
IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON I. MILLER, PRIVATE,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

**On Petition for a Writ of Certiorari
To the United States Court of Appeals for the
Armed Forces**

PETITION FOR WRIT OF CERTIORARI

The petitioner, Brandon I. Miller, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Armed Forces is unreported (Appendix A). The *per curiam* decision of the United States Army Court of Criminal Appeals is unpublished (Appendix B). The original decision by the United States Army

Court of Criminal Appeals (Appendix C) was set aside by the United States Court of Appeals for the Armed Forces in *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009) (Appendix D).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on February 25, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution:

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

STATUTE INVOLVED

This case also involves Articles 16, 25, 51, 52 and 66, UCMJ; 10 U.S.C. §§ 816, 825, 851, 852, and 866. These sections are provided below:

10 U.S.C. § 816

The three kinds of courts-martial in each of the armed forces are-

(1) general courts-martial, consisting of-

(A) a military judge and not less than five members or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a); or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of-

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

10 U.S.C. § 825(c)(1):

Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled

and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

10 U.S.C. § 851(a):

Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

10 U.S.C. § 852(b)(3):

All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

10 U.S.C. § 866(c):

In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as

approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

STATEMENT OF THE CASE

Procedural History

Before an enlisted panel¹ sitting as a special court-martial petitioner was convicted, contrary to his pleas, of absence without leave, assaulting a noncommissioned officer, resisting apprehension, communicating a threat, and using provoking speech, in violation of Articles 86, 91, 95, 117, and 134, UCMJ; 10 U.S.C. §§ 886, 891, 895, 917 and 934.

The panel sentenced petitioner to three months hard labor without confinement and a bad-conduct discharge. The convening authority reduced petitioner's sentence to a bad conduct discharge.

¹ A panel is the functional equivalent to a jury in the military justice system.

The Army Court of Criminal Appeals (Army Court) set aside the specification of provoking speech, Article 117, UCMJ, but denied any sentence relief, and affirmed the remainder of the enlisted panel's decision on March 24, 2008. (Appendix C).

The Court of Appeals for the Armed Forces (CAAF) reversed the decision of the Army Court, set aside the resisting apprehension charge, and remanded the case for sentence reassessment or a rehearing. *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009) (Appendix D).

On remand, the Army Court granted no sentence relief, and affirmed the remaining findings and sentence on August 11, 2009.

Petitioner appealed to CAAF on the issue:

WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS WERE VIOLATED BY THE LOWER COURT'S FAILURE TO REMAND THE CASE FOR A SENTENCE REHEARING WHEN APPELLANT SELECTED SENTENCING BY MEMBERS RATHER THAN BY THE JUDICIARY AFTER APPELLANT HAS BEEN GRANTED SUBSTANTIAL RELIEF THROUGH HIS APPEAL.

On February 25, 2010, CAAF granted petitioner's petition, but affirmed the Army Court's decision.

Statement of Facts

Petitioner was advised on the record by the military judge of his statutory right to choose to be tried by a panel of all commissioned officers, a panel of commissioned officers and at least one-third enlisted members, or military judge alone. 10 U.S.C. § 816.² Petitioner specifically invoked his right to be tried and sentenced by a panel of one-third enlisted Soldiers, rather than a military judge. At the trial level, these rights were not infringed upon. However, on appeal, two of five charges for which petitioner was convicted were set aside and three judges of the Army Court reassessed petitioner's sentence leaving the sentence unchanged. The three judge's were senior commissioned officers of the Judge Advocate General's Corps serving as judges on the Army Court.

² This provision outlines the default rule favoring trial by members, enlisted or officers. Trials by military judge alone are only permitted when the accused meets specific criteria, to include knowing the identity of the military judge, consulting with counsel, and making the request orally or in writing of the decision to request judge alone.

REASONS FOR GRANTING THE WRIT

The Army Court and the CAAF deprived petitioner of his constitutional and statutory right to be tried and sentenced by a panel composed of at least one-third enlisted service members rather than three judges.

SUMMARY OF ARGUMENT

Congress applied the Sixth Amendment right to a trial by jury to the system of military justice through statute. The Army Court's and CAAF's abridgement of that right violates the due process clause of the Fifth Amendment. Allowing service courts to reassess sentences after charges have been set aside on appeal, when a Soldier elected an enlisted panel, converts the prophylactic duty to review sentences for appropriateness under Article 66, UCMJ, into original sentencing authority which is contrary to Congressional intent and violates the Constitution.

ARGUMENT

Congress implemented the constitutional right of trial by jury in the military justice system by establishing the statutory right of an enlisted service member to have the findings and sentence determined by an enlisted panel. 10 U.S.C. §§ 816, 825, 851, and 852. Additionally, Congress statutorily mandated that an enlisted service member be sentenced as agreed upon by two-thirds of the

members of a panel. 10 U.S.C. § 852. Although the military justice system requires that a sentence be reviewed for appropriateness by the Court of Criminal Appeals (10 U.S.C. § 866), that power to review a sentence does not vest Courts of Criminal Appeals with original sentence authority.

To allow Courts of Criminal Appeals composed entirely of senior commissioned officers, to re-sentence a service member after significant charges have been set aside, usurps enlisted Soldiers' statutory right to be sentenced by a panel of at least one-third enlisted members. Congress, by mandating that an enlisted service member may have his or her sentence decided by an enlisted panel, accommodated the Sixth Amendment's requirements and protections to the military justice system, by balancing the Constitutional right to trial by jury against the peculiar needs of the military. S. REP. NO. 486, at 2 (1949). Congress plainly stated, "a provision giving an accused enlisted man the privilege of having enlisted men as members of the court trying his case," as "among the provisions designed to insure a fair trial," when it established the UCMJ. *Id.* The Congressional Hearings on the enactment of the UCMJ are replete with discussions about the importance of a right to an enlisted panel. *Uniform Code of Military Justice: Hearing on H.R. 2498 Before the H.R. Subcommittee of the Committee on Armed Services*, 81st Cong., 2 (1949) (Through his questions, Representative Philbin made clear that to have enlisted men serve on panels would be a "jury trial of his own peers," and Representative Rivers

added that it would give the enlisted man a feeling of confidence in the system of military justice. *Id.* at 724; In his questions, Robert W. Brooks, Professional Staff Member, emphasized that having enlisted men on panels would “remove the criticism that has been leveled at these trials which prohibited the use of enlisted men . . . to that extent it will have a good moral effect.” *Id.* at 1140-41).

“The Uniform Code of Military Justice, enacted in 1950, was Congress' evolutionary response to public demands for increased procedural due process in military justice that began with the “Texas Mutiny” and “Houston Riot” cases of 1917.” *United States v. Bauerbach*, 55 M.J. 501, 503 (C.A.A.F. 2001). The plain language of the statute, the Congressional record and public sentiment prior to enactment of the UCMJ, all show that Congress intended to give enlisted men and women the right to an enlisted panel as a means to better protect their constitutional rights.

Abridging the statutory right of a Soldier to have an enlisted panel decide his sentence violates the UCMJ, Fifth Amendment due process protections, and implicates Sixth Amendment concerns. 10 U.S.C. §§ 816, 825, 851, and 852; *see* U.S. CONST. amend. V and VI. Although the CAAF has held the right to a jury trial, as contemplated by the Sixth Amendment, does not apply in the military as to jury selection and juries being a representative cross section of the community (*United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing *United States v.*

Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973) and *Ex parte Quirin*, 317 U.S. 1, 39-41 (1942) (citations omitted)), this line of cases does not stand for the proposition that service members have no constitutional rights to some measure of a jury trial. Indeed, practical experience has demonstrated that military necessity does not require relinquishment of this Constitutional right; enlisted panels are convened routinely across the services and around the globe, including during armed conflict.

Just as the New Jersey sentencing procedure was “an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system,” in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), so too was the Army Court’s action in this case. In *Apprendi*, this Court emphasized as a matter of constitutional law that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” *Id.* at 490. Unlike the federal system where sentences run concurrently, in the military sentences run consecutively. Rule for Courts-Martial 1003(c)(1)(C). Every charge at a court-martial has potential to increase the maximum penalty that an accused faces. Thus, when charges are set aside on appeal and a service court simply reassesses the sentence based on the remaining charges, the right to trial by jury is offended when an accused elected a trial by enlisted panel, both as a matter of statute as well as the Constitution. Although, petitioner was subject to a special court-martial with jurisdictional limitations

on maximum sentence, the number and type of charges presented to the panel had an effect on the panel's sentencing decision.

As Justice Brennan pointed out in his dissent in *Jackson v. Taylor*, 353 U.S. 569, 581 (1957), "Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here, under the statute, only the court-martial was authorized to take this step." (The majority found no authority in that version of the UCMJ to remand a case for sentence rehearing and that Congress intended boards of review to modify sentences). Importantly, the majority in *Jackson* pointed out that the "petitioner claims no deprivation of constitutional rights," but rather argues only under military law. *Id.* at 572. In the case at bar, the petitioner specifically asserts deprivation of his constitutional rights as well as his statutory rights.

In the instant case, petitioner invoked his right to trial and sentencing by one-third enlisted members. During the course of the petitioner's appeal both the Army Court and CAAF overturned convictions of the petitioner for serious offenses. Therefore, the Army Court and CAAF violated petitioner's statutory and constitutional rights when petitioner was denied a panel rehearing on sentence.

Petitioner was originally sentenced to only hard labor and a bad conduct discharge.³ Congress mandated that petitioner be sentenced by an enlisted panel. Put another way, petitioner contends that an enlisted panel, presented solely with the charges for which he stands convicted, with matters in aggravation limited to those relevant to those particular offenses, would likely not adjudge a punitive discharge. An enlisted panel must sentence appellant, as both petitioner and Congress intended.

³ The Convening Authority approved only the bad conduct discharge.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

MARK TELLITOCCHI
Colonel, United States Army
Chief,
Defense Appellate Division

JONATHAN POTTER
Lieutenant Colonel,
United States Army
Senior Appellate Counsel,
Defense Appellate Division

SHAY STANFORD
Captain, United States Army
Branch Chief,
Defense Appellate Division

BRENT A. GOODWIN
Captain,
United States Army
Council of Record
U.S. Army Legal
Services Agency,
Defense Appellate
Division,
901 N. Stuart St.,
Suite 340,
Arlington, VA 22203
(703) 588-6020
[brent.a.goodwin@
us.army.mil](mailto:brent.a.goodwin@us.army.mil)

Counsel for Petitioner