IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Braxston C. SPENCER Lance Corporal (E-3) U.S. Marine Corps, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202400328 USCA Dkt. No. 25-____/MC

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

MICHAEL W. WESTER
Lieutenant Commander, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7290
michael.w.wester2.mil@us.navy.mil
Bar no. 37277

Index of Supplement

Table of Cases, Statutes, and Other Authorities

Issue Presented

I.

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?

Introduction

The CCA's opinion in this case makes it impossible to determine if the court considered the *appropriateness* of Appellant's sentence apart from its *legality*. The lower court explained that Appellant "voluntarily chose to plead guilty" through a plea agreement before saying "'we generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement.'"[1] However, the full sentence from the case the CCA cited 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.[2]

Because the CCA omitted the italicized part of the above sentence from its analysis—and combined with other parts of the opinion—this Court has no way to determine whether the CCA determined whether the sentence was appropriate.

Statement of Statutory Jurisdiction

Appellant's sentence as set forth in the entry of judgment includes a bad-conduct discharge.[3] The Navy-Marine Corps Court of Criminal Appeals (CCA) reviewed this case under Article 66(b)(3), Uniform Code of Military Justice

---

[1] *United States v. Spencer*, No. 202400328, 2025 CCA LEXIS 168, at *6 (N-M. Ct. Crim. App. Apr. 18, 2025) (quoting *United States v. Widak*, No. 201500309, 2016 CCA LEXIS 172, at *9 (N-M. Ct. Crim. App. Mar. 22, 2016).
[2] *Widak*, 2016 CCA LEXIS 172, at *7 (emphasis added).
[3] *Spencer*, 2025 CCA LEXIS 168, at *1.

(UCMJ).[4] Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.[5]

Statement of the Case

A special court-martial composed of a military judge sitting alone found Appellant guilty, consistent with his pleas, of four specifications of larceny under Article 121, UCMJ.[6] On April 18, 2025, the CCA affirmed the findings and sentence.[7] The Office of the Judge Advocate General mailed Appellant a copy of the CCA's decision on May 2, 2025. Appellant timely petitioned this Court on June 17, 2025.

Statement of Facts

Over the course of several days, Appellant stole merchandise from the Marine Corps Exchange at Camp Pendleton, California, totaling several thousand dollars.[8] Appellant pleaded guilty to four specifications of larceny.[9]

Appellant's plea agreement required the military judge to reduce Appellant to E-1.[10] However, it gave the military judge discretion over whether to adjudge a

---

[4] *Id*.
[5] 10 U.S.C. § 867(a)(3) (2018).
[6] R. at 81.
[7] *Spencer*, 2025 CCA LEXIS 168, at *6.
[8] Pros. Ex. 1 at 3; App. Ex. IV at 1-6; R. at 91-92.
[9] R. at 26; App. Ex. VIII ("My mother . . . raised me on her own until the age of 8, when my step-father . . . joined our lives in the year 2012.").
[10] App. Ex. V at 5.

punitive discharge.[11] It also gave the judge discretion over whether to adjudge up to two months' confinement as well as forfeitures of pay for up to two months.[12]

At the presentencing phase of the hearing, the Government presented no evidence.[13] There was also no victim impact statement or testimony.[14] By contrast, Appellant presented statements from several members of his chain of command who praised his service. One member wrote that there was not "a single junior [M]arine [she] would trust more than [Appellant] in or out of combat."[15] Appellant's squad leader, who served with him daily for a year, wrote: "After he got in trouble, he got a reality check and the change was noticed immediately."[16] Likewise, Appellant's former supervisor testified:

> [S]ince the incident back in June, he's grown exponentially. I've definitely seen he takes way more initiative. He tries to teach those around him from experiences that he's had and guide the newer Marines to not make the same mistakes and to better their careers.[17]

In his unsworn statement, Appellant expressed remorse for his actions.[18]

The military judge sentenced Appellant to reduction to E-1, forfeiture of

---

[11] *Id*.
[12] *Id*.
[13] R. at 84.
[14] R. at 83.
[15] Def. Ex. B. at 1-4.
[16] *Id*. at 10.
[17] R. at 88.
[18] App. Ex. VIII at 1.

$1,344 per month for two months, 60 days of confinement, and a bad-conduct discharge.[19] However, he recommended the confinement be suspended, explaining: "Witness testimony and character statements suggest the accused has made a sincere effort to reform."[20] Despite the military judge's recommendation, the Convening Authority did not suspend the confinement.[21]

On appeal, Appellant asked the CCA 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.[22] In its analysis, the CCA cited precedent regarding sentence appropriateness review.[23] However, in analyzing Appellant's case, the CCA focused on the *legality* of the sentence. The CCA explained the limits of a sentence under Article 56, UCMJ, and noted that a military judge may sentence an accused within the limits of a plea agreement.[24] The CCA 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.[25]

---

[19] R. at 100.
[20] R. at 100.
[21] Convening Authority's Action.
[22] *Spencer*, 2025 CCA LEXIS 168, at *1.
[23] *Id*. at *3-4.
[24] *Id*. at *4.
[25] *Id*. at 5.

However, the CCA did not discuss why—apart from why the sentence was legal—it was also appropriate. Instead, the CCA simply turned back to the plea agreement. The CCA 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."[26] The CCA also noted that the military judge recommended suspension only as to confinement and not to the discharge.[27] The CCA 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 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.[28]

Of note, the CCA's reference to "second guessing" omitted the first key part of the sentence the CCA quoted. The full sentence appeared in *United States v. Widak*, where the CCA 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

[26] *Id*.
[27] *Id*.
[28] *Id*. at *6 (emphasis added) (citation omitted).

clemency to an appellant.[29]

Here, by contrast, nowhere did the CCA explain that *apart* from the plea agreement, the CCA had considered the sentence to be appropriate under Article 66(d)(1), UCMJ. Likewise, the CCA did not explain why—regardless of the plea agreement—the sentence "should be approved" under Article 66(d)(1), UCMJ.

Reasons to Grant Review

I.

THE CCA CONDUCTED ITS SENTENCE APPROPRIATENESS REVIEW IN A MANNER THAT CONFLICTS WITH THIS COURT'S APPLICABLE DECISIONS.[30]

A. In *United States v. Baier*, this Court remanded when it was "impossible. . . to determine if the CCA conducted an independent assessment of the appropriateness of Appellant's sentence or merely deferred" to the decisions of the military judge and convening authority.

In *United States v. Baier*, the appellant pleaded guilty under a pretrial agreement to various offenses.[31] Before the CCA, the appellant asserted that his dishonorable discharge was inappropriately severe.[32] In its opinion, the CCA "quoted Article 66(c) and noted that its task was to determine 'whether the accused

[29] 2016 CCA LEXIS 172, at *7 (emphasis added).
[30] C.A.A.F. R. 21(b)(5)(B)(i).
[31] 60 M.J. 382, 383 (C.A.A.F. 2005).
[32] *Id*.

received the punishment he deserved.'"[33] Further, the CCA "properly distinguished its sentence appropriateness role from the convening authority's power to grant clemency."[34] Additionally, the CCA acknowledged "that it had the authority to 'disapprove any portion of a sentence that it deems inappropriately severe.'"[35]

The problem is that in assessing the sentence on appeal, the CCA used language suggesting that it was deferring to the decision of the military judge and the *legality* of the sentence. For example, the CCA in one place 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.'"[36] In another place, the CCA wrote that "[t]he appellant received the individual consideration required based on the seriousness of his offenses and his own character, which is all the law requires.'"[37] 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.'[38]

---

[33] *Id*.
[34] *Id*.
[35] *Id*. (citation omitted).
[36] *Id*. (citation omitted).
[37] *Id*. (citation omitted).
[38] *Id*. at 383-84.

This Court went on to explain that a CCA's task is to "determine whether it finds the sentence to be appropriate" which does not require a determination that it be "'so disproportionate as to cry out" for reduction.'"[39] Rather, the Court explained, "Article 66(c)'s sentence appropriateness provision is a 'sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'"[40] This Court also explained that "Article 66(c) '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.'"[41]

This Court acknowledged that "[i]t is possible that in this case, the lower court 'independently determined' the sentence's appropriateness."[42] However, the Court explained that due to the CCA's "recitation of an incorrect standard" the CCA "may have relied on an improperly circumscribed standard."[43]

B. In *United States v. Kelly*, this Court reaffirmed the principle that a CCA's sentence appropriateness review must independently assess the appropriateness of the sentence despite its legality.

Over a decade after *Baier* was decided, this Court in *United States v. Kelly*

---

[39] *Id*. at 384.
[40] *Id*. (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001)).
[41] *Id*. (quoting *Bauerbach*, 55 M.J. at 506) (alteration in original).
[42] *Id*. at 385.
[43] *Id*.

reinforced that a CCA's sentence appropriateness review must be assessed apart from the sentence's legality even when applied to *mandatory minimum* sentences.[44]

This Court "recognized" the " 'settled premise'" that a CCA's sentence appropriateness review gives it "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."[45] This Court later explained that the mandatory minimum provision under Article 56(b), UCMJ, imposed "a limit on the court-martial" but "not on any of the reviewing authorities."[46] This Court explained that "Congress has vested the CCAs with the oft-cited 'awesome, plenary, *de novo* power of review,' that effectively gives them '*carte blanche* to do justice.'"[47]

C. Here, the CCA's opinion makes it impossible to determine if it assessed the appropriateness of the sentence apart from its legality.

Here, like in *Baier*, the CCA's opinion suggests that it may not have applied the correct legal standards when conducting its sentence appropriateness review. Like in *Baier*, the CCA correctly stated the sentence appropriateness review standard. However, in its legal analysis, the CCA gave no indication that it assessed the appropriateness of the sentence apart from its legality. To the

---

[44] 77 M.J. 404, 405 (C.A.A.F. 2018).
[45] *Id*. at 406 (quoting *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010)).
[46] *Id*. at 407.
[47] *Id*. (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)) (italics in original).

contrary, like in *Baier*, the CCA's opinion strongly suggests that it deferred to the sentence the military judge awarded.

To illustrate, after explaining the sentence appropriateness review standard, the CCA shifted to a discussion about the legal limits of punishment under Article 56, UCMJ, as well as the military judge's discretion to sentence within the limits of a plea agreement.[48] The 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.[49]

This analysis would not be problematic if the CCA *also* discussed why the sentence was *appropriate* under Article 66, UCMJ. However, it did not do so. Rather, the CCA proceeded to explain why Appellant's sentence was permissible within the *plea agreement*. Worse, while doing so, it cited to a case but *omitted* the part of the sentence explaining its duty to assess the appropriateness of the sentence.

The CCA described Appellant's conduct; noted that the military judge recommended that the confinement—but not the punitive discharge—be suspended; and then wrote that "Appellant's punishment was the foreseeable result of the *plea agreement* that he negotiated and voluntarily entered into with the

---

[48] *Spencer*, 2025 CCA LEXIS 168, at *4.
[49] *Id*.

convening authority."[50] The Court then noted that Appellant "voluntarily chose to plead guilty in accordance with the specific terms of" his plea agreement and the CCA noted its precedent that it would "'generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement.'"[51]

However, the full sentence from *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.[52]

Because the CCA omitted the italicized part of *Widak* from its analysis—combined with its other analysis focusing on the sentence's legality within the plea agreement—this Court has no way to determine whether the CCA determined whether the sentence was appropriate within Article 66, UCMJ.

D. The proper remedy is a new sentence appropriateness review.

In *Baier*, the CAAF set aside the CCA's decision and remanded for a new sentence appropriateness review.[53] Likewise, in *Kelly*, this Court concluded that the proper remedy for a sentence appropriateness review based on an incorrect

---

[50] *Id*. at *5 (emphasis added).
[51] *Id*. (quoting *Widak*, 2016 CCA LEXIS 172, at *9).
[52] 2016 CCA LEXIS 172, at *7 (emphasis added).
[53] 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.").

view of the law is to remand for a new sentence appropriateness review.[54]

Here, this Court should likewise conclude that a new sentence appropriateness review is needed because the CCA abused its discretion when conducting its sentence appropriateness review.[55]

Conclusion

This Court should grant review, set aside the sentence, and remand for a new sentence appropriateness review under Article 66(d)(1), UCMJ.

Respectfully Submitted,

MICHAEL W. WESTER
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7290
michael.w.wester2.mil@us.navy.mil
Bar no. 37277

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

[55] *United States v. Flores*, 84 M.J. 277, 282 (C.A.A.F. 2024) (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).

List of Appendices

A. *United States v. Spencer*, No. 202400328, 2025 CCA LEXIS 168 (N-M. Ct. Crim. App. Apr. 18, 2025) (unpub op.)

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 21(b) Rule 37(d) because it contains fewer than 9,000 words.

2. This brief complies with the typeface and type style requirements of Rule 37(a) 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 June 16, 2025.

MICHAEL W. WESTER
Lieutenant Commander, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7290
michael.w.wester2.mil@us.navy.mil
Bar no. 37277

United States v. Lance Corporal

United States Navy-Marine Corps Court of Criminal Appeals

April 18, 2025, Decided

No. 202400328

Reporter
2025 CCA LEXIS 168 *; 2025 WL 1144759

UNITED STATES, Appellee v. Braxston C. SPENCER Lance Corporal (E-3), U.S. Marine Corps, Appellant

Subsequent History: As Corrected April 25, 2025.

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Aran T. Walsh (arraignment), Matthew M. Harris (trial). Sentence adjudged 13 May 2024 by a special court-martial tried at Marine Corps Base Camp Pendleton, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for 60 days, forfeiture of $1,344 pay per month for two months, and a bad-conduct discharge.

Core Terms

sentence, military, plea agreement, adjudge, confinement, bad-conduct, convening

Case Summary

Overview
Key Legal Holdings

- The sentence, which included a bad-conduct discharge, did not exceed the maximum allowable sentence under the UCMJ or the terms of the plea agreement.
- The Court has discretion in determining sentence appropriateness, but cannot engage in acts of clemency.

Material Facts

- Appellant, a Marine lance corporal, committed four specifications of larceny by stealing various electronics and other items from the Marine Corps Exchange on multiple occasions in June 2023.
- Appellant pleaded guilty pursuant to a plea agreement that allowed the military judge discretion to adjudge a bad-conduct discharge.
- The military judge sentenced Appellant to reduction in rank, a bad-conduct discharge, partial forfeiture of pay, and confinement, but recommended suspending the confinement.
- The convening authority declined to suspend the confinement as recommended by the military judge.

Controlling Law

- Uniform Code of Military Justice (UCMJ).
- Rules for Courts-Martial.

Court Rationale

The Court found that the sentence was within the limits allowed by the UCMJ and the plea agreement. Appellant committed serious misconduct by stealing from the Marine Corps Exchange on multiple occasions. The Court generally refrains from second-guessing sentences that flow from lawful pretrial agreements.

Outcome
Procedural Outcome

The findings and sentence were affirmed.

LexisNexis® Headnotes

Appendix A

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 **Judicial Review, Clemency & Parole**

An appellate court reviews sentence appropriateness de novo. The court may affirm only 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. 10 U.S.C.S. 866 (d)(1) (2021) UCMJ, 10 U.S.C.S. 866. In exercising this function, the court seeks to assure that justice is done and that the accused gets the punishment he deserves. The review requires an individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender. The court has significant discretion in determining sentence appropriateness, but it does not have discretion to engage in acts of clemency.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN2 **Judicial Review, Courts of Criminal Appeals**

Military appellate courts have the longstanding power, in the interests of justice, to substantially lessen the rigor of a legal sentence. However, a decision by a court of criminal appeals cannot be arbitrary or capricious, and must do justice with reference to some legal standard.

Criminal Law & Procedure > Sentencing > Plea Agreements

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN3 **Sentencing, Plea Agreements**

A court-martial may adjudge any punishment authorized, except 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. Rule for Courts-Martial 1002(a)(2). Additionally, 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(a), UCMJ, *10 U.S.C. § 856(a)*.

Military & Veterans Law > ... > Trial Procedures > Pleas > Pretrial Agreements

HN4 **Pleas, Pretrial Agreements**

Appellate courts generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement.

Counsel: For Appellant: Lieutenant Commander Michael W. Wester, JAGC, USN.

For Appellee: Lieutenant Commander Gregory A. Rustico, JAGC, USNR Lieutenant Lan T. Nguyen. JAGC, USN.

Judges: Before KISOR, HARRELL, and de GROOT, Appellate Military Judges.

Opinion

PER CURIAM:

A military judge sitting alone as a special court-martial convicted Appellant, pursuant to his pleas, of four specifications of larceny in violation of *Article 121, Uniform Code of Military Justice [UCMJ]*.[1] In the sole assignment of error, Appellant asserts his sentence which included a bad-conduct discharge was greater than necessary to achieve the goals of sentencing in the military justice system. We find no error and affirm.

I. BACKGROUND

[1] *10 U.S.C. § 921*.

On several different days in June 2023, Appellant stole from the Marine Corps Community Services at the Pacific Views [*2] Marine Corps Exchange (MCX). On 16 June 2023, Appellant, with the assistance of a fellow lance corporal, stole an Oculus 2 headset, electronic headphones, Nintendo Switch, a SONOS camera, an ASUS laptop, and a PlayStation 5 console, which, in total, was worth more than $1,000. He did so by taking the electronics off the shelf and placing them in the cart. He would then remove the security devices or "spider wraps" from the electronics, so he would not set off the alarm when he exited.[2] He walked through the exit without paying, put the items in his car, and drove them to his barracks room, where he put them in his locker and barracks room cabinet. He did not intend to return any of the items he took.

He took the same actions to steal a variety of items from the MCX on 19 June 2023 and at two separate times on 24 June 2023. On those days, Appellant took from the MCX two cameras, an Xbox console, graphic t-shirts, and a drill set among other items. The total value of those items was a little over $750. Appellant admitted he took those items for his own personal use with no intention of returning them.

Pursuant to a plea agreement, Appellant pleaded guilty in exchange for the sentence limitations [*3] that included a cap on confinement, a cap on forfeiture of pay, and protection from a fine being adjudged. Although the plea agreement required reduction to E-1, the military judge had discretion to adjudge a bad-conduct discharge, but could not adjudge a fine, or any other lawful punishment.[3] Additionally, Appellant specifically waived any motions to include unreasonable multiplication of charges and a motion to suppress statements.

The military judge sentenced Appellant to reduction to paygrade E-1, a bad-conduct discharge, forfeiture of $1,344 pay per month for two months, and confinement for 60 days for each specification of the Charge to run concurrently.[4] Additionally, the military judge recommended that all confinement be suspended for a period of six months based on testimony and character statements that stated Appellant had "made a sincere effort to reform."[5]

[2] Pros. Ex. 1, at 3.

[3] Appellate Ex. V at 5-6.

[4] R. at 100.

[5] R. at 100.

Appellant submitted clemency based on the military judge's recommendation. He asked the convening authority to set aside the 60 days of confinement.[6] The convening authority declined to grant clemency or take action on the military judge's recommendation to suspend the confinement.[7]

II. Discussion

Appellant asserts that his sentence [*4] of a bad-conduct discharge is inappropriately severe and should be set aside given the nature of the offense, the military judge's acknowledgement of his rehabilitative potential, Appellant's character statements, and remorse for his actions.

HN1[↑] We review sentence appropriateness de novo.[8] This Court "may 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."[9] In exercising this function, we seek to assure that "justice is done and that the accused gets the punishment he deserves."[10] The review requires an "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender."[11] We have significant discretion in determining sentence appropriateness, but we do not have discretion to engage in acts of clemency.[12]

[6] Request for Clemency at 1-2.

[7] Convening Authority Action at 2.

[8] *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*.

[9] *Article 66(d)(1)* (2021) UCMJ, *10 U.S.C. § 866*. On 27 December 2021, Congress removed this language from the current version of *Article 66* as part of its broader effort to legislate sentencing reform. The current version of *Article 66*, as it applies to this Court's scope of review of a sentence on appeal, is inapplicable to Appellant's case because the new sentencing rules only apply if all offenses occurred after 27 January 2023. ***National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E(f), 135 Stat. 1706 (2021)***.

[10] *United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)*.

[11] *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)* (citation and internal quotation marks omitted).

[12] The line between sentence appropriateness power and clemency power can be unclear. *HN2*[↑] But it is a

HN3[] A court-martial may adjudge any punishment authorized, except "[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."[13] Additionally, "[t]he punishment which [*5] a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."[14] 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.[15]

Appellant committed serious misconduct. He stole from the MCX on four separate occasions. Encouraged by his first sojourn into this criminal enterprise with a fellow Marine where he stole items worth a significant amount, he went back to the same store a mere three days later for an expensive tool set. Appellant was so emboldened by his previous thefts, he chose to go back again five days later to steal not one time, but two times that day, filching a variety of items from clothing to electronics. He admitted to foiling the security measures in place to prevent theft and walking out each time, taking the items with him for his personal use.

It is 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. Further, it is also noteworthy that [*6] in his recommendation to the convening authority, the military judge only spoke of suspension of the confinement as a result of Appellant's attempt to reform and not the discharge.

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.[16] Appellant voluntarily chose to plead guilty in accordance with the specific terms of an agreement he freely negotiated. HN4[] As we have previously stated, "we generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement."[17] Accordingly, we find Appellant's sole assignment of error to be without merit.

III. Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred. [18]

The findings and sentence are **AFFIRMED**.

End of Document

longstanding power of military appellate courts, in the interests of justice, to substantially lessen the "rigor of a legal sentence." *United States v. Joyner, 39 M.J. 965, 967-68 (Kean, J. dissenting) (A.F.C.M.R. 1994)* (quoting *UNITED STATES v. LANFORD, 6 U.S.C.M.A. 371, 378, 20 C.M.R. 87 (1955)*). But a decision by a court of criminal appeals cannot be arbitrary or capricious, and must do justice with reference to some legal standard. *See United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (further citations omitted).

[13] Rule for Courts-Martial 1002(a)(2).

[14] *Article 56(a), UCMJ*, *10 U.S.C. § 856(a)*.

[15] *See United States v. Avellaneda, 84 M.J. 656 (N-M. Ct. Crim. App. 2024)*.

[16] *United States v. Bocage, No. 202000206, 2022 CCA LEXIS 311, *7 (N-M. Ct. Crim. App. May 25, 2022)* (unpublished).

[17] *United States v. Widak, No. 201500309, 2016 CCA LEXIS 172, *9 (N-M. Ct. Crim. App. Mar. 22, 2016)* (unpublished).

[18] *Articles 59 & 66, UCMJ, 10 U.S.C. §§ 859*, *866*.