IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	
Appellee	)	**REPLY BRIEF**
v.	)	**ON BEHALF OF APPELLANT**
	)	
Sergeant (E-5)	)	Crim. App. Dkt. No. 20150725
ERIC F. KELLY	)	
United States Army,	)	USCA Dkt. No. 17-0559/AR
Appellant	)	

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

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ISSUE PRESENTED

WHETHER A COURT OF CRIMINAL APPEALS HAS THE AUTHORITY TO DISAPPROVE A MANDATORY MINIMUM PUNITIVE DISCHARGE.

STATEMENT OF STATUTORY JURISDICTION

The jurisdictional basis is provided in Appellant's primary brief.

STATEMENT OF THE CASE

The case chronology is provided in Appellant's primary brief.

STATEMENT OF FACTS

Material facts are provided in Appellant's primary brief.

SUMMARY OF ARGUMENT

The Appellee suggests that "because Article 60 limits what a convening authority could approve, this limitation constrains what a CCA can affirm under its appropriateness review." Appellee's Br. at 9. Yet Article 60, as amended, does not limit a convening authority's power to approve a sentence; it limits the convening authority's power to disapprove, and that limitation applies to much more than a mandatory minimum punitive discharge. Were the sentence appropriateness power of a Court of Criminal Appeals limited to only those sentences that a convening authority may disapprove, the power would be eviscerated. While Congress

certainly has the power to eliminate the sentence appropriateness power of a Court of Criminal Appeals, the 2014 amendment to Article 56 plainly did not do so.

ARGUMENT

IT IS FIRMLY ESTABLISHED THAT A COURT OF CRIMINAL APPEALS HAS THE POWER TO REDUCE A MANDATORY MINIMUM SENTENCE.

"The doctrine of stare decisis is 'most compelling where courts undertake statutory construction.'" *United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015) (quoting *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003)). The granted issue concerns both vertical and horizontal stare decisis. *See Quick*, 74 M.J. at 343 (Stucky, J. dissenting). The Supreme Court observed that when Congress enacted the Uniform Code of Military Justice, it gave the Courts of Criminal Appeals the power to alter sentences despite the opposition of military officials. *Jackson v. Taylor*, 353 U.S. 569, 577 (1957). This Court properly applies that precedent. The Army court, however, did not.[1]

[1] The supplement to Appellant's petition for grant of review by this Court identified five other issues where the Army court departed from this Court's precedent. This Court recently granted review of at least one of those issues in a different case. *See United States v. Marcum*, __ M.J. __, 2017 CAAF LEXIS 992, No. 17-0491 (C.A.A.F. Oct. 16, 2017) (grant order). Accordingly, Appellant respectfully requests that this Court reverse the Army court's decision in its entirety and remand for a correct review under Article 66.

Just 18 days after the Supreme Court issued its June 3, 1957, opinion in *Jackson*, this Court's predecessor observed that "the desire of Congress to have the [Court of Criminal Appeals] determine the appropriateness of a sentence is so strongly stated we concluded that a [Court of Criminal Appeals] can even ameliorate a sentence which the Uniform Code makes mandatory for the court-martial." *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. Jun. 21, 1957). The Appellee conceded as much before the court below. (JA at 47). Notwithstanding its change of heart, the Appellee's brief to this Court also acknowledges that the statutory provision interpreted in *Jackson* and *Atkins* is functionally unchanged. Appellee's Br. at 28 n.3. So too, therefore, is the legal analysis. The 2014 amendment to Article 56 did not change the power and duty of a Court of Criminal Appeals to determine the appropriateness of the sentence, including the appropriateness of a mandatory minimum punitive discharge. The Appellee may desire a different policy, but it is simply "not for us to question the judgment of the Congress in selecting the process it chose." *Jackson*, 353 U.S. at 580.

ARTICLE 60 DOES NOT MANDATE APPROVAL OF A MANDATORY MINIMUM PUNITIVE DISCHARGE.

"Words have meaning." *United States v. Janssen*, 73 M.J. 221, 224 (C.A.A.F. 2014). Article 60 does not – as the Appellee claims – "mandate[]

approval of the mandatory punitive discharge." Appellee's Br. at 9. Rather, Article 60 provides that:

> Except as provided in subparagraph (B) or (C), the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge.

Article 60(c)(4)(A) (emphasis added). The difference between the Appellee's interpretation of mandatory *approval*, and the actual statutory limitation on *disapproval*, *commutation*, or *suspension*, is more than mere semantics.

Article 60 itself provides three ways for a convening authority to avoid approving a mandatory minimum punitive discharge. First, Article 60(c)(4)(B) allows disapproval of a mandatory minimum punitive discharge "upon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense." Second, Article 60(c)(4)(C)(i) allows commutation of a mandatory minimum dishonorable discharge "pursuant to the terms of [a] pre-trial agreement." And third, one year after enacting the 2014 amendment, Congress restored the previously-unfettered Article 60 power in cases involving convictions of offenses that both pre- and post-date the effective date of the 2014 amendment, by enacting the following provision:

> With respect to the findings and sentence of a court-martial that includes both a conviction for an offense committed before [June 24, 2014] and a conviction for an offense committed on or after that effective date, the convening authority shall have the same authority to take action on such findings and sentence as was in effect on the day before such effective date, except with respect to a mandatory minimum sentence under section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice).

§531(g)(2)(A)(ii), *Carl Levin and Howard P. Buck Mckeon National Defense Authorization Act for Fiscal Year 2015*, 128 Stat. 3292, 3365 (Dec. 19, 2014). While this provision did not restore the Article 60 power to disapprove, commute, or suspend an adjudged mandatory minimum punitive discharge, it did restore the power to disapprove the findings of a court-martial even if one of the findings triggers a mandatory minimum punitive discharge.

In light of these provisions, the Appellee's argument that "Article 60 mandates approval of the mandatory punitive discharge," Appellee's Br. at 9, is simply wrong. The corresponding argument that a Court of Criminal Appeals is prevented "from determining that a sentence less than what the convening authority was legally allowed to approve, should be approved," Appellee's Br. at 9, is nonsensical.[2]

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[2] The Appellee's brief does not address what – if any – power it believes a Court of Criminal Appeals has to modify an adjudged punishment of confinement for more than six months or an adjudged (but not mandatory) punitive discharge.

A MANDATORY MINIMUM IS MANDATORY ONLY ON THE COURT-MARTIAL.

The Appellee's brief argues that this Court "faces two potential interpretation[s] of the Article; that the mandatory minimum is an absolute minimum, or that the mandate only applies to courts-martial. . . . the latter interpretation fails because it undercuts the intent of [C]ongress in amending Article 56." But the Appellee conspicuously avoids any discussion of the many ways (other than Article 66 sentence appropriateness review) in which a mandatory minimum punitive discharge is not an absolute minimum, because a mandatory minimum punitive discharge need not be executed.

Within the Uniform Code of Military Justice, Articles 71(a), 71(b), 74(a), and 74(b) provide independent and overlapping ways to commute, suspend, or remit a mandatory minimum punitive discharge. *See* Appellant's Primary Br. at 16-17 (discussing these provisions). The Article 74(a) power, in particular, may be delegated, and in both the Air Force and the Naval Service that power is delegated to the general court-martial convening authority over the accused's command. *Ibid*. As a result, an Air Force or Naval Service general court-martial convening authority who is prohibited from disapproving, commuting, or suspending a mandatory minimum punitive discharge under Article 60 may, nevertheless, exercise the Article 74(a) secretarial power and suspend and remit the discharge immediately after approving it. The 2014 amendment did not disturb this power or

the other similar powers within the UCMJ, and only by ignoring these powers can the Appellee argue that Congress intended a mandatory minimum punitive discharge be an absolute minimum. This Court, however, reads the UCMJ in harmony. *Cf. United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006) ("Through the passage of Article 56a, UCMJ, Congress did not disturb the President's existing Article 56, UCMJ, power").

Similarly, nothing in the UCMJ prohibits a convening authority from allowing an accused to be administratively discharged after a court-martial adjudges a mandatory minimum punitive discharge, thereby remitting the punitive discharge. *See United States v. Watson*, 69 M.J. 415, 416 (C.A.A.F. 2011) ("a post-trial administrative discharge operates to remit the unexecuted punitive discharge portion of an adjudged court-martial sentence.").

Furthermore, while Congress has the power "to make Rules for the Government and Regulation of the land and naval Forces," U.S. Const., Art. I, § 8, the President has the separate power "to Grant Reprieves and pardons for Offences against the United States," U.S. Const., Art. II, § 2. The Appellee's interpretation of Article 56 as an absolute minimum punishment requires that this Court determine whether Article 56 restricts the President's pardon power as applied to a punitive discharge. The canon of constitutional avoidance, however, encourages this Court to choose the plausible alternative that does not raise constitutional

concerns. *See United States v. Fosler*, 70 M.J. 225, 232 (C.A.A.F. 2011) (citing *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005)). That alternative is that Articles 56 and 60 mean only what they say: a dishonorable discharge or dismissal must be adjudged, and Article 60 provides limited authority to change it.

Finally, the use of the term *court-martial* in Article 56 is not, as the Appellee suggests, mere surplusage that only "reference[s] the entity responsible for adjudging the sentencing." Appellee's Br. at 23. The mandatory aspect of a mandatory minimum applies only to a court-martial because only a court-martial is subject to an enforcement mechanism. Specifically, Article 60(f)(2)(C) permits a proceeding in revision ordered to increase the severity of the sentence when "the sentence prescribed for the offense is mandatory." This forces the court-martial to adjudge the mandatory minimum. No other actor in the court-martial process may be forced so directly.

CONCLUSION

To imagine that when Congress restricted the Article 60 clemency power it also restricted the power and duty of a Court of Criminal Appeals to determine the appropriateness of the sentence in every case is to imagine a world in which the Courts of Criminal Appeals conduct no sentence appropriateness review at all. It replaces the legislative decision of Congress with the policy preference of the reader.

Mandatory minimum sentences are lawful sentences, but not necessarily appropriate sentences, and the Courts of Criminal Appeals have the power and duty to determine the appropriateness of the sentence in every case.

Because Appellant did not receive complete review of his case under Article 66, remand is required. In light of the other issues raised in Appellant's supplement to the petition for grant of review, Appellant respectfully asks that this Court reverse the decision of the Court of Criminal Appeals in its entirety and remand for an entirely new Article 66 review.

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 21, 2017, the foregoing was electronically filed with the Court and delivered to Government Appellate Division.

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Rule 24(b) because it does not exceed 15 pages.

This brief complies with the typeface and type style requirements of Rule 37 because it is prepared in Times New Roman 14-point typeface using Microsoft Word Version 2016.

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