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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Josue M. CARDOSO Lance Corporal (E-3) U.S. Marine Corps, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202500144 USCA Dkt. No. 26-0289/MC

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

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Issues Presented

I

Whether the lower court erred by affirming an inappropriately severe sentence that departed from the sentencing parameter.

II

Whether the military judge erred by imposing an inappropriately severe sentence.

Introduction

This case presents a critical question regarding the integrity of the new military sentencing process for sentences that exceed the sentence parameter. Appellant was sentenced to forty-eight months of confinement for a single domestic violence charge involving strangulation, exceeding the sentence parameter by twelve months.

Three errors occurred. First, the military judge procedurally erred in his justification for an upward departure, by improperly considering evidence from a dismissed attempted murder charge and double-penalizing Appellant for conduct already accounted for in separate sentences. Second, the lower court failed to consider whether the military judge improperly imposed a sentence that exceeded the parameter. Third, the lower court affirmed Appellant's inappropriately severe sentence by relying on improper considerations similar to the factual bases the military judge incorrectly relied on.

Under the new sentencing regime there are two questions appellate courts must ask during sentence appropriateness review of above-parameter sentences: whether the parameters were correctly applied; and whether the sentence is inappropriately severe.

The process for reviewing sentences imposed by civilian federal courts that the Supreme Court discussed in *Gall v. United States* is instructive.[1] It requires a two-step review on appeal. The first is a review of how the federal sentencing guidelines were applied, which is analogous to reviewing whether the sentence parameter was properly exceeded. The second is a review of the substantive reasonableness of the sentence, which is analogous to assessing whether the sentence is inappropriately severe. This Court should clarify that Courts of Criminal Appeals should apply a similar two-step review for an above-parameter sentence.

Because the lower court bypassed review of whether the military judge properly exceeded the parameter, the military judge's errors went unchecked, resulting in an unlawful and unsupported above-parameter sentence. This Court should grant review to provide guidance on how to properly adjudge a sentence that exceeds the new parameters and how Courts of Criminal Appeals should review above-parameter sentences on appeal.

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[1] *Gall v. United States*, 552 U.S. 38 (2007)

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed the case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[2] This Court has jurisdiction under Article 67(a)(3), UCMJ.[3]

Statement of the Case

A military judge at a general court-martial convicted Appellant following his pleas of guilty to willful disobedience of a superior commissioned officer, domestic violence, and obstruction of justice, in violation of Articles 90, 128b, and 131b, UCMJ.[4] The military judge sentenced Appellant to forty-eight months of confinement, reduction to the pay grade E-1, total forfeitures, and a dishonorable discharge.[5] The Convening Authority approved the findings and sentence, and the military judge entered them into judgment.[6] The lower court affirmed the findings and sentence on July 9, 2026.[7] Appellant timely filed a Petition for Grant of Review with this Court.

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[2] 10 U.S.C. §866(b)(3) (2024).
[3] 10 U.S.C. §867(a)(3) (2024).
[4] R. at 313-14; Entry of Judgment at 1-2, 4.
[5] R. at 386-87; Entry of Judgment at 2.
[6] Convening Authority's Action; Entry of Judgment.
[7] *Cardoso*, slip op. at 11.

Statement of Facts

In February 2024, Appellant got into an argument with his wife at their on-base residence aboard Camp Pendleton.[8] This was in violation of a Military Protective Order (MPO) prohibiting Appellant from contacting her.[9] The argument became physical and, at one point, Appellant grabbed his wife's neck.[10]

After the argument, Appellant went downstairs to "cool off" in the kitchen.[11] After cooling off, Appellant went back upstairs, took his wife's phone, and argued a second time with her about text messages she received from another man.[12] The argument escalated again and Appellant slapped his wife's face, pulled her hair, and grabbed her by the neck again.[13] During the second fight, Appellant's wife opened the window and called out "[h]elp he is going to kill me."[14]

Appellant then went outside to discourage the neighbors from calling the police, and his wife followed him out the door.[15] He told her to go back inside, but his wife refused, dropping to the ground.[16] In response, Appellant lifted her off the

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[8] *Id*. at 3.
[9] Pros. Ex. 1 at 2-3.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] Pros. Ex. 1 at 3.
[14] *Id*.; Pros. Ex. 7 at 1.
[15] Pros. Ex. 1 at 4.
[16] *Id*.

ground, led her by the arm to the passenger's seat of their car, and attempted to drive out of the neighborhood.[17]

Base police pulled them over a few minutes later. While Appellant was being questioned on the side of the road he told his wife, in Spanish, not to speak with the police.[18] Later, while in confinement, he continued to contact his wife, urging her not to cooperate with the investigation.[19]

The Government subsequently charged Appellant with domestic violence (strangulation) for the initial fight in the bedroom.[20] For the events surrounding the second fight and the subsequent events that followed—which occurred after he went back upstairs—Appellant was charged with attempted unpremeditated murder, robbery, domestic violence (assault and battery), and domestic violence (kidnapping).[21] Appellant was further charged with two orders violations for disobeying the MPO and two specifications of obstruction of justice for his attempts to dissuade his wife from participating in the investigation.[22]

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[17] *Id*.
[18] Pros. Ex. 1 at 12.
[19] Pros. Ex. 1 at 8.
[20] Charge Sheet.
[21] Charge Sheet.
[22] Charge Sheet.

A. The plea deal.

Prior to trial, the Defense struck a plea deal with the Government.[23] Appellant agreed to plead guilty to one specification of domestic violence (strangulation) for grabbing his wife's neck during the first argument, and one specification of domestic violence (assault and battery) for slapping her during the second fight.[24] Under the current sentencing parameters, domestic violence by strangulation is a Category 2 offense with a range of 1-36 months, and domestic violence by assault and battery is a Category 1 offense with a confinement range of 0-12 months.

However, as indicated in the chart below, the parties agreed to sentencing ranges that exceeded the established parameters for both charges by twelve months, agreeing to leave it to the military judge to determine whether such an upward departure was appropriate. [25]

Charge II	Category	Category Range	Plea Agreement Range
Spec 2 (Fight 1)	2	1-36 months	24-48 months
Spec 4 (Fight 2)	1	0-12 months	24-42 months

Appellant also agreed to plead guilty to both specifications of obstruction of justice and both orders violations with proposed sentencing ranges within the

[23] App. Ex. XLIII.
[24] App. Ex. XLIII at 2-6.
[25] App. Ex. XLIII at 8-9.

established parameters for these offenses.[26] In exchange, the Government agreed to withdraw and dismiss the attempted unpremeditated murder charge as well as the kidnapping and robbery specifications.[27]

B. The military judge considered evidence related to dismissed charges and charges for which Appellant already received a sentence to justify exceeding the sentencing parameters for the strangulation charge.

Although the attempted unpremeditated murder charge was withdrawn and dismissed, the Government nevertheless sought to admit his wife's statement that Appellant was "trying to kill her" as evidence in aggravation during the sentencing hearing.[28] The Defense objected, pointing out that the Government's theory had always been that there were two separate fights.[29]

According to the Government, the first fight arose from the initial argument after which Appellant went downstairs to "cool off."[30] The second fight happened after he "went back upstairs" and "asked for [his] wife's phone."[31] It was then—after reading a text from another man—that, according to the Government, "[Appellant] formed an intent to kill."[32]

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[26] App. Ex. XLIII at 2-6.
[27] Appellate Ex. XLIII at 7.
[28] R. at 319-20; App. Ex. XLVII at 1-8.
[29] R. at 319-20.
[30] R. at 110; App. Ex. XLVII at 2 (emphasis added).
[31] R. at 211, 282; App. Ex. XLVII at 2.
[32] R. at 115.

Nevertheless, the military judge found Appellant's wife's statements were "self-evidently relevant when you have a strangulation charge," that they were "clearly relevant based on [Appellant] pleading guilty to strangulation," and "that the probative value of that evidence is substantially outweighed by any prejudicial effect it may have."[33] But nowhere in this analysis did he reference Rule for Courts-Martial (R.C.M.) 1001(b)(4), which outlines the circumstances under which evidence in aggravation may be admitted.

The Government went on to reference this statement six times during his sentencing argument as a reason the military judge should exceed the confinement parameter for the strangulation charge.[34] The military judge proceeded to sentence Appellant to forty-eight months of confinement for the initial strangulation charge and twenty-four months for the assault and battery—twelve months above the parameters for each offense.[35] Pursuant to R.C.M. 1002(a), he drafted a Statement of the Factual Basis for the Sentence.[36] It included a list of his justifications for his upward departure—including conduct for which Appellant already received a sentence:

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[33] R. at 322-23.
[34] R. at 357-59, 364, 366; App. Ex. XLVII at 3.
[35] R. at 386; Entry of Judgment.
[36] App. Ex. XLIX.

- That Appellant negotiated a plea agreement that *may* warrant a sentence outside the applicable parameter.

- The act of strangulation itself," put Appellant's wife "in fear of her life."

- *Appellant violated a Military Protective Order to commit the strangulation*.

- Witnesses heard Appellant's wife shout, "he's trying to kill me," or words to that effect.

- *Appellant attempted to obstruct the investigation and conceal the strangulation offense*.

- The Defense's case in extenuation and mitigation "was not particularly strong."

- Appellant's military service was average.

- Appellant's allocution "minimized the severity of the offense."[37]

Noticeably absent from this list was any reference to the factors outlined in Appendix J of The Military Judge's Benchbook, which provides a non-exhaustive list of thirteen specific examples of factors that "may warrant a departure from the applicable sentencing range."[38] Defense Counsel raised this issue in his clemency request, which the military judge addressed at a post-trial 39(a) hearing.[39] But the

[37] App. Ex. XLIX at 2-3 (emphasis added).
[38] U.S. DEP'T OF THE ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK, App. J (Mar. 24, 2026).
[39] Request for Clemency at 1.

military judge explained that, although Appendix J outlines factors for him to consider when deciding whether to exceed the parameters, he did not find them persuasive.[40] He therefore declined to reevaluate Appellant's sentence and it stood as initially adjudicated.[41]

C. The lower court affirmed Appellant's sentence.

Appellant appealed his sentence for the strangulation charge[42] to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), asserting "[t]he military judge imposed an inappropriately severe sentence by departing from the sentencing parameters without good cause."[43] The lower court disagreed, and upheld the sentence for the same factual bases for which the military judge originally departed the sentence parameter.[44]

The majority found that "the domestic violence by strangulation . . . is, *on its own*, worthy of significant punishment."[45] In addition, it relied on the facts of the other domestic violence charge (assault and battery)—for which Appellant was

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[40] R. at 398-99.
[41] Entry of Judgment.
[42] All confinement was adjudged to run concurrently. Therefore, Appellant has not challenged the fact that the military judge exceeded the parameters for Specification 4 of Charge II, as relief on this count would have no practical effect on his confinement time.
[43] *Cardoso*, slip op. at 2.
[44] *Id.* at 9-11.
[45] *Cardoso*, slip op. at 9-10 (emphasis added).

sentenced to twenty-four months of confinement—to justify exceeding the sentencing parameter for the strangulation.[46] Specifically, the majority pointed to the fact that, during this incident, Appellant made threatening comments to his wife as he grabbed a pillow, making her think he was going to smother her with it.[47] The court also noted that Appellant's wife was "substantially lighter than Appellant," sustained visible injuries from her attack, and her shirt was ripped in the process."[48]

It further relied on the facts surrounding the obstruction of justice specifications and the MPO violations—despite the fact that Appellant also received confinement sentences for all of these specifications—finding them "highly relevant" to the strangulation.[49] As did the military judge, the lower court also explained that Appendix J of the Benchbook "is not binding, but rather provides guidance," and found no issue with the fact that the military judge did not consider it in formulating his sentence.[50]

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[46] *Id*. at 9-11.
[47] *Id*.
[48] *Id.* at 10.
[49] *Cardoso*, slip op. at 10.
[50] *Id.*

Reasons to Grant Review

A. There are two grounds for sentence review in this case, each requiring a different test. The lower court applied only one test.

Under the statute, when a military judge sentences an appellant above the parameter, there are at least two grounds for sentence review on appeal. Article 66(e)(1) provides that Courts of Criminal Appeals (CCA) evaluate "whether the sentence is inappropriately severe" and "whether the sentence is a result of an incorrect application of the parameter:"[51]

> (B) whether the sentence is *inappropriately severe*—
> …
> (ii) in the case of an offense for which the President has established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022, if the sentence is above the upper range of such sentencing parameter;
>
> (C) in the case of a sentence for an offense for which the President has established a sentencing parameter[,] whether the sentence *is a result of an incorrect application of the parameter*…[52]

Additionally, Congress added procedural steps for military judges to take before departing from the sentence parameter range. Military judges, when imposing a sentence outside a sentencing parameter range, "shall include in the record a written statement of the factual basis for the sentence."[53]

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[51] Art. 66(e)(1)(B)-(C); 10 U.S.C. § 866(e)(1)(B)-(C) (2024).
[52] Art. 66(e)(1)(B)-(C), 10 U.S.C. § 866(e)(1)(B)-(C) (2024) (emphasis added).
[53] Art. 56(c)(2)(B), UCMJ, 10 U.S.C. § 856(c)(2)(B) (2024); MANUAL FOR COURTS-MARTIAL, UNITED STATES [hereinafter MCM], RULE FOR COURT-MARTIAL 1002(2)(B) (2024) [hereinafter R.C.M].

This two-step review is similar to the review federal courts of appeal conduct when determining the "reasonableness" of sentences awarded by the lower courts. As the Supreme Court explained in *Gall v. United States*:

> [The appellate court] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [sentencing] factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.[54]

Here, the military judge failed to correctly apply the sentencing parameters in Appellant's case. And the lower court failed to consider whether the military judge arrived at the sentence through an incorrect application of the parameters. For the reasons below, this Court should hold that the CCAs should apply a two-step process similar that that applied by federal courts when determining whether an above-parameter sentence is inappropriately severe. Here, the lower court failed to do so, which prejudiced Appellant.

[54] *Gall v. United States*, 552 U.S. 38, 51 (2007) (internal citations omitted).

1. Above-Parameter Sentence Review in the New Sentencing Regime.

Congress now requires military judges imposing a sentence outside a sentencing parameter range to "include in the record a written statement of the factual basis for the sentence."[55] Therefore, CCAs must (1) assess the military judge's procedural determination (written factual basis) for the sentence in assessing whether the parameters were correctly applied, and (2) independently assess the substantive appropriateness of the sentence.[56]

While federal courts assess reasonableness rather than sentence appropriateness, the Supreme Court's two-step test in *Gall* for determining the reasonableness of sentences is instructive in applying both tests.[57] First, like the first step in *Gall*, the CCAs should "first ensure that the [military judge] committed no significant procedural error."[58] Such errors include failing to calculate (or improperly calculating) the parameter range, failing to consider the correct sentencing factors, selecting a sentence based on clearly erroneous facts, or failing

[55] Art. 56(c)(2)(B), UCMJ, 10 U.S.C. § 856(c)(2)(B) (2024).
[56] Art. 66(e)(1)(B)-(C), UCMJ, 10 U.S.C. § 866(e)(1)(B)-(C) (2024); *see Gall*, 552 U.S. at 51 (internal citations removed).
[57] *See Gall*, 552 U.S. at 46.
[58] *See Gall*, 552 U.S. at 51.

to adequately explain the chosen sentence that deviates from the parameters range.[59] This "procedural" analysis should be reviewed for abuse of discretion.[60]

Under the new sentencing regime, military courts follow sentence parameters similar to the federal sentencing guidelines. The majority of UCMJ offenses are divided into six categories, each having a corresponding sentencing range (parameter) from 0 months of confinement to life with the possibility of parole. These ranges are considered "*appropriate for a typical violation of the offense*," taking into consideration—

> (i) the severity of the offense;
> (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States District court;
> (iii) any military-specific sentencing factors;
> (iv) the need for the sentencing parameter to be *sufficiently broad* to allow for *individualized consideration* of the offense and the accused; and
> (v) any other relevant sentencing guideline.[61]

Military judges should sentence an accused to confinement within these

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[59] Art. 66(e)(1)(C), UCMJ, 10 U.S.C. § 866(e)(1)(C) (2024) (stating where the President has established a parameter, appropriate appellate review requires a CCA to examine "whether the sentence is the result of an incorrect application of the parameter.").

[60] *See Gall*, 552 U.S. at 41 ("[C]ourts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.").

[61] HOUSE COMM. ON ARMED SERVS., 117TH CONG., LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY S. 1605, PUBLIC LAW 117-81, at 169 (Comm. Print 2021) (emphasis added).

ranges unless there is good cause to exceed them. To determine whether there is good cause, military judges should look to the Benchbook as a tool "intended to ensure compliance with existing law."[62] Although the Benchbook is not binding authority, a military judge may not simply disregard it, and it must inform their sentencing decisions. In fact, this Court has held that, "an individual military judge should not deviate significantly from these instructions [the Benchbook] without explaining his or her reasons on the record."[63] If the military judge does exceed the parameters, he "shall include in the record a written statement of the factual basis for the sentence."[64]

The second instructive step in *Gall* is the substantive review of the sentence. Assuming that the military judge's sentencing decision is procedurally sound, the CCA should then consider, substantively and independently, whether the sentence is inappropriately severe, when sentence review is conducted pursuant to Article 66(e)(1)(B)(ii) for a sentence above the parameter.[65] In accordance with the case law for the previous sentence appropriateness paradigm that was in effect before this

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[62] *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013).
[63] *Id*. (citation omitted).
[64] Art. 56(c)(2)(B), UCMJ, 10 U.S.C. § 856(c)(2)(B) (2024); MCM, RCM 1002(2)(B).
[65] Art. 66(e)(1)(B), UCMJ, 10 U.S.C. §866(e)(1)(B) (2024); *Baier*, 60 M.J. at 383.

statutory change, this independent review of "substantive appropriateness" should be conducted *de novo*.[66]

That is because, although the revised statute narrows the scope of sentence appropriateness review, Congress maintained the same language, "inappropriately severe," that this Court has used for decades in the previous sentence appropriateness paradigm.[67] And when Congress "adopt[s] the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'"[68]

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[66] *Kelly*, 77 M.J. at 406. This differs from the standard of review federal courts apply in analyzing the substantive reasonableness of the sentence imposed, which is abuse of discretion. *Gall*, 552 U.S. at 51.

[67] *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005) ("A Court of Criminal Appeals must determine whether it finds the sentence to be appropriate. It may not affirm a sentence that the court finds inappropriate, but not 'so disproportionate as to cry out' for reduction. As the Army Court has recognized, Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused. 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.") (internal quotations and citations removed) (cleaned up).

[68] *Stone v. INS*, 514 U.S. 386, 397 (1995); *Shapiro v. United States*, 335 U.S. 1, 16 (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)); *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts . . . they are to be understood according to that construction.").

Before the change in the law, Article 66(c) provided that the lower court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[69] The previous sentence appropriateness regime bestowed the lower court "awesome, plenary, *de novo* power of review," which gave them "*carte blanche* to do justice."[70] Thus, CCAs shall conduct an independent analysis of whether an appellant's sentence is inappropriately severe when reviewing the sentence under Article 66(e)(1)(B)(ii). While the lower court performed an independent substantive analysis, it did not perform the first.[71] And in performing the substantive analysis, it overlooked that procedural errors led to the sentence.

B. Appellant was prejudiced by the military judge's procedural errors, which resulted in an unreasonable sentence outside the parameters.

In Appellant's case, the military judge made several procedural errors when he exceeded the confinement parameters for the strangulation charge. First, part of his justification for doing so was the fact that it "occurred while the accused was

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[69] Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2018).
[70] *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (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)).
[71] *Compare with Gall*, 552 U.S. at 56 ("Since the District Court committed no procedural error, the only question for the Court of Appeals was whether the sentence was reasonable[.]").

violating [an MPO],” and that he “attempted to conceal his offense and obstruct the investigation.”[72]

But Appellant was separately convicted and sentenced for these offenses. Therefore, the military judge’s justification runs afoul of the principle of segmented sentencing this court outlined in *United States v. Flores*—namely that “the amount of confinement for each guilty finding . . . [is] determined *separately*.”[73] In short, the military judge unlawfully punished Appellant twice for the same act.

The same goes for the admission of Appellant’s wife’s statement that Appellant was “trying to kill her” as evidence in aggravation. This evidence related to the attempted unpremeditated murder and kidnapping specifications, both of which were withdrawn and dismissed. In other words, it related to a “completely[] separate distinct act[]” and was made in the context of an “entire[ly] other course of conduct.”[74]

In addition, the military judge “failed to consider [federal sentencing] factors,”—procedural errors under *Gall*—when he denied the Defense’s request to apply Appendix J of the Benchbook.[75] But, as this Court has made clear, “an individual military judge should not deviate significantly from these instructions

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[72] App. Ex. XLIX.
[73] *United States v. Flores*, 84 M.J. 277 (C.A.A.F. 2024).
[74] R. at 109-13.
[75] Request for Clemency.

without explaining his or her reasons on the record."[76] The lower court endorsed this error by likewise finding its guidance "is not binding."

The factors the military judge did rely on to justify exceeding the parameters were improper. For example, he cited merely the facts of the charged incidents (which, while most unfortunate, were nevertheless quite "typical" for these types of offenses) as reasons to exceed the parameters.[77] He ignored the mitigating factors the Defense presented, such as Appellant's rehabilitative potential.[78] Further, rather than considering Appellant's respectable military record and the fact that he took responsibility by pleading guilty to the offenses as factors weighing in his favor, the military judge used them against him.[79] In short, he disregarded the guidance provided by the Benchbook, which would have steered him away from this procedural error.

C. The lower court affirmed Appellant's sentence by relying on similar improper considerations to the military judge's.

In conducting a *de novo* review of Appellant's sentence, the lower court upheld the sentence for the same improper bases for which the military judge originally departed the sentence parameter.[80] The lower court sentenced Appellant

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[76] *Id*. (citation omitted).
[77] App. Ex. XLIX.
[78] App. Ex. XLIX.
[79] App. Ex. XLIX.
[80] *Cardoso*, slip op. at 9-11.

twice for the same conduct when it relied on the facts of the other domestic violence charge (assault and battery) and on the facts surrounding the obstruction of justice specifications and the MPO violations to justify exceeding the sentencing parameter for the strangulation.[81] Further, like the military judge, the majority relied on Appellant's threatening comments to his wife related to the dismissed charges. Thus, in conducting its de novo review of the appropriateness of Appellant's sentence, the lower court refused to follow this Court's segmenting sentencing precedent established in *Flores*.[82]

[81] Cardoso, slip op. at 9-11.
[82] *United States v. Flores*, 84 M.J. 277 (C.A.A.F. 2024).

Conclusion

Had the lower court conducted the correct analysis, it would not have fallen into the same traps that the military judge fell into procedurally. However, by failing to consider the procedure by which the military judge arrived at Appellant's sentence, the NMCCA erred. This Court should grant review to decide a question of law that has not been but should be settled by this Court.[83]

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[83] C.A.A.F. R. 21(b)(5)(A).

Certificate of Compliance with Rules 21(b) and 37

This Supplement complies with the type-volume limitations of Rule 21(b) because it contains fewer than 9,000 words. This Supplement complies with the typeface and type style requirements of Rule 37.

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Appendix

A. *United States v. Cardoso*, No. 202500144, slip op. (N-M. Ct. Crim. App. July 9, 2026) (unpublished).

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division, at Code46-DAC@us.navy.mil, and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, at Joshua.D.Ricafrente.civ@us.navy.mil on October 16, 2026.

//s//
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This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps Court of Criminal Appeals

Before
GROSS, de GROOT, and ZIMMERMANN
Appellate Military Judges

UNITED STATES
Appellee

v.

Josue M. CARDOSO
Lance Corporal (E-3), U. S. Marine Corps
Appellant

No. 202500144

Decided: 9 July 2026

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Douglas C. Hatch

Sentence adjudged 12 September 2024 by a general court-martial convened 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 48 months, forfeiture of all pay and allowances, and a dishonorable discharge.[1]

For Appellant:
Captain Kyle W. Rodewald, USMC

For Appellee:
Major Mary Claire Finnen, USMC (argued)
Lieutenant K. Matthew Parker, JAGC, USN (on brief)

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[1] Appellant was credited with 200 days of pretrial confinement credit.

Judge ZIMMERMANN delivered the opinion of the Court, in which Senior Judge GROSS joined. Judge de GROOT filed a separate opinion concurring in the judgment.

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

ZIMMERMANN, Judge:

A military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of two specifications of disobeying a superior commissioned officer, two specifications of domestic violence (one by strangulation, one by assault consummated by a battery), and two specifications of obstructing justice, in violation of Articles 90, 128b, and 131b, Uniform Code of Military Justice (UCMJ).[2] The remaining charges and specifications, to which Appellant pleaded not guilty, were withdrawn and dismissed pursuant to a plea agreement.

Appellant asserts a single assignment of error (AOE): "The military judge imposed an inappropriately severe sentence by departing from the sentencing parameters without good cause."[3] We find no prejudicial error and affirm.

I. BACKGROUND

A. Underlying Facts

Appellant and his wife lived aboard Marine Corps Base Camp Pendleton, California. Several months before the incident giving rise to the charges, Appellant's battalion commander issued a military protective order (MPO) directing Appellant to have no contact with his wife and remain at least 500 feet away from her. On 25 February 2024, Appellant violated the order by going to the marital home and intentionally remaining on the second floor of the home until his wife returned to the house. At that point, they began to argue. The verbal quarrel escalated when Appellant put his hands around his wife's throat and squeezed, restricting her airway. She attempted to get to a window to call for help, but Appellant pulled her away. The argument continued, and

[2] 10 U.S.C. §§ 890, 928b, 931b.

[3] Appellant's Brief at 1. The AOE asserts error only with respect to Charge II, Specification 2.

Appellant hit his wife on her face with his open hand, pulled her hair, and again strangled her by using his hands to impede her breathing. She eventually was able to get to a window, pushed out the screen, and called for help to neighbors she saw from the window. Appellant went outside to speak to the neighbors, and his wife also exited the house. Appellant told one of the neighbors not to call the Provost Marshal's Office. Appellant's wife sat on the ground to avoid leaving with Appellant, but Appellant picked her up and forced her into his vehicle. Before they could leave the installation, military police stopped the car, and Appellant instructed his wife in Spanish not to talk to them, mistakenly believing the arresting officers did not speak Spanish. The military police apprehended Appellant.

From the confinement facility, Appellant continued to call his wife in violation of the MPO. His purpose in contacting her was to convince her to stop cooperating with authorities. These MPO violations were repeated and occurred over the course of several weeks. After Appellant's MPO violations were discovered, the confinement facility restricted Appellant's phone privileges. However, by using a phone designated for attorney consultations, Appellant was able to improperly circumvent these restrictions to continue attempting to persuade his wife to recant her allegations or otherwise stop cooperating with law enforcement.

B. The Plea Agreement

Appellant negotiated a plea agreement with the Office of Special Trial Counsel. In exchange for withdrawal and dismissal of several specifications, Appellant agreed to plead guilty to orders violations, domestic violence, and obstruction of justice. The parties agreed on the range of months of confinement that the military judge could sentence Appellant to serve for the offenses to which he pleaded guilty as indicated below, with confinement adjudged for each specification to be served concurrently:

Charge and Specification	Maximum Authorized by UCMJ	Plea Agreement Range	Sentencing Parameters Range	Adjudged Segmented Sentence to Confinement
Chg II, Spec 2 Art. 128b (domestic violence-strangulation)	96	24–48	Category 2 1–36	48
Chg II, Spec 4 Art. 128b (domestic violence-assault)	42	24–42	Category 1 0–12	24

Chg III, Spec Art. 131b (obstruction of justice)	60	24–48	Category 2 1–36	24
Chg IV, Spec 1 Art. 90 (disobey superior comm. officer)	60	24–48	Category 2 1–36	24
Chg IV, Spec 2 Art. 90 (disobey superior comm. officer)	60	24–48	Category 2 1–36	24
Add. Chg, Spec Art. 131b (obstruction of justice)	60	24–48	Category 2 1–36	30

Additionally, the parties agreed that *the evidence supported* a sentence above the parameters range for Charge II, Specification 4 (domestic violence by assault consummated by a battery), and that *the evidence may support* a sentence above the parameters range for Charge II, Specification 2 (domestic violence by strangulation).[4]

Following the providence inquiry, the military judge accepted Appellant's pleas and found him guilty of all charges and specifications to which he entered guilty pleas. During the plea colloquy, the military judge confirmed multiple times that Appellant fully understood the plea agreement and its terms, which included the sentencing range of 24 to 48 months of confinement for Charge II, Specification 2. The military judge also confirmed that Appellant had thoroughly discussed the decision to enter into the plea agreement and its terms with his trial defense counsel, including an explanation of the sentence limitation portion of the agreement. The military judge explicitly discussed the provision of the plea agreement regarding the possibility of an above-parameters sentence for Charge II, Specification 2.[5] After reviewing the plea agreement with Appellant, the military judge accepted it. Consistent with the plea agreement, the military judge sentenced Appellant to 48 months confinement for Charge II, Specification 2, which was within the plea agreement but above the upper range of the applicable sentencing parameter.

[4] App. Ex. XLIII at 8.

[5] R. at 301–03.

In accordance with Article 56(c)(2)(B)[6] and Rule for Courts-Martial (R.C.M.) 1002(a)(2)(B), the military judge entered written findings supporting the above-parameters sentence for that specification.[7] He referenced specific characteristics of the strangulation at issue, including the size disparity between Appellant and his wife, the pain and injuries the she suffered, and that it took place in on-base housing and while an MPO was in place.

The military judge did not recommend suspension of any of the adjudged confinement.[8] Further, although the adjudged sentence for two of the specifications of conviction exceeded the upper range of the parameters, the military judge did not reject the plea agreement as plainly unreasonable.[9]

Appellant submitted a clemency letter to the convening authority seeking deferment of the reduction to E-1 and waiver of automatic forfeitures for the benefit of his wife. In the letter, Appellant alleged legal error based on evidence and argument the Government relied upon to support its request for an above-parameters sentence. For example, Appellant argued the Government and military judge relied on evidence of the second phase of the altercation, which was charged as Charge II, Specification 4, to support the sentence on the initial strangulation charged as Charge II, Specification 2. Further, Appellant took issue with trial counsel and the military judge not analyzing the factors listed in Appendix J to the Military Judges' Benchbook regarding parameters.[10]

As a result, the military judge ordered briefing from both parties on the relevant issues and a post-trial hearing. Throughout the written pleadings and at the hearing, all parties agreed the sentence was within the range of the plea

[6] 10 U.S.C. § 856(c)(2)(B).

[7] The sentence for Charge II, Specification 4 also exceeds the upper range of the parameters, but the plea agreement documented the parties' agreement that the evidence supported such a sentence, and Appellant does not challenge the sentence adjudged for this specification.

[8] Art. 60a(c)(1), UCMJ; R.C.M. 1009(f)(1)(A).

[9] Art. 53a(b)(1), UCMJ; R.C.M. 1002(a)(3)(A).

[10] Dep't of the Army Pam. 27-9, *Military Judges' Benchbook*, App'x J.

agreement and lawful, and both parties wanted the agreement to remain in effect.

II. DISCUSSION

A. Standard of Review

The parties disagree on the applicable standard of review. Appellant argues we should review sentence appropriateness de novo, and the Government argues for a "sliding scale" standard of review.

For decades, Courts of Criminal Appeals (CCAs) reviewed sentence appropriateness de novo.[11] The Court of Appeals for the Armed Forces (CAAF) "described the service courts' authority to conduct sentence appropriateness as an awesome, plenary, de novo power of review."[12] The previous version of the statute governing appellate review stated the CCA "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."[13]

Congress passed the National Defense Authorization Act for Fiscal Year 2022,[14] which replaced this provision with new language describing the service courts' authority to review sentence appropriateness."[15] The revised Article 66(e)(1) states a CCA may review a sentence to determine, *inter alia*:

(B) whether the sentence is inappropriately severe—

(i) if the sentence is for an offense for which the President has not established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022; or

(ii) in the case of an offense for which the President has established a sentencing parameter pursuant to section 539E(e) of the National Defense

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[11] *See, e.g., United States v. Avellaneda*, 84 M.J. 656, 661 (N-M. Ct. Crim. App.), *review denied*, 85 M.J. 113 (C.A.A.F. 2024) (citing *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006)).

[12] *United States v. Arroyo*, 86 M.J. 89, 93 (C.A.A.F. 2025) (quoting *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (internal quotes and additional citations omitted)).

[13] *Id.* at 92–93 (quoting Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018); *United States v. Kelly*, 77 M.J. at 406).

[14] Pub. L. No. 117-81, § 539E(d), 135 Stat. 1541, 1703 (2021).

[15] *Arroyo*, 86 M.J. at 93 n.4.

Authorization Act for Fiscal Year 2022, if the sentence is above the upper range of such sentencing parameter[.]

In *Arroyo*, the CAAF did not opine as to "whether or how [the amendments] might affect this Court's sentence-appropriateness review jurisprudence."[16] The CAAF has not addressed this matter further, and the statute is silent as to the specific standard of review, despite the new requirement for military judges to enter factual findings into the record when they adjudge an above-parameters sentence. Based on our review of the entire record, our resolution of Appellant's assignment of error would not change under any standard of review. We therefore leave for another day the question of what standard applies.[17] Applying the most advantageous standard for Appellant, which is de novo, Appellant is not entitled to relief.

B. Limits on Sentencing

1. Statutory and Regulatory Maximum Punishments

Each punitive article of the UCMJ at issue in this case provides that an accused, upon conviction, shall be punished as a court-martial may direct.[18] The *Manual for Courts-Martial* provides specific maximum sentences to confinement a court-martial may adjudge.[19]

Additionally, Article 56(c), UCMJ, provides "a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces," considering enumerated factors.[20] Those include:

> (A) the nature and circumstances of the offense and the history and characteristics of the accused;
> (B) the impact of the offense on—

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[16] *Id.*

[17] We note that when civilian federal courts of appeals review sentences under similar circumstances, Congress directed review of the trial judge's factual findings for clear error and a de novo review of the application of the U.S. Sentencing Guidelines to those facts. 18 U.S.C. § 3742(e)(3)(C). Also, we presume Congress was aware of well-established case law holding a CCA reviews sentence appropriateness de novo when it amended Article 66, UCMJ, yet the amendment does not explicitly dictate a different standard of review. *See* Antonin Scalia & Bryan A. Garner, *Presumption Against Change in Common Law*, READING LAW (2012), at 318.

[18] Articles 90, 128b, 131b, UCMJ.

[19] *Manual for Courts-Martial, United States* (2019 ed.) (MCM) pt. IV, para. 16d, 78d, 83d at IV-24, IV-123, IV-129.

[20] R.C.M. 1002(c)(2) incorporates the same factors military judges should consider when arriving at an appropriate sentence.

(i) the financial, social, psychological, or medical wellbeing of any victim of the offense; and
(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;
(C) the need for the sentence—
(i) to reflect the seriousness of the offense;
(ii) to promote respect for the law;
(iii) to provide just punishment for the offense;
(iv) to promote adequate deterrence of misconduct;
(v) to protect others from further crimes by the accused;
(vi) to rehabilitate the accused; and
(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;
(D) the sentences available under this chapter; and
(E) the applicable sentencing parameters or sentencing criteria
. . .

R.C.M. 1002(d) explicitly authorizes the military judge to consider all evidence admitted during the findings and punishment phases of the court-martial in arriving at a sentence determination.

2. Parameters

Appellant's offenses occurred after the effective date of changes to the UCMJ implementing new sentencing procedures, including the establishment of sentencing parameters. These parameters set forth ranges of confinement for specified offenses based on the category of the charged offense. Article 56, UCMJ, now requires that a military judge sentence an accused to confinement within the range of established parameters.[21] Military judges may deviate from the parameters but must include a written explanation containing the factual basis supporting an above-parameters sentence.[22]

3. Plea Agreements

Appellant's offenses also occurred after the effective date of changes to the UCMJ requiring military judges to sentence convicted servicemembers "in accordance with the limits established by the plea agreement" if the military judge has accepted the plea agreement.[23] The statute provides an exception to this rule, allowing the military judge to reject the plea if the plea agreement

[21] Article 56(c)(2)(A); R.C.M. 1002(a)(2)(B).

[22] Article 56(c)(2)(B); R.C.M. 1002(a)(2)(B).

[23] Article 53a(e); *see also* R.C.M. 910(f)(5).

"proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable."[24]

C. The Sentence is Not Inappropriately Severe

Appellant challenges as inappropriately severe only one segment of the sentence the military judge adjudged: the confinement for 48 months with respect to Charge II, Specification 2. Appellant argues the military judge failed to provide an adequate factual basis to support such a sentence and therefore, it is inappropriately severe. The sentencing parameter for this specification establishes as a baseline a range of 1–36 months. However, the parties agreed on a range of 12–48 months for this specification in the plea agreement, understanding the military judge could find the evidence supported a sentence above the parameters.

To determine whether a sentence is inappropriately severe, we must make an "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender."[25] In exercising this function, we seek to ensure that "justice is done and that the accused gets the punishment he deserves."[26] In making this assessment, we analyze the record as a whole.

While we are not bound by the military judge's factual findings, we recognize that he heard the only witness called to testify at sentencing, Appellant's mother, and he was able to observe and assess Appellant's demeanor during his unsworn statement and providence inquiry. With respect to the numerous written exhibits the parties offered and the military judge admitted as evidence, we are able to conduct our own independent review of this evidence in order to evaluate the appropriateness of the sentence. We also consider the terms of the plea agreement in the context of the sentence appropriateness determination.[27] Finally, we are mindful that our review does not involve a decision whether to grant clemency.[28]

The crimes to which Appellant pleaded guilty were extremely serious as a whole. Further, the domestic violence by strangulation alleged in Charge II,

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[24] Art. 53a(b)(1); R.C.M. 1002(a)(3)(A).

[25] *Avellaneda*, 84 M.J. at 661 (quoting *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)).

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

[27] *See United States v. Spencer*, ___ M.J. ___, No. 25-0192, 2026 CAAF LEXIS 143, at *6 (C.A.A.F. Feb. 9, 2026) ("A CCA, therefore, must take a plea agreement into account in performing its sentence appropriateness review").

[28] *Avellaneda*, 84 M.J. at 661–62 (citing *Healy*, 26 M.J. at 395).

Specification 2 is, on its own, worthy of significant punishment.[29] Appellant admitted to putting his hands around his wife's neck and squeezing with a pressure of "seven or eight" on a scale of one to ten, "ten being the most pressure," for six to eight seconds.[30] During this encounter Appellant "slammed" his wife against a wall causing her to fall to the ground, then kicked her in the abdomen and knees.[31] During the second strangulation, Appellant stated, "Look at my eyes because these are the last eyes you'll ever see, b***h."[32] At that time, Appellant's wife saw Appellant grab a pillow, and she believed he was going to kill her with it. Appellant's wife, who was substantially lighter than Appellant, sustained visible injuries from this attack, and her shirt was ripped in the process. It is highly relevant that at the time of this event, Appellant was prohibited by a lawful order from being within 500 feet of or communicating with his wife for her protection. As the military judge found, these assaults took place in military housing, and other residents became involved. Appellant went to great lengths to obstruct an investigation that was sure to ensue and avoid the consequences of his actions, both immediately after the assaultive conduct and continuing for weeks, even after he was confined. He forced his wife into a vehicle and drove away so they would not be found together at the home, instructed her not to talk to the military police, and made false statements at the brig in order to continue contacting his wife in an effort to persuade her to stop cooperating with law enforcement.[33]

Appellant took responsibility for his crimes by pleading guilty to the offenses for which he was convicted rather than contesting them at trial. His willingness to take responsibility through his guilty pleas weighs in his favor. However, even in conjunction with the other evidence of extenuation and mitigation Appellant offered and we considered, it does not convince us that the sentence is inappropriately severe.

Appellant took issue with the military judge's omission of the factors listed in Appendix J of the Military Judges' Benchbook. However, that reference is not binding, but rather provides guidance. Appellant had the advice of

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[29] *United States v. Flores*, 84 M.J. 277, 278 (C.A.A.F. 2024).

[30] R. at 201.

[31] Pros. Ex. 14 at 1. Appellant did not object to this evidence.

[32] Pros. Ex. 14 at 2.

[33] Appellant characterizes the military judge's consideration of these factors as improper double punishment for the same offense since this conduct formed the basis of other specifications of which Appellant was convicted. We find this evidence proper aggravation under R.C.M. 1001(b)(4) as matters "directly relating to or resulting from" the domestic violence by strangulation.

competent counsel, knowingly and voluntarily entered into a plea agreement providing for the possibility of the sentence he received and repeatedly informed the military judge he wanted the agreement to remain in effect. Viewing the entire record in light of the factors listed in Article 56, UCMJ, and R.C.M. 1002, the adjudged sentence above the parameters—but within the terms of the plea agreement—was not inappropriately severe.

We have carefully considered Appellant's personal history and characteristics, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial.[34] We conclude that Appellant's sentence as a whole, and in particular, to 48 months of confinement for Charge II, Specification 2, is not inappropriately severe.

III. CONCLUSION

After careful consideration of the record, and the briefs and oral argument of appellate counsel, we have determined that the findings and sentence are correct in law and that no error materially prejudicial to Appellant's substantial rights occurred. The sentence is appropriate.

The findings and sentence are **AFFIRMED**.

[34] *See Spencer*, ___ M.J. ___, 2026 CAAF LEXIS 143, at *6 (a CCA must consider "the entire record" in performing its sentence appropriateness review).

de GROOT, Judge (concurring in the judgment):

While I concur with the majority opinion in the affirmance of the sentence, the majority leaves for another day what the appropriate standard of review should be. In my opinion, another day is today. In accordance with the language in the new Article 66, UCMJ, for sentences that may be considered inappropriately severe, specifically in cases where the sentence is above the upper limit of an established sentencing parameter, the standard of review should be abuse of discretion.

Under the version of Article 66 from which much of our case law has been derived, a Court of Criminal Appeals (CCA) could affirm "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."[35] When the statute was amended, the portion quoted above was removed. The current Article 66 tells the CCA that it may consider:

> (A) whether the sentence violates the law;
>
> (B) whether the sentence is inappropriately severe—
>
> (i) if the sentence is for an offense for which the President has not established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022; or
>
> (ii) in the case of an offense for which the president has established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022, if the sentence is above the upper range of such sentencing parameter;
>
> (C) in the case of a sentence for an offense for which the President has established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022, whether the sentence is a result of an incorrect application of the parameter;
>
> (D) whether the sentence is plainly unreasonable; and
>
> (E) in review of a sentence to death or to life in prison without eligibility for parole determined by the members in a capital case under section 853(c) of this title (Article 53(c)), whether the

[35] Article 66(d)(1), UCMJ (2019), 10 U.S.C. § 866(d)(1).

> sentence is otherwise appropriate, under rules prescribed by the President.[36]

Article 66(e)(2) goes on to tell the CCA that:

> [i]n an appeal under this subsection. . .the record on appeal shall consist of –
>
> (A) any portion of the record in the case that is designated as pertinent by any party;
>
> (B) the information submitted during the sentencing proceeding; and
>
> (C) any information required by rule or order of the Court of Criminal Appeals.[37]

This is a much narrower consideration than what was previously afforded the CCAs.

Under the prior Article 66, in *United States v. Kelly*, the Court of Appeals for the Armed Forces (CAAF) held that Article 56(b), UCMJ,[38] did not restrict the Army Court of Criminal Appeals from its ability to review a mandatory minimum sentence for sentence appropriateness.[39] The CAAF pointed out that while Article 56(b) and Article 66(c)[40] seemed to be at odds, they were not, as Article 56(b) was simply a limit on the court-martial and not the reviewing authorities.[41] Congress provided the CCA with "awesome, plenary, de novo power of review,"[42] and while it imposed limits on the convening authority's power, Congress was aware of the law and chose not to constrain the power of the CCA.[43] Congress has done so now under the current Article 66. The record on appeal when considering the sentence does not necessarily include the entire record of trial, nor does it explicitly state anymore that the CCA may

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[36] Article 66(e)(1), UCMJ.

[37] Article 66(e)(2), UCMJ.

[38] Article 56(b), UCMJ, 10 U.S.C. § 856(b) (2012 & Supp. I 2014) provided for mandatory sentence minimums for specific offenses, specifically a dismissal or dishonorable discharge as applicable.

[39] 77 M.J. 404, 405 (C.A.A.F. 2018).

[40] Article 66(c), UCMJ (2012).

[41] *Kelly,* 77 M.J. at 407.

[42] *Id.* (citations omitted)

[43] *Id.*

affirm only the sentence or the part of the sentence as the Court determines should be approved.[44]

While the CCAs review power has been truncated, the military judge is now required to do more should a sentence be outside the sentencing parameters. Article 56(c) states that "[i]n sentencing an accused under [article 53], a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces…" The statute goes on to list a number of considerations for the court-martial.[45] Article 53a(b) states:

> [s]ubject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that— (1) in the case of an offense with a sentencing parameter set forth in regulations prescribed by the President pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022, the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable. . .[46]

The current statute requires military judges to make determinations, which they were not previously required to do, prior to accepting a plea agreement.

In addition to making a finding as to whether a plea agreement that proposes a sentence above the sentencing parameters is plainly unreasonable, the military judge, if he or she imposes a sentence outside a sentencing parameter, "shall include in the record a written statement of the factual basis for the sentence."[47]

Appellant argues that the standard of review should be de novo in accordance with the decades of case law that has used the prior Article 66 language to justify the greater standard of review. In light of all the changes to Article 66, a de novo standard of review is no longer justified.

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[44] Under the previous Article 66, a CCA had "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." *United States v. Arroyo*, 86 M.J. 89, 92–93 (C.A.A.F. 2025) (citations omitted).

[45] *See* Article 56(c)(1), UCMJ.

[46] *See also* Rule for Courts-Martial (R.C.M.) 1002(b)(2) (2024). The current statute also states the military judge may reject a plea agreement where the sentence is not subject to parameters if the military judge finds it to be plainly unreasonable. Article 53a(b)(2), UCMJ, 10 U.S.C. § 853a(b)(2) (2024).

[47] Article 56(c)(2)(B), UCMJ; R.C.M. 1002(2)(B).

When a military judge makes findings of fact, the standard of review has historically been abuse of discretion. "'Abuse of discretion' is a term of art applied to appellate review of the discretionary judgments of a trial court. An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law."[48] "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."[49] As the military judge is required to make findings of fact in cases where he or she is sentencing an accused above the sentencing parameters, we should review the military judge's findings using the abuse of discretion standard.

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable' or 'clearly erroneous.'"[50] Under an abuse of discretion standard of review, Appellant's sentence is not inappropriately severe. Even under a de novo standard of review, I agree with the majority opinion that the Appellant's sentence is not inappropriately severe and therefore concur in the judgment.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[48] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

[49] *United States v. Gore*, 60 M.J. 178,187 (C.A.A.F. 2004) (citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)).

[50] *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (quoting *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000)).