IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	))	APPELLANT'S BRIEF IN SUPPORT OF CERTIFIED ISSUES
	)	
v.	)	Crim.App. Dkt. No. 202500333
	)	
Joel GONZALEZ, Private First Class (E-2) U.S. Marine Corps Appellee	))))	USCA Dkt. No. 26-0223/MC

TO THE 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

Appellee's sentence included a bad-conduct discharge and more than two years' confinement. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). On June 17, 2026, the Judge Advocate General of the United States Navy certified one Issue for review. This Court has jurisdiction under Article 67(a)(2), UCMJ, § 867(a)(2).

Statement of the Case

The Military Judge, sitting as a general court-martial, convicted Appellee, consistent with his pleas, of two Specifications of conspiracy, three Specifications of wrongful disposition of military property, and one Specification of larceny, in violation of Articles 81, 108, and 121, UCMJ, 10 U.S.C. §§ 881, 908, and 921. The Judge sentenced Appellee to a bad-conduct discharge, reduction to E-1, and thirty months' confinement. The Military Judge recommended the bad-conduct discharge be suspended for six months if Appellee provided substantial assistance to the Government. Trial Counsel determined that Appellee did not provide substantial assistance. The Convening Authority took no action on the Findings or Sentence, and the Military Judge entered the Judgment into the Record. On March 6, 2026, the lower court found Appellee's sentence plainly unreasonable and reduced his sentence from thirty to eight months' confinement.

Statement of Facts

A. The Government charged Appellee with larceny, wrongful disposition of military property, and conspiracy.

The Government charged Appellee with two Specifications of conspiracy, three Specifications of wrongful disposition of military property, and one Specification of larceny. (J.A. 229–31.) None of the alleged offenses met the statutory definition of a "covered offense" under Article 1(17), UCMJ.

B. Appellee entered into a Plea Agreement.

Appellee negotiated a Plea Agreement, agreeing to plead guilty to all Charges at a general court-martial and to provide substantial assistance in the investigation and prosecution of his co-conspirators. (J.A. 239, 360–62, 365–66.) In exchange, Appellee was provided immunity from uncharged, firearm-related misconduct, and his sentence was limited to a bad-conduct discharge, thirty to thirty-six months' confinement, served concurrently, and any fines, forfeitures, or rank reduction the Military Judge saw fit to adjudge.[1] (J.A. 366–67.) Further, if Trial Counsel determined he provided substantial assistance, his confinement could be reduced to eight months. (J.A. 365–66.)

1. <u>Trial Counsel had complete discretion to decide whether to issue a substantial assistance letter</u>.

Regarding Appellee's substantial assistance, his Agreement stated:

> The government and I agree that *if* I provide substantial assistance in the investigation . . . of [my co-conspirators] . . . the trial counsel who prosecuted my case *may* make a recommendation to the convening authority that my confinement be reduced to 8 months confinement for each of the specifications to which I plead guilty . . . *The determination as to whether I provide substantial assistance under this agreement rests solely with the trial counsel who prosecuted my case in accordance with R.C.M. 1109(e) . . . Upon receipt of such substantial assistance letter*, the convening authority agrees to act under R.C.M. 1109(e) and reduce the confinement to 8 months for each of the specifications to which I pleaded guilty . . .

(J.A. 365–66 (emphasis added).)

C. <u>The Military Judge confirmed Appellee's knowing, intelligent, and voluntary entry into this Agreement before accepting his Pleas</u>.

During his providence inquiry, Appellee admitted he (1) conspired with another Marine to order and sell military equipment for their own personal profit, (2) disposed of said military property by selling it, and (3) did so during the

[1] Due to his specific Charges, Appellee faced a maximum punishment of dishonorable discharge, total forfeitures, and ten years' confinement for each Specification. *See* Manual for Courts-Martial (MCM), United States, pt. IV, paras. 5.d.1, 43.d.1.b, and 64.d.1.b, IV-7, 58, and 103; *see also* J.A. 360–62.

charged time frame. (J.A. 247, 255, 265, 267, 270, 276, 279, 281, 285, 289, 291, 300, 343–47.) Appellee also affirmed he did so knowingly and voluntarily. (J.A. 252, 266, 272, 280, 282, 292, 343–47.)

The Military Judge examined Appellee's understanding of the above paragraph, asking: "[s]o all the months in excess of 8 months, *if* the accused provides substantial assistance and receives the trial counsel's letter, the convening authority will get rid of all the rest. And it will not come back if there's any UCMJ violations. Do you agree with that?" (J.A. 314 (emphasis added).) Appellee, through Counsel, agreed. (J.A. 314.)

Lastly, Appellee affirmed his understanding of the Agreement's sentencing range, including that a bad-conduct discharge and at least thirty months' confinement would be adjudged. (J.A. 318–22.) Finally, he confirmed he entered the Agreement of his "own free will," had not been forced into doing so, and fully understood all its terms. (J.A. 303–28.)

Thus, the Military Judge accepted Appellee's Pleas and found him guilty. (J.A. 330–31.)

D. The Government presented Appellee's Stipulation as aggravation evidence.

The Government introduced Appellee's signed Stipulation of Fact. (J.A. 327, 342–57.) In it, he admitted to conspiring with another Marine over a period of four months to use their positions in the supply department to order extra Peltor headsets, which he knew had a status of "low priority" gear and were unlikely to be flagged as missing. (J.A. 343–56.) He conspired to steal those headsets and sell them for personal profit. (J.A. 343–56.) Appellee confirmed he did, in fact, use his position to order multiple headsets and sold at least seven of them for personal profit. (J.A. 343–56.) Appellee admitted he and the other Marine communicated frequently about how to steal, store, and sell the headsets over their months-long criminal operation. (J.A. 343–56.)

E. The Military Judge sentenced Appellee pursuant to his Agreement.

The Military Judge sentenced Appellee to thirty months' confinement, reduction to E-1, and a bad-conduct discharge. (J.A. 340, 367.) He recommended suspending the bad-conduct discharge for six months if the Appellee provided substantial assistance to the Government. (J.A. 341.)

F. Appellee's attachments to the Record added facts related to the terms of his Agreement and assistance he provided.

Appellee filed a Motion to Attach concurrent with his appeal at the lower court. (J.A. 70–79.) The lower court partially granted his Motion, attaching Trial Defense Counsel's Affidavit, which included: (1) a written Mil. R. Evid. Proffer, dated December 19, 2024; (2) Appellee's first plea agreement, dated January 7, 2025; and, (3) the initial military judge's email, dated January 30, 2025. (J.A. 65, 80–100.)

In his Motion, Appellee alleged the attachments showed "Trial Counsel's unilateral determination to not issue a substantial assistance letter [was] plainly unreasonable and made in bad faith." (J.A. 71.) He further argued, "Federal courts review appellants' challenges to a prosecutor's decision to not make substantial assistance recommendations under the federal corollary to R.C.M. 1109(e)." (J.A. 74.) Appellee argued that because federal courts would consider additional material about a prosecutor's decision to issue a substantial assistance letter, the lower court should as well. (J.A. 75–76.)

1. <u>Trial Defense Counsel explained the circumstances leading to Appellee's Plea Agreement</u>.

Trial Defense Counsel stated Appellee initially signed a plea agreement in January 2025 which required Trial Counsel to provide a substantial assistance letter in exchange for Appellee's pleas. (J.A. 80, 96.) However, the initial military judge expressed concern, via email, about the agreement's substantial assistance provision and directed the Parties to "[b]e ready to discuss [it] in depth" the next day ahead of Appellee's guilty plea. (J.A. 81, 100.) In their Affidavit, Trial Defense Counsel stated the military judge previously explained to counsel in "other cases around the same time" that he did not think a plea term mandating trial counsels provide a substantial assistance letter was "permissible." (J.A. 81.)

However, the next day, Appellee made suicidal ideations and was found with a pistol in his barracks room, delaying his guilty plea. (J.A. 81.) Counsel then discussed the Military Judge's concerns in an R.C.M. 802 session and thereafter renegotiated Appellee's Agreement—reinstating Trial Counsel's complete discretion to issue a substantial assistance letter but adding a new term granting Appellee immunity for any "orders violations" and "wrongful possession of a firearm" offenses "for the suicide incident in his barracks room." (J.A. 81–82, 365–66.) The presiding Military Judge accepted this subsequent Plea Agreement. (J.A. 330–31.)

Afterwards, Trial Defense Counsel inquired about the potential substantial assistance letter, but Trial Counsel informed them "the information [Appellee] provided was not sufficient enough to seek a subpoena" with regards to one of Appellee's alleged co-conspirators and that "the command had not issued Requests for Legal Services" for the alleged co-conspirators. (J.A. 83.)

G. The lower court set aside the Entry of Judgment and directed the Convening Authority to consider suspending the punitive discharge. The Convening Authority then suspended Appellee's bad-conduct discharge, the Military Judge submitted the new Entry of Judgment, and Article 66 appellate review resumed.

On December 22, 2025, the lower court set aside the initial staff judge advocate review, convening authority action, and entry of judgment "so the Convening Authority can make a fully informed decision whether to suspend [Appellee's] BCD." (J.A. 116.)

Pursuant to that Order, the Convening Authority reviewed Appellee's renewed clemency request and suspended his bad-conduct discharge. (J.A. 119.) The Military Judge then entered the new Entry of Judgment into the Record on January 29, 2026. (J.A. 121–23.) Thereafter, the lower court conducted its Article 66 review. (J.A. 116.)

H. The lower court then found Appellee's sentence plainly unreasonable and reduced his sentence to eight months' confinement.

In an unpublished opinion, the lower court created a standard for plainly unreasonable, which it defined as "clearly or obviously unfair or unacceptable." (J.A. 6.) It then found Appellee's sentence plainly unreasonable, holding:

> even though trial counsel did not find that [Appellee's] outsized efforts to assist the Government merited submission of a letter which would have reduced his confinement by the agreed-upon 22 months, we conclude that [Appellee's] efforts factor meaningfully into our consideration of whether his sentence is plainly unreasonable . . . 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.

(J.A. 7–8 (emphasis added).)

The United States moved for panel and en banc reconsideration on April 6, 2026. (J.A. 184–98.) However, the lower court denied the United States' motions on April 20, 2026. *Gonzalez*, No. 202500333 (N-M. Ct. Crim. App. Apr. 20, 2026) (Ord. denying panel reconsideration); *Gonzalez*, No. 202500333 (N-M. Ct. Crim. App. Apr. 20, 2026) (Ord. denying En Banc Reconsideration).

Summary of Argument

The new Article 66 "plainly unreasonable" provision was created to parallel its federal civilian counterpart. Civilian appellate courts are highly deferential when reviewing alleged "plainly unreasonable" sentences: they apply a presumption of reasonableness for sentences within parameters and affirm sentences if a "modicum of evidence" supports the sentence. The lower court's opinion conflicts with both that interpretation of "plainly unreasonable," and also every other opinion from the Navy-Marine Corps Court of Criminal Appeals interpreting that test. Additionally, the lower court's opinion creates a new, equitable sentence-appropriateness test, resurrecting the old sentence-appropriateness review Congress replaced with one based on the federal "plainly unreasonable" test.

Even under the lower court's new equitable standard, it erred finding Appellee's sentence plainly unreasonable by ignoring key facts, including that Appellee's Agreement immunized him from his additional misconduct. And it contravenes the express terms of Article 60a(d) and R.C.M. 1109(e)(2) and Appellee's Agreement, which grants only Trial Counsel exclusive discretion to determine whether to issue a substantial assistance letter that a convening authority may use to reduce a sentence. If Trial Counsel's decision is reviewable, it should only be so after Appellee makes the required substantial threshold showing under

Wade v. United States, 504 U.S. 181 (1992), which he failed to do. This Court should reject the lower court's substitution of their own judgment for Trial Counsel's discretionary decision to not issue a substantial assistance letter, and this Court should find Appellee's sentence was not plainly unreasonable.

Argument

THE LOWER COURT'S DECISION CREATES AN EQUITABLE STANDARD THAT ERRS IN LAW, DEVIATES FROM STANDARD FEDERAL APPLICATION OF THE PLAINLY UNREASONABLE STANDARD OF REVIEW, AND USURPS TRIAL COUNSEL'S DISCRETION.

A. <u>Appellate courts interpret statutes using principles of statutory interpretation. Plain meaning is determined by the statute's language and context</u>.

The first step in statutory interpretation is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). Plain meaning is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2020) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

B. <u>Congress replaced the "should be approved" Article 66 power with five statutory ways for the Courts of Criminal Appeals to "consider[] a sentence on appeal," which parallels and copies part of the civilian sentencing and appeal scheme in 18 U.S.C. § 3742</u>.

Congress amended Article 66 after the Military Justice Review Group recommended "statutory standards" for appellate review of court-martial sentences. (J.A. 390.) The amendment follows 18 U.S.C. § 3742, which gives statutory standards for federal appellate courts reviewing sentences. *See* 18 U.S.C. § 3742(e); (*see also* J.A. 391 ("The term 'plainly unreasonable' is taken from 18 U.S.C. § 3742 and intended to provide substantial deference to the trial judge")).

Under Article 66(e), there are five discrete statutory ways for a service appellate court to evaluate a sentence:

> (A) whether the sentence violates the law;
>
> (B) whether the sentence is inappropriately severe;
>
> (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 the 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 sentence is otherwise appropriate, under rules prescribed the President.

10 U.S.C. § 866(e).[2]

This new statutory consideration of the sentence replaces the old precedent-based "sentence appropriateness" review[3] from the "should be approved" statutory language. *See United States v. Swisher*, 85 M.J. 1, 4 (C.A.A.F. 2024).

Appellee pled guilty to offenses occurring after December 27, 2023. (J.A. 229–31, 360–63.) Therefore, this Court considers Appellee's sentence under the amended Article 66, UCMJ. *See National Defense Authorization Act for Fiscal Year 2022*, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1703–1706 (2021). However, this Court has yet to define "plainly unreasonable."

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[2] *Cf.* 18 U.S.C. § 3742(a), allowing a defendant to appeal "for review of an otherwise final sentence if the sentence" (1) violates the law, (2) is "an incorrect application of the sentencing guidelines," (3) exceeds "the maximum established in the guideline range; or" (4) "was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."

[3] Notably, the new statute permits consideration of "whether the sentence is inappropriately severe" in two circumstances, neither of which are present in Appellee's case. Whether or not "inappropriate severity" review enables a review similar and often identical to the language used for sentence appropriateness review that arose from the old statutory "should be approved" power—is not an issue to be determined in this case, given that here a sentence parameter has been established, and Appellee's sentence falls within those parameters. The sole issue here is whether Appellee's sentence is "plainly unreasonable."

C. Federal circuit courts reviewing sentences under the 18 U.S.C. § 3742 "plainly unreasonable" standard give great discretion to the sentencing authority that considered and applied the facts in the first instance.

1. Under the federal appellate system, "plainly unreasonable" is a "highly deferential" standard.

Under the amended Article 66, service courts may now consider if a sentence is "plainly unreasonable." *See* Article 66(e)(1)(D), UCMJ, 10 U.S.C. § 866(e)(1)(D).[4] The Seventh Circuit holds that "plainly unreasonable" appellate review of trial sentences under 18 U.S.C. § 3742 in some cases, where no sentencing guidelines have been issued, is "highly deferential" and akin to the "narrowest judicial review of judgments we know" and requires only a "modicum of evidence" to support the sentence. *See United States v. Robertson*, 648 F.3d 858, 859 (7th Cir. 2011) (quoting *United States v. Kizeart*, 505 F.3d 672, 675 (7th Cir. 2007)); *United States v. Tucker*, 256 Fed. Appx. 836, 837–38 (7th Cir. 2007) (quoting *Kizeart*, 505 F.3d at 675).

Other circuits apply "plainly unreasonable" in a similar manner. *See, e.g.*, *United States v. De Jesus*, 277 F.3d 609, 612 (1st Cir. 2002) ("Under any

[4] While a circuit split exists as to whether *United States v. Booker*, 543 U.S. 220 (2005), abrogated "plainly unreasonable" under 18 U.S.C. § 3742, that is not at issue for purposes of 10 U.S.C. § 866(e). *See* MCM, App. 15 at A15–29 ("R.C.M. 1117(e), which provided a standard for what is 'plainly unreasonable,' is removed, thereby enabling the application of those words according to their plain language as provided in Article 66(e).").

circumstances, the 'plainly unreasonable' standard is extremely deferential"); *United States v. Cano*, 981 F.3d 422, 427 (5th Cir. 2020) (calling the "plainly unreasonable" review "highly deferential, because the sentencing court is in a better position to find facts and judge their import"). Plainly unreasonable is, thus, "quite similar" to abuse of discretion. *United States v. Rodriguez-Quintanilla*, 442 F.3d 1254, 1257 (10th Cir. 2006).

2. Under the federal appellate system, sentences within the sentencing guideline range are presumed reasonable.

Under the federal appellate system, a criminal sentence within the sentencing guideline range is "entitled to the presumption of reasonableness" under 18 U.S.C. § 3742. *See United States v. Yankey*, 56 F.4th 554, 560 (7th Cir. 2023); *see also United States v. Bell*, No. 23-30430, 2024 U.S. App. LEXIS 6327, at *2 (5th Cir. Mar. 15, 2024). In those cases, the accused bears the burden of demonstrating the sentence is "unreasonably high." *Id*.

D. Besides the *Gonzalez* decision, every decision from the Navy-Marine Corps Court of Criminal Appeals has adopted a standard similar to that of federal appellate courts.

As of this filing, the United States is unaware of any service court besides the Navy-Marine Corps Court of Criminal Appeals to issue an opinion discussing the standard for a "plainly unreasonable" sentence under Art. 66(e)(1)(D). However, the *Gonzalez* court's Opinion stands alone amongst the Navy- Marine Corps Court of Criminal Appeal's other opinions on that standard.

In *United States v. Simms*, No. 202400341, 2025 CCA LEXIS 500, *4–6 (N-M. Ct. Crim. App. Nov. 5, 2025), the lower court declined to create a new "plainly unreasonable" standard because it had "no trouble" deciding that the punitive discharge the appellant received "was not 'plainly unreasonable' under any standard" where it was "precisely and exclusively" "bargained for by [the] Appellant and the convening authority" in the plea agreement. *Id*. at *4–6. *See also United States v. Wilson*, No. 202400373, 2026 CCA LEXIS 72, at *13–14 (N-M. Ct. Crim. App. Feb. 12, 2026) (holding appellant's sentence was neither inappropriately severe nor plainly unreasonable, without discussing the latter standard, where it was within the bargained-for sentencing range and, thus, the "foreseeable result of the . . . agreement that he negotiated and voluntarily entered").

In *United States v. Brockenborough*, the court, for the first time, adopted a standard for "plainly unreasonable" sentences. No. 202400476, 2026 CCA LEXIS 21 (N-M. Ct. Crim. App. Jan. 21, 2026). Following the Fourth Circuit,[5] the court explained that determining whether a sentence is "plainly unreasonable" begins

[5] *United States v. Crudup*, 461 F.3d 433, 438–39 (4th Cir. 2006) (holding that if a sentence is not unreasonable, the analysis stops, but if a sentence is "procedurally or substantively unreasonable," it will "decide whether the sentence is *plainly* unreasonable," as defined by "'plain' error analysis," that is, "clear" or "obvious") (emphasis original).

with an analysis of whether the sentence was 'unreasonable,'" meaning it "lacks common sense or a rational legal basis." *Id*. at *7–8. If the sentence was not "unreasonable," then further analysis was unnecessary. *Id*. But if the sentence was unreasonable, courts should examine whether it was "plainly" so, meaning "clear or obvious," consistent with a plain error analysis. *Id*.

Thus, the court held there was "strong evidence" that the appellant's sentence was not plainly unreasonable where (1) the appellant was represented by competent counsel who (2) negotiated a sentence that "limited his exposure to a higher sentence," and (3) the sentence was within his deal's range and was the minimum required under the sentencing parameters, irrespective of the military judge's clemency recommendation. *Id*. at *8–10. *See also United States v. Downs*, No. 202500109, 2026 CCA LEXIS 246, *24–26 (N-M. Ct. Crim. App. May 27, 2026) (adopting same test based on same authorities, reaching similar result for similar reasons).

In *United States v. Sanchez,* the court noted "the Military Justice Review Group" stated "[t]he term 'plainly unreasonable' is taken from 18 U.S.C. § 3742 and is intended to provide substantial deference to the trial judge'" and that "'[i]n determining whether a sentence is plainly unreasonable, a Court of Criminal Appeals could, but would not be required to, presume that a sentence within a sentencing parameter is reasonable.'" No. 202500114, 2026 CCA LEXIS 249, *6–

7 (N-M. Ct. Crim. App. May 28, 2026). The court then adopted the same two-part test from *Brockenborough* and *Downs*, citing the same authorities and using almost identical language. *Id*. at *7–9. Thus, the appellant's sentence was not plainly unreasonable where, among other factors, his sentence was below the maximum of both the agreed-upon range in his plea deal and the sentencing parameters and where it "reflect[ed] the seriousness of the offense, promoted adequate deterrence, and [was] in accordance with the principles of sentencing." *Id*. at *10–12.

Similarly, in *United States v. Jones*, the court adopted the "highly deferential standard of review" from "federal civilian courts" for the military judge's sentencing decision, and like in *Sanchez* and *Downs*, adopted the same two-part test from *Brockenborough*—using virtually the same authorities and language. No. 202500018, 2026 CCA LEXIS 327, *4–6 (N-M. Ct. Crim. App. Jul. 13, 2026). Thus, the appellant's sentence was not plainly unreasonable where (1) it was an authorized, lawful punishment for his offense, (2) he was represented by competent counsel in negotiating his agreement, (3) the sentence was "within the limits of [his] negotiated plea agreement," and (4) he knowingly, intelligently, and voluntarily entered into its terms. *Id*. at *6–8.

E. The lower court erred in its interpretation of "plainly unreasonable" and applied a test tantamount to resurrecting the old "should be approved" standard. This Court should adopt the federal interpretation of the "plainly unreasonable" standard.

1. The lower court's Opinion fashions an equitable standard—rejected even under the more lenient "should be approved" statutory standard—from the new Article 66, circumventing the expressed purpose of its amendments.

Under the prior version of Article 66, the sentence appropriateness power caused almost seventy years of jurisprudential difficulty in determining the boundary between whether "should be approved" was applied in an unlawful equitable manner, or whether a given court applied it under a proper legal standard.[6] Indeed, the *Quiroz* court remanded for further consideration because the service court used the word "unfairly" in the "should be approved" context—reasoning that even under the old, more-expansive "800-pound gorilla" "should be approved" test, "the term 'unfairly' could be viewed as . . . an equitable rather than a legal standard." *United States v. Quiroz,* 55 M.J. 334, 339 (C.A.A.F. 2001); *see*

[6] *See, e.g., United States v. Nerad,* 69 M.J. 138, 140 (C.A.A.F. 2010) ("while CCAs have broad authority under [the 'should be approved' power of] Article 66(c) . . . that authority is not unfettered . . . [and] must be exercised in the context of legal—not equitable—standards"); *United States v. Wilson,* No. 200200954, 2003 CCA LEXIS 182, at *23–25 (N-M. Ct. Crim. App. Aug. 19, 2003) ("The difficulty with providing . . . guidance . . . regarding the application of the 'reasonableness' standard in [the 'should be approved' statutory context] is that—as one writer puts it—'"reasonableness" and "fairness" are not terms capable of objective measurement").

also United States v. Hale, 76 M.J. 713, 729 (N-M. Ct. Crim. App. 2017) (citations omitted) (providing "800-pound gorilla" descriptor).

But that statutory power is now gone, partly because of and *to correct* the unreviewable nature of that power, and replaced with legally standardized and appealable phrases, like "plainly unreasonable"—which the Military Justice Review Group pointed out is taken "from 18 U.S.C. § 3742 and intended to provide substantial deference to the trial judge." (J.A. 391.) Because all of Appellee's offenses occurred after December 27, 2023, the current Article 66, which removed the sentencing "should be approved" power, controls. *See National Defense Authorization Act for Fiscal Year 2022*, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1703–06 (2021).

The vast "should be approved" power enabled the judicial creation of an appellate-specific version of unreasonable multiplication of powers, allowed a near-equitable sentence appropriateness power, allowed a judicially-created, non-constitutional post-trial delay test, and much more. But Congress jettisoned those tests for legally reviewable and standardized appellate tests, similar or identical to those tests in the civilian federal appellate courts. This transition makes sense; Congress already requires the President ensure the Rules for Courts-Martial generally "apply the principles of law and rules of evidence . . . in the United States district courts." Art. 36(a), UCMJ; *Hamdan v. Rumsfeld*, 548 U.S. 557, 620

(2006). And the Military Rules of Evidence generally automatically mirror changes in the Federal Rules of Evidence after eighteen months. Mil. R. Evid. 1102(a).

Here, the lower court's Opinion adopted an "unfair or unacceptable" meaning for "unreasonable"—contrary to *Quiroz's* direct admonition of such equitable standards. Further, it flouts Congress' jettisoning of the "should be approved" sentencing power, as well as its express intent for military justice practice to mirror federal practice. Congress clearly acted to resolve the famous seventy-year quagmire of the "should be approved" power by removing that power. *Compare United States v. Lanford,* 6 C.M.A. 371, 378 (C.M.A. 1955) ("the name . . . is really unimportant . . . the board of review . . . can be compassionate; it can be lenient; it can be forbearing," one could even "call it clemency"), *with Nerad*, 69 M.J. at 145–46 ("Nonetheless, the words 'should be approved' do have some meaning . . . [because they have] been cabined in practice").

Here, the lower court assumed that power again, rejecting the "plainly unreasonable" sentencing review that federal courts apply—that is, "highly deferential" and affirming sentences where a "modicum of evidence"[7] supports it

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[7] *See De Jesus,* 277 F.3d at 612; *Cano*, 981 F.3d at 427; *Robertson*, 648 F.3d at 859; *Rodriguez-Quintanilla*, 442 F.3d at 1257.

or because the trier of fact considered and applied the facts as a factfinder in the first instance. Instead, the lower court judicially created an "unfair or unacceptable" test and, despite the Judge imposing the bargained-for sentence of the Plea Agreement, set aside the Sentence simply because they disagreed with it. (J.A. 8.) This recreation of broad "should be approved"-like powers into Article 66 sentencing review should be rejected.

Moreover, *see* Section F.1, *infra*, the lower court's appropriation of the power to consider assistance where Congress and the President have allocated the sole discretion to issue a "substantial assistance" letter to trial counsel, in order to enable convening authorities to consider that letter in limited circumstances—contravenes the principle that rights are given to servicemembers by the Constitution, the Uniform Code, and the Manual—not created by courts. *See United States v. Vasquez,* 72 M.J. 13, 19 (C.A.A.F. 2013) (abrogating decades of "military due process" precedent).

2. <u>The Opinion conflicts with the Navy-Marine Corps Court of Criminal Appeals' own precedent on "plainly unreasonable</u>."

a. <u>The lower court uses a different definition of "plainly unreasonable" than any of the other Navy-Marine Corps cases and applies different levels of deference to the trial court as a result</u>.

As discussed in Section D, the lower court's definition of "plainly unreasonable" differs from the definitions given in *Brockenborough*, *Sanchez*, *Downs*, and *Jones*, who all adopted the discretionary standard of review and "plain error" definitions from federal case law and Black's Law Dictionary.

However, the *Gonzalez* court's "clearly or obviously unfair or unacceptable" definition comes from the Cambridge Dictionary and outdated versions of the Manual for Court Martial. (J.A. 6–8.)

These definitions are incompatible with each other. The former involves a two-part test that starts by asking if a sentence has "a rational basis" and rejects clemency concerns. *See* Section D. The latter cites a generally "unfair" standard more associated with clemency, which is not within service courts' authority. *See, e.g., Nerad*, 69 M.J. at 145; *United States v. Gay*, 75 M.J. 264, 266, 269 (C.A.A.F. 2016). Further, a sentence could have a clear rational basis and yet seem unfair to a particular person—or appellate judge—meaning the "unfair" standard inherently calls for a less-deferential review of a trial court's sentence.

3. <u>This Court should adopt the Seventh Circuit's interpretation of "plainly unreasonable" under 18 U.S.C. § 3742</u>.

This Court should adopt the Seventh Circuit's standard, interpreting "plainly unreasonable" review of sentences as "highly deferential" and akin to the "narrowest judicial review of judgments we know" and requires only a "modicum of evidence" to support the sentence, particularly given that the new Articles 56 and 66 parallel, and in some places exactly copy, the federal civilian sentence and sentence appeal statutes, as well as the express intent in the Military Justice

Review Group to follow the operation of those statutes.[8] (*See also* J.A. 391 ("The term 'plainly unreasonable' is taken from 18 U.S.C. § 3742 and intended to provide substantial deference to the trial judge")).

4. This Court should likewise adopt the federal courts' presumption that sentences within the sentencing parameters are reasonable.

Similarly, this Court should follow the Military Justice Review Group and adopt federal courts' presumption that sentences within the sentencing parameters are reasonable. *See, e.g., Yankey*, 56 F.4th at 560; *Bell*, 2024 U.S. App. LEXIS 6327, at *2 ("a presumption of reasonableness applies to . . . within-Guidelines sentence[s]"); (J.A. 393 (adopting presumption "from 18 U.S.C. § 3742")).

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[8] Notably, not all federal appellate "plainly unreasonable" cases are applicable to military "plainly unreasonable" review. For example, under the federal appellate system, trial judges "shall state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553. Although Article 56 adopts sentencing factors from 18 U.S.C. § 3553, military judges have no such obligation except when they impose a sentence outside the sentencing parameters. *See* Art. 56(c)(2)(B), UCMJ; (*see also* J.A. 392 ("Article 56(c)(1) would enumerate factors the court-martial would be required to consider before imposing a sentence. The proposed factors are adapted from 18 U.S.C. § 3553.")). Thus, civilian cases that find sentences "plainly unreasonable" where a judge fails to announce the reasons for a sentence are not uniformly applicable to the military context. This is not at issue here, as Appellee's Agreement set a definite sentence within the sentencing parameter.

5. <u>Applying the comparable federal standard like that of 18 U.S.C. § 3742, the lower court erred in finding the sentence plainly unreasonable because a "modicum" of evidence in the Record supports it and because the sentence was within the sentencing parameters for violations of Articles 81, 108, and 121</u>.

Appellee's convictions—conspiracy, wrongful disposition of military property over $1,000.00, and larceny over $1,000.00—are all Category 2 Offenses. MCM, app. 12C at A12C-1–5. Category 2 offenses have a range of confinement from one to thirty-six months. MCM, app. 12B at A12B-1. Under Appellee's Plea Agreement, all confinement periods ran concurrently. (J.A. 367.)

Thus, Appellee's sentence was not above the sentencing parameter and is not reviewed for "inappropriate severity" but only for whether it "violates the law" or is "plainly unreasonable." Art. 66(e)(1)(A), (D). Further, because Appellee's Sentence was a specific one within the parameters for violations of Articles 81, 108, and 121, it is entitled to the presumption of reasonableness. *See Yankey*, 56 F.4th at 560. *See also United States v. Zelazurro*, 420 Fed. Appx 249, 250 (4th Cir. 2011) (where appellant agreed to specific sentence, could only appeal as "plainly unreasonable" when "sentence imposed is greater than the sentence set forth in such agreement").

Additionally, the Military Judge was required to accept the Plea Agreement. *See* Art. 53a(b), UCMJ (military judge "shall" accept plea agreement unless judge determines sentence "plainly unreasonable," *and* is either (1) outside parameters, or (2) for offense without parameters). Thus, this Court should find more than a "modicum of evidence" in the Record supports Appellee's Sentence and hold it was not plainly unreasonable.

6. Even under the lower court's own mistaken definition, Appellee's sentence was not plainly unreasonable.

A sentence falling within the congressionally-approved sentence range cannot be plainly unreasonable, let alone a sentence that was bargained for by an appellant and involved prosecutorial immunity for additional misconduct. *See* Sections C–D, *supra*; *see also United States v. Avellaneda*, 84 M.J. 656, 663 (N-M. Ct. Crim. App. 2024).

Here, the lower court stated, "the plain meaning of 'plainly unreasonable' is clearly or obviously unfair or unacceptable." (J.A. 6.) As discussed in Section C-D, *supra*, this definition conflicts with civilian appellate practice and the Navy-Marine Corps court's other decisions. However, even using its definition of "clearly or obviously unfair or unacceptable," Appellee's sentence is not plainly unreasonable.

First, Congress, provided a range of appropriate punishment for individuals who commit the misconduct Appellee committed. *See* MCM, app. 12B at A12B-1. Thus, his sentence is not arbitrary, or "clearly or obviously unfair or unacceptable," but a direct reflection of congressionally-approved standards.

Second, Appellee negotiated for his sentence. (J.A. 367.) It was not an unfair deal he was forced into, but an intentional choice he made, guided by competent counsel, to receive a benefit. (J.A. 301–02, 304, 326, 328, 358, 368–69.) He knew—because the Military Judge made sure he knew—that Trial Counsel might not issue the substantial assistance letter. (J.A. 313–14.) And Appellee has never alleged Trial Defense Counsel was ineffective in renegotiating or advising him on his Agreement. Therefore, his "punishment was the foreseeable result of the plea agreement," negotiated by his competent counsel, that he then "voluntarily entered into with the convening authority." *Wilson*, 2026 CCA LEXIS 72, at *13; *Jones*, 2026 CCA LEXIS 327, at *7; *Brockenborough*, 2026 CCA LEXIS 21, at *8.

Finally, and perhaps most importantly, the lower court's opinion ignores the key fact that Appellee's Agreement granted him immunity for uncharged misconduct. (J.A. 81–82, 365–66.)

Altogether, the lower court's erroneous standard of review is evident when it held a sentence that was (1) within the range of his bargained-for sentence and the parameters, (2) negotiated by Appellee via competent counsel, and (3) provided immunity from a firearm-related offense, was so "clearly or obviously unfair or unacceptable" as to be plainly unreasonable.

F. <u>The lower court's use of Appellee's assistance—where Trial Counsel under Article 60a, R.C.M. 1009, and the Plea Agreement had sole discretion to issue a substantial assistance letter—cannot lawfully detract from the high deference owed the sentencing authority by the lower court under "plainly unreasonable" review</u>.

1. <u>Trial counsels' decision to issue a substantial assistance letter is wholly discretionary under Article 60a and R.C.M. 1109(e)</u>.

Under *Vasquez*, "the choices made by Congress and the President in establishing the procedures for courts-martial under [the Code and the Rules for Courts-Martial] are entitled to a high degree of deference." 72 M.J. at 18 n.3. Courts must "presume that the statutory scheme established by Congress and implemented by the President constitutes both the parameters of what process is due and a fair trial in the military context" because "servicemembers [do not] enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM." *Id*. at 18 n.3, 19.

Here, Article 60a limits "authority to act on [a] sentence in" certain "post-trial circumstances." Art. 60a, UCMJ, 10 U.S.C. § 860a. Thus, convening authorities may only "reduce, commute, or suspend, in whole or in part," an accused's sentence for providing substantial assistance "[u]pon a recommendation by the trial counsel." Art. 60a(d), UCMJ, 10 U.S.C. §860a(d). R.C.M. 1109(e)(2) implements this statutory provision, allowing a convening authority to apply a substantial-assistance reduction "only upon the recommendation of trial counsel who prosecuted the accused," or, in that counsel's absence, the counsel "primarily responsible for the investigation or prosecution in the case in which the accused has provided substantial assistance."

Making this "recommendation . . . is the decision of trial counsel alone. No person may direct trial counsel to make or not make such a recommendation." *Id*. Only then may a convening authority "reduce, commute, or suspend a sentence in whole or in part, including any mandatory minimum sentence" on that basis. R.C.M. 1109(e)(4). *See also* Art. 60a(d). The only other authority informing trial counsels' decisions is R.C.M. 1109(e)(6), which merely states they "may consider the presentence assistance of the accused" when "evaluating whether [an] accused has provided substantial assistance." *See also* Art. 60a(d).

2. The Rule's federal counterpart provides more limited discretion for federal prosecutors. Federal courts apply a limited review to their decisions.

The Federal Rules of Criminal Procedure also contain a sentence-reduction mechanism for defendants who provide substantial assistance. Rule 35 outlines procedures, depending on how far past sentencing a case is, for federal prosecutors to make motions to reduce a defendant's sentence due to their substantial assistance. However, unlike trial counsels' sole discretionary authority to issue a substantial assistance letter, Rule 35 allows for courts to evaluate whether a defendant has provided substantial assistance. *See* Fed. R. Crim. P. 35(3). Even with this more limited discretion, however, federal courts only review these decisions in limited circumstances.

a. In *Hurtado*, the Eleventh Circuit held substantial assistance letters are a government "power, not a duty," and courts should only review decisions not to issue them where appellants make a "substantial threshold showing" of "unconstitutional motives" or irrational reasoning.

In *United States v. Hurtado*, No. 23-13160, 2025 U.S. App. LEXIS 838 (11th Cir. Jan. 14, 2025), the Eleventh Circuit examined Fed. R. Crim. Pro. 35 and found it "gives the government a power, not a duty, to file a motion when the defendant has substantially assisted." *Id.* (citing *United States v. McNeese*, 547 F.3d 1307, 1308 (11th Cir. 2008)). Thus, the court considered if the government—either through an agent's promise or the plea agreement—"unconditionally agreed" to file a substantial assistance motion. *Id.* at *7.

The court found the appellant failed to show "the government bargained away its discretion to refuse to file the motion." *Id*. at *8 (citing *United States v. Grant*, 493 F.3d 464, 467 (5th Cir. 2007)). Because the plea agreement only promised that the government would "consider" if the appellant's aid amounted to substantial assistance, the *Hurtado* court found the determination rested solely with the government. *Id*.

The court also held that when a plea agreement does not promise a substantial assistance motion, courts review the government's refusal to issue one only where an appellant makes a "substantial threshold showing" that the refusal was based on an "unconstitutional motive such as race or religion" or that "the refusal is not rationally related to any legitimate government end." *Id*. at *7 (citing *Wade v. United States*, 504 U.S. 181, 185–86 (1992)) (internal quotations omitted).

The court determined it could only review the decision to not file the motion under the *Wade* standard to determine if the appellant made the required substantial threshold showing. *Id*. at *8. The appellant did not claim unconstitutional motives or that the decision was not rationally related to a legitimate government end. *Id*. Thus, the court held the appellant failed to meet this showing. *Id*.

3. <u>R.C.M. 1109(e) is even more explicit about trial counsels' discretion than its federal counterpart. Thus, if service courts review their decisions at all, they should follow *Hurtado* and do so under the *Wade* threshold at most</u>.

As discussed in Section F.1–2, the President, in implementing Article 60a(d) through R.C.M. 1109(e)(2), provides even stronger language than Fed. R. Crim. P. 35: no one but trial counsel can decide whether an accused provided substantial assistance, and no one can direct trial counsel "to make or not make such a recommendation." This Court should thus interpret the decision as unreviewable, or, at most, follow *Hurtado* in reviewing solely under the *Wade* substantial-threshold showing, before finding no error in Trial Counsel's declination to issue a substantial assistance letter.

a. <u>Like in *Hurtado*, the Government did not bargain away its discretion; thus, at most, *Wade* applies</u>.

Here, Appellee's Plea Agreement emphasized the discretionary, conditional issuance of a substantial assistance letter no less than six times:

> (1) "*if* [Appellee provides] substantial assistance in the investigation and prosecution[;]" and
>
> (2) "*if* charges are referred [for two named Marines] and any other individuals," *then*
>
> (3) "the trial counsel who prosecuted [his] case *may* make a recommendation to the convening authority that [his] confinement be reduced[;]" however,
>
> (4) "*[t]he determination as to whether [he] provide[d] substantial assistance under this agreement rests solely with the trial counsel who prosecuted [his] case* in accordance with R.C.M. 1109(e)[;]" and
>
> (5) "*[i]f* trial counsel determines that [he] provided substantial assistance in accordance with this agreement," *then*
>
> (6) "a memo documenting such substantial assistance *may* be prepared by the trial counsel and provided to the convening authority."

(J.A. 365–66 (emphasis added).)

In contrast, the Convening Authority's action was conditional but non-discretionary: "Upon receipt of such substantial assistance letter, the convening authority agrees to reduce the confinement to 8 months for each [conviction] . . . and for the reduced confinement . . . to be served concurrently." (J.A. 366.)

Thus, like in *Hurtado,* the Government did not "bargain[] away its discretion." 2025 U.S. App. LEXIS 838 at *8. And, if Trial Counsel's decision is reviewable at all, Appellee must make *Wade's* requisite "substantial showing threshold," which he fails to do. *Wade*, 504 U.S. at 185–86.

b. Appellee fails to meet *Wade's* requisite showing.

Appellee failed to argue, much less make any "substantial threshold showing," that Trial Counsel's refusal to issue the letter was either based on unconstitutional motives or not rationally related to a legitimate government end. *See Wade*, 504 U.S. at 185–86. Instead, Appellee claimed Trial Counsel acted in bad faith. (J.A. 40, 71, 74–75.) However, he provided no evidence to support this speculative allegation; on the contrary, Trial Defense Counsel explained Trial Counsel found "the information [Appellee] provided was not sufficient enough to seek a subpoena" with regards to one of Appellee's alleged co-conspirators and that "the command had not issued Requests for Legal Services" for the alleged co-conspirators'. (J.A. 83.) Neither of these explanations demonstrate any "unconstitutional motive" or irrational relation "to any legitimate government end." *Wade* at 185–86.

And even if this Court were to review Trial Counsel's refusal to issue the substantial assistance letter for "bad faith," Appellee fails to explain why his additional misconduct of possessing a gun in the barracks was not the cause of his allegedly less favorable the Plea Agreement term. (J.A. 81–82, 366.)

Thus, even if this Court believes trial counsels' decisions on substantial assistances letters are reviewable at all given Article 60a(d), R.C.M. 1109, and plea agreement language like the one in this case, Appellee must provide some evidence to make a showing that Trial Counsel violated the Constitution or was not acting pursuant to a legitimate government purpose. *See Wade* at 185–86. He has failed to do so. Therefore this Court should find the Sentence is not plainly unreasonable and affirm it as adjudged.

4. <u>The lower court's decision creates confusion as to the proper standard in negotiating a plea agreement containing a substantial assistance provision</u>.

Determining whether to recommend a convening authority reduce the sentence of a court-martial under R.C.M. 1109(c)(3) is solely trial counsels' decision under R.C.M. 1109(e)(2), and an appellate court may not substitute its own opinion. Doing so would expand the scope of sentence review under Article 66 and usurp the independent authority of government counsel under Art. 60a(d), as implemented by the President in R.C.M. 1109(e), a rule which expressly provides that "[n]o person may direct trial counsel to make or not make such a recommendation." And in so doing, courts would grant servicemembers rights "beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM." *Vasquez*, 72 M.J. at 19.

Further, even if trial counsels' substantial-assistance determinations are reviewable, the lower court's holding also relieves Appellee of his burden to make the requisite "substantial threshold showing" to do so. *See* Section F.2–3, *supra*.

The opinion below assumes, without proving, (1) Trial Counsel's determinations are reviewable, (2) Appellee made the requisite showing to trigger that review, and (3) Appellee actually provided substantial assistance, not just tried to do so.[9]

Thus, the court created a standard in which—even if a trial counsel determines an appellant did not provide assistance substantial enough—service courts may circumvent that determination and invalidate part of a sentence using its "plainly unreasonable" sentence review power. This is clear from how the lower court reduced Appellee's sentence by the exact amount of confinement required had Trial Counsel issued the letter. (J.A. 9.) This reduction is both

[9] "'Substantial assistance' generally requires that the defendant's assistance has yielded results that are useful . . . not merely that the defendant expended substantial effort or good faith in attempting to assist." *United States v. Gonsalves*, 121 F.3d 1416, 1419 (11th Cir. 1997) *See also United States v. Guerra-Cabrera*, 477 F.3d 1021, 1025 n.4 (8th Cir. 2007) ("a substantial assistance departure also requires that positive results follow for the prosecution"); *United States v. Milo*, 506 F.3d 71, 78–79 (1st Cir. 2007) ("the government ordinarily insists on results to justify any assistance reduction," so trial court erred in awarding extremely low sentence where reasoning was based more on appellant's "contrition" than assistance provided).

arbitrary, in that it provides no analysis as to quantum, and *ultra vires*, in light of the amendments to Article 66 and the exclusive authority granted to the Trial Counsel in R.C.M. 1109 and Article 60a(d). The decision effectively neuters trial counsel's presidentially-directed power to determine if an appellant has, in fact, provided assistance sufficient to warrant a reduction in sentence and replaces it with the opinion of appellate judges reviewing the case from a cold record, far removed from the prosecutors and investigators who know the case best.

Conclusion

The United States respectfully requests that this Court reverse the decision of the lower court and affirm the findings and sentences of the Trial Court.

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MGO

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