IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br><br>Appellee<br><br>v.<br><br>Braxston C. SPENCER<br>Lance Corporal (E-3)<br>U.S. Marine Corps,<br><br>Appellant | BRIEF ON BEHALF OF APPELLANT<br><br>Crim. App. Dkt. No. 202400328<br><br>USCA Dkt. No. 25-0192/MC |

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:



STATUTES, RULES, AND REGULATIONS

## Issue Presented

**UNDER ARTICLE 66, UCMJ, A CCA MUST DETERMINE THE APPROPRIATENESS OF A SENTENCE APART FROM ITS LEGALITY. DID THE CCA ABUSE ITS DISCRETION BY SAYING IT WOULD NOT "SECOND GUESS[]" A SENTENCE BECAUSE IT FELL WITHIN THE RANGE OF A PLEA AGREEMENT WITHOUT INDICATING THE SENTENCE WAS ALSO APPROPRIATE?**

## Statement of Statutory Jurisdiction

Appellant's sentence as set forth in the Entry of Judgment includes a bad-conduct discharge.[1] The Navy-Marine Corps Court of Criminal Appeals reviewed this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[2] Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.[3]

## Relevant Authorities

Article 53a(a)(1)(B), UCMJ (MANUAL FOR COURTS-MARTIAL (MCM), 2024 ed.)

> Subject to paragraph (3), at any time before the announcement of findings under section 853 of this title (article 53), the convening authority and the accused may enter into a plea agreement with respect to such matters as . . . (B) limitations on the sentence that may be adjudged for one or more charges and specifications.

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[1] *United States v. Spencer*, No. 202400328, slip. op. at *1. (N-M. Ct. Crim. App. 2025).
[2] 10 U.S.C. § 866(b)(3) (2024).
[3] 10 U.S.C. § 867(a)(3) (2024).

Article 56(a), UCMJ (MCM, 2024 ed.)

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

Article 56(b), UCMJ (MCM, 2016 ed.)

While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60).

Article 58(a), UCMJ (MCM, 2024 ed.)

Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use.

Article 63(b), UCMJ (MCM, 2024 ed.)

If the sentence adjudged by the first court-martial was in accordance with a plea agreement under section 853a of this title (article 53a) and the accused at the rehearing does not comply with the agreement, or if a plea of guilty was entered for an offense at the first court-martial and a plea of not guilty was entered at the rehearing, the sentence as to those charges or specifications may include any punishment not in excess of that which could have been adjudged at the first court-martial, subject to limitations as the President may prescribe by regulation.

Article 66(d)(1), UCMJ (MCM, 2019 ed.)

In any case before the Court of Criminal Appeals 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). The Court may 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. In considering the record, the Court may weigh the evidence, judge the credibility of witness, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Rule for Court-Martial 705(d)(1)(A)-(D) (MCM, 2024 ed.)

Subject to such limitations as the Secretary concerned may prescribe pursuant to R.C.M. 705(a), a plea agreement that limits the sentence that can be imposed by the court-martial for one or more charges and specifications may contain: (A) a limitation on the maximum punishment that can be imposed by the court-martial; (B) a limitation on the minimum punishment that can be imposed by the court-martial; (C) limitations on the maximum and minimum punishments that can be imposed by the court-martial; or, (D) a specified sentence or portion of a sentence that shall be imposed by the court-martial.

Rule for Court-Martial 910(f)(5) (MCM, 2024 ed.)

If a plea agreement contains limitations on the punishment that may be imposed, the court-martial, subject to subparagraph (4)(B) and R.C.M. 705, shall sentence the accused in accordance with the agreement.

Rule for Court-Martial 1002(a)(3) (MCM, 2024 ed.)

If the military judge accepts a plea agreement with a sentence limitation, the court-martial shall sentence the accused in accordance with the limits established by the plea agreement. . . .

## Statement of the Case

A special court-martial composed of a military judge alone found Appellant guilty, consistent with his pleas, of four specifications of larceny under Article

121, UCMJ.[4] On April 18, 2025, the CCA affirmed the findings and sentence.[5] Appellant timely petitioned this Court on June 17, 2025, and this Court granted review on July 15, 2025.

## Statement of Facts

Over several days in June 2023, Appellant stole merchandise from the Marine Corps Exchange at Camp Pendleton, California, valued at several thousand dollars.[6] Appellant later pleaded guilty to four specifications of larceny.[7] At the time of the offenses, Appellant was about nineteen years old.[8]

Appellant's plea agreement required the military judge to reduce Appellant to E-1.[9] However, it gave the military judge discretion over whether to adjudge a punitive discharge or to adjudge up to two months' confinement and two months of forfeitures of pay and allowances.[10]

In presentencing, the Government presented no evidence.[11] There was also no victim impact statement or testimony.[12] By contrast, several members of

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[4] JA at 49.
[5] *Spencer*, slip op. at *2.
[6] J.A. at 69-75; J.A. at 99-104; J.A. at 58-59.
[7] J.A. at 16; J.A. at 97-98 ("My mother . . . raised me on her own until the age of 8, when my step-father . . . joined our lives in the year 2012.").
[8] J.A. at 97.
[9] J.A. at 94.
[10] J.A. at 47, 94.
[11] J.A. at 51.
[12] J.A. at 50.

Appellant's chain of command praised his service despite the crimes to which he pleaded guilty.[13] In his unsworn statement, Appellant said his actions were "wrong" and he was "ashamed" when he had to face his chain of command.[14]

The military judge appeared to believe in Appellant's rehabilitative potential. The military judge sentenced Appellant to reduction to E-1, forfeiture of $1,344 per month for two months, sixty days of confinement, and a bad-conduct discharge.[15] However, the military judge recommended the confinement be suspended, explaining: "Witness testimony and character statements suggest the accused has made a sincere effort to reform."[16] Despite this, the Convening Authority did not suspend the confinement.[17]

On appeal, Appellant challenged the appropriateness of his sentence. He asked the Navy-Marine Corps Court of Criminal Appeals to exercise its power under Article 66(d)(1), UCMJ, to conclude that the portion of Appellant's sentence including a bad-conduct discharge was inappropriately severe.[18]

In its analysis, the lower court cited the standard for conducting sentence

[13] J.A. at 78-81.
[14] J.A. at 97.
[15] J.A. at 67.
[16] J.A. at 67.
[17] J.A. at 7.
[18] *Spencer*, slip op. at *2.

appropriateness review.[19] The lower court explained the maximum limits of a sentence and separately noted that a military judge must sentence an accused within the limits of a plea agreement.[20] The lower court then wrote: "Given the terms of Appellant's plea agreement and the sentence adjudged, we find that the adjudged sentence did not exceed the maximum allowable sentence under the UCMJ, nor did it exceed the terms of the plea agreement."[21]

The lower court briefly discussed some of the facts, describing Appellant's "serious misconduct" of stealing over multiple days.[22] The lower court explained that it was "instructive to this Court that the convening authority and Appellant agreed to give the military judge discretion on whether or not to adjudge a bad-conduct discharge."[23] The lower court also noted that the military judge recommended suspension only as to confinement and not to the punitive discharge.[24] The lower court then provided—for a second time—a rationale for why the sentence was legal under the terms of the plea agreement:

> The record shows Appellant's punishment was the foreseeable result of the plea agreement that he negotiated and voluntarily entered into with the convening authority. Appellant voluntarily chose to plead guilty in accordance with the specific terms of an agreement he freely

[19] *Id*. at *3-4.
[20] *Id*. at *4.
[21] *Id*.
[22] *Id*. at *4-5.
[23] *Id*. at *5.
[24] *Id*.

> negotiated. As we have previously stated, '*we generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement*.' Accordingly, we find Appellant's sole assignment of error to be without merit.[25]

The lower court's reference to "second guessing" omitted the first key part of the sentence the lower court quoted. The full sentence appeared in *United States v. Widak*, where the lower court wrote:

> *Other than to ensure that the appellant's approved sentence is one that 'should be approved,' Article 66(c),* we generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement or a [Convening Authority's] lawful exercise of his authority to grant clemency to an appellant.[26]

Here, by contrast, nowhere did the lower court explain that *apart* from the plea agreement, the lower court had considered the sentence to be appropriate under Article 66(d)(1), UCMJ. Likewise, the lower court did not explain why—regardless of the plea agreement—the sentence "should be approved" under Article 66(d)(1), UCMJ. Rather, the lower court cited both Article 59, UCMJ, and Article 66, UCMJ, generally before concluding that "the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred."[27]

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[25] *Id*. at *5 (emphasis added) (citation omitted).
[26] *United States v. Widak*, No. 201500309, 2016 CCA LEXIS 172, at *7 (N-M. Ct. Crim. App. Mar. 22, 2016) (emphasis added).
[27] *Spencer*, slip op. at *5 n.18.

## Summary of Argument

Under Article 66(d)(1), UCMJ, a CCA is required to assess not only the legality of a court-martial sentence but also its appropriateness. In *United States v. Kelly*, this Court explained that a CCA retains its sentence appropriateness duty even over mandatory sentences. This Court explained that mandatory sentences impose a limit on the *court-martial*, not an appellate court. This Court should hold that the same concept applies to sentences authorized by plea agreements, which similarly limit the court-martial but not a CCA's sentence appropriateness power.

Here, the lower court failed to appreciate this concept. The lower court emphasized that Appellant's sentence did not exceed the statutory maximum and explained that the military judge was required to sentence Appellant within the plea agreement. It focused on the fact that Appellant voluntarily pleaded guilty and received a sentence within the permissible range of his plea agreement. After explaining that it generally refrains from "second guessing" a plea agreement, the lower court concluded: "Accordingly, we find Appellant's sole assignment of error to be without merit." In other words, because the sentence was within the plea agreement, the sentence was also appropriate. That the lower court omitted key language from a decision it cited further shows it did not apply the right standard.

Further, that the lower court discussed some of the aggravating facts does not show the court conducted a legally correct sentence appropriateness review.

Additionally, while the lower court concluded that the findings and sentence were correct in law and fact and cited Articles 59 and 66 in a footnote, it did not conclude that Appellant's sentence "should be approved" or explain that the sentence was appropriate. This distinguishes this case from *United States v. Flores*. The proper remedy is to remand for further Article 66 review.

## Argument

### The lower court abused its discretion by failing to determine the appropriateness of the sentence apart from its legality.

Standard of review

This Court's "'review of decisions by the Courts of Criminal Appeals on issues of sentence appropriateness is limited to the narrow question of whether there has been an obvious miscarriage[] of justice or abuse[] of discretion.'"[28] An abuse of discretion occurs when a "court's decision is influenced by an erroneous view of the law."[29]

A. A CCA must independently assess the appropriateness of a sentence under Article 66, UCMJ, apart from its legality under Article 59, UCMJ.

This Court explained in *United States v. Powell* that "Article 59(a) [UCMJ] limits military appellate courts from reversing a finding or sentence for legal error

[28] *United States v. Swisher*, 85 M.J. 1 (C.A.A.F. 2024) (citation omitted).
[29] *Id*.

'unless the error materially prejudices the substantial rights of the accused.'"[30] By contrast, under Article 66, UCMJ, "Courts of Criminal Appeals 'may only affirm' that which they independently find 'correct in law and fact' and that which they 'determine[], on the basis of the entire record, should be approved.'"[31] Thus, this Court explained: "Article 59(a) constrains [a CCA's] authority to reverse; Article 66[d][1] constrains their authority to affirm."[32] Indeed, "it is a 'settled premise' that in exercising this statutory mandate, a CCA has discretion to approve only that part of a sentence that it finds 'should be approved,' even if the sentence is 'correct' as a matter of law."[33]

This Article 66(d)(1) sentence appropriateness review authority is "'a sweeping mandate to ensure 'a fair and just punishment for every accused.'"[34] This Court has recognized that "[t]his power 'has no direct parallel in the federal civilian sector,' and no other federal appellate court, including [CAAF], in the

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[30] 49 M.J. 460, 465 (C.A.A.F. 1998).
[31] *Id*. at 463 (citation omitted). Congress amended Article 66, UCMJ, to modify a CCA's sentence appropriateness authority in cases, not including Appellant's, in which "all findings of guilty are for offenses that occurred after [December 21, 2023]." *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. 117-81, 135 Stat. 1703, 1706 (2021).
[32] *Id*. at 464.
[33] *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018); *United States v. Atkins*, 8 U.S.C.M.A. 77, 79 (C.M.A. 1957) ("In short, the criterion for the exercise of the board of review's power over the sentence is not legality alone, but legality limited by appropriateness.").
[34] *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citation omitted).

American criminal justice system possesses the same power."[35]

The power is not discretionary. As this Court has also explained, "Article 66[d][1] '*requires* that the members of [the Courts of Criminal Appeals] independently determine, in every case within [their] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [they] affirm.'"[36]

B. In *United States v. Kelly*, this Court held that a CCA's sentence appropriateness power under Article 66, UCMJ, is not restricted by mandatory minimum sentencing provisions under Article 56, UCMJ.

In *United States v. Kelly*, this Court harmonized two sentencing-related provisions of the UCMJ that seemed to be in conflict. In *Kelly*, the appellant was convicted of, *inter alia*, sexual assault, which carried a mandatory minimum punishment of a dishonorable discharge.[37] Before the Army CCA (ACCA), the appellant asked the court to conclude that the dishonorable discharge was inappropriately severe.[38] In response, the ACCA declined to grant this relief, explaining that it was "powerless to provide relief in the face of an applicable mandatory minimum sentence" such as the appellant's.[39]

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[35] *Kelly*, 77 M.J. at 407 (citation omitted); *see also Powell*, 49 M.J. at 463 ("Courts of Criminal Appeals enjoy much broader appellate authority than civilian intermediate courts or our Court[.]").
[36] *Id*. (emphasis added) (citation omitted).
[37] *United States v. Kelly*, 76 M.J. 793, 806 (A. Ct. Crim. App. 2017) (en banc).
[38] *Id*.
[39] *Kelly*, 77 M.J. at 406.

On review, this Court rejected the ACCA's view that the mandatory minimum provisions under Article 56(b), UCMJ, imposed a limit on the CCA's sentence appropriateness review power under then-Article 66(c).[40] Admittedly, this Court agreed that Article 56(b) and Article 66(c) could be viewed to be "in tension" with each other.[41] But this Court reached a different conclusion after applying the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[42] As this Court explained, the typical approach is for a court to attempt "'to harmonize independent provisions of a statute.'"[43] Applying these principles to Article 56(b) and Article 66(c), this Court concluded that the two provisions "may be harmonized by construing Article 56(b) as a limit on the court-martial, not on any of the reviewing authorities."[44]

In *Kelly*, this Court noted that in *United States v. Jefferson* the Court of Military Appeals interpreted the mandatory minimum punishment for murder under Article 118, UCMJ, "as applying only to the court-martial, thus leaving

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[40] *Id*. at 407-08.
[41] *Id*. at 407.
[42] *Id*. at 406 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).
[43] *Id*. at 407 (quoting *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)).
[44] *Id*.

appellate authorities 'free to reappraise the appropriateness of the sentence in the normal exercise of their review powers.'"[45] This Court explained that reading Article 56(b) and Article 66(c) in harmony with each other "gives full force and effect to both Article 56(b), UCMJ, and Article 66(c), UCMJ" and "recognizes that Congress has vested the CCAs with the of-cited 'awesome, plenary, *de novo* power of review.'"[46]

C. This Court should hold that a CCA's duty to consider the appropriateness of sentences includes sentences adjudged pursuant to plea agreements.

The principles from *Kelly* should apply with equal force to bargained-for sentences under military plea agreements.

As background, in 2016, Congress enacted Article 53a, UCMJ, which established military plea agreements in place of the previous pretrial agreements that were not explicitly addressed under the UCMJ.[47] In relevant part, Article 53a explains that an accused and the Convening Authority may agree to impose "limitations on the sentence that may be adjudged for one or more charges and

[45] *Id*. (quoting *United States v. Jefferson*, 7 C.M.A. 193, 194 (C.M.A. 1956)).
[46] *Id*. (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).
[47] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5237, 130 Stat. 2917 (2016); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 analysis, at A21-38 (2016) [hereinafter MCM] (explaining that "[t]he code does not address pretrial agreements, and MCM, 1969 (Rev.) did not discuss them").

specifications."[48] Yet while Congress enacted Article 53a, it did not repeal the duty of a CCA under Article 66(d)(1)—previously in Article 66(c)—to "affirm only . . . the sentence or such part or amount of the sentence, as the Court finds correct in law and determines, on the basis of the entire record, should be approved."[49]

As with the mandatory minimum provisions at issue in *Kelly*, Article 53a and Article 66(d)(1) could be read to conflict with each other. However, the two provisions can be harmonized with each given full effect. To start, it is significant that in Article 53a, Congress used the word "limitations" as being applicable to "the sentence that may be adjudged for one or more charges and specifications." It is beyond cavil that an appellate court does not adjudge a sentence. Further, where Congress has used the word "adjudged" in the context of sentencing in other sections of the UCMJ, it has done so in describing the action of the *court-martial*, not an appellate court.[50]

Aside from this, the President made the matter clear when he specified through R.C.M. 705 that it is the *court-martial*—not the appellate courts—who are

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[48] 10 U.S.C. § 853a(a)(1)(B) (2018 & Supp IV).
[49] Art. 66(d)(1), 10 U.S.C. § 866(d)(1) (2018 & Supp. IV).
[50] *See, e.g.*, 10 U.S.C. § 858(a) (2018 & Supp. V) (describing "a sentence of confinement adjudged by a court-martial or other military tribunal"); 10 U.S.C. § 857(a)(2) (2018 & Supp. V) (describing the running of a period of confinement "adjudged by the court-martial"); 10 U.S.C. § 863(b) (2018 & Supp. V) (discussing limitations on a sentence in a rehearing in the context of a "sentence adjudged by the first court-martial").

restricted by the sentence limitation provisions of plea agreements. In relevant part, the President wrote:

> (1) Subject to such limitations as the Secretary concerned may prescribe pursuant to R.C.M. 705(a), a plea agreement that limits the sentence that can be imposed *by the court-martial* for one or more charges and specifications may contain:
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> (A) a limitation on the maximum punishment that can be imposed *by the court-martial*;
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> (B) a limitation on the minimum punishment that can be imposed *by the court-martial*;
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> (C) limitations on the maximum and minimum punishments that can be imposed *by the court-martial*; or,
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> (D) a specified sentence or portion of a sentence that shall be imposed *by the court-martial*.[51]

The President has also made clear in other provisions of the R.C.M. that sentencing limits in plea agreements bind the court-martial—without any indication that they also bind the CCAs. For example, in one provision, the President explained that "[i]f a plea agreement contains limitations on the punishment that may be imposed, the *court-martial* . . . shall sentence the accused in accordance with the agreement."[52] In another Rule, the President provided that "[i]f the military judge accepts a plea agreement with a sentence limitation, the *court-martial* shall sentence the accused in accordance with the limits established

[51] MCM, R.C.M. 705(d)(1)(A)-(D) (2024) (emphasis added).
[52] MCM, R.C.M. 910(f)(5) (2024) (emphasis added).

by the plea agreement."[53]

Finally, for the same reasons this Court explained in *Kelly*, there is simply no reason to read into the enactment of Article 53a an implied repeal of the sentence appropriateness power under Article 66(d)(1). As this Court has noted, given the coercive nature of the military, Congress believed it was necessary to empower the CCAs with the ability to ensure fairness in sentencing.[54] In short, both Article 53a and Article 66(d)(1) can be given full effect by interpreting the former as limiting the sentencing power of a court-martial while the latter continues a CCA's long-held power to review the appropriateness of a sentence.

D. Here, the lower court failed to determine that Appellant's sentence was appropriate apart from its legality under the plea agreement.

The lower court failed to appreciate that the *appropriateness* of Appellant's sentence was a separate concept from its *legality* under a bargained-for plea.

In evaluating Appellant's sole assignment of error that his sentence was not appropriate under Article 66, UCMJ, the lower court correctly cited the sentence appropriateness review standard under Article 66(d)(1), UCMJ, and explained that

[53] MCM, R.C.M. 1002(a)(3) (2024) (emphasis added).
[54] *United States v. Boone*, 49 M.J. 187, 191-92 (C.A.A.F. 1998) (noting that Congress "perceived a need to provide for an intermediate appellate tribunal that would have the high responsibility of ensuring uniformity and evenhanded-ness, values that could not be assured if final decision making were left at the command level").

its task was to "'affirm only 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.'"[55]

However, the lower court then veered into a discussion about the *legality* of Appellant's sentence. The lower court focused on the fact that the military judge was required to sentence Appellant pursuant to the terms of the plea agreement under R.C.M. 1002(a)(2).[56] The lower court also wrote that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.'"[57] These were both correct statements of the law, but they had little relevance to whether Appellant's sentence was appropriate or "should be approved" under Article 66(d)(1), UCMJ.

The lower court also wrote: "Given the terms of Appellant's plea agreement and the sentence adjudged, we find that the adjudged sentence did not exceed the maximum allowable sentence under the UCMJ, nor did it exceed the terms of the plea agreement."[58] Again, as this Court noted in *Kelly*, the statutory limit of

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[55] *Spencer*, slip op. at *3-4 (quoting 10 U.S.C. § 866(d)(1) (2018 & Supp. III)).
[56] *Id*. at *4 (explaining that '[i]f the military judge accepts a plea agreement with a sentence limitation, the court-martial shall sentence the accused in accordance with the limits established by the plea agreement'") (alteration in original) (quoting MCM, R.C.M. 1002(a)(2) (2024)).
[57] *Id*. (quoting 10 U.S.C. § 56(a)).
[58] *Id*.

punishment that a court-martial may adjudge is distinct from the *appropriateness* of the sentence under Article 66, UCMJ.

The lower court then acknowledged some of the facts of Appellant's case. It noted Appellant's "serious misconduct" of stealing "items worth a significant amount" in "emboldened" fashion from a store on the base on multiple days, including by "foiling security measures" to prevent theft.[59] While this shows that the lower court considered the aggravating facts of this case, a discussion of the facts does not by itself show that the lower court applied the correct sentence appropriateness legal standards, as this Court has noted in a very similar setting.[60]

The lower court then again returned to a discussion of the legality of the sentence. The lower court found it "instructive" "that the convening authority and Appellant agreed to give the military judge discretion on whether or not to adjudge a bad-conduct discharge" that that the military judge only recommended that the convening authority suspend Appellant's confinement.[61] However, the views of the Convening Authority and military judge—while relevant in that they describe what occurred in the "entire record"[62]—should not be "instructive" to the lower court

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[59] *Id*. at *4-5.
[60] *Baier*, 60 M.J. at 383 (noting that "[a]fter discussing the facts of Appellant's case, the lower court concluded its sentence appropriateness analysis with [a problematic legal standard]").
[61] *Spencer*, slip op. at *5.
[62] 10 U.S.C. § 866(d)(1) (2018 & Supp. IV).

conducting sentence appropriateness review. Rather, the lower court's role was to consider the appropriateness of Appellant's sentence *independently of* the views of the convening authority and military judge.[63]

The lower court then concluded that because Appellant's sentence was voluntary and within the range of his plea agreement, it was appropriate. It wrote:

> The record shows Appellant's punishment was the foreseeable result of the plea agreement that he negotiated and voluntarily entered into with the convening authority. Appellant voluntarily chose to plead guilty in accordance with the specific terms of an agreement he freely negotiated. As we have previously stated, 'we generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement.' *Accordingly, we find Appellant's sole assignment of error to be without merit*.[64]

By concluding that Appellant's assignment of error was meritless *because* his adjudged sentence fell within the range of a voluntary plea agreement, the lower court failed to determine the appropriateness of the sentence apart from its legality.

In further support of this, when the lower court explained that it would "'generally refrain from second guessing or comparing a sentence that flows from

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[63] *Baier*, 60 M.J. at 384 (noting that the sentence appropriateness review power 'requires that the members of [the Courts of Criminal Appeals] independently determine, in every case within [their] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [they] affirm'") (citation omitted).
[64] *Spencer*, slip op. at *5 (emphasis added) (citation omitted).

a lawful pretrial agreement,'" it omitted key language from the case it cited.[65] The full sentence from the cited case—*United States v. Widak*—reads:

> *Other than to ensure that the appellant's approved sentence is one that 'should be approved,' Article 66(c),* we generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement or a CA's lawful exercise of his authority to grant clemency to an appellant.[66]

By omitting the italicized part of *Widak*, it is plausible to infer the lower court did *not* ensure that Appellant's sentence "should be approved" under Article 66 and instead upheld the sentence because it was legally correct under Article 59. This conflated the lower court's distinct duties under Article 59 and Article 66.[67]

This case is distinguishable from *United States v. Flores*, where this Court found evidence that the Air Force Court of Criminal Appeals (AFCCA) determined the appropriateness of the sentence.[68] There, this Court quoted the AFCCA's opinion in which the court noted its "statutory responsibility to affirm only so much of the sentence that is correct and should be approved, Article 66(d), UCMJ," before concluding "the sentence is not inappropriately severe[.]"[69]

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[65] *Id*. (quoting *Widak*, 2016 CCA LEXIS 172, at *7).
[66] 2016 CCA LEXIS 172, at *7 (emphasis added).
[67] *Powell*, 49 M.J. at 464 (explaining that "Article 59(a) constrains [a CCA's] authority to reverse; Article 66[d][1] constrains their authority to affirm.").
[68] 84 M.J. at 282.
[69] *Id*. at 279 (quoting *United States v. Flores*, No. ACM 40294, 2023 CCA LEXIS 165, at *15-18 (A.F. Ct. Crim. App. Apr. 13, 2023).

Here, by contrast, there is no similar language in the lower court's opinion. On top of the lower court's problematic focus on the legality of Appellant's sentence as well as its omission of the key language from *Widak*, the lower court did not explicitly state that it had concluded that the sentence was appropriate or "should be approved" under Article 66(d)(1), UCMJ. Rather, in the final sentence of the opinion, the Court concluded "that the findings and sentence are correct in law and fact" and in a footnote cited Articles 59 and 66—not Article 66(d)(1).[70]

Thus, this Court is confronted with a situation similar to what occurred in *United States v. Baier*.[71] In *Baier*, the appellant asserted before the NMCCA that his dishonorable discharge was inappropriately severe.[72] In its opinion, the NMCCA correctly "quoted Article 66(c) and noted that its task was to determine 'whether the accused received the punishment he deserved.'"[73] However, in assessing the sentence on appeal, the NMCCA suggested that it deferred to the military judge's decision and the *legality* of the sentence.

For example, similar to what occurred in Appellant's case, the NMCCA wrote in *Baier* that "[t]he appellant received the individual consideration required [at the trial level] based on the seriousness of his offenses and his own character,

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[70] *Spencer*, slip op. at *5 & n.18.
[71] 60 M.J. at 382.
[72] *Id*. at 383.
[73] *Id*.

which is all the law requires.'"[74] And in another place, the NMCCA seemed to apply an incorrect standard when it wrote that the sentence "should not be disturbed unless 'the harshness of the sentence is so disproportionate to the crime as to cry out for equalization.'"[75]

On review, this Court explained:

> Based on that language, it is impossible for us to determine whether the lower court conducted an independent assessment of the appropriateness of Appellant's sentence or merely deferred to the 'individual consideration' Appellant had previously received from the military judge and the convening authority. Nor can we determine whether the lower court independently assessed the sentence's appropriateness for this particular offender or merely determined that the sentence was not 'so disproportionate to the crime as to cry out for equalization.'[76]

This Court likewise cannot determine that the lower court "independently assessed the sentence's appropriateness" because it deferred to the sentence's legality. Like in *Baier*, the lower court failed to conduct a correct sentence appropriateness review by focusing on the fact that Appellant received consideration within the court-martial system. This was an abdication of the lower court's independent duty to determine whether the sentence was appropriate. Thus,

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[74] *Id*. (citation omitted).
[75] *Id*. (citation omitted).
[76] *Id*. at 383-84 (citation omitted).

this Court should conclude that the lower court abused its discretion.[77]

E. This Court should remand for further Article 66, UCMJ, review.

In *Baier*, this Court set aside the CCA's decision and remanded for a new sentence appropriateness review.[78] Likewise, in *Kelly*, this Court concluded that the proper remedy for a sentence appropriateness review based on an incorrect view of the law is to remand for a new sentence appropriateness review.[79]

Here, this Court should likewise conclude that a new sentence appropriateness review is needed.

## Conclusion

This Court should set aside the sentence and remand for further review under Article 66, UCMJ.

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[77] *Flores*, 84 M.J. at 282 (explaining that the standard of review is whether "the CCA abused its discretion or acted inappropriately—i.e., arbitrarily, capriciously, or unreasonably—as a matter of law'" when conducting its sentence appropriateness review) (citation omitted); *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997) (explaining that when reviewing "a decision of the Court of Criminal Appeals for abuse of discretion, we use the same standard as we use in reviewing a decision of a military judge" and that a "lower court is deemed to have abused its discretion if its decision is based on 'an erroneous view of the law.'") (citation omitted).

[78] 60 M.J. at 385 ("To ensure that Appellant was not prejudiced by the lower court's erroneous view of the law, we set aside the lower court's opinion as to the sentence and remand the case for a new Article 66(c) sentence appropriateness determination using the correct legal standard.").

[79] *Kelly*, 77 M.J. at 408.

Respectfully Submitted,

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Certificate of Compliance with Rules 24(b) and 37

1. This brief complies with the type-volume limitations of Rule 24(b) because it contains approximately 4,922 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and electronically served on opposing counsel on August 8, 2025.

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