IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ISRAEL E. FLORES,
Senior Airman (E-4),
United States Air Force,
Appellant

USCA Dkt. No. 23-0198/AF

Crim. App. Dkt. No. ACM 40294

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

WHETHER SENTENCE APPROPRIATENESS REVIEW FOR SEGMENTED SENTENCING MUST CONSIDER EACH SEGMENTED SENTENCE TO CONFINEMENT, OR INSTEAD ONLY THE OVERALL SENTENCE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction to review this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

A military judge sitting as a general court-martial convicted Senior Airman (SrA) Israel Flores, consistent with his pleas and pursuant to a plea agreement, of one specification of making a false official statement and two specifications of assault consummated by a battery[2] in violation of Articles 107 and 128, UCMJ, 10 U.S.C. §§ 907, 928. Joint Appendix (JA) at 13-14, 32.

[1] All references to the punitive articles, UCMJ, the Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] For both specifications, SrA Flores pleaded guilty to the lesser-included offense of assault consummated by a battery and not guilty to the excepted words: ", a child under the age of 16 years." JA at 13-14, 32.

The military judge sentenced SrA Flores to a reduction to the grade of E-1, total forfeiture of pay and allowances for 12 months, 12 months' confinement,[3] and a bad-conduct discharge. JA at 26. The AFCCA affirmed the findings and sentence. JA at 2.

STATEMENT OF FACTS

1. While sleep deprived and suffering from a psychiatric disorder, SrA Flores hit his girlfriend's son.

Senior Airman Flores became involved in a romantic relationship with E.F., an Air Force staff sergeant (E-5). JA at 27. She had a son, J.F. *Id.* SrA Flores dated E.F. from approximately September 2020 to November 25, 2020. *Id.* Throughout their relationship, SrA Flores took care of J.F. on multiple occasions when E.F. was not present. *Id.* At that time, SrA Flores was 23 years old and J.F. was two years old. *Id.* SrA Flores did not have any children of his own and had little experience dealing with children in general. JA at 24. On November 25, 2020, SrA Flores was "running off 2 to 3 hours of sleep on a 72-hour period in addition to working night shift, 12- to 14-hour shifts - - grave shifts." *Id.* After one of these long shifts, SrA Flores became frustrated while watching J.F. and hit him. JA at 28. E.F. took J.F. to the emergency room later that day. *Id.* At that time, SrA Flores "suffered

[3] The military judge sentenced SrA Flores to 12 months' confinement for the false official statement and 6 months' confinement for each specification of assault consummated by a battery with all terms of confinement running concurrently. JA at 26.

from chronic night terrors, insomnia, and was sleep-deprived for three days." *Id.* SrA Flores was also diagnosed with adjustment disorder with mixed anxiety and depressed mood. JA at 27. But SrA Flores did not believe any of those issues condoned his actions against J.F. as they were wrong and he genuinely regretted what he did. JA at 22-23.

On November 26, 2020, SrA Flores's then-First Sergeant, Senior Master Sergeant (SMSgt) O.M., transported him to the Air Force Office of Special Investigations (AFOSI). JA at 29. After SrA Flores's interview with AFOSI, SMSgt O.M. provided SrA Flores the phone number for SrA Flores's Area Defense Counsel (ADC). *Id.* SMSgt O.M. further stated, "If you need anything, let's work out places to stay" and "no judgment until all of this stuff shakes out – I'm your [First Sergeant]." *Id.* SrA Flores responded, "You know it is what it is – it's okay. I've got plenty of stuff on her" and "I wasn't even there." *Id.* The statement, "I wasn't even there," was the single false official statement charged. JA at 11.

2. Pursuant to a Plea Agreement, Senior Airman Flores pleaded guilty to assault consummated by battery and making a false official statement.

Pursuant to a plea agreement, SrA Flores pleaded guilty to making the false official statement to his First Sergeant (Charge I and its Specification). JA at 19-20, 32-37. SrA Flores also pleaded guilty to two specifications of the lesser-included offense of assault consummated by a battery against J.F. arising on November 25,

2020: (1) striking J.F., on divers occasions, on the face and head with his hand (Charge II, Specification 1); and, (2) striking J.F. on the face and head with a spatula (Charge II, Specification 2). JA at 19-20, 32-37.

The plea agreement stated the minimum and maximum punishments for each charge and specification. JA at 33-34. For the false official statement, the minimum punishment was 6 months' confinement and a bad-conduct discharge while the maximum punishment was 3 years' confinement and a dishonorable discharge. JA at 33. For both specifications of assault consummated by a battery, the minimum punishment was a bad-conduct discharge while the maximum punishment was the statutory maximum of 6 months' confinement. JA at 33-34. All confinement was to run concurrently. *Id.*

3. The Military Judge sentenced SrA Flores to,* inter alia*, 12 months' confinement for the false official statement and 6 months' confinement for each specification of assault consummated by a battery.

The military judge sentenced SrA Flores to 12 months' confinement for the false official statement charge and 6 months' confinement for each specification of assault consummated by a battery; because of the concurrent sentences, this amounted to a total of 12 months' confinement. JA at 26. He was also sentenced to a bad conduct discharge. JA at 14, 26.

4. The AFCCA considered the nature and seriousness of the offenses to conclude that the sentence was appropriate.

The AFCCA "agree[d] there were mitigating circumstances and evidence of rehabilitative potential," but concluded SrA Flores's sentence was not inappropriately severe. JA at 9. It commented, "The circumstances surrounding the assault consummated by a battery and underlying the false official statement are aggravating." *Id.* The AFCCA described SrA Flores as being "reluctant to admit" striking J.F. on the head and face. *Id.* It then focused on "[t]he fact that [J.F.] was a helpless two-year-old child who could not express himself what he had endured" and how that "compound[ed] [SrA Flores's] actions." *Id.* The AFCCA expanded: "[SrA Flores] chose to minimize the assault—leaving [E.F.] to rely on a friend's advice instead of arming her with a full, accurate, and timely disclosure of the events so that she could decipher [J.F.'s] symptoms and make well-informed medical decisions for her toddler as quickly as possible." *Id.* It then finally referenced the charged false official statement: "When [SrA Flores] told SMSgt [O.M.], that he 'wasn't even there,' he continued to attempt to escape responsibility for his actions." *Id.* The AFCCA "conclude[d] that the nature and seriousness of the *offenses* support the adjudged sentence." JA at 10 (emphasis added).

SUMMARY OF THE ARGUMENT

When analyzing the appropriateness of SrA Flores's sentence, a Court of Criminal Appeals (CCA) cannot ignore the importance, and practical consequence,

of the military judge's sentencing structure. Article 66(d), UCMJ, does not ignore this sentencing structure—it commands that CCAs "may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 60c, UCMJ, 10 U.S.C. § 860c, pertains to the Entry of Judgement (EOJ), which refers to the Statement of Trial Results (STR) found under Article 60, UCMJ, 10 U.S.C. § 860. Both documents show the segmented sentence the military judge adjudged for each specification as Congress directed under Article 56(c)(2), UCMJ, 10 U.S.C. § 856(c)(2), and prescribed by the President under Rule for Courts-Martial 1002(d)(2). It follows that Article 66(d), UCMJ, directs CCAs to review each segmented sentence and to "affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved."

The military judge adjudged a segmented sentenced, making it clear SrA Flores was sentenced to 12 months' confinement solely for the false official statement. The AFCCA focused its sentence-appropriateness analysis on the assaults, which were the more serious offenses. But SrA Flores explicitly entered a favorable plea agreement that limited the sentence to only 6 months' confinement for each assault offense. The AFCCA's analysis bypassed the fundamental importance of segmented sentencing, effectively performing review as though the sentence were unitary. The AFCCA's clear focus—assault—drove this conclusion.

Standing alone, SrA Flores's inconsequential false statement did not merit 12 months' confinement.

Therein lies both the AFCCA's error and the profound problem its error creates. A CCA cannot—consistent with its statutory sentence appropriateness responsibility—ignore the constraints on the sentence that segmented sentencing imposes. When a CCA does so it undermines both the sentencing authority's intention and, more importantly, Congress' will. CCAs must review each segmented sentence just as the military judges are mandated to adjudge each segmented sentence to confinement based on what is appropriate for each offense.

ARGUMENT

SENTENCE APPROPRIATENESS REVIEW MUST CONSIDER EACH SEGMENTED SENTENCE, NOT THE TOTAL CONFINEMENT.

Standard of Review

A decision by a CCA determining sentence appropriateness is reviewed for an abuse of discretion. *See United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016) (citations omitted). The scope and meaning of Article 66(d),[4] UCMJ, is a matter of

[4] While *United States v. Willman* discussed Article 66(c) (2012), the statute has remained relatively the same through MJA 2016 with the language regarding "as approved by the convening authority" changing to "as entered into the record under section 860c of this title (article 60c)." *Compare Willman*, 81 M.J. 355, 357 (C.A.A.F. 2021), *with* Article 66(d), UCMJ (2019). This procedural difference does not affect the substantive rights afforded under Article 66, UCMJ.

statutory interpretation that is reviewed *de novo*. *Willman*, 81 M.J. at 357 (citations omitted).

Law

1. *As part of its Article 66, UCMJ, review authority, a CCA may only affirm the sentence, or portion of the sentence, that the court finds correct in law and fact and, based on the entire record, determines should be approved.*

CCAs have "not only the power but also the independent duty to consider sentence appropriateness" and whether the court-martial "adjudged too harsh a sentence." *See United States v. Baker*, 28 M.J. 121, 122-23 (C.M.A. 1989).

Congress, recognizing that broad discretion in a decentralized military-justice system "is likely to produce disparate results, has provided the [CCAs] not only with the power to determine whether a sentence is correct in law and fact, but also with the highly discretionary power to determine whether a sentence 'should be approved.'" *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). This Court expressly recognized that the words "should be approved" in Article 66(d), UCMJ, have meaning, and that "sentencing decisions on this point underscore that the statutory phrase 'should be approved' does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review." *United States v. Nerad*, 69 M.J. 138, 145-46 (C.A.A.F. 2010) (citations omitted). "The breadth of the power granted to the [CCAs] to review a case for sentence

appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted).

The CCA's role in reviewing sentences under Article 66(d), UCMJ, is to "do justice," as distinguished from "the discretionary power of the convening authority to grant mercy." *United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998) (citing *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988)) (explaining that in *Healy*, "[t]his Court distinguished between the role of the Courts of Military Review to 'do justice' and the discretionary power of the convening authority to grant mercy"). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *Healy*, 26 M.J. at 395, *superseded by statute*, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955-56 (2013).

This Court's authority is limited to reviewing matters of law and lacks the same power to independently review sentence appropriateness. Article 67(c)(4), UCMJ, 10 U.S.C. § 867(c)(4). Still, it may review a CCA's exercise of this authority for abuse of discretion. *See Gay*, 75 M.J. at 267 (this Court reviewed the CCA's sentence appropriateness determination for an abuse of discretion).

In *United States v. Buber*, the Army Court of Criminal Appeals (ACCA) set aside convictions for murder and assault upon a child , then reassessed the sentence for the sole remaining offense—false official statement—to two years' confinement

and a bad-conduct discharge. 62 M.J. 476, 476-77 (C.A.A.F. 2006). This Court set aside the sentence and returned the case for a rehearing, explaining that the case changed "dramatically" and that it could not interpret the ACCA's holding that the "serious circumstances of appellant's lie" justified the reassessed sentence. *Id.* at 479-80.

2. When interpreting a statute, courts look to the plain meaning of the statue's text.

A statute is clear and unambiguous if it is susceptible to only one interpretation. *United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022) (citing *United States v. Kohlbek*, 78 M.J. 326, 331 (C.A.A.F. 2019)). A general rule of statutory construction is to use the plain meaning and apply the statute as written when it is clear an unambiguous. *Id.* However, when giving each word its "ordinary, contemporary, common meaning," the inquiry is not limited to the text in isolation. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (citation omitted). Instead, courts look to the "text of the whole statute" to instruct on its meaning. *Id.* "We apply these principles [of statutory construction] when we interpret the rules and other provisions in the [MCM] as well." *United States v. Andrews*, 77 M.J. 393, 400 n.8 (C.A.A.F. 2018). Case law may be used to resolve ambiguity, though case law must square with the statute not the other way around. *Schmidt*, 82 M.J. at 73 (citation omitted). This Court "assume[s] that Congress is

aware of existing law when it passes legislation." *Id.* (quoting *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019)).

3. Given that military judges must adjudge confinement for each individual specification, CCAs must consider each segmented sentence while conducting Article 66, UCMJ, review.

Under Article 56, UCMJ, 10 U.S.C. § 856, military judges shall specify the term of confinement for each offense the accused is found guilty; if more than one term of confinement is imposed, the military judge shall specify whether they run concurrently or consecutively with each other. Article 56(c)(2), UCMJ. Such sentences shall be "sufficient, but not greater than necessary." Article 56(c)(1), UCMJ, 10 U.S.C. § 856(c)(1). "In any case before the [CCA] under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 66(d), UCMJ. A CCA may affirm only such findings and sentence as it finds "correct in law and fact and determines, on the basis of the entire record, should be approved." *Id.*

Article 60c, UCMJ, covers the EOJ. "In accordance with rules prescribed by the President, in a general or special court-martial, the military judge shall enter into the record of trial the judgment of the court. The judgment of the court shall consist of . . . [t]he (STR) under section 860 of this title (article 60)." Article 60c(1)-(1)(A), UCMJ. The STR "shall set forth—(A) each plea and finding; (B) the sentence, if

any; and (C) such other information as the President may prescribe by regulation." Article 60(a)(1), UCMJ, 10 U.S.C. § 860(a)(1).

Rule for Courts-Martial 1002(d)(2) broadly tracks Article 56, UCMJ. Rule for Courts-Martial 1002(d)(1) directs that when the accused has elected sentencing by members in a general or special court-martial, "the members shall determine a single sentence for all the charges and specifications of which the accused was found guilty." Prior to the Military Justice Act of 2016 (MJA 2016),[5] all sentences, whether adjudged by members or a military judge, were unitary. *See* R.C.M. 1002(b) (2016). MJA 2016 altered this system. Now, unless an accused makes a timely request for sentencing by members, the military judge shall determine the sentence. R.C.M. 1002(d)(2). Military judges then must determine the appropriate amount of confinement for each specification separately. R.C.M. 1002(d)(2)(A), Discussion. Only after deciding on the term of confinement should the military judge determine if the term runs concurrently or consecutively with any other term of confinement. R.C.M. 1002(d)(2)(B).

This Court has yet to address how segmented sentencing affects the CCAs' sentence appropriateness review. In *United States v. Alkazahg*, the Navy Marine Corps Court of Criminal Appeals (NMCCA) did address the impact of MJA 2016

[5] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301, 130 Stat. 2000, 2920 (2016).

on sentence appropriateness review. 81 M.J. 764, 785-86 (N.M. Ct. Crim. App. 2021). The NMCCA set aside one specification for failure to state an offense, and then addressed whether the sentence was appropriate for the remaining unitary and segmented sentences. *Id.* The NMCCA affirmed the unitary sentence, but found the remaining segmented sentences inappropriate and only affirmed them to the extent they were appropriate. *Id.* at 786–91.

The NMCCA recognized that Article 66(d)'s, UCMJ, "sentence appropriateness provision is a sweeping [c]ongressional mandate to ensure a fair and just punishment for every accused." *Id.* at 785 (quoting *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005), which was referencing Article 66(c)'s, UCMJ, sentence appropriateness provision). After setting aside the segmented sentence for the findings it set aside, the NMCCA then applied the *Winckelmann*[6] factors for the remaining offenses it affirmed. *Id.* at 786. The NMCCA held "MJA 16's segmented sentencing obviates the need for sentence *reassessment* of confinement or fines imposed by a military judge for specifications that were not set aside. But there is still the matter of whether the remaining segmented and unitary sentences are *appropriate*." *Id.*

Other CCAs have wisely recognized inappropriately severe sentences for a false official statement and provided relief. *See, e.g.*, *United States v.*

[6] *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013).

Simmermacher, No. 201300129, 2015 CCA LEXIS 425, at *3–5 (N.M. Ct. Crim. App. Oct. 15, 2015) (per curiam) (dismissing a cocaine charge and reassessing the sentence for the sole offense—the appellant's false statement to investigators that she never used cocaine—to a reduction to the grade of E-3); *United States v. Spurling*, No. 201400124, 2014 CCA LEXIS 771, at *6, 19 (N.M. Ct. Crim. App. Oct. 16, 2014) (disapproving part of the member's sentence of a bad-conduct discharge as inappropriately severe for a single specification of false official statement involving a lie to a non-commissioned officer about authorization to drink alcohol), *rev'd on other grounds*, 74 M.J. 261 (C.A.A.F. 2015).

Analysis

In its sentence appropriateness review, the AFCCA did not determine whether each component of the sentence was inappropriately severe on an individual basis (i.e., 6 months for each assault and 12 months for the false official statement). Instead, it looked at the sentence holistically, treating it as though the military judge issued a unitary sentence.

1. Congress directed military judges to adjudge segmented sentences for confinement and fines in military-judge-alone sentencing.

Pursuant to Article 56(c)(1)-(2), UCMJ, a military judge must impose confinement for each segmented offense individually and shall only impose an amount of confinement sufficient, but not greater than necessary.

As the President prescribed by regulation, Rule for Courts-Martial 1002(d)(2)(A) flows directly from Article 56(c)(2), UCMJ. In effect, military judges are to determine an appropriate sentence for each charge and specification individually and only then decide if each of those appropriate sentences of confinement should be served concurrently or consecutively.

2. CCAs are charged with affirming only the "sentence or such part or amount of the sentence" the Court finds correct in law and fact and, based on the entire record, should be approved.

Consistent with the rules of statutory interpretation, this Court in *Willman* first looked to the text of Article 66(c), UCMJ, in assessing the CCAs' role in reviewing the findings and sentence of each appellant's case. *Willman*, 81 M.J. at 357. This Court has always interpreted the CCAs' sentence-appropriateness review power broadly. *See United States v. Jessie*, 79 M.J. 437, 447 (C.A.A.F. 2020) (comparing the limited authority federal circuit courts have to supplement the record to the "uniquely broad authority" CCAs have under Article 66, UCMJ, and finding Article 66, UCMJ, clearly allowed CCAs to determine when to allow supplementation of the record); *see also Lacy*, 50 M.J. at 287-88 (reviewing the Congressional purpose and history of sentence appropriateness under Article 66, UCMJ). This power acts on *each* offense. Reading separate provisions of the UCMJ as a whole, Congress' mandate to military judges to adjudge a sentence of confinement for each offense naturally flows into the CCAs' charge to affirm only the "sentence or such part or

amount of the sentence" that should be approved. Article 56(c)(2), UCMJ; Article 66(d), UCMJ. Contrary to the plain reading of the statute altogether, the AFCCA found no authority compelled it to consider each sentence separately. *See United States v. Souders*, No. 40145, 2023 CCA LEXIS 126, at *23 (A.F. Ct. Crim. App. Mar. 9, 2023) (The AFCCA stated it was "unaware of any authority that would require [it] to use a segmented term of confinement" in conducting its Article 66, UCMJ, review). However, it is the logical reading of the UCMJ provisions that compels this conclusion.

Sentence appropriateness analysis necessarily became more complex with MJA 2016 and the requirement that military judges adjudge appropriate terms of confinement, if sufficient, but no more than necessary, for each specification. Article 56(c)(1)-(2), UCMJ. And Article 66(d), UCMJ, accounted for that complexity by referencing the EOJ under Article 60c, UCMJ, and the STR covered by Article 60, UCMJ. Both the EOJ and STR must identify each segmented sentence of confinement and whether each term would run concurrently or consecutively. CCAs are then explicitly mandated to only act with respect to the findings and sentence "as entered into the record" via the EOJ when conducting their sentence-appropriateness review under Article 66(d), UCMJ. The text of Article 66(d), UCMJ, specifies that CCAs are only to affirm the sentence, part of a sentence, or amount of a sentence, that should be approved. This clearly provides for CCAs'

review of various forms of sentences based on the different realms in which each court-martial may arrive at a sentence. It necessarily follows that CCAs may only act with respect those segmented sentences by affirming "the sentence or such part or amount of the sentence" that "should be approved." Article 66(d), UCMJ.

3. It is untenable to conclude that Congress directs military judges to adjudge segmented sentences that CCAs would then review as unitary.

The CCAs should not be blind to a military judge's segmented sentence. To clarify, MJA 2016 directs military judges to adjudge segmented sentences for confinement and fines, if necessary, for each offense, but unitary sentences still apply for reprimands, reductions in grade, forfeitures, and punitive discharges. It does not follow that Congress would make this distinction for military judges and then intend for CCAs to review those same sentences as one unit. A military judge's decision, both by specification and in deciding whether confinement runs concurrently or consecutively, is a fundamental aspect of the sentence. Article 66(d), UCMJ, provides for reviewing those types of sentences as entered into the record through the EOJ and STR.

At a minimum, CCAs have utilized the segmented sentences when conducting sentence reassessment. In such situations, the CCA must gauge whether it "can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity"; if so, that sentence "will be free of the prejudicial effects of error." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Since

MJA 2016, many CCAs have looked to the segmented sentence to answer that question. Where the military judge issued a segmented term of confinement or fine on a specification, the CCAs have targeted the segmented sentence for any set aside or overturned offense and reassessed the sentence accordingly. *See United States v. McCameron*, No. 40089, 2022 CCA LEXIS 663, at *15–16 (A.F. Ct. Crim. App. Nov. 17, 2022) (noting that "we also have the benefit of the military judge's segmented sentence in this case" and reassessing the sentence by removing the $100.00 fine that corresponded to the set-aside specification); *United States v. Injerd*, No. 40111, 2022 CCA LEXIS 727, at *29 (A.F. Ct. Crim. App. Dec. 20, 2022) (considering "the fact that the military judge imposed a segmented sentence of three months' confinement for [a]ppellant's conviction" that was set aside, the Court reassessed the sentence by reducing the confinement for three months); *United States v. Figuereo*, No. 202100048, 2023 CCA LEXIS 153, at *7 (N.M. Ct. Crim. App. Mar. 31, 2023) (reassessing the sentence to set aside the exact amount of confinement from the military judge's segmented sentence after setting aside that specification).

The NMCCA in *Alkazahg* demonstrated a proper use of the MJA 2016's segmented sentencing not just as to sentence reassessment, but also to its sentence appropriateness review. There, the NMCCA held that regardless of any need for sentence reassessment, "there is still the matter of whether the remaining segmented

and unitary sentences are *appropriate*." *Alkazahg*, 81 M.J. at 786. This makes sense, because while a CCA may determine that the sentence adjudged would have been at least a certain severity, it may also conclude that the segmented sentences are not appropriate based on the entire record and then only affirm the sentence, or part of a sentence, that should be approved. Specifically, in *Alkazahg*, the NMCCA's sentence appropriateness review of the segmented sentence for the false official statement to appellant's gunnery sergeant found "no more than 30 days' confinement" as opposed to 24 months' confinement was appropriate. 81 M.J. at 786-87. The NMCCA then found appellant's lie about not having firearms in his truck was more akin to criminal conduct amounting to a special court-martial and thus, held 24 months' confinement was inappropriate, cutting the amount in half. *Id.* at 787. As for the fraudulent enlistment where in the appellant had lied on his enlistment paperwork, the NMCCA found it was more like the false official statement appellant made to his gunnery sergeant and held no more than 30 days' confinement was appropriate. *Id.* 787-88. Thus, while the AFCCA's approach anachronistically treats the sentence as unitary, the NMCCA is treating it, appropriately, as segmented.

Utilizing the segmented sentences when a conviction is set aside to determine any need for sentence reassessment makes sense, because the CCA can set aside the specific term of confinement adjudged for that overturned conviction. But the

analysis cannot stop there. The NMCCA's approach to both sentence reassessment and its sentence appropriateness review is correct and tracks the responsibility bestowed upon CCAs by Congress to consider each sentence, or part of a sentence, and only approve the appropriate sentences that should be approved. Absent the sentence-appropriateness review of each segmented sentence of confinement, there would be no check on the military judge's requirement to adjudge appropriate sentences for each offense as illustrated by *Alkazahg*. For example, without the additional sentence-appropriateness review, the appellant in *Alkazahg* would have remained inappropriately sentenced to 58 additional months of confinement despite the segmented sentence for one overturned conviction being set aside.

4. CCAs' review of military judge alone segmented sentences as unitary is fraught with problems as illustrated by SrA Flores's case.

Here, the AFCCA lumped together the circumstances surrounding the assaults and the false official statement when it analyzed the sentence. JA at 9-10. In so doing, it ignored the actual sentence adjudged by the military judge and reflected in the EOJ. The EOJ in SrA Flores's case lays out the adjudged sentence to terms of confinement for each charge and specification as required by Article 60, UCMJ; Article 60c, UCMJ; and R.C.M. 1002(d)(2). JA at 13-18. The issue with CCAs reviewing military judges' segmented sentences as unitary is clearly demonstrated in SrA Flores' case—the aggravation for the assaults bled over to the false official

statement, thus, permitting SrA Flores to be sentenced not commensurate with the charged offense.

In its sentence appropriateness review, the AFCCA "agree[d] there were mitigating circumstances and evidence of rehabilitative potential," but concluded SrA Flores's sentence as a whole was not inappropriately severe. JA at 9. Of note, SrA Flores did not raise the issue of whether six months' confinement for each assault was inappropriately severe. Yet, the AFCCA went on to describe the aggravating factors for the assaults. It commented, "[t]he circumstances surrounding the assault consummated by a battery and underlying the false official statement are aggravating." JA at 9. Instead, had the AFCCA performed its congressionally mandated review of each segmented sentence to confinement, it would have had to articulate what warranted 12 months' confinement for the single false official statement. And it would have been difficult for AFCCA to justify given a single false official statement is almost never going to call for 12 months' confinement absent aggravating facts independent of another charged offense.

The AFCCA's Article 66(d), UCMJ, review here contrasts sharply with the NMCCA's action in *Alkazahg* as discussed above. It does not stand to reason that SrA Flores would be sentenced to twice as much[7] confinement for a single lie than for the gravamen offenses. Nevertheless, the AFCCA looked at the segmented

[7] Or to four times as much confinement considering the total amount for the assaults.

sentences to three different terms of confinement as a unitary sentence, while ignoring the plea agreement, and determined that a year was appropriate for striking "a helpless two-year-old child who could not express himself what he had endured" on the head and face. JA at 9.

The AFCCA's analysis of the facts surrounding the single false official statement in SrA Flores's case is inconsistent with this Court's factual analysis in *Buber*. The appellant in *Buber* was initially convicted of killing his four-year-old stepson by shaking and striking the child; of assaulting the child on a separate occasion; and of making a false official statement about the circumstances of the death of the child. 62 M.J. at 477. In *Buber*, this Court found the lower court erred in reassessing the sentence[8] as opposed to ordering a sentencing rehearing when the reassessed sentence was to two years' confinement and a bad-conduct discharge for a single specification of a false official statement. 62 M.J. at 476.

While SrA Flores's case is distinct in that the two specifications of assault consummated by a battery were not dismissed or set aside, the amount of confinement for each was clearly set out in the STR and EOJ—6 months for each specification. The issue here is not reassessing the sentence versus ordering a sentencing rehearing. Instead, the issue remains that the AFCCA did not conduct a

[8] The lower court dismissed the charges of murder and assault after finding the defense theory of accidental injury was not disproven beyond a reasonable doubt. 62 M.J. at 477 (citation omitted).

sentence appropriateness review under Article 66(d), UCMJ, for the segmented sentence of the false official statement.

Considering that segmented sentence alone, this Court's finding regarding the false official statement in *Buber* is instructive. There, this Court found "[a] single statement made to law enforcement ten days before the child's death did not necessarily support any determination that there was a causal connection between the statement to law enforcement and any medical treatment or the failure to give any necessary medical treatment." 62 M.J. at 476. The same is true here. SrA Flores's statement was made to his First Sergeant, not to law enforcement. JA at 29. The statement was made the morning after and did not thwart any medical treatment as SrA Flores had already admitted to J.F.'s mother that he had hit J.F. JA at 28-29. Further, J.F. had been seen to the hospital prior to SrA Flores's statement to his First Sergeant. *Id*. There was no causal connection between SrA Flores's statement to law enforcement and any medical treatment or the failure to give any necessary medical treatment. Thus, 12 months' confinement for a single statement is inappropriately severe and at a minimum, the AFCCA should have considered that sentence alone in its sentence appropriate assessment.

Rather, the AFCCA "conclude[d] that the nature and seriousness of the *offenses* support the adjudged sentence." JA at 10 (emphasis added). It did not review the single false official statement and determine if the 12 months'

confinement was inappropriately severe or not. The false statement here is of minor significance, especially in comparison to the striking a two-year-old on the head and face specifications; the fleeting statement cannot possibly warrant twice (or four times) as much confinement as the gravamen offenses.

5. Conclusion.

SrA Flores is not asking this Court to usurp the AFCCA's authority to review his sentence. Instead, SrA Flores asks this Court to review the AFCCA's lack of Article 66(d), UCMJ, review as applied to each segmented sentence of confinement for an abuse of discretion. *See Gay*, 75 M.J. at 267. The statute tells CCAs to analyze by specification any segmented sentence of confinement as adjudged by the military judge and entered into the record through the EOJ. The AFCCA did not do that here. Its lack of adherence to the Congressional mandate to conduct sentence appropriateness review under Article 66(d), UCMJ, led to the absurd result of approving the segmented sentence of 12 months' confinement for a single false official statement.

WHEREFORE, SrA Flores respectfully requests this Court remand this case to the AFCCA to conduct sentence appropriateness review for each segmented sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on August 21, 2023.

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CERTIFICATE OF COMPLIANCE
WITH RULES 24(b) AND 37

This Supplement complies with the type-volume limitation of Rule 24(b) because it contains 5,700 words. This Supplement complies with the typeface and type style requirements of Rule 37.

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