

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Jaime C. HERNANDEZ
Master Sergeant (E-8)
U.S. Marine Corps,

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 202500071

USCA Dkt. No. 26-0263/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	iv
Issue Presented	1
Statement of Statutory Jurisdiction	1
Statement of the Case	1
Statement of Facts	2
Reasons to Grant Review	5
I. The NMCCA expressed its opinion on the merits of the plea agreement, after discussing withdrawn sexual offenses, contrary to Article 66, UCMJ, and <i>United States v. Arroyo</i>	5
A. This Court has explained that a CCA may cite a plea agreement for context but may not rely on dismissed charges in a plea agreement to justify a harsher sentence or to presume the appellant guilty of them	5
B. By opining that Appellant’s plea agreement was “very favorable” after discussing withdrawn offenses, the NMCCA evaluated the appropriateness of Appellant’s sentence, in part, based on withdrawn offenses	8
C. The NMCCA’s approach invites the problem of incentivizing drafting “bogus charges” as discussed at the <i>Arroyo</i> oral argument	10
Conclusion	11
List of Appendices	12
Certificate of Compliance	12
Certificate of Filing and Service	12

Table of Cases, Statutes, and Other Authorities

UNITED STATES COURT OF MILITARY APPEALS AND UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

<i>United States v. Arroyo</i> , 86 M.J. 89 (C.A.A.F. 2025)	5-7, 9
<i>United States v. Hendon</i> , 6 M.J. 171 (C.M.A. 1979).....	6

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

<i>United States v. Hernandez</i> , No. 202500071, slip op. (N-M. Ct. Crim. App. June 15, 2026).....	1, 3-4, 8-9
--	-------------

UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946 (2024):

Article 66.....	1
Article 67.....	1
Article 80.....	2
Article 128.....	2

C.A.A.F. RULE OF PROCEDURE AND PRACTICE

Rule 21	5, 11
---------------	-------

Issue Presented

In evaluating whether Appellant’s sentence was appropriate, did the lower court err by opining that the plea agreement was “very favorable” after discussing dismissed charges?

Statement of Statutory Jurisdiction

The Navy-Marine Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).¹ Appellant invokes this Court’s Article 67(a)(3), UCMJ, jurisdiction.²

Statement of the Case

A special court-martial composed of a military judge sitting alone found Appellant guilty, consistent with his pleas, of one specification of assault consummated by a battery in violation of Article 128, UCMJ, and one specification of attempted violation of a lawful general order under Article 80, UCMJ.³ He was sentenced to reduction to E-6 and forfeitures of \$3,230 for 12 months.⁴ The NMCCA affirmed the findings and sentence on June 15, 2026.⁵ The Office of the Judge Advocate General mailed Appellant a copy of the NMCCA’s

¹ *United States v. Hernandez*, No. 202500071, slip op. (N-M. Ct. Crim. App. June 15, 2026).

² 10 U.S.C. § 867(b)(3) (2024).

³ R. at 72; 10 U.S.C. §§ 880, 928 (2018).

⁴ R. at 75.

⁵ *Hernandez*, slip op., at *5.

decision on June 26, 2026. Appellant timely petitioned this Court on August 13, 2026.

Statement of Facts

Appellant attended his unit's Marine Corps Birthday Ball in November 2023.⁶ He admitted to buying alcohol for an E-4 with whom he worked and entering her hotel room uninvited.⁷ Based on what occurred on the evening at issue, Appellant pleaded guilty at a special court-martial to one specification of assault consummated by a battery under Article 128, UCMJ, for "unlawfully touch[ing] the neck" of the E-4 with his mouth.⁸ Appellant also pleaded guilty to one specification of attempted fraternization under Article 80, UCMJ, for wrongfully texting the E-4, entering her hotel room without her consent, and touching her neck with his mouth without her consent.⁹

Under the plea agreement, the military judge had discretion over whether to sentence Appellant to the following: a fine, forfeitures for up to 12 months, and/or reduction to E-6 or E-7.¹⁰ In the end, the military judge sentenced Appellant to forfeitures of \$3,230 per month for 12 months and reduction to E-6.¹¹

⁶ Pros. Ex. 1 at 2.

⁷ Pros. Ex. 1 at 3.

⁸ Appellate Ex. III at 3-4.

⁹ Appellate Ex. III at 3-4.

¹⁰ App. Ex. III at 6; R. at 67.

¹¹ R. at 147.

Before the NMCCA, Appellant asserted that his sentence was inappropriately severe.¹² In evaluating the appropriateness of the sentence, the NMCCA discussed the background of the case and explicitly referenced the fact that the Convening Authority originally referred more serious charges against Appellant to a general court-martial. The lower court wrote:

Appellant faced charges of attempted sexual assault, abusive sexual contact, violation of a lawful general order (fraternization), and assaulted consummated by a battery based on allegations made by [the E-4], following the Marine Corps birthday ball in 2023. [The E-4] alleged that Appellant sent her inappropriate text messages, entered her hotel room without her consent, attempted to sexually assault her, and kissed her neck as she physically resisted his advances.¹³

The NMCCA then stated that Appellant later “entered into a plea agreement with the Office of Special Trial Counsel (OSTC)” and agreed to plead guilty to kissing the E-4 and attempting to fraternize with her.¹⁴ The NMCCA explained that “[t]he OSTC, in turn, agreed to withdraw and dismiss the sexual offenses, refer the allegations to a special court-martial, and limit the authority of the military judge to impose a sentence beyond reduction to paygrade E-6 and forfeiture of up to two-thirds base pay per month for up to 12 months.”¹⁵

¹² *Hernandez*, slip op., at *2.

¹³ *Id.* at *2.

¹⁴ *Id.*

¹⁵ *Id.* at *2.

In determining that Appellant's adjudged sentence was not inappropriately severe, the NMCCA wrote: "[w]hile we recognize Appellant's case in extenuation and mitigation, we find that Appellant received a *significant benefit from the OSTC through a very favorable plea agreement*."¹⁶

The NMCCA then added that Appellant's "knowing and voluntary entry into the plea agreement, which authorized the military judge to impose the sentence of which he now complains, is strong evidence that at the time he entered into the agreement, he believed it to be appropriate for his misconduct."¹⁷ The NMCCA then wrote that it reviewed "all of the matters submitted at Appellant's court-martial" and "independently determined" the appropriateness of the sentence.¹⁸

¹⁶ *Id.* at *4 (emphasis added).

¹⁷ *Id.*

¹⁸ *Id.*

Reasons to Grant Review

I.

The NMCCA expressed its opinion on the merits of the plea agreement, after discussing withdrawn sexual offenses, contrary to Article 66, UCMJ, and *United States v. Arroyo*.¹⁹

- A. This Court has explained that a CCA may cite a plea agreement for context but may not rely on dismissed charges in a plea agreement to justify a harsher sentence or to presume the appellant guilty of them.

This Court should grant review because the lower court decided a question of law contrary to this Court's previous decision.²⁰ In *United States v. Arroyo*, this Court evaluated whether the Air Force Court of Criminal Appeals (AFCCA) erred in its sentence appropriateness review. In evaluating the appropriateness of the appellant's sentence, the AFCCA described the appellant's offense, noted that the appellant failed to offer extenuating evidence, and detailed the impact of the offense on the victim.²¹ Following this, the AFCCA also wrote:

It is also worth noting in this case that Appellant, with the assistance of competent counsel, negotiated and secured a plea agreement, where she received the benefit of having two specifications of sexual assault withdrawn and dismissed with prejudice, in exchange for her plea of guilty to a separate offense. *This benefit not only reduced Appellant's criminal exposure, but it also ensured Appellant would not be exposed to additional significant collateral consequences that were possible under the dismissed specifications.* In exchange for this benefit,

¹⁹ 86 M.J. 89 (C.A.A.F. 2025).

²⁰ C.A.A.F. Rule 21(b)(5)(B)(i).

²¹ *Id.* at 92 (citation omitted).

Appellant agreed to a minimum punishment that would include at least 14 days of confinement and a bad-conduct discharge.²²

Based on this passage, the appellant argued (1) the AFCCA “violated her constitutional right to a presumption of innocence by considering the benefit that [she] received when the Government withdrew the two specifications of sexual assault”; and (2) the AFCCA improperly compared “the severity of her adjudged sentence to the maximum punishment that she could have received had she been convicted of the two withdrawn sexual assault specifications.”²³

In rejecting these arguments, this Court explained that while “a service court *could* err by improperly using a plea agreement during its sentence appropriateness review . . . we do not agree that the AFCCA was prohibited from acknowledging the plea agreement’s existence or discussing the context in which the parties reached the agreement.”²⁴

In addressing the appellant’s first argument, this Court cited Court of Military Appeals precedent explaining that “[a]n accused’s own sentence proposal is a reasonable indication of the sentence’s probable fairness to the [her.]”²⁵ Therefore, this Court explained, “the AFCCA did not err merely by discussing the

²² *Id.* (emphasis added) (citation omitted).

²³ *Id.* at 93.

²⁴ *Id.* at 92 (emphasis in original).

²⁵ *Id.* (quoting *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979) (alterations in original)).

plea agreement while performing its sentence appropriateness review.”²⁶

This Court also rejected the argument that by referencing the plea agreement’s withdrawn charges, the AFCCA improperly compared the severity of the appellant’s adjudged sentence to the maximum punishment for all charged offenses. This Court explained that “the AFCCA did nothing more in its analysis than acknowledge the factors that led the Government and Appellant to agree that Appellant should be sentenced [to the agreed-upon sentence in the plea agreement].”²⁷ This Court explained: “[t]he AFCCA’s recognition of these benefits in assessing *why* Appellant agreed to the terms of the plea agreement was entirely proper as part of the AFCCA’s de novo determination of whether the punishment dictated by the plea agreement and imposed by the military judge was appropriate.”²⁸

At the same time, this Court explained that there could be circumstances in which a CCA could improperly reference a plea agreement in its sentence appropriateness review. It wrote:

[t]o be clear, we do not suggest that it would be impossible for a service court to violate an appellant’s presumption of innocence when performing sentence appropriateness review or to improperly compare an adjudged sentence to a theoretical maximum sentence from withdrawn specifications. *But nothing in the AFCCA’s opinion*

²⁶ *Id.*

²⁷ *Id.* at 93-94.

²⁸ *Id.* at 94 (emphasis in original).

*suggests that it presumed Appellant committed the sexual assaults or used the dismissed charges to justify a harsher sentence than it would otherwise have approved as appropriate. At most, the AFCCA considered why Appellant agreed that [the agreed-upon sentence] was a fair punishment for her assault of [the victim].”*²⁹

- B. By opining that Appellant’s plea agreement was “very favorable” after discussing withdrawn offenses, the NMCCA evaluated the appropriateness of Appellant’s sentence, in part, based on withdrawn offenses.

In this case, the NMCCA took it a step too far. Rather than discussing the terms of the plea agreement for why *Appellant* believed the plea agreement was fair, the NMCCA expressed its *own* view of the fairness of the plea agreement in a manner that suggested Appellant escaped guilt for withdrawn offenses.

To illustrate, the NMCCA began its opinion by noting that the OSTC originally charged Appellant with far more serious offenses than the ones to which he pleaded guilty. The NMCCA noted that the OSTC charged Appellant at a general court-martial with attempted sexual assault and abusive sexual contact.³⁰ The NMCCA also observed that in exchange for Appellant’s guilty pleas, OSTC “agreed to withdraw and dismiss the sexual offenses, refer the allegations to a special court-martial, and limit the authority of the military judge to impose a sentence beyond reduction to paygrade E-6 and forfeiture of up to two-thirds base

²⁹ *Id.* (emphasis added).

³⁰ *Id.* at *2.

pay per month for up to 12 months.”³¹

Then, when evaluating the appropriateness of Appellant’s adjudged sentence later in the opinion, the NMCCA wrote: “While we recognize Appellant’s case in extenuation and mitigation, we find that Appellant received a significant benefit from the OSTC through a very favorable plea agreement.”³² In other words, the NMCCA did not take note of the withdrawn offenses merely to observe why *Appellant* believed his sentence was fair, as occurred in *Arroyo*. Rather, by stating that OSTC gave Appellant “a very favorable plea agreement” amid a backdrop of a discussion of withdrawn offenses, the NMCCA subtly suggested its *own* view of the plea agreement: that Appellant’s sentence was appropriate because he was getting away with more serious offenses.

This type of consideration of withdrawn offenses contradicted Article 66, UCMJ. While the NMCCA was permitted to consider the plea agreement for context, it was limited to assessing the appropriateness of the findings and sentence in the *Entry of Judgment*, not withdrawn offenses. Under the version of Article 66, UCMJ, applicable to this court-martial, the NMCCA was required to evaluate the appropriateness of Appellant’s sentence under the following standard:

In any case before the Court of Criminal Appeals . . . the Court may act *only with respect to the findings and sentence as entered into the record*

³¹ *Arroyo*, 86 M.J. at 94.

³² *Hernandez*, slip op. at *4.

. . . 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.³³

In short, the NMCCA weighed the appropriateness of Appellant’s sentence, in part, by expressing its view that OSTC had given Appellant “a very favorable” plea agreement after noting that OSTC had originally charged Appellant with far more serious offenses. This contradicted both *Arroyo* and Article 66, UCMJ, because it strongly suggests that the NMCCA assessed the appropriateness of Appellant’s sentence based on withdrawn offenses.

C. The NMCCA’s approach invites the problem of incentivizing drafting “bogus charges” as discussed at the *Arroyo* oral argument.

During oral argument in *United States v. Arroyo*, Chief Judge Ohlson posed the following problem to appellate government counsel:

In your brief, you express concerns about incentivizing the accused and defense counsel to “play games.” If we were to rule in your favor, wouldn’t we be incentivizing the Government to come up with bogus charges? And they say, “Oh, we’ll dismiss these. Don’t worry about it,” knowing that then the CCA is going to consider the punitive exposure of what were bogus charges?³⁴

The danger expressed by Chief Judge Ohlson’s hypothetical applies to this case. Here, the Government charged Appellant with far more serious charges than

³³ 10 U.S.C. § 866(d)(1) (2018) (emphasis added).

³⁴ Oral Argument at 22:00-22:25, *United States v. Arroyo*, No. 24-0212 (Feb. 25, 2025).

the findings in the Entry of Judgment. Yet the NMCCA effectively presumed the merits of the original charging scheme by calling the plea agreement “very favorable” after noting the original charges. This approach is inconsistent with Article 66, UCMJ, which permits the NMCCA to “act only with respect to the findings and sentence as entered into the record” rather than withdrawn offenses.

Conclusion

There is good cause to grant review. In evaluating the appropriateness of Appellant’s sentence, the lower court expressed its view that OSTC had given Appellant “a very favorable” plea agreement after noting that OSTC had originally charged Appellant with far more serious offenses. This improperly suggested the withdrawn offenses had merit, contrary to a previous decision of this Court.³⁵ This also contradicted Article 66, UCMJ, because the lower court was only permitted to weigh the appropriateness of the findings and sentence in the Entry of Judgment. This Court should grant review and set aside the lower court’s decision.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'MWester', with a stylized flourish at the end.

MICHAEL W. WESTER
Lieutenant Commander, JAGC, USN
Appellate Defense Counsel

³⁵ C.A.A.F. Rule 21(b)(5)(A).

List of Appendices

A. *United States v. Hernandez*, No. 202500071, slip op. (N-M. Ct. Crim. App. June 15, 2026).

Certificate of Compliance

1. This supplement complies with the type-volume limitations of Rule 21(b) because it contains fewer than 9,000 words.
2. This supplement 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 I delivered the foregoing to the Court and served a copy on opposing counsel on September 8, 2026.



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

This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps
Court of Criminal Appeals

Before
DALY, GROSS, and de GROOT
Appellate Military Judges

UNITED STATES
Appellee

v.

Jaime C. HERNANDEZ
Master Sergeant (E-8), U.S. Marine Corps
Appellant

No. 202500071

Decided: 15 June 2026

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Matthew M. Harris

Sentence adjudged 4 October 2024 by a special court-martial tried at Marine Corps Base Camp Pendleton, California, consisting of military judge alone. Sentence in the Entry of Judgment: reduction to paygrade E-6 and forfeiture of \$3,230.00 per month for 12 months.

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

For Appellee:
Captain Michael M. O'Regan, JAGC, USN
Captain Jacob R. Carmin, USMC

**This opinion does not serve as binding precedent but
may be cited as persuasive authority under
NMCCA Rule of Appellate Procedure 30.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas, of one specification of assault consummated by a battery and one specification of attempted violation of a lawful general order in violation of Articles 128 and 80, Uniform Code of Military Justice (UCMJ).¹ We have jurisdiction to hear this case pursuant to Article 66(b)(1)(A).

Appellant raises one assignment of error: whether the sentence in the entry of judgment is inappropriately severe. Having considered the record as a whole, we find that Appellant's sentence is appropriate and affirm.

I. BACKGROUND

Appellant faced charges of attempted sexual assault, abusive sexual contact, violation of a lawful general order (fraternization), and assault consummated by a battery based on allegations made by Corporal (Cpl) M.S., a young Marine attached to his command, following the Marine Corps birthday ball in 2023. Corporal M.S. alleged that Appellant sent her inappropriate text messages, entered her hotel room without her consent, attempted to sexually assault her, and kissed her neck as she physically resisted his advances.

After the charges were initially referred to a general court-martial, Appellant entered into a plea agreement with the Office of Special Trial Counsel (OSTC). Appellant agreed to plead guilty to kissing Cpl M.S. on the neck and attempting to fraternize with her by sending her inappropriate text messages, entering her room, and kissing her without her consent. The OSTC, in turn, agreed to withdraw and dismiss the sexual offenses, refer the allegations to a special court-martial, and limit the authority of the military judge to impose a sentence beyond reduction to paygrade E-6 and forfeiture of up to two-thirds base pay per month for up to 12 months.

¹ 10 U.S.C. §§ 928, 880.

At Appellant’s guilty plea hearing, he told the military judge that he signed the plea agreement voluntarily and agreed to all of the terms. He confirmed when asked by the military judge that he wished to be bound by the agreement, and that he entered into the plea agreement because he sought to receive the benefit of a reduced sentence. Having conducted a colloquy with Appellant into the factual basis of his pleas, the military judge found Appellant guilty.

Corporal M.S. testified in aggravation and also provided a victim impact statement. She told the military judge that Appellant’s actions had a lasting negative impact on her and her view of the Marine Corps. Appellant provided evidence in extenuation and mitigation of his 22 years of service that included several deployments and positive fitness reports prior to his misconduct. He also presented evidence of personal tragedy he had suffered and family hardships. The military judge then imposed a sentence that was the maximum he was authorized to impose under the plea agreement.

II. DISCUSSION

We review sentence appropriateness de novo.² In conducting our review, we “may affirm only the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved.”³ Article 66 provides courts of criminal appeals a great deal of discretion in determining whether a particular sentence is appropriate; however, in conducting our review, we are not authorized to engage in exercises of clemency.⁴ Generally, sentence appropriateness should be judged by “individualized consideration” of the particular appellant “on the basis of the nature and seriousness of the offense and the character of the offender.”⁵

² *United States v. Baier*, 60 M.J. 382, 384–85 (C.A.A.F. 2005).

³ Article 66(d)(1), UCMJ. Article 66(d)(1), codified at 10 U.S.C. 866(d) (2018), applies to Appellant’s case because the findings of guilty were for offenses that occurred prior to 27 December 2023. *See United States v. Spencer*, ___ M.J. ___, No. 25-0192, 2026 CAAF LEXIS 143, at *5–6 (C.A.A.F. Feb. 9, 2026) (reiterating the standard of review for sentence appropriateness under the version of Article 66, UCMJ, as it existed in 2018.).

⁴ *See United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988).

⁵ *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

A court of criminal appeals is required in conducting its sentence appropriateness review to consider each part of the sentence, as well as the sentence as a whole.⁶

The Court of Appeals for the Armed Forces (CAAF) has told us in considering a sentence that rises from a negotiated plea agreement, that the sentence agreed to by an appellant “is a reasonable—but not dispositive—indication of the sentence’s fairness to [the] [a]ppellant.”⁷ Therefore the CAAF stated, “the existence of a plea agreement is a material consideration in a service court’s sentence appropriateness review.”⁸

Viewing Appellant’s case through the lens of our plenary de novo authority under the UCMJ, we are satisfied that Appellant’s sentence is appropriate for his misconduct. Appellant’s behavior was a drastic departure from the behavior expected of a senior enlisted Marine with over 20 years of service. He targeted a junior Marine from his unit, sought an inappropriate relationship with her, and entered her room without consent. When Cpl M.S. specifically rebuked Appellant for his behavior and intentions, Appellant persisted in his unlawful conduct and escalated it by kissing her without her consent.

While we recognize Appellant’s case in extenuation and mitigation, we find that Appellant received a significant benefit from the OSTC through a very favorable plea agreement. His knowing and voluntary entry into the plea agreement, which authorized the military judge to impose the sentence of which he now complains, is strong evidence that at the time he entered into the agreement, he believed it to be appropriate for his misconduct. Having reviewed all of the matters submitted at Appellant’s court-martial, we have independently determined that Appellant’s adjudged sentence is not inappropriately severe and that it is appropriate for his misconduct.

⁶ *United States v. Flores*, 84 M.J. 277, 281–82 (C.A.A.F. 2024).

⁷ *United States v. Arroyo*, 86 M.J. 89, 93 (C.A.A.F. 2025).

⁸ *Id.* at 94.

III. CONCLUSION

After careful consideration of the record and the briefs of the parties, we have determined that the findings are correct in law and the sentence is correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.⁹ The findings and sentence are **AFFIRMED**.



FOR THE COURT:

Mark K. Jamison
MARK K. JAMISON
Clerk of Court

⁹ Articles 59 & 66, UCMJ.