IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE'S REPLY BRIEF
v.	)	Crim.App. Dkt. No. 202400328
Braxton C. Spencer, Lance Corporal (E-3) U.S. Marine Corps, Appellant	)	USCA Dkt. No. 25-0192/MC

JACOB R. CARMIN
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
Bar no. 38092

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8502, fax (202) 685-7687
Bar no. 37314

IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 33211

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

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Issue Presented

UNDER ARTICLE 66, UCMJ, A CCA MUST DETERMINE THE APPROPRIATENESS OF A SENTENCE APART FROM ITS LEGALITY. DID THE CCA ABUSE ITS DISCRETION BY SAYING IT WOULD NOT "SECOND GUESS[]" A SENTENCE BECAUSE IT FELL WITHIN THE RANGE OF A PLEA AGREEMENT WITHOUT INDICATING THE SENTENCE WAS ALSO APPROPRIATE?

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of bad-conduct discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2018). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

A military judge sitting as a special court-martial convicted Appellant, pursuant to his pleas, of larceny in violation of Article 121, UCMJ, 10 U.S.C. § 921 (2018). The Military Judge sentenced Appellant to a total of sixty days of confinement, reduction to pay grade E-1, forfeiture of $1,344 per month for two months, and a bad-conduct discharge. The Convening Authority took no action on the sentence. The Military Judge entered the judgment into the Record, whereby the sentence, except for the punitive discharge, was executed.

Statement of Facts

A. The United States charged Appellant with four Specifications of larceny and he agreed to plead guilty.

The United States charged Appellant with four Specifications of larceny. (J.A. 13–15.) Under a Pretrial Agreement, Appellant agreed to plead guilty to all four Specifications. (J.A. 91–94.) In exchange, Appellant would serve no longer than two months of confinement and would not be adjudged a fine. (J.A. 94.) Appellant also agreed to be reduced to pay grade E-1, to forfeit two-thirds of his pay for up to two months, and that the Military Judge would be able, but was not required, to adjudge a bad conduct discharge. (J.A. 94.)

B. Military Judge accepted his Pleas.

The Military Judge conducted a Providence Inquiry and Appellant agreed to a Stipulation of Fact. (J.A. 16–48, 70.) Appellant said within just eight days, he stole from the Marine Corps Exchange on Camp Pendleton four times, taking electronics, tools, and clothing with a total value of about $4,283.92. (J.A. 20–21, 27–28, 31, 34–36, 39–42; *see* J.A. 99–104.) Appellant would seize the merchandise, remove any theft-prevention tags, and exit the store without paying. (Pros. Ex. 1 at 3, 5, 7, 8; R. 36, 45.) Appellant admitted to stealing "for personal use and benefit of myself." (J.A. 42.) Except for Specification 1, where Appellant was assisted by another Marine, Appellant committed the offenses alone. (J.A. 70.)

The Military Judge accepted Appellant's Pleas and found Appellant guilty of all four Specifications of larceny. (J.A. 48–49.)

C. The United States and Appellant submitted sentencing evidence.

As evidence in aggravation, the United States offered the matters submitted for findings. (J.A. 50; *see* J.A. 19–43; *see also* J.A. 70.) The United States recommended a sentence of sixty days of confinement and a bad-conduct discharge. (J.A. 60.)

As evidence in extenuation and mitigation, Appellant offered character statements, his completion of a substance abuse rehabilitation program, and testimony from Appellant's supervisor about his military performance. (J.A. 78–90.) His supervisor "[did not] think his actions were justified." (J.A. 56.) Appellant also provided an unsworn statement, where he said he confessed to his guilt and "felt ashamed" only after his arrest. (J.A. 57, 97.) Appellant requested a sentence of thirty days of confinement without a bad-conduct discharge. (J.A. 66.)

D. The Military Judge sentenced Appellant.

The Military Judge sentenced Appellant to a total of sixty days of confinement, reduction to pay grade E-1, forfeiture of $1,344 per month for two months, and a bad-conduct discharge. (J.A. 67.) The Military Judge recommended to the Convening Authority that all confinement be suspended for a

period of six months because "[w]itness testimony and character statements suggest[ed] [Appellant] ha[d] made a sincere effort to reform." (J.A. 67.)

E. The Convening Authority took no action and the Military Judge executed the Entry of Judgment.

The Convening Authority took no action on Appellant's Sentence. (J.A. 6–7.) The Military Judge then entered the Judgment into the Record. (J.A. 8.)

F. The lower court reviewed the sentence.

Before the lower court, Appellant alleged that his bad-conduct discharge was inappropriately severe. (J.A. 3.)

In assessing the sentence, the lower court concluded that "Appellant committed serious misconduct" by "steal[ing] from the [Marine Corps Exchange] on four separate occasions." (J.A. 4–5.) It noted that Appellant stole from the Exchange twice in a single day, that he foiled antitheft measures, and that he stole the clothing and electronics for personal use. *Id*.

The court then held:

> It is instructive to this Court that the convening authority and Appellant agreed to give the military judge discretion on whether or not to adjudge a bad-conduct discharge. Further, it is also noteworthy that in his recommendation to the convening authority, the military judge only spoke of suspension of the confinement as a result of Appellant's attempt to reform and not the discharge. The record shows Appellant's punishment was the foreseeable result of the plea agreement that he negotiated and voluntarily entered into with the convening authority. Appellant voluntarily chose to plead guilty in accordance with the specific terms of an agreement he freely negotiated. As we have previously stated, "we generally refrain from second guessing or

> comparing a sentence that flows from a lawful pretrial agreement." Accordingly, we find Appellant's sole assignment of error to be without merit.

(J.A. 4–5.)

The lower Court upheld the Findings and Sentence. (J.A. 5.)

Argument

THE LOWER COURT PROPERLY CONSIDERED BOTH THE LEGALITY AND THE APPROPRIATENESS OF APPELLANT'S SENTENCE.

A. The standard of review is de novo.

This Court reviews a service court's sentence appropriateness review by asking whether the lower court abused its discretion or acted inappropriately—that is, arbitrarily, capriciously, or unreasonably—as a matter of law. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010). In analyzing sentences, a service court is not obligated to detail its analysis, but it does receive greater deference on review when such an analysis is included. *United States v. Flores*, 84 M.J. 277, 282 (C.A.AF. 2024); *United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013) (reassessing sentence). Nonetheless, even where the analysis is not included in the opinion, a service court does not abuse its discretion where it considers the totality of the circumstances and applies the correct framework. *Winckelmann*, 73 M.J. at 16.

The scope and meaning of Article 66 is a matter of statutory interpretation, and is reviewed de novo. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010).

B. Although the lower court erred in the effective date of the new statute, it court correctly applied the prior Article 66 sentence appropriateness review, using the "should be approved" standard and its associated precedent.

Appellant's offenses occurred in June, 2023. (J.A. 13.) By that time, Congress had substantially amended Article 66. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-18 § 539E(d) 135 Stat. 1541, 1703–1706 (2021). However, the amendment was to "take effect on the date that is two years after the date of the enactment of [the National Defense Authorization Act for Fiscal Year 2022] and shall apply to sentences adjudged in cases in which all findings of guilty are for offenses that occurred after the date that is two years after the date of the enactment of this Act." Pub. L. No. 117-81 § 539E(f). The act was passed on December 27, 2021. *Id.*

Because Appellant pled guilty to offenses occurring before December 27, 2023, the lower court should have, and in fact did review Appellant's sentence under the earlier version of Article 66, UCMJ.[1] *See* National Defense

[1] The lower court erroneously claimed that the current version of Article 66 applies only if all of Appellant's offenses occurred after January 27, 2023. The determinative date is, in fact, December 27, 2023. Appellant's offenses occurred in June 2023, prior to the effective date. Thus, while the lower court misstated the

Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E(f), 135 Stat. 1541, 1703–1706 (2021).

"Article 66(d)(1) provides, in part, that courts of criminal appeals may affirm only . . . the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." *United States v. Swisher*, 85 M.J. 1, 4 (C.A.A.F. 2024). The language "empowers the CCAs to review cases for sentence appropriateness." *Id.* Sentence appropriateness is an individualized assessment based on the nature and seriousness of the offense, as well as the character of the offender.

"A Court of Criminal Appeals must determine whether it finds the sentence to be appropriate." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). This analysis requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (citation omitted).

This Court has recognized that it is a "settled premise" that in exercising this statutory mandate, a service court has discretion to approve only that part of a sentence that it finds "should be approved," even if the sentence is "correct" as a

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date on which the new standard took effect, it nonetheless applied the correct standard.

matter of law.[2] *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (internal citation removed) (finding that a service court's sentence appropriateness power was not limited by statutory mandatory minimum punishments).

D. In *Baier* and *Kelly*, the lower court applied an incorrect standard.

In *Baier*, the Navy-Marine Court of Criminal Appeals used legally incorrect language in its sentence appropriateness analysis from a case that had been set aside by the Court of Military Appeals. 60 M.J. 382, 384. Specifically, the lower court wrote that "the appellant received the individual consideration required based on the seriousness of his offenses and his own character, which is all the law requires." *Id*. It then cited to the superseded case, and incorrectly indicated that the case had been affirmed by the Court of Military Appeals. *Id*.

The service court's opinion did not indicate whether it was independently assessing the sentence or merely deciding whether the sentence merited assessment at all. *Id*. This Court found that, because of the ambiguity and recitation of an incorrect standard, it was "impossible" to determine whether the lower court conducted "an independent assessment of the appropriateness of Appellant's sentence or merely deferred to the 'individual consideration' Appellant had

[2] The United States concurs with Appellant's assertion that this Court should hold that "a [service court]'s duty to consider the appropriateness of sentences includes sentences adjudged pursuant to plea agreements." (Appellant Br. at 13, Aug. 8, 2025); *see United States v. Arroyo*, No. 24-0212, 2025 CAAF LEXIS 688 (C.A.A.F. Aug. 19, 2025).

previously received from the military judge and the convening authority." *Id*. at 383–85. Thus, to ensure that the appellant was not prejudiced, this Court set aside the lower court's opinion. *Id*. at 385.

In *Kelly*, the service court declined to review the severity of a mandatory dishonorable discharge, reasoning that it lacked the power to exercise sentence appropriateness review on a punishment mandated by law. 77 M.J. at 406. This Court remanded, holding that Congress intended the service courts to have "awesome, plenary, de novo power of review" granting them power to disapprove mandatory sentences. *Id*. at 407–08. (citations omitted.)

E. Unlike *Baier* and *Kelly*, the lower court here applied the correct standard.

Unlike *Baier* and *Kelly*, the lower court did not rely on legally incorrect standards or limitations on their authority. The Navy-Marine Corps Court first noted the recent Congressional change to Article 66(d)(1), and correctly determined which sentence appropriateness standard applied to Appellant's case. (J.A. 4 at n.9.) *See supra*, Section B. The lower court then correctly restated its "significant discretion" in assessing the sentence so long as it did not engage in acts of clemency. (J.A. 4.) The court noted the difficulties in distinguishing clemency from sentence appropriateness, but cited this Court's decision in *Nerad* to support that the analysis must be done with reference to "some legal standard."

(J.A. 4. at n.12.) The lower court did not, as the service court did in *Kelly*, erroneously indicate that it was not empowered to act upon the sentence.

Then, again unlike *Baier*, the lower court did not make it ambiguous whether it had considered the sentence independently. Rather, the service court indicated in three places that it had independently considered the appropriateness of the sentence. First, it indicated that it considered Appellant's argument that "his sentence of a bad-conduct discharge is inappropriately severe and should be set aside given the nature of the offense, the military judge's acknowledgement of his rehabilitative potential, Appellant's character statements, and remorse for his actions." (J.A. 3.) Next, the court noted that its review required "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." (J.A. 4.) Finally, the lower court discussed Appellant's misconduct—and its severity—in depth:

> Appellant committed serious misconduct. He stole from the MCX on four separate occasions. Encouraged by his first sojourn into this criminal enterprise with a fellow Marine where he stole items worth a significant amount, he went back to the same store a mere three days later for an expensive tool set. Appellant was so emboldened by his previous thefts, he chose to go back again five days later to steal not one time, but two times that day, filching a variety of items from clothing to electronics. He admitted to foiling the security measures in place to prevent theft and walking out each time, taking the items with him for his personal use.

(J.A. 4.)

F. The lower court's distinction between clemency recommendations and sentence appropriateness is accurate under *Nerad*, and its reference to the Military Judge's sentence suspension recommendation was responsive to Appellant's argument before the lower court.

Although the Service Courts have the discretion to review the appropriateness of the adjudged sentence, they may not engage in acts of clemency. *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010).

In *Nerad*, this Court remanded a sentence evaluation where the service court dismissed a conviction for child pornography—reasoning that the specific conduct at issue had not merited prosecution for an offense requiring sex offense registry. 69 M.J. at 141. This Court found the service court abused its discretion because it had not disapproved the finding with reference to a legal standard, but rather to an equitable one; it held that a service court abuses its discretion when it acts with the belief that the appellant should not have been prosecuted or that clemency should have been granted by a convening authority. *Id*. at 148.

Here, the lower court explicitly cited this Court's admonition in *Nerad* that it must only take action on the findings and sentence with regard to "some legal standard"; and that it did "not have discretion to engage in acts of clemency." (J.A. 5.) It discussed in detail the Military Judge's recommendation for suspension—which the court noted was focused on confinement, not discharge—

and noted that the convening authority reviewed that recommendation and took no action.

Appellant now claims that this indicated the lower court failed to conduct an independent, de novo review. (Appellant Br. at 18–19.) This is an inaccurate characterization. The lower court was simply responding to Appellant's argument before the lower court 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." (J.A. 3.) Thus, the lower court correctly reasoned that taking action as to the sentence—for the reasons Appellant provided—would have constituted impermissible clemency.

G. Like *Flores* and *Arroyo*, the lower court considered the evidence against Appellant and "the entire record"—including the plea agreement and the context in which the parties reached the agreement—in assessing the sentence.

1. In *Flores*, this Court did not require the lower court provide detailed analysis on every charge.

In *United States v. Flores*, 84 M.J. 277 (C.A.A.F. 2024), this Court reviewed whether the Air Force Court of Criminal Appeals abused its discretion in assessing the appropriateness of a segmented sentence when it focused its written analysis almost entirely on the false official statement charge, with little discussion of the assault charge. This Court found that the service court did not abuse its discretion because it "looked carefully and fully at the aggravating evidence pertaining to

each of the offenses of which Appellant was found guilty"—including that the victim was a two-year-old, that the appellant's lies had minimized the assault, and that the lies prevented the child from being treated. *Id*. at 282.

2. Like *Flores*, the lower court addressed the aggravating circumstances, and there is no error where they did not explicitly find the sentence appropriate.

The lower court here did not explicitly state that the sentence was appropriate given the offense and the evidence in the Record. However, as in *Flores*, the court "looked carefully and fully at the aggravating evidence" when it discussed the frequency of Appellant's repeated thefts and the items he stole. (J.A. 4–5.) 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. *Winckelmann*, 73 M.J. at 16.

3. In *Arroyo*, the lower court did not err by considering a plea agreement in its sentence appropriateness review.

In *United States v. Arroyo*, No. 24-0212, 2025 CAAF LEXIS 688 (C.A.A.F. Aug. 19, 2025), this Court declined to hold that a service court could never recognize a plea agreement in determining its sentence appropriateness review. While recognizing that a service court could err by using a plea agreement improperly, it nevertheless recognized the longstanding premise that absent evidence to the contrary, an appellant's own sentence proposal—and the context in which the parties reached the agreement—were valid considerations in assessing

the sentence. *Id*. at *9–10 (internal citations omitted). Thus, "the sentence agreed to by [an appellant] in the plea agreement is a reasonable—but not dispositive—indication of the sentence's fairness to [a]ppellant." *Id* at *11 (citing *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979).

4. Like *Arroyo*, the lower court here was not wrong in considering the Plea Agreement as part of the "whole record."

Likewise, the lower court considered, one by one, every relevant factor in determining whether Appellant's sentence was appropriate, separate from its legality. The lower court, distinguishing 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. (J.A. 2–5.) Thus, contrary to Appellant's assertion, the lower court considered the appropriateness of the sentence apart from it's legality. Its discussion of the Plea Agreement was not merely a discussion as to legality, but as in *Arroyo*, was a factor in assessing the appropriateness of the sentence.

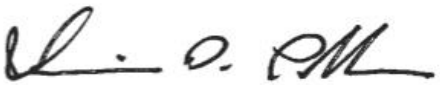
Appellant's argument otherwise constitutes a mere complaint that the lower court did not detail its reasoning, which it was not obligated to do. *Wincklemann*, 73 M.J. at 16.

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged below.

JACOB R. CARMIN
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
Bar no. 38092

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687
Bar no. 37314



IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 33211

BRIAN K. KELLER
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Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

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JACOB R. CARMIN
Captain, U.S. Marine Corps
Appellate Government Counsel