

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellant

v.

JOEL GONZALEZ
Private First Class (E-2)
U.S. Marine Corps,

Appellee

APPELLEE'S ANSWER

Crim. App. Dkt. No. 202500333

USCA Dkt. No. 26-0223/MC

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

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Issue Presented

Did the lower court err finding the sentence plainly unreasonable, where the sentence was bargained for and within parameters and where trial counsel chose not to exercise discretion under R.C.M. 1109 to issue a substantial assistance letter?

Statement of Statutory Jurisdiction

The sentence adjudged included a bad-conduct discharge.¹ Accordingly, the lower court had jurisdiction pursuant to Article 66(b)(3) of the Uniform Code of Military Justice (UCMJ).² The Judge Advocate General of the Navy filed a Certificate for Review of the above issue with this Court, giving this Court jurisdiction under Article 67(a)(2), UCMJ.³

Relevant Authorities

The following relevant authorities are reprinted in Appendix A:

Article 53a(b), (e), UCMJ, 10 U.S.C. §§ 853a(b), (e) (2024);

Article 60a(d), UCMJ, 10 U.S.C. § 860a(d) (2024);

Article 66(e), (f), UCMJ, 10 U.S.C. §§ 866(e), (f) (2024); and

Rule for Court-Martial 1109(e) (2024).

¹ J.A. 396.

² 10 U.S.C. § 866(b)(3) (2024).

³ 10 U.S.C. § 867(a)(2) (2024).

Statement of the Case

A general court-martial consisting of a military judge alone convicted PFC Gonzalez, consistent with his pleas, of violations Article 81 (two specifications), 108 (three specifications), and 121 (one specification) of the UCMJ.⁴ Pursuant to a plea agreement, the Military Judge sentenced PFC Gonzalez to confinement for thirty months, reduction to pay grade E-1, and a bad-conduct discharge.⁵ The Military Judge credited PFC Gonzalez with seventy-four days of pretrial confinement. The Military Judge recommended suspension of the bad-conduct discharge if PFC Gonzalez provided substantial assistance to the Government.⁶

The Convening Authority initially declined to suspend the bad-conduct discharge.⁷ But upon PFC Gonzalez's request, the lower court remanded the case to the Convening Authority to reassess his clemency request.⁸ On remand, the Convening Authority suspended the bad-conduct discharge, finding PFC Gonzalez "provided substantial assistance," and a military judge entered the sentence into judgment.⁹

⁴ JA 221-25.

⁵ JA 221-25.

⁶ JA 222, 340-41.

⁷ JA 218-19.

⁸ JA 114-17.

⁹ JA 118-23.

The lower court then found PFC Gonzalez’s confinement sentence of thirty months plainly unreasonable, setting aside confinement above eight months.¹⁰ On April 20, 2026, the lower court denied Appellant’s motion for reconsideration.¹¹ The Judge Advocate General of the Navy certified the issue presented above for this Court’s review on June 17, 2026.¹²

Introduction

The lower court acted within explicit statutory authority when it found Appellee’s confinement sentence plainly unreasonable. The court’s action was also consistent with two decades of Supreme Court precedent on appellate sentence review. Accordingly, there are no grounds to reverse the lower court’s opinion on its application of Article 66, its definition of “plainly unreasonable,” deference to the sentencing judge, parameters, presumptions, or the plea agreement.

The Government offers a parade of horribles, alleging the court “usurp[ed]” a line trial counsel’s authority, acted “*ultra vires*[,]” “assumed” power it didn’t have, “flout[ed]” Congress, and “reject[ed]” the statute.¹³ It did none of this. Rather, it made clear what it was doing: assessing the sentence in light of the plea

¹⁰ *United States v. Gonzalez*, No. 202500333, slip op. at *6-8 (N-M. Ct. Crim. App. Mar. 6, 2026).

¹¹ JA 184-214.

¹² *United States v. Gonzalez*, No. 26-0223/MC, 2026 CAAF LEXIS 530, at *1 (C.A.A.F. June 17, 2026).

¹³ Appellant’s Br. at 10, 20, 34-35.

agreement and the facts of the case, under its Article 66 authority.¹⁴ It also made clear what it was not doing: adjudicating the merits or legality of the trial counsel's decision under Rule for Court-Martial (R.C.M.) 1109.¹⁵

That trial counsel's discretion, however poorly exercised, remains intact. The lower court did not order him to issue a substantial assistance letter or hold his decision as a legal error. But as the court explained, his discretion at the post-trial stage does not foreclose the lower court's sentence review under Article 66. That discretion does not eliminate the lower court's Article 66 judicial authority. The court's action was well within the bounds of its statutory authority and supported by a wall of Supreme Court precedent on the importance of *judicial* review of sentences, in both the civilian *and* military systems—cases the Government ignores.

The Government proposes a system where a line trial counsel can make an unreasonable decision, refuse to explain himself to anyone in the judiciary, subvert an appellant's benefit of his bargain, and cause him to stay in prison for an extra twenty-two months. In the Government's view, no one in the judicial system can modify the sentence that flows from that prosecutor's decision. The judiciary, in

¹⁴ *Gonzalez*, No. 202500333, slip op. at *6-8.

¹⁵ *Id.*

the Government's view, cannot question trial counsel's actions, let alone correct the injustice.

This is not the system Congress created and it is not the system the Supreme Court implemented in *United States v. Booker*, *United States v. Gall*, or the cases that followed. Fairness was Congress's "initial and basic sentencing intent" in the first place.¹⁶ It is a legal concept with a long history in sentencing and sentence review.¹⁷ The lower court left both parties with their probable and reasonable expected outcomes. Appellee received no windfall or unjust enrichment. Rather, he served over thirteen months of confinement, far more than eight, while the Government received the benefit of his conviction and significant confinement.

In *Booker*, the Supreme Court grounded its opinion by trusting appellate judges to apply the reasonableness standard with "equanimity," and they have here.¹⁸ Sentencing relief was rare under the old system and it's likely to be even rarer under the new system.¹⁹ Thus, there was no abuse of discretion in how the

¹⁶ *United States v. Booker*, 543 U.S. 220, 264 (2005).

¹⁷ *Gall v. United States*, 552 U.S. 38, 50 (2007) (explaining the procedural protections in sentencing "allow for meaningful appellate review" and "promote the perception of fair sentencing").

¹⁸ *Booker*, 543 U.S. at 263.

¹⁹ See, e.g., *United States v. Kerr*, No. 202200140, 2023 CCA LEXIS 434, at *9 (N-M. Ct. Crim. App. Oct. 17, 2023). Before PFC Gonzalez's case, the last time the lower court set aside a sentence under its Article 66 powers was two-and-a-half years prior (under the prior version of Article 66). PFC Gonzalez's case remains the only time the lower court has set aside a sentence under the new version of sentence review.

lower court delicately and carefully considered—and corrected—the injustice in this case.

Statement of Facts

A. PFC Gonzalez served as a helicopter mechanic when he experienced severe mental health issues leading to several suicide attempts.

PFC Gonzalez enlisted in the Marine Corps in October 2020 and became an aircraft mechanic.²⁰ He completed Marine Combat Training and Naval Air Crew Candidate School.²¹ He earned meritorious Lance Corporal advancement after completing helicopter mechanic school.²² And he earned Naval aircrew wings after completing further training.²³ He was then assigned to Marine Heavy Helicopter Squadron 462, Marine Aircraft Group 16, Third Marine Aircraft Wing (3D MAW) at Marine Corps Air Station, Miramar.²⁴

While serving on the flight line, PFC Gonzalez began to experience mental health issues. He had suicidal ideations in December 2021, contemplating suicide with a blade to his wrist.²⁵ In June 2022, he attempted suicide in the barracks with a gun, but a friend intervened by calling him.²⁶ This led to a psychiatric

²⁰ JA 332-39, 370-87.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ JA 342-57.

²⁵ JA 373-87.

²⁶ JA 332-39, 373-87.

hospitalization and he continued to receive outpatient care with a military psychiatrist, including a prescription for Lexapro, an antidepressant.²⁷

After receiving assistance and written counseling, he was transferred from the flight line to become an “expeditor” within the squadron.²⁸ An “expeditor” is a role that interfaces between Supply and the squadron to obtain materials for aircraft.²⁹ As an expeditor, he was an “exemplary Marine” and worked towards his E-4 advancement.³⁰ He returned to the aircrew, but decided to drop his wings because he felt more comfortable being an expeditor than on the flight line due to his mental health issues and medications.³¹

From April to November 2023, he deployed to Marine Corps Air Station Futenma in Okinawa, Japan with his squadron.³² Following his return, the friend that helped him through his previous suicide attempt died and he faced further mental health issues.³³ His life began to spiral out of control: his romantic relationship failed, his parents faced immigration (deportation) issues, he had financial issues, and his younger sibling fell into a drug problem.³⁴ He again

²⁷ JA 332-39.

²⁸ JA 332-39, 373-87.

²⁹ JA 255.

³⁰ JA 332-39, 370-87.

³¹ JA 332-39, 373-87.

³² *Id.*

³³ JA 332-39.

³⁴ JA 332-39, 373-87.

attempted suicide in March 2024 in the mountains with a rifle—this incident led to his arrest by San Diego law enforcement.³⁵ Local authorities lowered PFC Gonzalez’s state felony weapons charge to a misdemeanor.³⁶ This incident also led to non-judicial punishment and initiation of separation processing.³⁷ He was seen by a military psychiatrist, where he still exhibited daily suicidal ideations including plans to overdose, cut himself, use a firearm, or jump.³⁸ His doctor switched his medication from Lexapro to Prozac.³⁹

B. From January to April 2024, PFC Gonzalez was involved in the theft and sale of Marine Corps equipment: Peltor aircrew headsets.

It was common knowledge within PFC Gonzalez’s unit that individuals could obtain Marine Corps gear coded as “AP5” with relative ease.⁴⁰ AP5 was a lower priority gear category that did not gain scrutiny or attention from Supply.⁴¹ Around January 2024, a co-worker, LCpl Lima, informed PFC Gonzalez of the ease in ordering Peltor headsets through the AP5 system.⁴² LCpl Lima informed PFC Gonzalez that he had been ordering Peltor headsets for his own use “for a

³⁵ *Id.*

³⁶ JA 373-87.

³⁷ JA 332-39, 373-87.

³⁸ JA 332-39.

³⁹ JA 373-87.

⁴⁰ JA 255, 342-57.

⁴¹ *Id.*

⁴² JA 256, 342-57.

while.”⁴³ They entered into an agreement to order a number of Peltor headsets to sell to third parties.⁴⁴ From April to May, PFC Gonzalez ordered eight headsets and sold them on Facebook Marketplace.⁴⁵

C. PFC Gonzalez immediately acknowledged guilt to law enforcement, authorized a search of his phone, provided a written proffer, and entered into a plea agreement.

In May 2024, a Criminal Investigative Division (CID) investigation into the thefts identified PFC Gonzalez, and CID interviewed him.⁴⁶ PFC Gonzalez immediately admitted to selling or trading eight Peltor headsets and signed a permissive authorization for search and seizure (PASS) of his phone.⁴⁷ Charges were preferred against PFC Gonzalez in August 2024 and referred to a General Court-Martial in October 2024.⁴⁸ In December 2024, PFC Gonzalez provided a sixteen-paragraph written proffer, outlining the names of at least fourteen individuals in his unit involved in the theft of Marine Corps gear, and explaining the process by which individuals manipulated the system to avoid detection and steal gear.⁴⁹

⁴³ JA 256.

⁴⁴ JA 342-57.

⁴⁵ JA 255-57, 342-57.

⁴⁶ JA 080.

⁴⁷ *Id.*

⁴⁸ JA 229-31.

⁴⁹ JA 085-87 (written proffer), 311 (Military Judge inquiring about written proffer).

On January 7, 2025, PFC Gonzalez and the Convening Authority (CA) signed a plea agreement.⁵⁰ The plea agreement required cooperation in the investigation and prosecution of LCpl Lima and any other individuals involved in the theft of Peltors. It provided for an aggregate confinement range of twelve to thirty-six months.⁵¹ The plea agreement also stated that trial counsel “will” provide a substantial assistance letter reducing confinement to six months across all specifications.⁵² At the time, the lead trial counsel on the case was Capt Whiskey.⁵³

About twenty days later, PFC Gonzalez attempted suicide by overdosing on his prescribed Prozac pills.⁵⁴ Three days later, PFC Gonzalez held a three-hour in-person proffer session with Capt Whiskey and a CID agent with Trial Defense Counsel (TDC) present.⁵⁵ Both Capt Whiskey and the agent asked PFC Gonzalez hundreds of questions about the mechanics of the supply system; the details of his and other Marines’ thefts; the vulnerabilities of the supply system to theft; and the culpability of other members in the unit.⁵⁶ At the end of the interview, Capt

⁵⁰ JA 089-99 (January 7, 2025 plea agreement), 233-34 (parties informing the Military Judge of ongoing plea negotiations on January 3, 2025).

⁵¹ JA 089-99.

⁵² JA 096.

⁵³ JA 232, 237.

⁵⁴ JA 332-39, 373-87.

⁵⁵ JA 080-84.

⁵⁶ JA 080-87.

Whiskey told PFC Gonzalez he had “been a huge help,” that he appreciated PFC Gonzalez’s “willingness to engage,” and appreciated his “time” and “honesty.”⁵⁷

D. PFC Gonzalez again attempted suicide the morning of this anticipated guilty plea, and the Military Judge directed the parties to change language in the plea agreement regarding substantial assistance.

The day before the guilty plea, the Military Judge, Lieutenant Colonel (LtCol) Harris, emailed the parties to express his “concerns” about the substantial assistance language.⁵⁸ Around the same time, LtCol Harris had informed local trial counsel and TDCs that he did not believe a plea agreement could bind trial counsel to issue a substantial assistance letter, and that the agreement must use the words “may make a recommendation” vice “will make a recommendation.”⁵⁹

The day of the plea, PFC Gonzalez attempted suicide in his barracks with a pistol.⁶⁰ Military law enforcement seized the pistol, and his command sent him to Naval Medical Center Balboa for evaluation and then promptly placed him in pre-trial confinement.⁶¹ Already at the courtroom for the anticipated guilty plea that day, the TDCs informed LtCol Harris of the incident. They explained the guilty plea hearing could not occur that day and that they would request a Rule for Court-

⁵⁷ JA 081.

⁵⁸ JA 081-82.

⁵⁹ *Id.*

⁶⁰ JA 332-39, 373-87.

⁶¹ *Id.*; JA 080-84.

Martial (R.C.M.) 706 inquiry.⁶² They also addressed the Military Judge’s concern with the plea agreement language—acknowledging that the parties would change the word “will” to “may” in accordance with the Military Judge’s direction.⁶³

E. PFC Gonzalez signed a less favorable plea agreement, then a different military judge accepted his plea, acknowledged the Government’s “obligation” regarding substantial assistance, and recommended suspending the punitive discharge.

The parties executed a new plea agreement. This plea agreement had several changes. First, as directed by LtCol Harris, the substantial assistance language was changed from “will” make a recommendation to “may.”⁶⁴ Second, the plea agreement included an agreement by the CA to not prefer charges related to the pistol found in PFC Gonzalez’s room.⁶⁵ Third, the plea agreement contained a higher confinement “floor” (thirty months, as opposed to the original twelve months), and agreed to reduce confinement to eight months upon receipt of the substantial assistance letter (as opposed to the original six months).⁶⁶

A new military judge, LtCol Seagraves, held the guilty plea hearing. At this point, two new trial counsel were assigned to the case, Maj Tango and Capt

⁶² JA 081.

⁶³ *Id.*

⁶⁴ JA 365-66.

⁶⁵ *Id.*

⁶⁶ JA 97, 367.

Charlie.⁶⁷ They were not involved in the earlier plea negotiations.⁶⁸ During the hearing, the Military Judge explained that he understood from the parties that substantial assistance had begun but was not yet complete; he then stated: “And that, you know, once it is done, the trial counsel understands their part of the bargain there.”⁶⁹ The Defense also informed the Military Judge that PFC Gonzalez had provided a written proffer regarding the thefts.⁷⁰ Regarding the substantial assistance portion of the plea agreement, the Military Judge explained to PFC Gonzalez:

For as far as i, the substantial assistance. So essentially, if you testify against these people and you do everything you’re supposed to, and the trial counsel agrees that you did provide substantial assistance, they’re going to give a letter to the convening authority and they’re going to reduce your confinement to 8 months for each of the specifications to which you’ve pled guilty. And they’re still going to serve concurrently.⁷¹

The Military Judge conducted an extensive providence inquiry on the charged specifications, comprising fifty-seven pages of transcript.⁷² The Defense

⁶⁷ Maj Tango was a Captain at the time of trial, but this Brief refers to him by his current rank of Major for clarity and consistency.

⁶⁸ JA 342-57, 235, 240-41 (Military Judge asking Trial Counsel whether, even though Capt Whiskey signed the stipulation of fact, the Government still wishes to be bound by it). Capt Whiskey signed the Stipulation of Fact on January 29, 2025, along with PFC Gonzalez and the TDCs, but Maj Tango and Capt Charlie signed it on April 15, 2025, the day of the guilty plea. JA 357.

⁶⁹ JA 238.

⁷⁰ JA 311.

⁷¹ JA 312.

⁷² JA 244-301.

presented mitigating evidence including *Wheeler* Factors, a character letter from PFC Gonzalez's Staff Sergeant, and the long-form R.C.M. 706 report.⁷³ PFC Gonzalez also provided an unsworn statement.⁷⁴ The Military Judge awarded the lowest level of confinement available under the plea agreement, thirty months, and also recommended suspending the bad-conduct discharge: "If PFC Gonzalez provides substantial assistance to the government, including making training materials for the government to better be able to understand the supply system to catch theft."⁷⁵

The military judge "ask[ed] that the convening authority consider [PFC Gonzalez's] long struggles with mental health and . . . the better likelihood of receiving mental health treatment from organizations if [he has] and administrative discharge rather than a punitive one."⁷⁶

F. PFC Gonzalez conducted two more proffer sessions of about three hours each, where he answered hundreds of questions about Peltor thefts and provided several new search authorizations for his new phone.

After the guilty plea hearing, PFC Gonzalez agreed to two additional proffer sessions.⁷⁷ The proffer sessions lasted approximately three hours each, and PFC

⁷³ JA 370-87.

⁷⁴ JA 332-39, 373-87.

⁷⁵ JA 340-41.

⁷⁶ *Id.*

⁷⁷ JA 080-84.

Gonzalez again answered hundreds of questions involving the Peltor thefts, vulnerabilities of the supply and acquisition systems, and his co-accused's culpability.⁷⁸ At no point did PFC Gonzalez decline to answer any question related to the Peltor theft.⁷⁹

Although not required by the plea agreement, PFC Gonzalez also signed several new PASS's for his new cellular phone, including authorizing a forensic review of that phone (in addition to the PASS for his prior phone that he already signed at the time of the Peltor thefts). He sat with the agent and went through text messages and photographs on both phones.⁸⁰

G. Major Tango refused to issue the substantial assistance letter and provided verbal reasons to trial defense counsel. On remand, the Convening Authority set aside the punitive discharge, finding PFC Gonzalez “provided substantial assistance.”

The CA initially declined to take action on the sentence, explaining he would reassess his decision should he receive the substantial assistance letter.⁸¹

The Military Judge signed the Entry of Judgment (EOJ) on July 3, 2025.⁸² Later—in July, August, and September—Maj Tango verbally expressed reluctance to issue the substantial assistance letter, refusing multiple requests from both TDC and

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ JA 218-22.

⁸² JA 221-25.

ADC to explain his reasoning in writing or suggest how PFC Gonzalez could provide sufficient assistance.⁸³

Major Tango indicated, verbally to the TDCs, that (1) the information PFC Gonzalez provided was not sufficient to seek a subpoena to request LCpl Lima's Instagram records; and (2) he did not believe PFC Gonzalez would comply with a federal subpoena to testify in the co-accused's courts-martial.⁸⁴ He did not provide a reason for these beliefs.⁸⁵ There was no indication that charges had been preferred or referred against LCpl Lima or any of PFC Gonzalez's other co-accused.⁸⁶

In September 2025, Maj Tango verbally informed TDCs of his final decision to not issue the letter.⁸⁷ PFC Gonzalez went into post-trial confinement on April 15, 2025, and was credited with seventy-four days of pretrial confinement.⁸⁸ If Maj Tango had issued the letter, PFC Gonzalez's maximum release date would have been on approximately October 2, 2025 (not accounting for good time).⁸⁹

⁸³ JA 080-84.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ JA 221-25.

⁸⁹ April 15, 2025 plus eight months is December 15, 2025; subtracting seventy-four days of confinement credit makes the approximate release date October 2, 2025.

On appeal, PFC Gonzalez raised four assignments of error, including that his confinement sentence of thirty months was plainly unreasonable.⁹⁰ He also challenged the bad-conduct discharge, and asked the lower court to remand to the CA to reassess his decision on the Military Judge's recommendation in light of PFC Gonzalez's substantial assistance.⁹¹

Before the Government filed its Answer, the lower court set aside the Staff Judge Advocate Review (SJAR), Convening Authority Action (CAA), and EOJ, remanding to the CA.⁹² The court found it was "clear from the defense declaration that by the time the CA signed the CAA, [Appellee] had in fact provided considerable assistance to the Government after sentencing[,]" but "neither that assistance, nor any of [Appellee]'s previous assistance, was mentioned in the [SJAR] or the CAA."⁹³ The court found "from [its] review of the record . . . that the CA was unaware of the full extent of [PFC Gonzalez's] assistance[,]" and "determine[d] that the CA should have the opportunity to consider whether [PFC Gonzalez's] assistance was sufficient to merit suspension of the BCD, as recommended by the military judge."⁹⁴

⁹⁰ JA 017-18.

⁹¹ JA 050 (requesting the lower court remand to the CA to reevaluate the Military Judge's suspension recommendation).

⁹² JA 114-17.

⁹³ JA 115.

⁹⁴ *Id.*

After the remand, PFC Gonzalez submitted a supplemental clemency request, highlighting his assistance efforts and including a hand-written, six-page training outline that he wrote by hand in confinement to assist the command with preventing acquisition thefts in the future.⁹⁵ The CA “determined [PFC Gonzalez] provided substantial assistance to the Government in accordance with the plea agreement[,]” and suspended the bad-conduct discharge.⁹⁶ After the parties submitted their briefs, the lower court set aside confinement in excess of eight months, finding it was plainly unreasonable.⁹⁷

PFC Gonzalez was released from confinement on March 9, 2026, meaning he served a total of 402 days of confinement (over thirteen months).⁹⁸

⁹⁵ JA 172-83.

⁹⁶ JA 119.

⁹⁷ *Gonzalez*, No. 202500333, slip op. at *6-8.

⁹⁸ April 15, 2025 to March 9, 2026 is 328 days—PFC Gonzalez also served seventy-four days of pre-trial confinement.

Summary of Argument

The lower court properly exercised its Article 66 authority in concluding that Appellee’s thirty-month confinement sentence was plainly unreasonable. Article 66 expressly permits Courts of Criminal Appeals to set aside sentences that are plainly unreasonable, including sentences within negotiated parameters.⁹⁹ The lower court applied its authority consistent with Supreme Court sentencing-review precedent; it did not conduct an impermissible de novo review or disregard the military judge’s sentencing decisions.¹⁰⁰

The court also properly considered the plea agreement, applied a strong presumption the sentence was reasonable, but found it plainly unreasonable in light of the agreement and Appellee’s substantial assistance.¹⁰¹ Its decision did not override trial counsel’s discretion under Rule for Court-Martial (R.C.M.) 1109 or deprive the Government of its bargain. Rather, it ensured meaningful judicial review of a sentence after the agreed opportunity for confinement relief proved illusory.¹⁰² The decision should be affirmed.

⁹⁹ 10 U.S.C. §§ 853a(e), 866(e)(1)(D) (2024).

¹⁰⁰ *Gall*, 552 U.S. at 50-52, 59.

¹⁰¹ *Gonzalez*, No. 202500333, slip op. at *6-8.

¹⁰² *Id.* at *10-11 (Harrell, S.J., concurring).

Argument

The lower court acted well within its statutory powers, Supreme Court precedent, and this Court’s precedent, in finding the sentence plainly unreasonable.

Standard of Review

“Questions of statutory construction, including articles under the Uniform Code of Military Justice, are reviewed by this Court de novo.”¹⁰³ When analyzing the action of a service Court of Criminal Appeals (CCA), this Court reviews for an abuse of discretion:

An abuse of discretion occurs when the CCA’s findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the CCA’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.¹⁰⁴

Analysis

A. Article 66, as amended, explicitly authorizes the CCAs to set aside within-parameter sentences they find plainly unreasonable, and the lower court did not abuse its discretion when it did just that.

In *United States v. Booker*, the Supreme Court rejected the mandatory nature of the federal sentencing guidelines and held that appellate review of sentences was based on a reasonableness standard, as informed by the federal sentencing

¹⁰³ *United States v. Armsbury*, 86 M.J. 466, 470 (C.A.A.F. 2026) (citing *United States v. Fetrow*, 76 M.J. 181, 185 (C.A.A.F. 2017)).

¹⁰⁴ *Id.* at 470 (quoting *United States v. Behunin*, 83 M.J. 158, 161 (C.A.A.F. 2023)).

factors.¹⁰⁵ In *Gall v. United States*, the Court expanded on *Booker*, explaining how trial judges commit (or do not commit) procedural and substantive sentencing errors, and the deference appellate courts must give to their discretionary “sentencing decisions.”¹⁰⁶

As the federal circuits have done post-*Booker* and *Gall*, this Court should likewise “decline to adopt the view that Gall[,],” and the Article 66 amendments based on it, “eviscerated any form of appellate review of trial court sentencing.”¹⁰⁷ “If Gall had intended to dispense with any semblance of meaningful review, there would have been no need for the decision to say what it did.”¹⁰⁸ *Gall*’s “directives leave no doubt that an appellate court may still overturn a substantively unreasonable sentence . . . and that appellate review has not been extinguished.”¹⁰⁹

Congress based military sentencing (and appellate review) amendments on the federal civilian system, but the Government largely ignores the voluminous case law that provides the answers here. It cites to *Booker* once in passing and never acknowledges the other seminal Supreme Court sentence review cases like

¹⁰⁵ *Booker*, 543 U.S. at 245-46, 261-63.

¹⁰⁶ *Gall*, 552 U.S. at 46, 49-52.

¹⁰⁷ *United States v. Abu Ali*, 528 F.3d 210, 265-66 (4th Cir. 2008); see *Gall*, 552 U.S. at 50-52 (explaining appellate courts review for procedural sentencing errors, and then consider the substantive reasonableness of the sentence); *Booker*, 543 U.S. at 262-63 (explaining appellate judges “will prove capable” of reviewing the reasonableness of sentences with “equanimity”).

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008).

Gall v. United States or *Rita v. United States*.¹¹⁰ Instead, the Government mostly cherry-picks federal circuit cases out of context, leaving an incomplete picture and missing the forest for the trees.

The complete picture starts with the Supreme Court’s “unequivocal[]” opening line in *Rita*: “The federal courts of appeal review federal sentences and set aside those they find unreasonable.”¹¹¹ This is not a “hollow exercise,” it’s not an “empty formality,” and adjudged sentences are not “unfettered by meaningful standards or shielded from thorough appellate review.”¹¹² Rather, the Supreme Court has reinforced, time and again, that the primary consideration in both trial

¹¹⁰ Appellant’s Br. at 13; *Rita v. United States*, 551 U.S. 338, 353-55 (2007) (authorizing appellate courts to apply a discretionary, nonbinding presumption of reasonableness to within-guidelines sentences); *Gall*, 552 U.S. 38; *Booker*, 543 U.S. 220.

¹¹¹ *Rita*, 551 U.S. at 341; *United States v. Kane*, 639 F.3d 1121, 1135 (8th Cir. 2011).

¹¹² *Kane*, 639 F.3d at 1135; *Gall*, 552 U.S. at 68 (Alito, J., dissenting).

sentencing *and appellate review* is the application of the sentencing factors, which are virtually verbatim in both Titles 10 and 18.¹¹³

Here, the lower court conducted a thorough review of the Record and the sentence. Its conclusion that the sentence was plainly unreasonable was well supported by both the facts and the law.

- i. Article 66(e)(1)(D) explicitly applies to within-parameter sentences and both Congress and the Supreme Court have long defined “fairness” as a legal concept in appellate sentence review.

Article 66(e)(1)(D), authorizing CCAs to find sentences plainly unreasonable, explicitly applies to within-parameter sentences.¹¹⁴ Article 66(e)(1)(B)—another subsection—creates a different standard for offenses *without*

¹¹³ *Hughes v. United States*, 584 U.S. 675, 689 (2018) (explaining the government’s benefit of its bargain “has nothing to do” with sentencing under the guidelines, and before a court grants a reduction, “it must consider” the sentencing factors); *Rita*, 551 U.S. at 350 (explaining the “Guidelines . . . seek to embody the § 3553(a) considerations, both in principle and in practice”); *Spears v. United States*, 555 U.S. 261, 267 (2009) (holding it was “absurd to think that a sentence which is reasonable in light of the statutory sentencing factors” becomes unreasonable because the judge disagreed with the guidelines); *Kimbrough v. United States*, 552 U.S. 85, 111 (2007) (explaining the “ultimate question” is whether the judge “abused his discretion in determining that the § 3553(a) factors supported [the] sentence”); *Gall*, 552 U.S. at 59 (holding the guidelines are “only one of the factors to consider when imposing a sentence, and § 3553(a)(3) directs the judge to consider sentences other than imprisonment”); *Booker*, 543 U.S. at 261 (explaining section 3553(a) “remains in effect” and “will guide appellate courts . . . in determining whether a sentence is unreasonable”); 10 U.S.C. § 856 (2024); 18 U.S.C. § 3553(a) (2024).

¹¹⁴ 10 U.S.C. § 856(e)(1)(D) (2024).

an established parameter and for sentences *above* an established parameter.¹¹⁵ If Article 66(e)(1)(D) did not apply to within-parameter confinement sentences, it would be surplusage.¹¹⁶

Nonetheless, the Government argues that a CCA can *never* find a within-parameter confinement sentence plainly unreasonable.¹¹⁷ This position directly conflicts with Article 66(e)(1)(D) and would render sentence review for within-parameter sentences a hollow and pointless exercise. Besides conflicting with the

¹¹⁵ 10 U.S.C. § 856(e)(1)(B) (2024).

¹¹⁶ *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (explaining the statutory canon against surplusage and the presumption that “a legislature says in a statute what it means and means in a statute what it says there”) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)); *id.* (explaining this Court considers “the context in which the language is used, and the broader statutory context”) (quoting *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016)).

¹¹⁷ Appellant’s Br. at 25 (“A sentence falling within the congressionally-approved sentence range cannot be plainly unreasonable[.]”).

statute, the Government’s argument incorrectly characterizes the sentence parameter ranges as “congressionally-approved,” when they were not.¹¹⁸

The Government’s first critique is on the lower court’s definition of “plainly unreasonable.”¹¹⁹ Statutes are interpreted by their plain language and ordinary meaning.¹²⁰ The Government takes no issue with the lower court’s definition of “plainly” as “clear or obvious.”¹²¹ The dispute is only with the definition of “unreasonable,” notwithstanding the Supreme Court’s holding in *Booker* that appellate judges are well-suited to know and apply the term “reasonable.”¹²²

¹¹⁸ National Defense Authorization Act for the Fiscal Year 2022, Pub. L. No. 117-81, div. A, tit. V, § 539E(e)(4)(F), 135 Stat. 1541, 1705 (2021), established a board to recommend the sentencing parameters and criteria. This board was limited by a “DLSA [Defense Legal Service Agency] Report” that “was of limited use in crafting initial sentencing parameters” due to limited courts-martial statistics from a single year during the COVID pandemic; Military Justice Review Panel, *2024 Comprehensive Review and Assessment of the Uniform Code of Military Justice* at 8-9 (Dec. 2024), available at <https://mjrj.osd.mil/Portals/152/2024%20Comprehensive%20Review%20and%20Assessment%20of%20the%20UCMJ%20021825.pdf?ver=5k7JiZzdCPFDBYQkd3mJ5g%3D%3D>. Nonetheless, the board recommended the current parameters, which the President promulgated in “2023 Amendments to the Manual for Courts Martial, United States,” *see* Exec. Order No. 14,103, 88 Fed. Reg. 50535 (Aug. 2, 2023), available at <https://jsc.defense.gov/Military-Law/Executive-Orders/>. Congress did not “approve” the sentencing ranges.

¹¹⁹ Appellant’s Br. at 10-23.

¹²⁰ *Sager*, 76 M.J. at 161.

¹²¹ Appellant’s Br. at 15, n.5.

¹²² *Booker*, 543 U.S. at 261-62 (explaining the Court “think[s] it fair . . . to assume judicial familiarity with a ‘reasonableness’ standard”).

The lower court did not err in applying the Cambridge Dictionary’s definition for unreasonable: “unfair or unacceptable.”¹²³ This Court has previously used dictionary definitions in similar statutory interpretations; last term, it cited to the *same* Cambridge Dictionary to define the word “appropriate.”¹²⁴ The Government does not offer a preferred definition, yet argues the lower court’s definition conflicts with other cases that used “[n]ot guided by reason; irrational or capricious.”¹²⁵ But that definition does not contradict “unfair,” nor is it a meaningfully different concept. Irrational, capricious, and unfair all fit within the

¹²³ *Gonzalez*, No. 202500333, slip op. at *6, n.18.

¹²⁴ *United States v. Valentin-Andino*, 85 M.J. 361, 365 (C.A.A.F. 2025).

¹²⁵ Appellant’s Br. at 21-22 (arguing the lower court’s definition “differs from the definitions given in *Brockenborough*, *Sanchez*, *Downs*, and *Jones*,” but not reciting the definitions in those cases or arguing that they were correct); *see, e.g., United States v. Brockenborough*, No. 202400476, 2026 CCA LEXIS 21, at *7 (N-M. Ct. Crim. App. Jan. 21, 2026) (defining unreasonable as “[n]ot guided by reason; irrational or capricious”).

ordinary meaning of “unreasonable,” and the Government draws distinctions that aren’t there.¹²⁶

The Government’s view is that appellate courts have no power to set aside plainly unreasonable sentences, and especially no power to correct plainly unfair ones. On the one hand, it infers (without acknowledging) they may have power to set aside irrational or capricious sentences.¹²⁷ But at the same time, it argues that no within-parameters sentence can *ever* be plainly unreasonable.¹²⁸ There’s no coherence to this argument, it contradicts the statute, and it makes the exercise “hollow.”¹²⁹ Worse, it directly conflicts with *Booker* and *Gall*.

Fairness, and the concern about unfair sentences, comes directly from Supreme Court’s longstanding interpretation of the original statute upon which

¹²⁶ See Unreasonable, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/unreasonable> (last visited Sept. 9, 2026) (defining “unreasonable” as “not governed by or acting according to reason”); Unfair, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/unfair> (last visited Sept. 9, 2026) (defining “unfair” as “marked by injustice, partiality, or deception”); Irrational, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/irrational> (last visited Sept. 9, 2026) (defining “irrational” as “lacking usual or normal mental clarity or coherence”); Capricious, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/capricious> (last visited Sept. 9, 2026) (defining “capricious” as “governed or characterized by sudden irrational and unpredictable impulses or whims”).

¹²⁷ Appellant’s Br. at 21-22, 25.

¹²⁸ *Id.*

¹²⁹ *Kane*, 639 F.3d at 1135.

Congress based Article 66.¹³⁰ *Booker* explained that Congress’s “initial and basic sentencing intent” was to “provide certainty and *fairness* in meeting the purposes of sentencing.”¹³¹ It added in *Gall* that sentencing procedure protections “promote the perception of *fair* sentencing.”¹³² In other sentencing cases, the Supreme Court has analyzed whether the proceedings created an “unfairness” and described the question as a “legal principle.”¹³³ The notion that appellate review turns a blind eye to unfair sentences directly contradicts decades of Supreme Court precedent.

Military law provides the same answer. Last term, in *United States v. Arroyo*, this Court analyzed an accused’s sentence proposal as a “reasonable indication of the sentence’s probable *fairness* to the accused.”¹³⁴ *United States v. Quiroz*, the Government’s only support for its novel theory about the acceptability of unfair sentences, does not contradict the lower court’s opinion.¹³⁵ First, *Quiroz* was not a sentencing case—it was about unreasonable multiplication of charges

¹³⁰ *Booker*, 543 U.S. at 264.

¹³¹ *Id.* (emphasis added).

¹³² *Gall*, 552 U.S. at 50.

¹³³ *Payne v. Tennessee*, 501 U.S. 808, 825-26 (1991) (analyzing whether victim impact statement rules for capital cases created a potential for “unfairness”) (emphasis added); *Andrew v. White*, 604 U.S. 86, 95 (2025) (describing the holding in *Payne* as a “legal principle” and explaining that the Supreme Court “had several times before” analyzed whether prosecutorial actions “render[ed] a trial or capital sentencing [proceeding] fundamentally unfair”).

¹³⁴ *United States v. Arroyo*, 86 M.J. 89, 90 (C.A.A.F. 2025).

¹³⁵ Appellant’s Br. at 18-20 (citing *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001)).

(UMC).¹³⁶ Second, *Quiroz* qualified its statement that “unfairly *could be viewed*” as an equitable concept by explaining the “factor may be used” in a non-equitable way by addressing a “legal issue.”¹³⁷ While *Arroyo* was decided under the prior version of Article 66, the *Arroyo* Court made a legal determination—not an equitable one.¹³⁸

Arroyo reinforces *Booker*’s and *Gall*’s holdings, and all three cases overtake *Quiroz*’s qualified language about UMC: fairness is a *legal* consideration in sentencing review. As this Court did in *Arroyo*, the lower court here used the term to answer a “question in terms of the legal issue” of whether PFC Gonzalez’s sentence was plainly unreasonable—precisely how *Quiroz* said the factor can be used in a non-equitable way.¹³⁹ Unfairness is also a common legal concept in other areas of the law.¹⁴⁰ The military justice system does not allow unfair trials and there is nothing in the Article 66 amendments that infers Congress intended it to affirm plainly unfair sentences.

¹³⁶ *Quiroz*, 55 M.J. at 338-39.

¹³⁷ *Id.* (emphasis added).

¹³⁸ *Arroyo*, 86 M.J. at 93-94 (citing *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *United States v. Herndon*, 6 M.J. 171, 175 (C.M.A. 1979)).

¹³⁹ *Quiroz*, 55 M.J. at 338-39.

¹⁴⁰ *See, e.g., United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010) (describing the standard for “fundamentally unfair” trials); *United States v. Collier*, 67 M.J. 347, 354-55 (C.A.A.F. 2009) (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)) (explaining the history and rationale behind rules of evidence prohibiting unfairly prejudicial evidence).

Finally, the lower court’s definition here is not “incompatible” or in conflict with its other opinions.¹⁴¹ As Appellee has argued throughout, in addition to being plainly unfair, the thirty-month confinement sentence was also “not grounded in reason” and “capricious.”¹⁴² The lower court went about its review here, albeit under different facts, in the same way it did in its other sentence review cases.

- ii. The lower court did not commit a *Gall*-deference error or conduct an impermissible de novo review; if anything, deference to the military judge would resolve in Appellee’s favor.

It is axiomatic that the federal circuits provide deference to a sentencing judge’s sentencing *decisions*.¹⁴³ The lower court correctly acknowledged this “highly deferential standard of review” and cited to *Gall*.¹⁴⁴ It got the law correct. The Government never cites *Gall* and misunderstands what deference in sentencing review means and how it works.¹⁴⁵ *Gall*’s holding, which courts have cited over 21,000 times, is about providing deference to a judge’s “sentencing *decisions*.”¹⁴⁶ Deference is owed because the judge “is in a superior position to find facts and judge their import under [the sentencing factors] in the individual

¹⁴¹ *But see* Appellant’s Br. at 21-22 (describing the lower court’s opinion as “incompatible” with its opinions in *Brockenborough*, *Sanchez*, *Downs*, and *Jones*).

¹⁴² JA 162-63, 165, 206.

¹⁴³ *See Gall*, 552 U.S. at 51-53.

¹⁴⁴ *Gonzalez*, No. 202500333, slip op. at *6, n.16 (citing *Gall*, 552 U.S. at 51-53).

¹⁴⁵ A Lexis Shepard’s “Citing Decision Analysis” search reveals that as of September 10, 2026, *Gall* has been cited by federal courts 21,819 times.

¹⁴⁶ *Gall*, 552 U.S. at 49-53 (emphasis added).

case.”¹⁴⁷ The deference is to the sentencing judge’s determination that the applicable sentencing factors justify the chosen sentence. The *Gall* court reversed the circuit court because it failed to give due deference to that determination and instead effectively decided, de novo, that the variance was insufficiently justified.¹⁴⁸

The Government, without citing *Gall*, misinterprets the well-established law on deference. It argues the lower court committed a deference error yet never explains what “decision” it didn’t defer to.¹⁴⁹ Effectively, the Government argues the sentence *itself* gets deference, without any regard for what happened at trial or for the facts of the case. That is not *Gall*’s holding, it is not how the civilian system works, and it is not useful when applied to this appeal.

Indeed, this appeal never turned on the military judge’s “sentencing decision.”¹⁵⁰ The judge had no discretion to reject the plea agreement.¹⁵¹ At trial, he assumed, based on Maj Tango’s assertions, that substantial assistance was in progress and there were no concerns on either side.¹⁵² He ensured Maj Tango

¹⁴⁷ *Id.* at 51 (explaining the judge “sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record”) (quotation omitted).

¹⁴⁸ *Id.* at 55-57.

¹⁴⁹ Appellant’s Br. at 10-23.

¹⁵⁰ JA 162 (“[T]he question before the Court does not require reviewing any decision by a military judge.”).

¹⁵¹ 10 U.S.C. § 853a(b) (2024).

¹⁵² JA 238, 311-12.

“underst[ood] his obligations” under the plea agreement, and believed that both parties were proceeding towards substantial assistance in good faith.¹⁵³ He conducted a cursory colloquy inferring that he assumed the letter was forthcoming.¹⁵⁴ The judge saw and heard the evidence and was swayed by Appellee’s strong extenuating and mitigating evidence under the Article 56, UCMJ, factors. His only sentencing decisions were to: (1) recommend suspension of the BCD, and (2) award the lowest confinement that he could within the plea agreement’s range.¹⁵⁵

The pertinent facts for this appeal (Appellee’s assistance efforts and Maj Tango’s refusal to issue the letter) occurred *after* the guilty plea.¹⁵⁶ The Military Judge had no decision before him, no facts to find, and no law to analyze regarding those issues. The central question before the lower court—confinement of eight months or thirty—never turned on any “decision” of the Military Judge.

The lower court did not impermissibly question, re-analyze, or criticize any action of the judge. It did not second-guess him, disregard his findings, or refuse to defer to him. It did not weigh the Article 56 factors differently than him. It did

¹⁵³ JA 238.

¹⁵⁴ JA 238 (“There [has] been some assistance but not the complete substantial assistance. . . once it is done, the trial counsel understands their part of the bargain there.”), 311-12.

¹⁵⁵ JA 340-41.

¹⁵⁶ JA 70-100.

not find a witness credible that he found lacking credibility. Those could be *Gall* deference errors, but there were no such errors here.

The Government believes the controlling authorities on deference are cases implementing 18 U.S.C. § 3742 because that’s where, in its view, Congress took “plainly unreasonable” from.¹⁵⁷ First, that statute is a far less-used standard that applies to sentences “for which there is no applicable” guideline, and is primarily used for supervised release revocation sentences.¹⁵⁸ Courts make “modifications” with that standard to “take into account the unique nature of supervised release revocation sentences.”¹⁵⁹

Second, the only difference between “plainly unreasonable” (the rarer federal standard) and “unreasonable” (the typical, *Booker* standard) is “plainly”—and there’s no dispute the lower court correctly defined that term as “clear or obvious.”¹⁶⁰ There is no reason the word “plainly”—the difference between *Booker* and the Section 3742 cases—changes how deference works or places that question outside *Gall*’s well-established framework. The Government’s fifteen

¹⁵⁷ Appellant’s Br. at 11-14, 16, 19, 22-24.

¹⁵⁸ See 18 U.S.C. § 3742(a)(4) (2024); *United States v. Crudup*, 461 F.3d 433, 435-36 (4th Cir. 2006).

¹⁵⁹ *Crudup*, 461 F.3d at 438-39.

¹⁶⁰ Appellant’s Br. at 15, n.5.

citations to Section 3742 do not answer or explain how the lower court—which did acknowledge *Gall*—committed a deference error.¹⁶¹

The Government’s hyperbolic accusations that the lower court “flout[ed]” Congress, “assumed[] power” it didn’t have, and “reject[ed]” the statute and federal case law miss the mark.¹⁶² The lower court correctly acknowledged the controlling Supreme Court case, but deference to the judge’s sentencing decisions was not a turning point in this case. Even if deference was relevant here, deference to the judge’s sentencing decisions would weigh strongly towards agreeing with the lower court’s decision. Nothing the sentencing judge did, said, or decided at trial remotely supports the idea that he believed PFC Gonzalez should languish in prison for an extra twenty-two months simply because Maj Tango decided it was so.¹⁶³

- iii. The lower court applied the presumption Appellant complains it didn’t; and even if it didn’t, that non-binding presumption is discretionary to appellate courts.

The Supreme Court held in *Rita* that circuit courts were *allowed* to apply a *nonbinding*, rebuttable presumption that sentences within the federal guidelines are

¹⁶¹ *Id.* at 11-14, 16, 19, 22-24.

¹⁶² *Id.* at 20.

¹⁶³ JA 238, 311-12, 340-41.

reasonable.¹⁶⁴ Contrary to the Government’s assertion, this presumption is not mandatory and the Supreme Court left it to each circuits’ discretion whether to apply it.¹⁶⁵ The Second Circuit, for example, does not apply the presumption.¹⁶⁶ Without citing *Rita*, the Government incorrectly argues this presumption is mandatory, that all circuits apply it, and that not applying it is legal error.¹⁶⁷ That is plainly incorrect.

Additionally, it’s irrelevant in this case because the lower court applied a different presumption that had the same effect. It applied a “strong presumption” the sentence was reasonable because it was bargained-for.¹⁶⁸ It explained in detail why it found that presumption overcome.¹⁶⁹ Even if it applied an additional presumption of reasonableness for parameters, nothing would have changed.

The lower court did not abuse its discretion. The Government does not allege it clearly erred in any factual findings. The Government itself misapplies the Supreme Court’s jurisprudence on the discretionary, permissive, nonbinding

¹⁶⁴ *Rita*, 551 U.S. at 353; *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (“*Rita*, we recognize, does not hold that appellate courts *must* embrace the presumption.”) (emphasis in original).

¹⁶⁵ Compare *id.* with Appellant’s Br. at 9, 23-24.

¹⁶⁶ *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); see also *United States v. Dorvee*, 616 F.3d 174, 187-88 (2d Cir. 2010) (explaining deference to the guidelines “is not absolute or even controlling”).

¹⁶⁷ *Rita*, 551 U.S. at 353; Appellant’s Br. at 9, 23-24.

¹⁶⁸ *Gonzalez*, No. 202500333, slip op. at *8.

¹⁶⁹ *Id.* at *6-8.

presumption of reasonableness for the federal guidelines—without citing *Rita*. The lower court did not abuse its discretion, and even if it applied the *Rita* presumption, it already explained why it would have found such a presumption of reasonableness overcome in this case. In any event, declining to apply the *Rita* presumption is not legal error.¹⁷⁰

B. The lower court explicitly found the sentence plainly unreasonable because of the plea agreement, not in spite of it; it acted under clear statutory authority; and it was not bound by the plea agreement.

- i. The lower court did not err in finding the sentence was plainly unreasonable because of the plea agreement.

The lower court did not subvert the plea agreement; it vindicated the probable and expected outcome for both parties. In doing so, it corrected an injustice that would not have served the plea agreement or the parties.¹⁷¹ Once again, the parade of horrors the Government offers simply does not apply here.

Longstanding case law supports military appellate courts looking to the plea agreement as a strong indicator of whether a sentence is “reasonable” or “fair.”¹⁷²

When CCAs do this, time and again using the plea agreement to affirm sentences,

¹⁷⁰ *Rita*, 551 U.S. at 353; *Vonner*, 516 F.3d at 389.

¹⁷¹ *Arroyo*, 86 M.J. at 94 (explaining the “Supreme Court has long recognized that guilty pleas and plea agreements ‘are important components of this country’s criminal justice system’ that, when properly administered, ‘can benefit all concerned’”) (quoting *Blackledge*, 431 U.S. at 71).

¹⁷² *Id.* at 93-94 (“[T]his Court has long recognized that, ‘[a]bsent evidence to the contrary, [an] accused’s own sentence proposal is a reasonable indication of its probable fairness to [him].’”) (citing *Herndon*, 6 M.J. at 175).

the Government has no problem.¹⁷³ Here, the CCA did precisely the same analysis: it specifically looked *to* the plea agreement, and found that *because* of the plea agreement, a sentence above eight months was plainly unreasonable:

This is a standard and unremarkable tale, and in most instances we would be loath to find a bargained-for sentence which falls inside the sentencing parameters plainly unreasonable.[] But [Appellee]’s situation is noteworthy for what he did after he was caught. The assistance [Appellee] provided to the Government dramatically modifies the way this Court views [Appellee]’s case, overcoming the strong presumption that a bargained-for sentence is not plainly unreasonable. That is because [Appellee]’s assistance not only related directly to his offenses, *but was also an explicit part of a contractual plea agreement between him and the Government*. Therefore, because of the specific facts of this case, considering this offender’s crimes and the assistance he willingly provided to hold other offenders accountable and prevent similar future misconduct, 30 months of confinement is clearly unfair and is thus plainly unreasonable.¹⁷⁴

The lower court correctly applied the law and did everything the Government alleges it didn’t. The Government argues the lower court’s selection of eight months is suspicious, “arbitrary” and “*ultra vires*,” as if the lower court was being coy and pretending it independently arrived at that number without regard for the plea agreement.¹⁷⁵ This argument either ignores or misunderstands

¹⁷³ See, e.g., *Brockenborough*, 2026 CCA LEXIS 21, at *8 (finding the appellant’s plea bargain was “strong evidence” the sentence was not plainly unreasonable); Appellant’s Br. at 15, 17, 21 (citing to *Brockenborough* favorably).

¹⁷⁴ *Gonzalez*, No. 202500333, slip op. at *8 (emphasis added) (citation omitted).

¹⁷⁵ Appellant’s Br. at 34-35 (arguing the lower court “circumvent[ed]” and “invalidate[d]” Maj Tango’s decision, and that this abuse was “clear from how the lower court reduced [PFC Gonzalez’s] sentence by the exact amount of confinement required had Trial Counsel issued the letter”).

the lower court’s opinion. The court explained exactly what it was doing and why. It explained that it selected eight months precisely *because* the plea bargain made any higher amount plainly unreasonable.¹⁷⁶ The lower court did not abuse its discretion in concluding that confinement above eight months was plainly unreasonable in light of the plea agreement’s terms.

ii. CCAs are not bound by plea agreement sentence minimums and the Government lost no benefit of its bargain.

Last term, this Court held that under the prior version of Article 66, CCAs were not bound by plea agreement sentence minimums.¹⁷⁷ The Court pointed to Article 53a, UCMJ, which specifically binds the court-martial and the parties, but not the CCAs.¹⁷⁸ It left open whether that carries over to the new Article 66.¹⁷⁹ The Court should now determine that it does. Congress amended significant portions of the UCMJ, but it left in place the precise language behind the holding in *Armsbury*.¹⁸⁰ It also left in place the CCAs’ ability to attach post-trial documents to the record, set aside sentences, and reassess sentences, if necessary.¹⁸¹

¹⁷⁶ *Gonzalez*, No. 202500333, slip op. at *8.

¹⁷⁷ *Armsbury*, 86 M.J. at 468, 470.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 468, n.2.

¹⁸⁰ 10 U.S.C. § 853a(e) (2024).

¹⁸¹ 10 U.S.C. §§ 866(e), (f) (2024).

Additionally, there is no windfall here and no party is losing the benefit of their bargain. The CA, who executed the agreement on behalf of the United States, suspended Appellee’s punitive discharge and found, in no uncertain terms, that he provided substantial assistance.¹⁸² Appellee’s ultimate confinement sentence of eight months is the precise number that both parties could reasonably expect under the agreement if he provided substantial assistance. He ultimately served over thirteen months. If anything, the Government received a windfall.

Even if the Government “lost” a benefit of its bargain—and it did not—that loss is not a primary consideration under the Supreme Court’s sentencing framework. In *Hughes v. United States*, the Supreme Court held that some appellants could receive new sentencing hearings when the guidelines changed after sentencing, even if they had stipulated sentences.¹⁸³ The Court was dismissive of the Government’s argument that it would lose the benefit of its bargain.¹⁸⁴ The Court reinforced, as it had in *Booker* and its progeny, that the primary consideration is application of the sentencing factors.¹⁸⁵ The lower court’s opinion was in line with both the plea bargain and Supreme Court precedent.

¹⁸² JA 119.

¹⁸³ *Hughes*, 584 U.S. at 687-88.

¹⁸⁴ *Id.* at 688-89.

¹⁸⁵ *Id.*; see *Booker*, 543 U.S. at 261 (“[The sentencing] factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”).

- iii. Plea bargains contain implicit guarantees of good faith and PFC Gonzalez was entitled to a fair and honest accounting of his assistance.

Plea bargains have an implicit guarantee of good-faith bargaining.¹⁸⁶ Some circuit courts have questioned prosecutorial refusals to issue substantial assistance recommendations.¹⁸⁷ The D.C. Circuit explained that a prosecutor's reasons must be in good faith and the appellant is entitled to an "honest and fully informed evaluation" of his assistance.¹⁸⁸ Appellee's plea didn't guarantee the letter would come, but it did guarantee a good faith, honest, and informed evaluation.¹⁸⁹ The Government opposed explaining the reasons for Maj Tango's refusal.¹⁹⁰ The few reasons that are in the record (that he did not believe he had probable cause for an electronic warrant for a co-accused, and that he wanted PFC Gonzalez to remain

¹⁸⁶ *United States v. Rexach*, 896 F.2d 710, 714 (2d Cir. 1990) ("[T]he prosecutor's discretion is not completely unlimited. There is, as Rexach argues, an implied obligation of good faith and fair dealing in every contract." (citing *Filner v. Shapiro*, 633 F.2d 139, 143 (2d Cir. 1980); Restatement (Second) of Contracts § 205 (Am. L. Inst. 1981)).

¹⁸⁷ *United States v. Knights*, 968 F.2d 1483, 1488 (2d Cir. 1992) (finding prosecutor's six reasons for withholding recommendation were not "sufficient," vacating sentence, and remanding for further proceedings on whether the government acted in bad faith); *United States v. Jones*, 58 F.3d 688, 691-92 (D.C. Cir. 1995) (expressing concern of a prosecutor's extraordinary power to issue recommendation and "lure" defendants into plea agreements; reinforcing the "implied obligation of good faith and fair dealing," and suggesting prosecutors should provide reasons for withholding a recommendation so a court can review them).

¹⁸⁸ *Jones*, 58 F.3d at 691-92.

¹⁸⁹ *Id.*

¹⁹⁰ JA 108-13.

confined to ensure his presence at other trials) are “conspicuous” and “illusory.”¹⁹¹ As the Supreme Court held in *Santobello v. New York*, when a plea “rests in any significant degree on a promise or agreement by the prosecutor, so it can be said to be part of the inducement or consideration, such promise must be fulfilled.”¹⁹²

Finally, the Government’s reliance on *United States v. Wade* is unavailing because that case did not involve a plea agreement.¹⁹³ *Wade* explicitly carved plea agreements out of its holding because they can provide greater protection than the base rule.¹⁹⁴ And the purpose behind the federal rule on substantial assistance recommendations is different than here, as it functions to allow sentences to be lower than statutory mandatory minimums.¹⁹⁵ There is no mandatory minimum here; and the guideline minimum for Appellee’s offenses (all Category II offenses) is one month.¹⁹⁶ The lower court left Appellee with an eight-month sentence—eight times higher than the guideline’s nonbinding minimum. Instead, the issue here was the plea bargain, and the lack of good faith Maj Tango exhibited in

¹⁹¹ *Gonzalez*, No. 202500333, slip op. at *10-11 (Harrell, S.J., concurring); JA 080-84.

¹⁹² *Santobello v. New York*, 404 U.S. 257, 262 (1971).

¹⁹³ 504 U.S. 181, 185 (1992).

¹⁹⁴ *Id.* at 185 (explaining a plea agreement can supersede the substantial assistance default under the Federal Rules of Criminal Procedure).

¹⁹⁵ Fed. R. Crim. P. 35; *see, e.g., United States v. Holbby*, 489 F.3d 910, 914 (8th Cir. 2007) (explaining Fed. R. Crim. P. 35 allows deviations from statutory mandatory minimums only on the government’s motion).

¹⁹⁶ *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, A12B-1, A12C (2024) [hereinafter MCM].

refusing to issue the letter and refusing to explain his reasoning—leaving PFC Gonzalez with an “illusory” chance at obtaining the principal benefit of his bargain.¹⁹⁷

C. Congress preserved meaningful judicial review of sentences and the lower court’s Article 66 powers govern the appellate review stage.

- i. A trial counsel’s discretion at the post-trial stage does not bar an appellate court from exercising its independent statutory authority to review a sentence under Article 66.

In *United States v. Boudreax*, then-Chief Judge Sullivan explained a “‘tunnel of power’ theory to illustrate how the UCMJ was wisely constructed by Congress to give jurisdiction to various authorities during a case’s progress through the judicial system.”¹⁹⁸ When the case (the train in the analogy) “moves to the other sections of the tunnel controlled by [the appellate courts] pursuant to the relevant portions of the UCMJ,” those statutory “provisions describe which authority has control or power or jurisdiction over the case at that time.”¹⁹⁹ In *Boudreax*, the “train was parked in the convening authority’s portion of the tunnel,” who there, “had the jurisdiction” to act.²⁰⁰

¹⁹⁷ *Gonzalez*, No. 202500333, slip op. at *10-11 (Harrell, S.J., concurring).

¹⁹⁸ *United States v. Boudreaux*, 35 M.J. 291, 296 (C.A.A.F. 1992) (Sullivan, C.J., concurring).

¹⁹⁹ *Id.* at 296-97.

²⁰⁰ *Id.* at 297.

The “train” analogy is particularly useful here. Maj Tango’s discretion applies to the post-trial/convening authority action stage. The train moved down the tunnel and was not “parked” there anymore.²⁰¹ It was now parked at the Article 66, UCMJ station, and the lower court’s powers, authority, and jurisdiction made *it* the entity with power to act—not Maj Tango.

Maj Tango’s discretion earlier in the process, however poorly exercised, remains intact. The lower court explicitly acknowledged Maj Tango’s discretion and the court’s inability to invalidate it.²⁰² But it also explained the question didn’t end there—because it had the power to conduct an Article 66 review of the sentence.²⁰³ It did not hold Maj Tango’s decision was error.²⁰⁴ It did not order him to issue the letter.²⁰⁵ To this day, he has not issued the letter.²⁰⁶ Accordingly, his discretion is intact; it’s just not the end of the tunnel. Whether the sentence is plainly unreasonable is a different question, and it’s the one the CCA answered.

²⁰¹ *Id.* at 296-97; R.C.M. 1109.

²⁰² *Gonzalez*, No. 202500333, slip op. at *7 (“Although we lack the authority to provide relief were we to disagree with trial counsel’s decision not to submit a substantial assistance letter to the CA, that does not prohibit further inquiry by this Court. We still have the statutory authority to determine whether [Appellee]’s sentence is plainly unreasonable.”) (citing Article 66(e), UCMJ) (other citations omitted).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ JA 118.

- ii. Supreme Court precedent reinforces the importance of judicial involvement in sentencing, and particularly, in judicial review of sentences.

The Government argues this case presents a separation of powers problem where a rogue judiciary usurped prosecutorial power from the executive.²⁰⁷ It's true this case represents a threat to the separation of powers, but it's the Government that advances the threat. As Justice Scalia explained, separation of powers cases "[f]requently . . . come . . . so to speak, in sheep's clothing . . . But this wolf comes as a wolf."²⁰⁸

The "military justice system's essential character" is "in a word, judicial[.]"²⁰⁹ The decisions of its "tribunals are subject to an appellate process . . . that replicates the judicial apparatus found in most States."²¹⁰ The federal sentencing system, upon which Congress based the Article 66 amendments, requires appellate courts to apply the sentencing factors and set aside sentences they find unreasonable.²¹¹ The judiciary's discretion in sentencing is an "unbroken

²⁰⁷ See, e.g., Appellant's Br. at 33 (arguing the lower court "usurp[ed] the independent authority of government counsel"), 35 (arguing the lower court's action was "*ultra vires*" because of Trial Counsel's "exclusive authority" under R.C.M. 1109 and Article 60a(d), UCMJ); *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026) (describing the prosecutorial power as "quintessentially executive").

²⁰⁸ *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

²⁰⁹ *Ortiz v. United States*, 585 U.S. 427, 437 (2018).

²¹⁰ *Id.* (citation omitted).

²¹¹ *Rita*, 551 U.S. at 350; *Gall*, 552 U.S. at 59; *Booker*, 543 U.S. at 261.

tradition” dating back to the “beginning of the Republic[.]”²¹² The judiciary has a “special, and indeed pivotal, role” in sentencing proceedings—even empowering it to invalidate appellate waivers that were struck “without judicial involvement.”²¹³

In the face of that authority, the Government argues that a single R.C.M. provision *eliminates* judicial power to act on a confinement sentence that deprives an appellant of liberty for twenty-two extra months.²¹⁴ Under its theory, no one in the judiciary, up to and including the Supreme Court justices, has power to lower PFC Gonzalez’s sentence. This holds, in the Government’s theory, even where Maj Tango verbally provided conspicuous and illusory reasons and then refused to put them in writing. It holds even where the Government opposed justifying his actions to the lower court and PFC Gonzalez was left languishing in prison after performing his obligations in good faith. Such an outcome would dangerously eviscerate the judiciary’s power. The Federal Circuits rejected the notion that appellate review of sentences was eviscerated, and this Court should too.²¹⁵

²¹² *Concepcion v. United States*, 597 U.S. 481, 491-92 (2022).

²¹³ *Hunter v. United States*, 146 S. Ct. 1702, 1712 (2026) (explaining that if “enforced, the appeal waiver will, by eliminating judicial review, cement into place a district court’s sentence, whether or not lawful”).

²¹⁴ Appellant’s Br. at 10, 20, 34-35.

²¹⁵ *Abu Ali*, 528 F.3d at 265-66 (“[W]e decline to adopt the view that Gall eviscerated any form of appellate review of trial court sentencing.”); *Kane*, 639 F.3d at 1135 (explaining appellate review of sentences is a not “hollow exercise”).

In sum, Maj Tango’s “power”—confined to the post-trial process—cannot bear the weight the Government asks of it. It does not overtake the lower court’s power under Article 66 to review and correct a plainly unreasonable sentence. The lower court judges acted as a check on a plainly unreasonable sentence that would have subverted the plea agreement and deprived PFC Gonzalez of his liberty for twenty-two months without reason. Congress did not eliminate such judicial review; it merely altered the standard and some of the procedures. It left powers for the lower court to do what it did in Articles 53a(e), 66(e), and 66(f). The court’s exercise of that power was in line with decades of Supreme Court precedent.

Conclusion

Appellee respectfully requests that this Court affirm the lower court’s opinion.

//s//

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List of Appendices

A. Reprinting of Relevant Authorities:

Article 53a(b), (e), UCMJ, 10 U.S.C. §§ 853a(b), (e) (2024);

Article 60a(d), UCMJ, 10 U.S.C. § 860a(d) (2024);

Article 66(e), (f), UCMJ, 10 U.S.C. §§ 866(e), (f) (2024); and

Rule for Court-Martial 1109(e) (2024).

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 (Code 46), at DACCode46@navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity (Code 40), at Joshua.D.Ricafrente.civ@us.navy.mil on October 2, 2026.

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Certificate of Compliance with Rule 24(b)

This Brief complies with the type-volume limitations of Rule 24(b) because:

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Appendix A

Reprinting of relevant authorities:

Article 53a(b), (e), UCMJ, 10 U.S.C. §§ 853a(b), (e), states:

(b) Acceptance of plea agreement. Subject 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 [10 USCS § 856 note], 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; and

(2) in the case of 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 [10 USCS § 856 note], the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

(e) Binding effect of plea agreement. Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties (including the convening authority and the special trial counsel in the case of a plea agreement entered into under subsection (a)(3)) and the court-martial.

Article 60a(d), UCMJ, 10 U.S.C. § 860a(d), states:

(d) Reduction of sentence for substantial assistance by accused.

(1) Upon a recommendation by the trial counsel, if the accused, after sentencing and before entry of judgment, provides substantial assistance in the investigation or prosecution of another person, the convening authority may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

(2) Upon a recommendation by a trial counsel, designated in accordance with rules prescribed by the President, if the accused, after entry of judgment, provides substantial assistance in the investigation or prosecution of another person, a convening authority, designated under such regulations, may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

(3) In evaluating whether the accused has provided substantial assistance under this subsection, the convening authority may consider the presentence assistance of the accused.

Article 66(e), (f), UCMJ, 10 U.S.C. §§ 866(e), (f), states:

(e) Consideration of sentence.

(1) In general. In considering a sentence on appeal, other than as provided in section 856(d) of this title (article 56(d)) [10 USCS § 856(d)], the Court of Criminal Appeals 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 [10 USCS § 856 note]; 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 [10 USCS § 856 note], 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 [10 USCS § 856

note], 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)) [10 USCS § 853(c)], whether the sentence is otherwise appropriate, under rules prescribed by the President.

(2) Record on appeal. In an appeal under this subsection or section 856(d) of this title (article 56(d)) [10 USCS § 856(d)], other than review under subsection (b)(2) of this section, 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.

(f) Limits of authority.

(1) Set aside of findings.

(A) In general. If the Court of Criminal Appeals sets aside the findings, the Court—

(i) may affirm any lesser included offense; and

(ii) may, except when prohibited by section 844 of this title (article 44) [10 USCS § 844], order a rehearing.

(B) Dismissal when no rehearing ordered. If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed.

(C) Dismissal when rehearing impracticable.

(i) In general. Subject to clause (ii), if the Court of Criminal Appeals orders a rehearing on a charge and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charge.

(ii) Cases referred by special trial counsel. If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

(2) Set aside of sentence. If the Court of Criminal Appeals sets aside the sentence, the Court may—

(A) modify the sentence to a lesser sentence; or

(B) order a rehearing.

(3) Additional proceedings. If the Court of Criminal Appeals determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue, subject to such limitations as the Court may direct and under such regulations as the President may prescribe. If the Court of Appeals for the Armed Forces determines that additional proceedings are warranted, the Court of Criminal Appeals shall order a hearing or other proceeding in accordance with the direction of the Court of Appeals for the Armed Forces.

Rule for Court-Martial 1109(e) (2024) states:

(e) *Reduction of sentence for substantial assistance by accused.*

(1) *In general.* A convening authority may reduce, commute, or suspend the sentence of an accused, in whole or in part, if the accused has provided substantial assistance in the criminal investigation or prosecution of another person.

(2) *Trial counsel.* A convening authority may reduce the sentence of an accused under this subsection only upon the recommendation of trial counsel who prosecuted the accused. If the person who served as trial counsel is no longer serving in that position, or is not reasonably available, the attorney who is primarily responsible for the investigation or prosecution in which the accused has provided substantial assistance, and who represents the United States, is trial counsel for the purposes of this subsection. The recommendation of trial counsel is the decision of trial counsel alone. No person may direct trial counsel to make or not make such a recommendation.

(3) *Who may act.*

(A) Before entry of judgment, the convening authority who convened the original court-martial or the convening authority's successor in command may act on the recommendation of trial counsel under paragraph (2).

(B) After entry of judgment, the convening authority who convened the original court-martial or the convening authority's successor in command or a convening authority otherwise designated by the Secretary concerned may act on the recommendation of trial counsel under paragraph (2).

(4) *Scope of authority.* A convening authority authorized to act under paragraph (3) may accept the recommendation of trial counsel under paragraph (2) of this subsection, and may reduce, commute, or suspend a sentence in whole or in part, including any mandatory minimum sentence.

(5) *Limitations.*

(A) A sentence of death may not be suspended under this subsection.

(B) In the case of a recommendation by trial counsel under paragraph (2) of this subsection made more than one year after entry of judgment, the convening authority who convened the original court martial or the convening authority's successor in command or a convening authority otherwise designated by the Secretary concerned may reduce a sentence only if the substantial assistance of the accused involved—

(i) Information not known to the accused until one year or more after sentencing;

(ii) Information the usefulness of which could not reasonably have been anticipated by the accused until more than one year after sentencing and which was promptly provided to the Government after its usefulness was reasonably apparent to the accused; or

(iii) Information provided by the accused to the Government within one year of sentencing, but which did not become useful to the Government until more than one year after sentencing.

(6) *Evaluating substantial assistance.* In evaluating whether the accused has provided substantial assistance, the trial counsel and convening authority may consider the presentence assistance of the accused.

(7) *Action after entry of judgment.* If the convening authority who convened the original court-martial or the convening authority's successor in command or a convening authority otherwise designated by the Secretary concerned acts on the sentence of an accused after entry of judgment, the action shall be forwarded to the chief trial judge. The chief trial judge, or a military judge detailed by the chief trial judge, shall modify the judgment of the court-martial to reflect the action. The action and the modified judgment shall be forwarded to the Judge Advocate General and shall be included in the original record of trial. The reduction of a sentence under this rule shall not abridge any right of the accused to appellate review.