IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Braxston C. SPENCER Lance Corporal (E-3) U.S. Marine Corps, Appellant	REPLY ON BEHALF OF APPELLANT Crim. App. Dkt. No. 202400328 USCA Dkt. No. 25-0192/MC

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

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

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Reply

A. The Government is right that a CCA need not explain its reasoning; but where, as here, a CCA's reasoning creates "open questions" that it applied the correct law, a new sentence appropriateness review may be needed.

The Government cites *United States v. Wincklemann* for the proposition that the CCA was not required to explain its reasoning behind its sentence appropriateness review.[1] It also compares this case to *United States v. Flores*[2] and argues that "it was not error for the lower court to not explicitly write that the sentence for every offense was appropriate given the evidence—especially since it was not required to detail its analysis at all."[3]

While it is true that a CCA need not explain its reasoning, as this Court wrote in *Flores* itself, "if the CCA's opinion reveals a misunderstanding of the applicable law, this Court may require a new sentence appropriateness review."[4]

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[1] Ans. at 5 (citing 73 M.J. 11, 16 (C.A.A.F. 2013)).
[2] 84 M.J. 277 (C.A.A.F. 2024).
[3] Ans. at 13.
[4] Ans. at 13. This is consistent with this Court's precedents explaining that a military judge is presumed to know the law—until the evidence indicates otherwise. *See, e.g., United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary."); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (explaining that a CCA is entitled to the presumption "that military judges are presumed to know the law and follow it, absent clear evidence to the contrary").

In fact, there only needs to be an "open question" that the CCA correctly applied the law for a remand to be appropriate.[5]

Here, the lower court's opinion creates several "open questions" as to whether it independently assessed the appropriateness of the sentence apart from its legality. The lower court did the following:

- Wrote: "'we generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement'"[6]
- Omitted the phrase "[o]ther than to ensure that the appellant's approved sentence is one that 'should be approved;" from the case it quoted above in saying it would not second guess the sentence;[7]
- Failed to say anywhere in the opinion that Appellant's sentence "should be approved" or was "appropriate" under the circumstances, unlike the Air Force CCA in *Flores*;
- Wrote that "Appellant's punishment was the foreseeable result of the plea agreement that he negotiated and voluntarily entered into with the convening authority";[8]
- Stated that "Appellant voluntarily chose to plead guilty in accordance with the specific terms of an agreement he freely negotiated";[9]

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[5] *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022) ("This Court also has remanded when it is 'an open question' whether a CCA's review under Article 66(d)(1), UCMJ, was 'consistent with a correct view of the law.'") (citation omitted).
[6] *United States v. Spencer*, No. 202400328, 2025 CCA LEXIS 168, at *6 (N-M. Ct. Crim. App. Apr. 18, 2025) (quoting *United States v. Widak*, No. 201500309, 2016 CCA LEXIS 172, at *7 (N-M. Ct. Crim. App. Mar. 22, 2016)).
[7] *Id*.; *Widak*, 2016 CCA LEXIS 172, at *7.
[8] *Spencer*, 2025 CCA LEXIS 168, at *6.
[9] *Id*.

- Found "instructive" that the Convening Authority and Appellant agreed to give the military judge discretion over whether to adjudge a bad-conduct discharge;[10]

- Cited the fact that "the adjudged sentence did not exceed the maximum allowable sentence under the UCMJ" or "exceed the terms of the plea agreement";[11]

- Deemed it "noteworthy" that the military judge only recommended clemency as to confinement but not a bad-conduct discharge.[12]

With regard to the last bullet point, the Government claims the lower court did not defer to the views of the military judge; rather, it claims "[t]he lower court was simply responding to Appellant's argument that it should find it important that the military judge recommended that Appellant's confinement be suspended due to the accused's 'sincere effort to reform.'"[13]

However, the CCA did not actually say that. Instead of adopting the Government's interpretation, this Court should simply look at what the lower court wrote. Here, the lower called the military judge's recommendation "noteworthy." This suggests that in conducting its sentence appropriateness review, the lower court found it important that the military judge did not recommend clemency as to the bad-conduct discharge. This creates the concern raised in *Baier* that the lower

[10] *Id*. at *5.
[11] *Id*.
[12] *Id*. at *6.
[13] Ans. at 12.

court "merely deferred to the 'individual consideration' [a]ppellant had previously received from the military judge" rather than independently assessing the issue.[14]

B. Unlike what occurred in *Arroyo*, the CCA did not cite the plea agreement for context—it cited the plea agreement as *the* context for its review and even referenced a policy against "second guessing" plea agreement sentences.

The Government acknowledges that the CCA referenced Appellant's plea agreement in evaluating the appropriateness of Appellant's sentence.[15] The Government says this was consistent with *United States v. Arroyo*.[16] However, the Government reads *Arroyo* too broadly.

In *Arroyo*, the appellant boldly argued that a CCA may not "legally recognize the existence of the plea agreement" when conducting its sentence appropriateness review.[17] In rejecting this argument, this Court explained that the plea agreement may be considered because it provides *context* to the CCA; it allows the CCA to understand why the parties believed the sentence in the plea agreement was fair.[18] This Court viewed the plea agreement's limitations on the sentence as "a reasonable—but not dispositive—indication of the sentence's

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[14] *United States v. Baier*, 60 M.J. 382, 383 (C.A.A.F. 2005).
[15] Ans. at 14.
[16] No. 24-0212, 2025 CAAF LEXIS 688 (Aug. 19, 2025).
[17] *Id*. at *9.
[18] *Id*. at *11 (explaining that "the AFCCA may evaluate the context in which the plea agreement arose, to understand why the parties—including Appellant—believed that the agreed-upon sentence was fair").

fairness to [the] [a]ppellant."[19] In other words, the plea agreement provides context though does not replace the CCA's duty to independently evaluate the sentence.

Here, by contrast, the lower court took the plea agreement too far. It referenced its policy that it would "generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement."[20] But "second guessing"—or at least scrutinizing—the sentence is the very duty that Congress requires the CCA to do, regardless of the sentence's legality. As this Court has also explained, "Article 66[d][1] '*requires* that the members of [the Courts of Criminal Appeals] independently determine, in every case within [their] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [they] affirm."[21]

Relatedly, as this Court recently explained, even where there is a plea agreement, a CCA must "determine *on its own* whether the sentence agreed to by the parties is appropriate."[22] In *Arroyo*, this Court acknowledged that it would not condone a CCA's "improperly using a plea agreement during its sentence appropriateness review[.]"[23] The CCA's policy is one such example of such an

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[19] *Id*.
[20] *Spencer*, 2025 CCA LEXIS 168, at *6 (citation omitted).
[21] *Baier*, 60 M.J. at 384-85 (emphasis added) (citation omitted).
[22] *Arroyo*, 2025 CAAF LEXIS 688, at *11 (emphasis added).
[23] *Id*. at *9-10 ("Although we agree that a service court *could* err by improperly using a plea agreement during its sentence appropriateness review (as Appellant suggests in her assigned issues before this Court), we do not agree that the AFCCA

improper use: it eroded Appellant's statutory right to an independent review of the appropriateness of his sentence.

C. The Government's three proffered reasons for why the lower court did not err all come up short under *United States v. Baier*.

The Government claims three reasons show the lower court properly applied the law. First, the Government points out that the lower court acknowledged Appellant's argument.[24] Next, the Government observes that the lower court made legally correct statements about sentence appropriateness review in its analysis.[25] Finally, the Government notes that in a four-sentence paragraph, "the lower court discussed Appellant's misconduct—and its severity—in depth[.]"[26]

United States v. Baier explains the shortcomings of all three arguments. In *Baier*, this Court noted that a CCA's recital of the correct legal standard in one part of its analysis does not necessarily cure other defects in its analysis.[27] Like

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was prohibited from acknowledging the plea agreement's existence or discussing the context in which the parties reached the agreement.") (emphasis in original).

[24] Ans. at 10.

[25] *Id*. at 9-10; *id*. at 14 (arguing that the lower court "distinguish[ed] its authority from clemency power, detailed the severity of Appellant's misconduct, noted that the Appellant and Convening Authority agreed to give the Military Judge discretion as to discharge, considered that the Military Judge's suspension recommendation was focused on confinement and not discharge, and finally noted its general practice to not second-guess sentences flowing from lawful plea agreements.").

[26] *Id*.

[27] 60 M.J. at 383.

occurred in Appellant's case, in *Baier*, the CCA properly noted that its role was to decide "'whether the accused received the punishment he deserved'" and distinguished sentence appropriateness review from acts of clemency.[28] Also like in Appellant's case, the CCA in *Baier* also described "the facts of [a]ppellant's case" and alluded to the "seriousness of" the appellant's "offenses" in the case.[29]

This was not enough. As this Court explained, the problem arose from the CCA's other comments in the opinion, including its statement that "[t]he appellant received the individual consideration required based on the seriousness of his offenses and his own character, which is all the law requires."[30] As this Court explained, this sentence made it "impossible for [this Court] to determine whether the lower court conducted an independent assessment of the appropriateness of [a]ppellant's sentence or merely deferred to the 'individual consideration' [a]ppellant had previously received from the military judge and the convening authority."[31]

The same logic applies in Appellant's case. That the CCA acknowledged Appellant's argument and correctly described—in general terms—its sentence

[28] *Id*. (citation omitted).
[29] *Id*.
[30] *Id*.
[31] *Id*.

appropriateness review duty in one place does not cure the problematic statements in its opinion, discussed above.

The same is true of the lower court's four-sentence description of Appellant's conduct. In the paragraph, the CCA described Appellant's crimes as "serious misconduct"; explained that he returned to the store "a mere three days later" to steal again; and "was so emboldened" as to go back and steal yet again.[32] But as *Baier* instructs, even if the lower court discussed the facts of the case and alluded to the "seriousness" of Appellant's acts, if the lower court's analysis in other places "suggests that it may have relied on an improperly circumscribed standard" the remedy is to remand to ensure a proper standard is applied.[33]

In short, this Court's words in *Baier* dictate the proper result: while "[i]t is possible that in this case, the lower court 'independently determined' the sentence's appropriateness[,]" its other comments make it "impossible" for this Court to be sure of this.[34]

[32] *Spencer*, 2025 CCA LEXIS 168, at *5.
[33] *Baier*, 60 M.J. at 385.
[34] *Id*. at 383, 385.

D. The Government's reliance on *Flores* is misplaced: there, unlike here, the CCA gave no indication it applied the wrong standard and clearly indicated that it considered the appropriateness of the sentence apart from its legality.

Separately, the Government compares what occurred in this case to *United States v. Flores*.[35] Again, the Government reads a CAAF precedent too broadly.

In *Flores*, this Court concluded that the CCA was not required to comment on the appropriateness of each segmented sentence if the opinion did not provide a reason to question whether the lower court properly applied the law.[36] As *one reason* for affirming the lower court's decision, this Court noted that the CCA "looked carefully and fully at the aggravating evidence pertaining to each of the offenses of which Appellant was found guilty."[37] The Government seizes on this part of *Flores* and argues that because the lower court here also commented on the aggravating facts of Appellant's case, this Court can likewise be convinced that the CCA properly applied the law.[38]

However, *Flores* does not stand for the proposition that a CCA's sentence appropriateness review is legally correct *as long as* the CCA comments on the

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[35] 84 M.J. at 277.
[36] *Id*. at 282 (explaining that the CCA's opinion "did not express any incorrect statement of the law").
[37] *Id*.
[38] Ans. at 13 ("And, as in *Flores*, it was not error for the lower court to not explicitly write that the sentence for every offense was appropriate given the evidence—especially since it was not required to detail its analysis at all.").

aggravating facts. Rather, *Flores* stands for the unremarkable proposition that a CCA's sentence appropriateness review will be affirmed unless the opinion provides a reason to believe the CCA misapplied the law.[39] And in *Flores*, unlike here, there was good reason for this Court to believe the lower court properly applied the law. In *Flores*, the AFCCA's sentence appropriate analysis concluded with a paragraph that demonstrated it had considered the appropriateness of the appellant's sentence apart from its legality. The paragraph in question read:

> We have conducted a thorough review of Appellant's entire court-martial record, including Appellant himself, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record of trial. We conclude that the nature and seriousness of the offenses support the adjudged sentence. Understanding we have a statutory responsibility to affirm only so much of the sentence that is correct and should be approved, Article 66(d), UCMJ, we conclude that the sentence is not inappropriately severe, and we affirm the sentence adjudged and as entered by the military judge.[40]

Here, by contrast, there is no such paragraph at the end of the lower court's analysis. In fact, the lower court did not even say that it found the sentence "appropriate" or otherwise conclude that it "should be approved." As a result—

[39] *Flores*, 84 M.J. at 282 (explaining that "if the CCA's opinion reveals a misunderstanding of the applicable law, this Court may require a new sentence appropriateness review").
[40] *United States v. Flores*, No. ACM 40294, 2023 CCA LEXIS 165, at *17-18 (A.F. Ct. Crim. App. Apr. 13, 2023).

unlike in *Flores*—this Court is left guessing as to whether the lower court applied the correct legal standard.

Conclusion

This Court should set aside the sentence and remand for further review under Article 66, UCMJ.

Respectfully Submitted,

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

Certificate of Compliance with Rules 24(b) and 37

1. This brief complies with the type-volume limitations of Rule 24(b) because it contains fewer than 6,500 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and electronically served on opposing counsel on September 30, 2025.

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