words importing the plural include the singular . . . [.][20] The Manual for Courts-Martial specifically incorporated 1 U.S.C. § 1 in Rule for Courts-Martial (RCM) 103(21).[21] This Court noted the Manual's embrace of this statutory canon in *United States v. Edwards*. "RCM 103(20) expressly adopts 'the definitions and rules of construction in **1 U.S.C. §§ 1 through 5**. . . [.]"[22] Applying this rule, if one of several findings is set aside, then "the findings" are set aside within the meaning of Article 66(d), UCMJ.[23]

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[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM), R.C.M. 103(21) (analysis) A21-6 (2012).
[20] 1 U.S.C. § 1 (2012).
[21] MCM, R.C.M. 103 (2012) (definitions and rules of construction).
[22] *United States v. Edwards*, 46 M.J. 41, 45 (C.A.A.F. 1996). In 1996, R.C.M. 103(20) employed the same language which now appears in R.C.M. 103(21). *Compare* MCM, R.C.M. 103(20) (analysis) A21-6 (1995) *with* MCM, R.C.M. 103(21) (analysis) A21-6 (2012).
[23] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 463 (1984) ("Although the word 'copies' is in the plural in [the statute], there can be no question that under the Act the making of even a single unauthorized copy is prohibited.") (citing 1 U.S.C. § 1); *United States v. May*, 748 F.3d 758, 761 (7th Cir. 2014) (applying 1 U.S.C. §

The Government was apparently unaware of 1 U.S.C. § 1, RCM 103(21), and *Edwards*.[24] As a result, it lost Article 66(d)'s plain meaning, and applied a flawed and unnecessarily complex analysis. This began with its argument that Congress's use of the definite article "the" particularized "the findings and sentence" as an indivisible whole.[25] But particularization is not at issue. Therefore this argument distracts from an appropriate reading of "the findings and sentence" in Article 66(d), UCMJ.

The Government's particularization argument relies primarily on *American Bus Ass'n v. Slater*, and *Reid v. Angelone*. In *American Bus Ass'n*, the U. S. Court of Appeals for the District of Columbia Circuit held the Department of Transportation (DOT) could not expand remedies for violations of the Americans with Disabilities

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1 to interpret a word of plurality in a criminal statute); *Smith v. Zachary*, 255 F.3d 446, 449 (7th Cir. 2001) (applying 1 U.S.C. § 1, Court assumed "Congress intended the plural word 'conditions' to include a singular event."); *Soto-Hernandez v. Holder*, 729 F.3d 1, 5 (1st Cir. 2013) (finding "firearms" includes a single firearm in light of 1 U.S.C. § 1); *but see Dakota, Minn. & Eastern R.R. Corp v. Schieffer*, 648 F.3d 935, 938 (8th Cir. 2012) (finding context of 29 U.S.C. § 1002 showed that 1 U.S.C. § 1 plurality rule should not govern because the Act, ERISA, was not meant to cover a severance package for an individually contracted executive employee).

[24] None are cited in the Government's brief or table of authorities.

[25] Appellant's Br. at 13-14.

Act because Congress "particularized" that statute's remedies by employing the definite article, "the."[26] The Court interpreted "the" as language of limitation, and found for the petitioner who sought relief from a DOT regulation.[27]

But particularization analysis does not resolve this Court's understanding of the words of plurality--"the findings"--Congress employed in Article 66(d), UCMJ, whereas 1 U.S.C. § 1 does. Furthermore, since there is only one set of findings and sentence, "particularization" is irrelevant.[28]

The same is true of *Reid v. Angelone.* There, the U.S. Court of Appeals for the Fourth Circuit held an order denying relief from a final judgment under Federal Rule of Civil Procedure 60(b) was "the final order" in a *habeas corpus* proceeding.[29] This was critical because 28 U.S.C. § 2253(c) limited the petitioner's right of appeal to "the

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[26] 231 F.3d 1 (D.C. Cir. 2000)
[27] *Id*. at 4.
[28] The Government also cited *Warner-Lambert Co. v. Apotex Corp.* for the same proposition: that "the" acts as language of limitation. Appellant's Br. at 13; 316 F.3d 1348, 1356 (Fed. Cir. 2003). That case is inapplicable for the same reason as *American Bus Ass'n.*
[29] *Reid v. Angelone*, 369 F.3d 363 (4th Cir. 2004).

final order", as opposed to "an" order, denying relief in a *habeas corpus* proceeding.[30]

Again, this does not aid this Court's interpretation of "the findings and sentence." Sgt Quick does not contend that some other "findings and sentence" are relevant to the lower courts exercise of its Article 66(d), UCMJ, discretion in his case.

Along with its misapplication of particularization, the Government also advances the doctrine of *pari materia*, and argues the plain meaning of Article 66(d), UCMJ, can only be understood in the context of the UCMJ's legislative intent.[31] In support, the Government cites to this Court's opinion in *United States v. Diaz*.

Diaz is based on the U.S. Court of Appeals for the Fourth Circuit's decision in *United States v. Morison*.[32] There the defendant argued the Court should apply Congress's legislative intent rather than a criminal statute's plain language.[33] The Court disagreed. It explained "courts are not free to replace that clear language with unenacted legislative intent. . . . If the

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[30] *Id*. at 367.
[31] Appellant's Br. at 8.
[32] *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010) (quoting *United States v. McGuinness*, 35 M.J. 149, 153 (C.M.A. 1992) (citing *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988) (citations omitted))).
[33] *Morison*, 844 F.2d at 1064.

terms of the statute are unambiguous . . . there is no need to consult legislative history [because] that is applied in construing ambiguous criminal statutes."[34]

This Court has applied 1 U.S.C. § 1 in the past to interpret the UCMJ.[35] It should do so here because 1 U.S.C. § 1 makes the plain language of Article 66(d), UCMJ, clear and unambiguous. Since its application leaves no ambiguity, there is no need for this Court to look beyond the plain language in Article 66(d), UCMJ.[36]

In Sgt Quick's case, the lower court set aside and dismissed a finding and the sentence. Thus, pursuant to 1 U.S.C. § 1, "the findings and sentence" were set aside. Therefore, the lower court was authorized to order a rehearing.

2. "rehearing"

The Government's interpretation of Article 66(d), UCMJ, also requires this Court to read "rehearing" as a

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[34] *Id*.
[35] *Edwards*, 46 M.J. at 45; *United States v. Fry*, 70 M.J. 465, 470 (2012) (describing 1 U.S.C. § 1 as a general definition section).
[36] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *see also McPherson*, 73 M.J. at 395 ("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.") (emphasis added).

synonym for "re-trial."[37] But military justice has never defined "hearing" so narrowly.[38] In fact, general terms are usually read to include their "full and fair scope."[39] If a hearing is "[a] judicial session . . . held for the purpose of deciding issues of fact or of law[,]"[40] then there is no reason to assume Congress intended "rehearings" in Article 66(d), UCMJ, to exclude those for sentencing.

The Supreme Court endorsed this canon of construction in *United States v. Monsanto*. There, the meaning of 18 U.S.C. § 853(a) was at issue. It states a person convicted of an offense "shall forfeit . . . any property" derived

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[37] *See* Appellant's Br. at 14 ("Rather, it used 'the' to particularize 'findings' to refer to an integrated whole, requiring a rehearing on both the findings and sentence.").

[38] *See, e.g.*, *United States v. Ellis*, 68 M.J. 341, 342 (C.A.A.F. 2010) ("In a **sentencing hearing**, an accused's potential for rehabilitation is a proper subject of testimony by qualified experts.") (emphasis added) (quoting *United States v. Stinson*, 34 M.J. 233, 238 (C.A.A.F. 1992)).

[39] ANTONIN SCALIA, BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (Thomson-West 2012); *cf. United States v. South Half of Lot 7 & Lot 8, Block 14, Kountz's 3rd Addition to the City of Omaha*, 910 F.2d 488 (8th Cir. 1990) (*en banc*) (holding "any property, including money" also includes real property within the requirements of 18 U.S.C. § 1955(d)).

[40] *Black's Law Dictionary*, 737 (8th ed. 2004); *see also* MCM, R.C.M. 1001(b) (2012) (presentencing procedure); *Barclay v. Florida*, 463 U.S. 939, 945 (1983) (noting the Florida Supreme Court *sua sponte* ordered a rehearing on sentencing on behalf of the defendant in light of Supreme Court's decision regarding a defendant's right to rebut pre-sentencing information in a death penalty case) (citing *Gardner v. Florida*, 430 U.S. 349 (1977)).

from the commission of that offense. The petitioner argued the scope of 18 U.S.C. § 853(a) did not extend to money he planned to use to pay his attorneys fees.[41]

The Supreme Court disagreed. "The statutory provision at issue here is broad and unambiguous, and Congress' failure to supplement § 853(a)'s comprehensive phrase -- 'any property' -- with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language."[42]

The same is true here. The word "rehearing" is a general term applicable to both trial and sentencing.[43] The Government would have this Court limit the scope of "rehearing" in Article 66(d), UCMJ, simply because "rehearing" is accompanied by explanatory language in other portions of the UCMJ.[44] But there is no logical, grammatical, or contextual reason to do this in Article 66(d), UCMJ, because, absent ambiguity, relevant terms are entitled to their "common and ordinary meaning."[45]

Applying the more sensible approach from *Monsanto*, the absence of explanatory or limiting language in Article

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[41] *United States v. Monsanto*, 491 U.S. 600 (1989).
[42] *Id*. at 609.
[43] *Cf.* MCM, R.C.M. 810 (2012) (procedure for rehearings, new trials, and other trials).
[44] Appellant's Br. at 8-9, 14-16.
[45] *Reid*, 369 F.3d at 367 (quoting *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999)).

66(d), UCMJ, means "rehearing" should enjoy its "full and fair scope" in that portion of the statute. Therefore, under Article 66(d), UCMJ, "a rehearing" is clear and unambiguous language that includes rehearings on sentencing.

3. The context of Article 66(d), UCMJ does not indicate that 1 U.S.C. § 1 should not apply because the Government's interpretation of the first sentence in Article 66(d), UCMJ, renders the second sentence meaningless surplusage.

The Government cites *Davis v. Mich. Dep't of Treasury* for the proposition that statutory language cannot be read in a vacuum.[46] There, the Supreme Court read 4 U.S.C. § 111 in its entirety to determine whether a Michigan law violated 4 U.S.C. § 111's anti-discrimination clause by taxing federal retirement benefits while exempting state retirement benefits.[47]

Applying that analysis here, the first sentence of Article 66(d), UCMJ, must be read in conjunction with the second sentence. But the Government's interpretation of the first sentence requires this Court to read "the findings" as "all the findings," and to read "rehearing" as "re-trial." This flawed analysis would strip the second sentence of its meaning.

[46] Appellant's Br. at 8.
[47] *Davis*, 489 U.S. at 809.

Using the Government's logic, all the findings and the sentence must be set aside to trigger the lower court's discretion to order a rehearing. But if the lower court chooses not to order a rehearing, then nothing else besides dismissal of those charges is possible.[48] Thus, under the Government's reading, when a Court of Criminal Appeal (CCA) "sets aside the findings and sentence," and chooses not to order a rehearing or reassess the sentence itself, the second sentence could do nothing that the first sentence has not already directed. This renders the second sentence surplusage.

It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant[,]"[49] and that courts should favor "a construction

[48] Surely the Government does not think a military accused whose convictions are set aside, in their entirety, on appeal should remain on appellate leave for the rest of his or her life. *See Bates v. District of Columbia Bd. Of Elections & Ethics*, 625 A.2d 891, 896 (D.C. 1993) (Schwelb, J. concurring) ("[A]bsurdity is a result courts should view with disfavor.") (quoting *United States v. Katz*, 271 U.S. 354, 357 (1926)).

[49] *Kungys v. United States*, 485 U.S. 759, 778 (1988) (citing *Coluatti v. Franklin*, 439 U.S. 379, 392 (1979) (finding interpretations that render other sections of a law redundant or superfluous violate "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

that will render every word operative. . . [.]"[50] The Government's suggested interpretation of the first sentence of Article 66(d), UCMJ, violates these rules.

Now consider an interpretation of Article 66(d), UCMJ, governed by 1 U.S.C. § 1. If a CCA sets aside one of several findings along with the sentence, it now has a choice; order a rehearing, reassess the sentence, or do neither. If it chooses to do neither, then the second sentence of Article 66(d), UCMJ, dictates the outcome; the CCA *shall* order the charges--those that remain--dismissed. This Court should assume Congress included the second sentence to delineate the range of potential outcomes based on the first sentence,[51] because without this range, the second sentence is surplusage.[52]

This Court should reject the Government's misreading and apply 1 U.S.C. § 1 because it gives both sentences

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[50] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF AMERICAN UNION 58 (1868); *Gerberding v. Munro*, 134 Wn.2d 188, 215 (1998); *Aspley v. Murphy*, 52 F. 570, 573 (1892).

[51] *See Rowland v. California Men's Colony*, 506 U.S. 194, 201 (1993) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.") (citations omitted).

[52] *Kungys*, 485 U.S. at 778-79; *Coluatti*, 439 U.S. at 392.

operative meaning, and renders the statutory scheme "consistent and coherent."[53]

B. This Court should adhere to *United States v. Miller* because it does not contradict the holding in *Jackson v. Taylor*.

The Government also claims the Supreme Court's opinion in *Jackson v. Taylor* already judicially resolved whether a CCA has authority to order sentence-only rehearings.[54] But that was not the question the *Jackson* Court was asked to answer. Therefore, its discussion of sentence-only rehearings was non-binding *dicta.*

Dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding. . . [.]"[55] Distinguishing holding from *dicta* is critical--even if the disputed language comes from the Supreme Court[56]--because

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[53] *McPherson*, 73 M.J. at 395; *Barnhart*, 534 U.S. at 450; *Robinson*, 519 U.S. at 340.

[54] Appellant's Br. at 17-19; *see also Winklemann*, 73 M.J. 11, at 17 (C.A.A.F. 2013) (Stucky, J. and Ryan, J., concurring).

[55] *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1989) (citing *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986); *Stover v. Stover*, 60 Md. App. 470, 476 (1984) ("Dictum is defined to mean 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.")).

[56] *See Cybergenics Corp. v. Chinnery*, 330 F.3d 548 (3rd Cir. 2003) (Supreme Court's *dicta* not binding on the Courts of

dicta "is not authoritative [and] a later court, even if it is an inferior court, is free to reject [it]."[57] When determining whether a disputed portion of a judicial opinion is *dicta*, the reader should ask if "the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been had it been essential to the outcome."[58]

The precise question in *Jackson* was whether the Board of Review lacked the authority to reassess the petitioner's sentence and was, therefore, required to order a rehearing. "[Petitioner] argues that under military law the board of review should have ordered a rehearing or that he be released from confinement because it was without authority to impose the 20-year sentence."[59] This is also demonstrated by the question presented in the Solicitor General's response to the petitioner. It asked:

> Whether, after a general court-martial had convicted a soldier of the two crimes of premeditated murder and attempted rape and

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Appeal); *Arthur C. Harvey Co. v. Malley*, 61 F.2d 365 (1st Cir. 1932) (Court of Appeal not bound by *dictum* from Supreme Court, **particularly where *dictum* is contrary to the statute and would produce an inequitable result**); *see also* 10 U.S.C. § 866(d) (2012); *Winklemann*, 73 M.J. at 11; *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Miller*, 10 U.S.C.M.A. 296 (C.M.A. 1959).

[57] *Crawley*, 837 F.2d at 292.

[58] *Id*.

[59] *Jackson v. Taylor*, 353 U.S. 569, 572 (1959).

> imposed one aggregate sentence of life imprisonment for both offenses, the Army Board of Review, after reversing the finding of guilt on the murder charge, **had authority to reduce the sentence** to the maximum sentence for attempted rape.[60]

Since the question in *Jackson* was whether Boards of Review had the authority to reassess sentences, the portion of that opinion discussing sentence-only rehearings was not essential to *Jackson's* outcome. It is therefore *dicta* to which this Court was not, and is not, bound. This is supported by the fact that *Jackson's* entire discussion about sentence-only rehearings and their drawbacks could have been removed from the opinion, and the question presented--whether boards of review could reassess sentences on appeal--would still have been answered.[61]

Therefore, the Court of Military Appeals did not offend *Jackson's* core holding[62] when it found the Supreme Court "was merely pointing out some difficulties which prompted Congress to authorize reassessment of the sentence by a board of review and that it was not intending to say

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[60] J.A. at 85 (emphasis added).
[61] *Crawley*, 837 F.2d at 292; *Jackson*, 353 U.S. at 577 ("It is manifest then that it was the intent of Congress that a board of review should exercise just such authority [sentence reassessment] as was exercised here.").
[62] *See Jordon v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974) ("Even the [Supreme] Court's dicta is of persuasive precedential value.")

the power to order the limited rehearing was not impliedly granted by Articles 66 and 67 of the Code."[63]

As such, *Miller* should not be overruled.

C. This Court should adhere to *Miller* because to do otherwise would be contrary to *stare decisis* considerations, and would cause this Court to infringe on Congress's legislative supremacy.

1. Sgt Quick's case asks this Court to interpret a statute, not the Constitution.

The Government urges this Court to apply the Supreme Court's recent landmark decision in *Citizens United v. FEC* to determine whether *stare decisis* should apply.[64] But that case dealt with *stare decisis* in constitutional interpretation, not statutory construction.[65] Therefore, it is not applicable.

In *Neal v. United States,* the Supreme Court held *stare decisis* carries greater weight in statutory construction because "Congress is free to change this Court's interpretation of its legislation."[66] This Court adopted

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[63] *Miller*, 10 U.S.C.M.A at 299. It is worth noting the lone dissent in *Miller* took no issue with that Court's decision to affirm sentence-only rehearings. *Id*. at 300-02 (Ferguson, J. dissenting).
[64] Appellant's Br. at 21.
[65] *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) ("This Court has not hesitated to overrule decisions offensive to the First Amendment.")
[66] 516 U.S. 284, 295 (1996) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1979)); *see also Flood v. Kuhn*, 407 U.S. 258, 282 (1972); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

the same posture in *United States v. Rorie*.[67] In statutory construction, *stare decisis* prevails unless "the intervening development in the law has removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal interests."[68]

But *stare decisis* is less controlling in constitutional interpretation because amending the Constitution is legislatively impractical, whereas statutory revision is not.[69]

Since this Court is now asked to interpret Article 66(d), UCMJ, it should apply the test from *Neal*, and not the less stringent constitutional standard from *Citizen's United*.

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[67] 58 M.J. 399, 406 (C.A.A.F. 2006) (holding "[t]he doctrine [*stare decisis*] is 'most compelling' where courts undertake statutory construction") (citing *Hilton*, 503 U.S. at 202); *accord Neal*, 516 U.S. at 295.

[68] *Neal*, 516 U.S. 295.

[69] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J. dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled, than that it be settled right. This is commonly true even where the error is a matter of serious concern provided correction can be had through legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decision.") (internal citations omitted); *see also Rorie*, 58 M.J. at 406 (citing *Harris v. United States*, 536 U.S. 545, 556 (2002) (holding *stare decisis* concerns are "less pronounced" in constitutional cases)).

2. This Court should adhere to *Miller* because nothing has removed or weakened its analytical foundation, Congress has not amended Article 66(d), UCMJ, to reject sentence-only rehearings, and there are reliance interests at risk.

a. Nothing has removed or weakened the analytical foundation of *Miller*.

Since *Miller* was decided in 1959, Congress amended the UCMJ several times. The only changes it made to Article 66(d), UCMJ, were to recast "boards of review" as "Courts of Military Review," and more recently as "Courts of Criminal Appeal." This is not evidence that Congress rejected *Miller* or sentence-only rehearings.

The Government's misread of Congress's inaction results in an illusory choice: that Congress is either unaware of *Miller*, or that Congress rejected *Miller* by declining to amend the statute to directly reflect its language.[70]

But the Government offers no evidence to support its claim that Congress is unaware of *Miller*. Quite the opposite, *Miller* is a significant precedent in the administration of military justice.[71] Moreover, the Government conveniently omits the more obvious and contextually supportable conclusion: that Congress wrote

[70] Appellant's Br. at 27.
[71] *Winklemann*, 73 M.J. at 14 ("This consistent practice has stood since 1959 without legislative amendment by Congress.")

Article 66(d), UCMJ, to allow sentence-only rehearings, that Congress is aware of *Miller*, and that Congress fundamentally agrees with *Miller's* holding.

b. The analytical foundation of *Miller* is stronger because of precedent and reliance interests.

The Government's claim that there are no reliance interests at play in the lower courts' continued ability to order sentence-only rehearings is demonstrably untrue.[72]

First and foremost, this Court has reaffirmed *Miller's* holding and cited it on several occasions since 1959.[73] But there are other reliance interests beyond *Miller's* direct progeny.

Take, for example, *United States v. Moreno*, where this Court crafted at least one appellate remedy for appellants who are prejudiced by significant post-trial delay. There, this Court held a potential remedy could be "a limitation upon the sentence that may be approved by the convening authority **following a rehearing**."[74]

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[72] Appellant's Br. at 24.
[73] *See, e.g., id*. at 11; *Moffeit*, 63 M.J. at 40; *Sales*, 22 M.J. at 305.
[74] *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006) (emphasis added).

Also, sentence-only rehearings were recently used to remedy apparent bias by a military judge.[75] In *United States v. Arnold*, the appellant pleaded guilty at special court-martial before a military judge. Though the trial counsel requested reduction to pay-grade E-1, ninety days confinement, and a bad-conduct discharge, the military judge sentenced the accused to the jurisdictional maximum. Less than a month later, that same military judge gave a lecture to new judge advocates wherein he made disparaging remarks about military accuseds and court-martial members, and encouraged his audience to "crush" military accuseds if they serve as prosecutors.

While it found no reason to doubt the providency of the appellant's pleas, the lower court found the military judge's conduct undermined the public's faith in the appellant's court-martial. As a remedy, it remanded his case for a rehearing on sentencing.[76]

To now jettison sentence-only rehearings eliminates a helpful appellate remedy where lower courts find prejudicial post-trial delay, or encounter military judges

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[75] *United States v. Arnold*, No. 201200382, 2014 CCA LEXIS 902, *8 (N-M. Ct. Crim. App. Dec. 23, 2014) (per curiam) (unpublished op.).
[76] *Arnold*, 2014 CCA LEXIS at *8 (citing *United States v. Quintinilla*, 56 M.J. 37, 80 (C.A.A.F. 2001)).

who show bias. It may also remove a potential remedy for unlawful command influence that only affects sentencing.[77]

The Government argues--and it may well be true--that sentence-only rehearings can present practical difficulties. But the prejudicial errors that sentence-only rehearings are meant to remedy are the real genesis of these inconveniences. This Court should not elevate Government's convenience above an appellant's statutory rights, particularly when the Government's legal errors are the cause of the inconvenience it so decries.

3. The Government's argument is a plea for this Court to invade Congress's legislative supremacy.

Congress has not amended Article 66(d), UCMJ, to reject *Miller* or sentence-only rehearings. But rather than seek a legislative solution, the Government instead asks this Court to eschew the statute's plain meaning along with sixty years of appellate precedent. This is a request for judicial revision of Article 66(d), UCMJ, which ignores the constitutional doctrine of separation of powers.

Respect for separation of powers is an important basis for applying *stare decisis*. In fact, it was as important

[77] *Cf. United States v. Biagese*, 50 M.J. 143, 150 (C.A.A.F. 1999) ("[A]n appellate court may not affirm findings or sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been effected by the command influence.") (citations omitted).

to the Supreme Court's application of the doctrine in *Neal* as Congressional acquiescence. Writing for a unanimous court, Justice Kennedy explained "Congress, not [the Supreme Court], has the responsibility for revising statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."[78]

The same was true in *Faragher v. City of Boca Raton*. There the Court adhered to a previous decision as both a matter of *stare decisis*, and in deference to Congress's legislative supremacy. The Court held it was bound to honor its previous opinion because, "To disregard [it] now (even if we are convinced of reasons for doing so) would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment . . . for Congress's considered decision on the subject."[79]

These separation of powers concerns are often weighed differently for the Supreme Court as opposed to the Courts

[78] *Neal*, 516 U.S. at 296.
[79] *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 n.4 (1998). On unrelated grounds, Justice Thomas joined Justice Scalia's dissent. Therefore the cited portion above can be considered unanimously decided.

of Appeal.[80] This is because the Supreme Court usually has the last word on statutory interpretation, whereas the Courts of Appeal do not.[81] But given the infrequency with which the Supreme Court grants *certiorari* in military justice cases, it is likely this Court's interpretation of Article 66(d), UCMJ, and its judgment of *Miller* will be final.[82] As such, this Court should also adhere to *stare decisis* in deference to separation of powers in a manner similar to the Supreme Court.

This consideration is similarly fatal to the Government's argument because there is no reason to doubt Congress's knowledge of *Miller* and sentence-only rehearings. This is buttressed by Congress's repeated refusals to amend the statute to terminate the CCA's authority to remand for sentence-only rehearings. Thus, the Government's argument against *stare decisis* in this case is not only incorrect statutory interpretation, it is

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[80] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeal*, 73 Geo. Wash. L. Rev. 317, 327-30 (2005) (hereinafter *Statutory Stare Decisis*).
[81] *Statutory Stare Decisis*, *supra*, at 330 (arguing Supreme Court doctrines of interpretation should not always be adopted by lower courts).
[82] The Supreme Court has only granted *certiorari* in two military cases since 2000. *See United States v. Denedo*, 555 U.S. 1041 (2008); *O'Connor v. United States*, 535 U.S. 1014 (2002).

an invitation for this Court to invade Congress's legislative supremacy.[83]

[83] In fact, if this Court agrees with Sgt Quick's interpretation of Article 66(d), UCMJ, the Government's argument is also a non-justiciable political question because it is a request for this Court to amend that statute. *United States v. New*, 55 M.J. 95, 108 (C.A.A.F. 2001) ("Based upon the Constitutional principle of separation of powers in the three branches of Government, judicial review of 'a political question' is precluded where the Court finds one or more of the following: 'a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government. . . [.]'") (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Conclusion

This Court should reject the Government's misreading of Article 66(d), UCMJ, and invitation to overrule *Miller*. The plain language of Article 66(d), UCMJ, when read through the appropriate canons of construction, permits sentence-only rehearings. Moreover, the Supreme Court's holding in *Jackson* is not a basis to overrule *Miller* because that case resolved a separate issue. Finally, *stare decisis* and separation of powers counsel in favor of adhering to *Miller* and continuation of the six-decades-old practice of sentence-only rehearings.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on April 1, 2015.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Rule 21(b). This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word version 2010 with 12-point-Courier-New font. It contains 6,360 words.

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