IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States, Appellee v. Eric F. Kelly, Sergeant (E-5) U.S. Army, Appellant	BRIEF OF AIR FORCE APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR GRANT OF REVIEW USCA Dkt. No. 17-0559/AR Crim. App. No. 20150725

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

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

Amicus joins Appellant's Petition and Supplement on Issues I and III, which involve the Army Court of Criminal Appeals (ACCA), sitting *en banc*, deciding a question of law in a way in conflict with applicable decisions of this Court, and deciding the validity of a provision of the Uniform Code of Military Justice (UCMJ) that was directly drawn into question in that court, respectively.

I

CITING R.C.M. 919(c), THE ARMY COURT OF CRIMINAL APPEALS HELD FAILURE TO OBJECT TO IMPROPER ARGUMENT WAIVES ANY LATER CLAIM OF PROSECUTORIAL MISCONDUCT. THE COURT'S HOLDING CONFLICTS WITH THIS COURT'S LONG-STANDING PRECEDENT.

The ACCA's decision in *United States v. Kelly*, 2017 CCA LEXIS 453 (A. Ct. Crim. App. 2017) (*en banc*), which has recently been adopted by the Navy-Marine Corps Court of Criminal Appeals, *United States v. Mostenbocker*, 2017 CCA LEXIS 539 (N-M. Ct. Crim. App. 2017) is "a weed in the garden of [this Court's] jurisprudence." *United States v. Baier*, 60 M.J. 382, 383 (C.A.A.F. 2005). This Court should "now pull it up by the roots." *Id.*

Just as in *United States v. Davis*, 76 M.J. 224 (C.A.A.F. 2017), the ACCA has acted "on the assumption that an opinion of this Court has been implicitly overruled." *Id.* at 228 n.2. Less than sixty days after this Court admonished ACCA in *Davis*, ACCA has now concluded this Court's recent decision in *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017) implicitly overruled decades of precedent set forth in cases such as *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (failure to object is forfeiture), *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2017) (failure to object is forfeiture) *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (failure to object is forfeiture), and *United*

States v. Diffoot, 54 M.J. 149, 151 n.1 (C.A.A.F. 2000) (failure to object is forfeiture "despite the language of 'waiver' in RCM 919(c)").

And ACCA has done this knowing military courts have not consistently distinguished between the terms waiver and forfeiture, *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009), which has led the President to mistakenly reference waiver in the Manual for Courts-Martial when "clearly referring to 'forfeiture.'" *Davis*, 76 M.J. at 227 n.1. Indeed, the Joint Service Committee on Military Justice recently proposed changing the language of R.C.M. 919(c) and R.C.M. 1001(h) to explicitly adopt this Court's forfeiture precedent. *See* 82 Fed. Reg. 31952 (Jul. 11, 2017).

As of this filing, the Air Force Court of Criminal Appeals continues to adhere to this Court's precedent that the failure to object to improper argument at trial forfeits, rather than waives, any error. *See United States v. Campbell*, 76 M.J. 644, 660 (A. F. Ct. Crim. App. Apr. 25, 2017), *rev. denied*, __ M.J. __, 2017 CAAF LEXIS 804 (C.A.A.F. Aug. 17, 2017); *United States v. Robinson*, 76 M.J. 663, __, 2017 CCA LEXIS 378, *22 (A.F. Ct. Crim. App. May 15, 2017), *rev. granted on other grounds*, __ M.J. __, 2017 CAAF LEXIS 830 (C.A.A.F. Aug. 18, 2017).

But, in addition to *Mostenbocker*, recent experience proves erroneous decisions of ACCA can quickly metastasize to all of the Courts of Criminal Appeals. *United States v. Barnes*, 74 M.J. 692 (A. Ct. Crim. App. 2015), *overruled by*

United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016); *United States v. Bass*, 74 M.J. 806 (N-M. Ct. Crim. App. 2015); *United States v. Maliwat*, 2015 CCA LEXIS 443 (A.F. Ct. Crim. App. 2015).

Amicus respectfully urges this Court to grant Appellant's Petition and address ACCA's contention this Court implicitly overruled long-standing precedent with respect to prosecutorial misconduct in *Ahern*, which has also created a conflict between the Courts of Criminal Appeals. *Davis*, 76 M.J. at 228 n.2 ("It is this Court's prerogative to overrule its own decisions.").

III

THE ARMY COURT OF CRIMINAL APPEALS HELD THE RECENT AMENDMENT TO ARTICLE 56, UCMJ, RESTRICTED THE COURT'S STATUTORY AUTHORITY TO APPROVE ONLY SO MUCH OF THE SENTENCE AS THE COURT DETERMINED SHOULD BE APPROVED. THIS IS A NOVEL QUESTION OF LAW THAT SHOULD BE DECIDED BY THIS COURT.

This Court has likened the Courts of Criminal Appeals to a "proverbial 800-pound gorilla when it comes to their ability to protect an accused." *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993). Article 66, UCMJ, "clearly establishes a discretionary standard for sentence appropriateness relief awarded by the Courts of Criminal Appeals." *United States v. Gay*, 75 M.J. 264, 268 (C.A.A.F. 2016) (citation omitted). And although the Military Justice Review Group (MJRG) presented the Department of Defense with proposed statutory

language restricting the review of sentences by the Courts of Criminal Appeals, MJRG, Dep't of Defense, Report of the MJRG Part I: UCMJ Recommendations 615-16 (2015), that language was not included in the Military Justice Act of 2016.

Amicus respectfully urges this Court to grant Appellant's Petition and resolve ACCA's contention that Congress's requirement that members adjudge certain mandatory minimum punishments cabins the discretion of a Court of Criminal Appeals to "approve only that part of a sentence that it finds 'should be approved.'" *Gay*, 75 M.J. at 268 (citation omitted).

Respectfully submitted,

Jane E. Boomer, Colonel, USAF
Chief, Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4770

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on September 5, 2017, pursuant to this Court's order dated July 22, 2010, and that a copy was also electronically served on the Army Appellate Government and Defense Divisions.

Respectfully submitted,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773