

No. _____

In the Supreme Court of the United States

MAKHI BROCKENBOROUGH, PRIVATE FIRST CLASS,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

PETITION FOR WRIT OF CERTIORARI

COLIN P. NORTON	BENJAMIN M. COOK
MAJ, U.S. MARINE CORPS	LT, JAGC, U.S. NAVY
<i>Counsel of Record</i>	

Navy-Marine Corps
Appellate Defense Division
1254 Charles Morris St., S.E.
Building 58, Suite 100
Washington, DC 20374
colin.p.norton.mil@us.navy.mil
(202) 685-7054

Counsel for Petitioner

QUESTION PRESENTED

Congress amended the military's sentencing review scheme, effective December 2023. Both parties agree Congress intended to replicate the existing federal sentencing review scheme post-*United States v. Booker*, 543 U.S. 220 (2005). In *Gall v. United States*, 552 U.S. 38, 51 (2007), this Court held that appellate courts “must give due deference” to a sentencing judge’s “decision” applying the 18 U.S.C. § 3553(a) sentencing factors, and courts of appeal cannot conduct *de novo* reviews. The military’s mandatory sentencing factors, 10 U.S.C. § 856, are virtually analogous to section 3553(a).

Here, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) acknowledged existing federal case law, yet affirmatively declined to consider, let alone provide deference to, the sentencing judge’s decision applying the sentencing factors. The Court of Appeals for the Armed Forces (CAAF) declined review.

The question presented is:

Whether an appellate court can conduct a *de novo* sentence review, refusing to consider the sentencing judge’s decision in applying the sentencing factors.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are: The United States and Private First Class Makhi Brockenborough, U.S. Marine Corps.

CORPORATE DISCLOSURE STATEMENT

No publicly traded entity has an interest in the outcome of this appeal.

RELATED PROCEEDINGS

Other than the direct appeal that forms the basis for this petition, there are no related proceedings for purposes of S. Ct. R. 14.1(b)(iii).

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OPINIONS BELOW

The order of the United States Court of Appeals for the Armed Forces (CAAF) denying review of Petitioner's case is not yet reported. It is available at 2026 CAAF LEXIS 404 (C.A.A.F. May 4, 2026), and is reproduced in App. A. The decision of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) is unreported. It is available at 2026 CCA LEXIS 21 (N-M. Ct. Crim. App. Jan. 21, 2026), and is reproduced in App. B.

JURISDICTION

The NMCCA had jurisdiction over this case pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2024). The CAAF had jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2024). On May 4, 2026, the CAAF issued its order denying review, under 10 U.S.C. § 867(b)(1)-(2) (2024). This Court has jurisdiction under 28 U.S.C. § 1259(3).

STATUTORY PROVISIONS INVOLVED

Full text provided at App. 18-23

1. Article 53a(b), (c), (e), UCMJ, 10 U.S.C. § 853a(b) (2024)
2. Article 56(c), UCMJ, 10 U.S.C. § 856(c) (2024)
3. Article 60a(c), UCMJ, 10 U.S.C. § 860(c) (2024)
4. Article 66(e)(1)(D), (f)(2), UCMJ, 10 U.S.C. § 866(e)(1)(D) (2024)
5. 18 U.S.C. § 3553(a) (2024)

STATEMENT OF THE CASE

Petitioner, an active-duty Private First Class in the United States Marine Corps, matched with “Karina” on an adult dating application. App. 5-6. In truth, Karina was a fictitious online persona that law enforcement created and controlled, though Appellant did not know that until his arrest. App. 6. After Petitioner matched and began messaging with Karina in the dating application chat, the law enforcement agent stated that Karina was close to fifteen-years-old, not eighteen-years-old as her dating profile represented. App. 6-7.

The United States charged Petitioner, and he agreed to plead guilty to attempted sexual assault of a child, attempted sexual abuse of a child, attempted extramarital sexual conduct, and fleeing apprehension.¹ App. 7-8. Under the agreement, the stipulated sentence was to be thirty months’ confinement, reduction in rank, and a punitive discharge (either a bad-conduct or dishonorable discharge). *Id.* The sentencing judge had no discretion to award less than thirty months’ confinement and was required to award a punitive discharge. *Id.*

In his sentencing case, Petitioner called a forensic psychologist from Walter Reed National Military Medical Center. App. 8. The psychologist performed a recidivism risk analysis/actuarial risk assessment, which included reviewing all case material, medical records, and behavioral health records. *Id.* The

¹ The court of first instance exercised federal jurisdiction pursuant to Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1) (2024).

psychologist rated Petitioner as having below average risk of recidivism, the second lowest tier. *Id.*

Following sentencing arguments, the military judge sentenced Petitioner to the stipulated amount of confinement, thirty months, and awarded the lower of the two discharges he could award. App. 8-9, 15-16. He then recommended that the punitive discharge and eight months' confinement be suspended. App. 15-16. The judge explained his reasoning on the record:

- Petitioner's young age of eighteen at the time of the offenses;
- Petitioner's limited life experience;
- The fact that Petitioner was convicted of indecent communication with a fictitious online persona;
- The "age" of the online persona in relation to Petitioner's age;
- Petitioner's "readily apparent remorse" and "sincere acknowledgment of his wrongdoing during his unsworn statement";
- The fact that Petitioner is a father of young children;
- The fact that Petitioner's plea agreement includes a provision for waiver of an administrative separation board;
- The testimony of a defense sentencing witness regarding the Petitioner's low risk of recidivism;

- The “safe harbor provision” in [Department of Defense Instruction] 1325.07 applies;²
- The absence of significant evidence in aggravation;
- The need for the sentence to be sufficient but not greater than necessary to promote justice; and
- The need for the sentence to rehabilitate Petitioner.

Id.

On appeal to the Navy and Marine Corps Court (NMCCA) of Criminal Appeals, Petitioner raised one issue—that his sentence was “plainly unreasonable” under 10 U.S.C. § 866(e)(1)(D) (2024). The NMCCA acknowledged the “military judge identified several mitigating factors leading to his clemency recommendation to the convening authority,” but declined to consider them in its sentencing review because “clemency involves bestowing mercy and is [not] a function . . . [of] the military appellate courts[.]” App. 13. The court then recited what *it* found to be aggravating factors in the case and held the sentence was reasonable. App. 13-14.

Petitioner sought review before the Court of Appeals for the Armed Forces (CAAF), arguing the

² This provision makes a consensual offense between a victim of at least thirteen years of age and an offender not more than four years older than the victim a non-reportable offense for sex registration purposes. *See* App. B at 7 (citing Dep’t. of Def. Instr. 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Programs*, para. 5.7(d)(5)(a) (Nov. 21, 2024)).

NMCCA violated this Court's case law by refusing to consider the sentencing judge's findings and by ignoring the mandatory sentencing factors upon which those findings were based. The CAAF declined review. App. 1-2.

REASONS FOR GRANTING THE PETITION

Military courts refuse to apply *Gall* and will not consider, let alone provide deference to, a sentencing judge’s “decision” applying mandatory sentencing factors when it benefits the appellant.

This Court’s holding in *Gall v. United States*, 552 U.S. 38 (2007), has been the law of the land for nearly twenty years. Federal courts have cited *Gall* over 18,000 times, and it is universally understood to be the Black Letter law on how appellate courts review trial judges’ sentencing decisions. *See, e.g., Holguin-Hernandez v. United States*, 589 U.S. 169, 170 (2020). But military courts refuse to apply *Gall* when it benefits the appellant—only providing such deference when it supports a higher sentence.³

Appellant asks this Court to grant, vacate, and remand to the NMCCA with a narrow requirement: to conduct its sentence review in accordance with *Gall v. United States*; the court cannot completely disregard the sentencing judge’s decision, and it cannot conduct a *de novo* review. Appellant does not ask this Court to address whether the sentence is reasonable, or to

³ Compare App. 13 (refusing to consider Appellant’s request to consider the sentencing judge’s sentencing decision, which supported his position on appeal) with *United States v. Sanchez*, No. 202500114, 2026 CCA LEXIS 249, at *6-7 (N-M. Ct. Crim. App. May 28, 2026) (providing deference to the sentencing judge’s sentencing decision, where such deference supported the Government’s position on appeal) (citing *Gall*, 552 U.S. at 51-53) (other citations omitted); *United States v. Jones*, No. 202500018, 2026 CCA LEXIS 327, at *5 (N-M. Ct. Crim. App. July 13, 2026) (same) (citing *Gall*, 552 U.S. at 51-53) (other citations omitted)).

otherwise dictate the particulars of sentencing review under the Uniform Code of Military Justice (UCMJ).

Congress amended the military's sentencing review statute in a way that both parties and the court agree: to align the military's system with federal civilian post-*United States v. Booker*, 543 U.S. 220 (2005), sentencing scheme. The Government, in this case and others, argues military appellate courts should apply *Gall* deference to sentencing judges. App. 17. Military courts partially agree and apply that deference, but only when beneficial to the Government. Here, contrary to the Government's argument that *Gall* applies, the military court refused to consider the judge's sentencing decision when he agreed with the Defense's argument that the sentence was too high. It then conducted an impermissible *de novo* review.

The sentencing judge lacked the power to reject the plea agreement, Article 53a(b), UCMJ, 10 U.S.C. § 853a(b) (2024), but believed the mandated punishment in the agreement was greater than necessary to serve the sentencing factors. App. 15-16. He exercised the only sentencing power he had to recommend a lower sentence—specifically, that confinement should be lowered by eight months, and the punitive discharge removed. *Id.*

He based his decision squarely on the statutory sentencing factors and he provided detailed reasoning. *Id.* The military court affirmed the sentence, refusing to consider his recommendation. App. 13-14. Its cursory sentencing review disregarded the sentencing factors upon which that recommendation relied. *Id.*

This conflicts with *Gall* and throws the military’s sentencing review system into chaos. If allowed to stand, it would create a schism between the military and civilian systems that Congress intended to align. Instead of implementing the statute as this Court and the federal circuits have done post-*Booker*, military courts will only consider a sentencing judge’s application of the sentencing factors if it benefits the Government.⁴

The Court of Appeals for the Armed Forces (CAAF) refused to intervene and hear this case, notwithstanding the obvious split with this Court’s precedent and that of every federal circuit. As this Court has done many times over the past twenty years for civilian defendants when challenging their sentences, it should step in to require the NMCCA to apply the law.

A. The parties and the court agree that Congress amended the UCMJ to align with the post-*Booker* federal sentencing review system.

Congress amended the military’s sentencing review statute, changing the standard from the military’s unique test to one based on reasonableness. *See* Article 66(e), UCMJ, 10 U.S.C. § 856 (2024); *National Defense Authorization Act for Fiscal Year 2022*, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1703–1706 (2021); *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (describing the prior sentence review standard as having “broad discretion[,]” “no direct parallel in the federal civilian

⁴ *See* note 3, *supra*.

sector” and reflecting “the unique history and attributes of the military justice system”) (citations omitted).

The parties agree this amendment was “intended to provide substantial deference to the trial judge[.]” and Article 66’s plain language supports this position. 10 U.S.C. § 866(e) (2024); App. 17 (quoting Office of the General Counsel, Dep’t of Defense, Report of the Military Justice Review Group (“MJRG”) Part I: UCMJ Recommendations (Report of the Military Justice Review Group), at 619 (Dec. 22, 2015)). The military court agrees, but only when beneficial to the Government. For example, in *United States v. Sanchez*, decided four months after Appellant’s case, the same court quoted the same MJRG report, explaining the amendment “provide[s] substantial deference to the trial judge” and cited to *Gall* for the “highly deferential standard of review[.]” *United States v. Sanchez*, 2026 CCA LEXIS 249, at *7 (N-M. Ct. Crim. App. May 28, 2026) (citing *Gall*, 552 U.S. at 51-53) (other citations omitted).

The similarities between the two systems extend beyond just deference. For example, in *Sanchez*, the NMCCA cited to *Booker*, *Gall*, and cases from the First, Fourth, and Seventh Circuits in interpreting other aspects of the sentencing review system. *Sanchez*, 2026 CCA LEXIS 249, at *7-8. There is no dispute between the parties, or apparently the courts, that Article 66’s new sentencing review scheme is based on the federal system and that it incorporates applicable case law from that system—particularly, *Booker* and *Gall*.

As explained below, though, in the one scenario where this deference would benefit the appellant—

where the military judge believes a stipulated sentence is too high—the military court refused to even consider the judge’s sentencing decision.

B. The rationale behind *Gall* deference is straightforward and all the reasons it is required in federal courts apply here.

Contrary to both parties’ arguments that *Gall* applies, the lower court did not apply substantial deference, any deference, or even consider the sentencing judge’s decision to recommend a lower sentence. App. 13, 15-17. Instead, it *sua sponte* declared it would ignore it. *Id.* Two decades after *Booker*, it is axiomatic that the sentencing judges apply the sentencing factors and provide reasoning on the record; and the appellate courts review that decision while providing deference. This Court has time and again reinforced the paramount importance of the section 3553(a) factors both at sentencing, and on appeal. *Spears v. United States*, 555 U.S. 261, 267 (2009); *Gall*, 552 U.S. at 59; *Kimbrough v. United States*, 552 U.S. 85, 111 (2007); *Rita v. United States*, 551 U.S. 338, 350 (2007); *Booker*, 543 U.S. at 261.

Here, the sentencing judge put his sentencing decision on the record, and he methodically applied the military sentencing factors, which are almost verbatim to section 3553(a). App. 15-16; see Article 56(c), UCMJ, 10 U.S.C. § 856(c) (2024). He concluded the sentence was “greater than necessary” to achieve the purpose of punishment, the talismanic standard of sentencing review under section 3553(a) and section 856(c). App. 15-16. He applied, in line, the facts to mandatory sentencing factors. *Id.*

These were not “mercy” or non-judicial concepts. They were factual findings based on legal factors, Article 56(c), 10 U.S.C. § 856(c) (2024), and they were remarkably similar to the sentencing judge’s reasoning in *Gall*, 552 U.S. at 56-57. The judge saw and heard the evidence and was in a superior position to apply the factors. *Id.* at 51. He directly based his sentencing decision on the evidence he received—including the uncontroverted testimony of the expert psychologist. App. 15-16. Under *Gall*, the appellate court had to, at least, *consider* his conclusions. *Gall*, 552 U.S. at 59-60.

Appellant does not ask this Court to get involved in the precise level of deference required in the military’s new system, which the CAAF has not yet opined on. Appellant asks this Court to enforce a bright-line, fundamental rule: whatever level of deference, the reviewing court cannot *ignore* and *refuse to consider* the judge’s sentencing decision by conducting a *de novo* review. *Gall*, 552 U.S. at 59. The Court explicitly held as such in *Gall*, and military courts have affirmatively declined to follow it. *Id.*

Besides not applying *Gall* and disregarding the judge’s sentencing decision, the court also failed to consider *all* the accused-centric sentencing factors. App. 13-14. The military court only considered the plea agreement and the Government’s purported aggravating evidence. *Id.* This was not sentencing review, and if allowed to stand, the system that Congress established will not function. Where the CAAF has declined to require military service courts to apply *Gall*, this Court should grant, vacate, and remand for a sentence review that at least *considers* the judge’s sentencing decision in line with *Gall*.

C. The military judge’s sentencing decision was an exercise of judicial discretion.

While more common historically in the federal system, see *Hughes v. United States*, 584 U.S. 675, 686-87 (2018), “stipulated sentence” plea agreements are a new development in the military. The President did not explicitly authorize them until 2024. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, Rule for Court-Martial 705(d)(1)(D) (2024). In 2022, the military court first approved of their legality, relying on the existence of discretion in other parts of the military justice system. *United States v. Rivero*, 82 M.J. 629, 634 (N-M. Ct. Crim. App. 2022). Particularly, the court held that a sentencing judge could still exercise discretion by recommending the sentence be lower, and the appellate court reviewing the sentence could then lower it. *Id.*

The military court here justified its refusal to consider the judge’s sentencing decision by characterizing that decision as a recommendation for “clemency” or “mercy” that had no *legal* import. App. 13-14. But that was not what the judge recommended or why he recommended a lower sentence. App. 15-16. Perhaps that would have been accurate if the judge had characterized his decision as being for clemency or mercy reasons, such as feeling sympathy for Petitioner. But that was not his sentencing decision, nor was it based on such reasons.

Rather, his decision and the reasons supporting it were purely judicial, legal, and subject to appellate judicial review. Military courts have long recognized the distinction between mercy actions and the judicial review of sentences, including recognizing that in civilian courts, a sentencing judge’s suspension of a

sentence is a judicial act. *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988).

The military judge lacked authority to reject the plea agreement, and he lacked authority to award any sentence but the stipulated sentence. Article 53a(b), (e), 10 U.S.C. § 853a(b), (e) (2024). His “sentencing decision” was to exercise the only discretion he had available: award the sentence required by the plea agreement, while recommending it be lowered consistent with his application of the sentencing factors to the facts of the case. App. 15-16; Art. 60a(c), UCMJ, 10 U.S.C. § 60a(c) (2024). The military court’s oversimplification caused it to miss the forest for the trees. The recommendation *was not* for clemency or mercy, nor did the judge say that was the purpose. It was a “sentencing decision[.]” in the form of a legal conclusion based on the mandatory sentencing factors. *Gall*, 552 U.S. at 51; 10 U.S.C. § 856, 860a (2024).

As this Court explained in *Concepcion v. United States*, “[f]rom the beginning of the Republic, federal judges were entrusted with wide sentencing discretion[.]” which “carries forward to later proceedings that may modify an original sentence[.]” *Concepcion v. United States*, 597 U.S. 481, 491 (2022). And as this Court explained in *Gall*, sentencing judges are in a superior position to make judgment calls on the sentencing factors. *Gall*, 552 U.S. 51-52. The judge here exercised that discretion in a legal sense, not in a non-judicial mercy sense. See *Ortiz v. United States*, 585 U.S. 427, 437 (2018) (“The military justice system’s essential character” is “in a word, judicial[.]”).

The military court plainly applied a double standard in how it treats this “recommendation,” which is part of the judge’s “sentencing decision.” In *Sanchez*, the same court specifically noted the judge there “had the option to recommend clemency but chose not to[.]” crediting this decision as a reason to affirm the adjudged sentence. *Sanchez*, 2026 CCA LEXIS 249, at *7. When advantageous to the Government, it credits this sentencing decision; when advantageous to the appellant, it refuses to consider it. This double standard is beyond problematic and exposes the faulty premise of the court’s rationale here.

Besides conflicting with *Gall*, the double standard is directly contrary to “Congress’ initial and basic sentencing intent . . . ‘to provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities[.]’” *Booker*, 543 U.S. at 264 (citations and quotations omitted).

If the NMCCA can ignore the only sentencing decision on which the judge had discretion, there is then *no discretion* at the sentencing hearing. For seventy years, military courts have rightly held that sentencing proceedings cannot be empty rituals. *United States v. Allen*, 25 C.M.R. 8, 11 (U.S.C.M.A. 1957). This Court’s decisions in *Booker* and its progeny affirm this basic, fundamental tenet. This Court must step in, or military courts will ignore the sentencing decisions of judges unless, apparently, they benefit the Government.

D. The military courts’ decision to ignore *Gall* raises similar concerns that this Court just addressed in *Hunter v. United States*.

In *Hunter v. United States*, the Court recently reaffirmed the “special, and indeed pivotal role of the judiciary” in sentencing—specifically in “approving and implementing appeal waivers.” *Hunter v. United States*, No. 24-1063, 2026 U.S. LEXIS 2558, at *19 (June 18, 2026). The Court had concern that allowing fundamental, serious errors in sentencing to stand would compromise “the judicial system’s integrity.” *Id.* at *20-21.

While this case does not involve appellate waiver, it raises similar concerns—particularly those expressed by Justice Gorsuch’s concurrence. For example, the “coercive prosecutorial tactics designed to induce defendants to take plea deals,” *id.* at *28 (Gorsuch, J., concurring) are more concerning and problematic in the military. *United States v. Chancellor*, 36 C.M.R. 453, 455 (U.S.C.M.A. 1966) (“During the hearings on the Uniform Code of Military Justice, there was considerable concern expressed regarding the entry of guilty pleas in courts-martial, and Congress made clear the nature of the safeguards which they intended to surround the receiving of such a judicial confession.”); *see also United States v. Weasler*, 43 M.J. 15, 17 (C.A.A.F. 1995) (explaining “[u]nlawful command influence has been a concern since World War I[,]” is the “mortal enemy of military justice[,] and “Congress responded” by enacting articles prohibiting it after World War II) (quotation omitted); *United States v. Lewis*, 12 M.J. 205, 206-07 (C.A.A.F. 1982) (explaining Congress enacted

legislation to protect against “a subordinate military person’s obligation to respond to the command of his superior,” and the military’s self-incrimination protections are “broader” than those in *Miranda v. Arizona*, 384 U.S. 436 (1966), which they also predate by a decade)). Military accused are not charged by neutral prosecutors seeking justice—they are charged by their commanding officers, to whom they owe absolute and unquestioned obedience.

Even more so than in the civilian world, CA’s “quickly . . . tak[e] full advantage of . . . judicial latitude” in plea bargaining.” *Hunter*, 2026 U.S. LEXIS 25588, at *36 (Gorsuch, J., concurring). For example, new rules allow “stipulated sentence” agreements, like the one here, that required a mandatory punitive discharge. *See, e.g., United States v. Armsbury*, No. 25-0233, 2026 CAAF LEXIS 274, at *8-9 (C.A.A.F. Mar. 24, 2026). In the military, while not necessarily an “orangutan,” the CA does “pick the defendant’s sentence from a hat.” *Hunter*, 2026 U.S. LEXIS 2558, at *39 (Gorsuch, J., concurring). The CA holds a plea offer over the accused’s head, threatening decades in confinement unless the accused agrees to a “take-it-or-leave-it” sentence.

That happened here as Appellant faced a maximum sentence of seventeen years for the charges to which he pled guilty, thirty-seven years for all the charges. The CA made an all-or-nothing offer without any obligation to apply the sentencing factors, and before receipt of any extenuating or mitigating evidence, let alone a pre-sentence report, which does not exist in the military. Military accused, as Justice Gorsuch explained, truly “negotiate in the dark”—

particularly when they accept stipulated sentence agreements under coercive pressure. *Id.*

This leaves the judiciary as the only “check” in the system: judicial discretion by the sentencing judge and sentence review by the appellate court. The judge can recommend suspension of all or part of the sentence; and the court of appeals can set aside all or part of the sentence. Arts. 60a(c); 66(f)(2), 10 U.S.C. 860a(c), 866(f)(2) (2024); *see also Armsbury*, 2026 CAAF LEXIS 274, at *8-9 (holding that under the prior sentence review system, military courts are “not bound by the plea agreement’s terms”) (citation omitted). If these avenues are ignored, then the CA truly does pick a sentence from a hat, and the sentence sticks with no meaningful judicial involvement. *But see Ortiz*, 585 U.S. at 438-39 (explaining courts-martial impose sentences, including “terms of imprisonment[,]” and “the decisions of those tribunals are subject to an appellate process” that “replicates the judicial apparatus found in most States”) (citations omitted).

While this case does not involve an appellate waiver, it does involve a “marked departure from mandatory sentencing procedures.” *Hunter*, 2026 U.S. LEXIS 2558, at *42 (Gorsuch, J., concurring) (citing *Gall*, 552 U.S. at 49-51). The judge used “a degree of judicial discretion” in “weighing [the] sentencing factors[,]” *id.* at *42-43, and the appellate court *refused* to consider his decision. This eviscerated any utility in the only way the judiciary could review the sentence the CA selected before the trial even started.

For many of the same reasons this Court held for the defendant in *Hunter*, this case presents an opportunity to “correct course.” *Id.* at *28. Unlike

other military petitions, this is not a unique, military-specific issue. Congress replicated the federal civilian system in the military, and everyone agrees that *Booker*, *Gall*, and their progeny apply. But the military courts refuse to apply a core principle of those cases that benefits appellants—while simultaneously applying it when it benefits the Government. This presents the rare scenario where this Court should step in and correct course with a simple, clear statement: military appellate courts must consider the sentencing judge’s application of the sentencing factors when placed on the record.

It can do so by granting, vacating, and remanding to the military court with a one-sentence proviso: conduct sentence review in accordance with *Gall v. United States*; the court cannot completely disregard the sentencing judge’s decision, and it cannot conduct a *de novo* review.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted.

COLIN P. NORTON
MAJ, U.S. MARINE CORPS
COUNSEL OF RECORD

BENJAMIN M. COOK
LT, JAGC, U.S. NAVY

NAVY-MARINE CORPS
APPELLATE DEFENSE DIVISION
1254 CHARLES MORRIS ST., S.E.
BUILDING 58, SUITE 100
WASHINGTON, DC 20374
COLIN.P.NORTON.MIL@US.NAVY.MIL
(202) 685-7054

Counsel for Petitioner

APPENDIX

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**Appendix A — Order of the United States Court
of Appeals for the Armed Forces denying the
petition for review (May 4, 2026).**

**United States Court of Appeals
For the Armed Forces
Washington, D.C.**

United States, USCA Dkt. No. 26-0157/MC
Appellee Crim.App. No. 202400476

v. **ORDER DENYING PETITION**

Makhi
Brockenborough,
Appellant

On consideration of the petition for grant of
review of the decision of the United States Navy-
Marine Corps Court of Criminal Appeals, it is by the
Court, this 4th day of May, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

Appendix A, App. 2

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Norton)
Appellate Government Counsel (Keller)

**Appendix B — Opinion of the United States
Navy-Marine Corps Court of Criminal Appeals
(Jan. 21, 2026).**

*This opinion is subject to administrative
correction before final disposition.*

United States Navy–Marine Corps
Court of Criminal Appeals

Before
KISOR, GANNON, and FLINTOFT
Appellate Military Judges

UNITED STATES
Appellee

v.

Makhi BROCKENBOROUGH
Private First Class (E-2), U.S. Marine Corps
Appellant

No. 202400476

Decided: 21 January 2026
Appeal from the United States Navy-Marine
Corps Trial Judiciary

Appendix B, App. 4

Military Judge:
Aran T. Walsh

Sentence adjudged 28 August 2024 by a general court-martial tried at Marine Corps Base, Camp Pendleton, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for 30 months, and a bad-conduct discharge.¹

For Appellant:
Lieutenant Colonel Gregory P. Adams, USMCR

For Appellee:
Lieutenant Michael G. Osborn, JACG, USN
Commander John T. Cole, JAGC, USN

Judge FLINTOFT delivered the opinion of the Court, in which Senior Judge KISOR and Judge GANNON joined.

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

¹ Appellant was credited with 125 days of pretrial confinement credit.

FLINTOFT, Judge:

A general court-martial composed of a military judge alone convicted Appellant, consistent with his pleas, of one specification of attempted sexual abuse of a child involving indecent communication, one specification of attempted extramarital sexual conduct, and one specification of fleeing apprehension in violation of Articles 80 and 87a of the Uniform Code of Military Justice (UCMJ).² The military judge sentenced Appellant to reduction to paygrade E-1, confinement for 30 months, and a bad-conduct discharge (BCD).

Appellant asserts a single assignment of error: that his “sentence was plainly unreasonable considering substantial mitigating evidence and the military judge's recommendation to suspend Appellant's BCD and eight months of the adjudged 30 months of confinement.”³ We disagree and affirm.

I. BACKGROUND

At the time of the offense, Appellant was an 18-year-old, married Marine assigned to Marine Corps Detachment Goodfellow aboard Goodfellow Air Force Base located in San Angelo, Texas. Appellant was using Tinder, a dating application for adults, and was matched with someone named “Karina.”⁴ Appellant and “Karina” began communicating through text and

² 10 U.S.C. §§ 880, 887(a).

³ Appellant's Brief at 2.

⁴ Pros. Ex. 1 at 2.

Appendix B, App. 6

other applications.⁵ Soon after they began corresponding, “Karina” informed Appellant she was a 14-year-old, military dependent, who lived on Goodfellow Air Force Base.⁶ Unbeknownst to Appellant at the time, “Karina” was a fictitious profile of an undercover law enforcement officer.

Appellant, believing “Karina” to be a 14-year-old military dependent, initiated sexual conversations between them and sought pictures of her “body” so he can see what he is “working with.”⁷ Appellant made known his intentions with “Karina” stating, “I’m talking about f[***]ing.”⁸ During the course of texting, “Karina” reminded Appellant that she was 14 years old, to which Appellant responded by asking, “[D]o you consent?”⁹ “Karina” answered in the affirmative, and Appellant subsequently messaged, “u wanna get f[***]ed tomorrow or not?”¹⁰ Later, when Appellant asked “Karina” if she could meet up, she advised that she needed to shower. Appellant responded, “u can take a shower after we f[***].”¹¹

The two agreed to meet at a location on base where Appellant intended to have sexual intercourse with her.¹² Appellant also agreed to bring condoms.¹³ When Appellant arrived at the agreed upon location to meet

⁵ Pros. Ex. 1 at 2.

⁶ Pros. Ex. 2 at 7.

⁷ Pros. Ex. 2 at 8.

⁸ Pros. Ex. 2 at 8.

⁹ Pros. Ex. 2 at 8.

¹⁰ Pros. Ex. 2 at 8.

¹¹ Pros. Ex. 1 at 2.

¹² Pros. Ex. 1 at 4.

¹³ Pros. Ex. 1 at 4.

Appendix B, App. 7

with “Karina,” he was met by law enforcement personnel, who announced themselves as police, and directed Appellant to get down on the ground.¹⁴ Rather than do this, Appellant fled on foot and was pursued by law enforcement. During the pursuit, Appellant ran by his senior enlisted leader who directed him to stop. Appellant complied with the order and was subsequently detained by law enforcement.¹⁵

Appellant, who was represented by counsel, entered into a plea agreement and pleaded guilty to attempted sexual abuse of a child involving indecent communication, attempted extramarital sexual conduct, and fleeing apprehension. In exchange, the convening authority, in part, agreed to withdraw and dismiss a specification of attempted sexual assault of a child. The parties also agreed that the minimum sentence would include a punitive discharge, reduction to E-1, and confinement for 30 months.¹⁶ The military judge confirmed Appellant fully understood, and had discussed with his defense counsel, the plea agreement and its terms, to include the limitations on sentencing.¹⁷

¹⁴ Pros. Ex. 1 at 5.

¹⁵ Pros. Ex. 1 at 6.

¹⁶ The maximum sentence authorized based solely on the guilty plea was 17 years of confinement, reduction to the paygrade of E-1, forfeiture of all pay and allowances, a fine, and a dishonorable discharge. Under the plea agreement, the military judge had the discretion to award Appellant with either a dishonorable discharge or a BCD.

¹⁷ R. at 80-87.

Appendix B, App. 8

The military judge accepted Appellant's pleas and found him guilty. During his presentencing case, Appellant called a forensic psychologist as an expert witness who testified that Appellant was in the second lowest category of recidivism.¹⁸ The expert further testified that there is "nothing in [his] review of the information ... that would suggest that [Appellant] has any risk for sexual re-offense or his ability to be safe in the community."¹⁹

The military judge sentenced Appellant to reduction to paygrade E-1, confinement for 30 months, and a BCD.²⁰ Following sentencing, the military judge recommended that the convening authority suspend the BCD and eight months of the adjudged confinement for six months. The military judge's reasoning was as follows:

The Court considered the young age of the accused -- he was 18 at the time of the offense -- the limited life experience of the accused, the age of the online persona Karina -- she was presented to be 14 years of age -- the fact that ... Karina was a fictitious online persona, the applicability of the ... safe harbor provision in DoDI 1325.07 to the facts of

¹⁸ R. at 141.

¹⁹ R. at 149-50.

²⁰ Appellant was sentenced to 30 months of confinement for attempted sexual abuse of a child involving indecent communication; 1 month of confinement for attempted extramarital sexual conduct; and 3 months of confinement for fleeing apprehension. Consistent with the plea agreement, the terms of confinement will be served concurrently.

Appendix B, App. 9

this case,^[21] the nature of the communication, the . . . readily apparent remorse of the accused and sincere acknowledgment of his wrongdoing during his unsworn statement, the fact that the accused is a father, the fact that the plea agreement includes a provision for waiver of an administrative separation board, the testimony of the defense sentencing witness, the absence of significant evidence of aggravation, and the need for the sentence adjudged to be sufficient but not greater than necessary to promote justice and maintain good order and discipline and that it should also consider the need to . . . rehabilitate the accused.²²

²¹ This provision provides, “an offense involving consensual sexual conduct is not a reportable offense [as a sex offender] if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.” Dep’t. of Def. Instr. 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Programs*, para. 5.7(d)(5)(a) (Nov. 21, 2024). In this case, the fictitious persona, “Karina,” was reported to be nearly 15 years old, while Appellant was almost 19 years old at the time of the offense. The military judge found that the lack of specificity and uncertainty with the fictitious persona’s age would not be used against Appellant and held this provision was applicable. Additionally, the military judge informed Appellant that his determination was not final and that certain state laws may still require sex offender registration. *See R.* at 90-121.

²² *R.* at 165.

Appendix B, App. 10

Appellant's clemency request aligned with the military judge's recommendation; however, the convening authority took no action on the sentence.

II. DISCUSSION

Appellant raises one assignment of error arguing his sentence was plainly unreasonable considering substantial mitigating evidence and the military judge's recommendation to suspend Appellant's BCD and 8 months of the adjudged 30 months of confinement. The Government contends, in opposition, that Appellant's bargained-for sentence was not plainly unreasonable as he received the benefit he negotiated for in his plea agreement, which was at the minimum level of confinement under the sentencing parameters, and that he was awarded the lesser of the two authorized punitive discharges.

Congress amended Article 66, UCMJ, in the National Defense Authorization Act for Fiscal year 2022, adjusting the lens through which courts of criminal Appeals (CCAs) review sentencing.²³ This change in law now permits CCAs to evaluate sentences for UCMJ offenses occurring on or after 28 December 2023 as to "whether the sentence is plainly unreasonable" ²⁴

²³ We acknowledge that Article 66, UCMJ "should be approved" review authority for consideration of sentences was removed for violations of the UCMJ offenses on or after 28 December 2023. See Nat'l Def. Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §539E, 135 Stat. 1541, 1700-06 (2021).

²⁴ 10 U.S.C. § 866(e)(1)(D).

Appendix B, App. 11

Neither we nor our superior court have defined the “plainly unreasonable” standard for sentence appropriateness review. Although the Manual for Courts-Martial previously included a definition for “plainly unreasonable,” this definition was removed to allow “plainly unreasonable” to be interpreted according to its plain meaning for review under Article 66(e).²⁵

While there are some variances in sentencing mandates between military and federal courts, the federal courts, in interpreting what is meant by plainly unreasonable, have clarified that Congress intends there to be a distinction between “unreasonable” and “plainly unreasonable.” Specifically, the word “plainly” is not just “surplusage” but was meant to modify “unreasonable,” indicating a more stringent standard.²⁶ Therefore, as the Fourth Circuit held in *United States v. Crudup*, determining whether a sentence is “plainly unreasonable” begins with an analysis of whether the sentence was “unreasonable.”²⁷

“Unreasonable” is defined as “[n]ot guided by reason; irrational or capricious.”²⁸ In other words, this means accessing whether the sentence adjudged lacks common sense or a rational legal basis. If this Court determines the sentence was not “unreasonable,” then

²⁵ R.C.M. 1117(e). “*Standard*. A sentence is plainly unreasonable if no reasonable sentencing authority would adjudge such a sentence in view of the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.” Manual for Courts-Martial, United States (2019 ed.).

²⁶ See *United States v. Crudup*, 461 F.3d 433, 438 (4th Cir. 2006).

²⁷ *Id.*

²⁸ Black's Law Dictionary (11th ed. 2019).

Appendix B, App. 12

further analysis is unnecessary. Only if the sentence is determined to be unreasonable do we then examine whether it was “plainly” so. Consistent with the jurisprudence of our superior court and that of federal courts, we define “plain” to mean “clear or obvious” which is taken from our plain error analysis.²⁹ We see no reason to deviate from that definition here.

Applying this standard to the current case, we conclude that the sentence negotiated by Appellant was not unreasonable. With the advice and assistance of counsel, Appellant negotiated for a favorable plea agreement that dismissed a specification of attempted sexual assault of a child and limited his exposure to a higher sentence. The 30 months of confinement was the minimum under the sentencing parameter for the charges to which he pleaded guilty. Additionally, the military judge adjudged a BCD, which was the lesser of the two punitive discharges permitted under the plea agreement.

When an Appellant is represented by competent counsel and bargains for and receives the benefit of a specific sentence, that is strong evidence that the sentence is not inappropriately severe or plainly unreasonable.³⁰ This is especially true when the sentence falls within the sentencing parameters.

²⁹ See *United States v. Cole*, 84 M.J. 398, 404 (C.A.A.F. 2024) (citing *United States v. Bodoh*, 78 M.J. 231, 236 (C.A.A.F. 2019); See also *Crudup*, 461 F.3d at 439.

³⁰ *United States v. Avellaneda*, 84 M.J. 656, 663 (N-M Ct. Crim. App. 2024) (“Although not dispositive, when an accused who is represented by competent counsel bargains for a specific sentence, that is strong evidence that the sentence is not inappropriately severe and it will likely not be disturbed on appeal.”).

Appendix B, App. 13

Appellant relies heavily on the military judge's clemency recommendation to the convening authority as to why his bargained-for sentence was plainly unreasonable. This Court recognizes that a convening authority may, but is not required to, approve a clemency recommendation from the military judge.³¹ Here, the convening authority considered and disapproved all clemency matters submitted, which included the clemency recommendation and supporting justification made by the military judge in the Statement of Trial Results. Although the military judge identified several mitigating factors leading to his clemency recommendation to the convening authority, the decision to grant clemency is a matter of command prerogative. Moreover, as this Court has previously held, clemency involves bestowing mercy and is a function of the convening authority rather than the military appellate courts, which do not have clemency power.³²

Here, Appellant failed to cease contact with “Karina” upon being informed she was a 14-year-old military dependent. Instead, he attempted to sexually abuse a child, and then made arrangements to meet at a specified time and location on a military base

³¹ Art. 60a(c)(1), UCMJ (“Upon recommendation of the military judge, as included in the Statement of Trial Results, together with an explanation of the facts supporting the recommendation, the convening authority may suspend— (A) a sentence of confinement . . . (B) a . . . bad-conduct discharge . . .”); *See also* R.C.M. 1109(f); *Avellaneda*, 84 M.J. at 661 (“The military judge's recommendation for suspension of part of a sentence is not binding on the convening authority.”) (citation omitted).

³² *Avellaneda*, 84 M.J. at 661-62.

Appendix B, App. 14

intending to have sexual intercourse. Upon being caught, he fled from law enforcement.³³

Though “Karina” was fictitious, Appellant preyed upon a person he believed to be a 14-year-old child of a fellow service member. In light of these circumstances, the adjudged sentence is reasonable and reflects the seriousness of the offenses and promotes adequate deterrence.

III. CONCLUSION

Accordingly, after careful consideration of the record and briefs of appellate counsel, we do not believe this sentence, as bargained for by Appellant and the convening authority was unreasonable, let alone plainly unreasonable.³⁴

The findings and sentence are **AFFIRMED**.

U.S. NAVY-MARINE
CORPS COURT OF
CRIMINAL APPEALS

FOR THE COURT:

/s/

MARK K. JAMISON
Clerk of Court

³³ Pros. Ex. 1 at 5-6.

³⁴ Articles 59 & 66, UCMJ.

**Appendix C — Trial transcript of the Military
Judge's sentencing decision.**

MJ: PFC Brockenborough, this court-martial sentences you as follows:

To be reduced to the pay grade of E-1;

To be confined for a period as follows:

For Specification 2 of Charge I:

30 months;

For Specification 3 of Charge I:

1 month;

For the sole Specification of Charge II:

3 months

**All periods of confinement to run
concurrently with each other.**

**To be discharged from the Marine Corps with
a bad-conduct discharge.**

You may be seated.

[The accused and defense counsel did as directed.]

MJ: Additionally, the Court recommends that 8 months of the a[d]judged confinement and the bad-conduct discharge be suspended.

The Court recommends that the period of suspension for a period of 6 months. Specifically, the 8 months of recommended suspended confinement applies to Specification 2 of Charge I.

Appendix C, App. 16

In recommending the sentence be suspended, the Court considered the young age of the accused -- he was 18 at the time of the offense -- the limited life experience of the accused, the age of the online persona Karina -- she was presented to be 14 years of age -- the fact that the Karina was a fictitious online persona, the applicability of the safe harbor --

Excuse me, safe harbor provision in DoDI 1325.07 to the facts of this case, the nature of the communication, the readily -- readily apparent remorse of the accused and sincere acknowledgment of his wrongdoing during his unsworn statement, the fact that the accused is a father, the fact that the plea agreement includes a provision for waiver of an administrative separation board, the testimony of the defense sentencing witness, the absence of significant evidence of aggravation, and the need for the sentence adjudged to be sufficient but not greater than necessary to promote justice and maintain good order and discipline and that it should also consider the need to rehabilitate -- rehabilitate the accused.

**Appendix D — Excerpt of Government’s
Answer.**

- A. Congress replaced the “should be approved” Article 66, UCMJ, 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.

Congress amended Article 66 after the Military Justice Review Group recommended “statutory standards” for appellate review of court-martial sentences. Office of the General Counsel, Dep’t of Defense, Report of the Military Justice Review Group Part I: UCMJ Recommendations (Report of the Military Justice Review Group), at 605 (Dec. 22, 2015). The amendment adheres closely to 18 U.S.C. § 3742, which defines the statutory standards for how federal appellate courts review sentences. *See* 18 U.S.C. § 3742(e); *see also* Report of the Military Justice Review Group at 619 (“The term ‘plainly unreasonable’ is taken from 18 U.S.C. § 3742 and intended to provide substantial deference to the trial judge.”).

Appendix E — Statutory provisions involved.

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

(b) Acceptance of plea agreement. Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties except that—

(1) in the case of an offense with a sentencing parameter set forth in regulations prescribed by the President pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022 [10 USCS § 856 note], the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

(2) in the case of an offense for which the President has not established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022 [10 USCS § 856 note], the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

(c) Limitation on acceptance of plea agreements. The military judge of a general or special court-martial shall reject a plea agreement that—

(1) contains a provision that has not been accepted by both parties;

(2) contains a provision that is not understood by the accused;

(3) except as provided in subsection (c), contains a provision for a sentence that is less than

Appendix E, App. 19

the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)) [10 USCS § 856(b)(2)];

(4) is prohibited by law; or

(5) is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements.

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

Article 56(c), UCMJ, 10 U.S.C. § 856(c) (2024)
states:

(c) Imposition of sentence.

(1) In general. In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

(A) the nature and circumstances of the offense and the history and characteristics of the accused;

(B) the impact of the offense on—

(i) the financial, social, psychological, or medical well-being of any victim of the offense; and

(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

Appendix E, App. 20

- (C) the need for the sentence—
 - (i) to reflect the seriousness of the offense;
 - (ii) to promote respect for the law;
 - (iii) to provide just punishment for the offense;
 - (iv) to promote adequate deterrence of misconduct;
 - (v) to protect others from further crimes by the accused;
 - (vi) to rehabilitate the accused; and
 - (vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;
- (D) the sentences available under this chapter [10 USCS §§ 801 et seq.]; and
- (E) the applicable sentencing parameters or sentencing criteria set forth in regulations prescribed by the President pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022 [note to this section].

Section 60a(c), UCMJ, 10 U.S.C. § 860a(c) states:

(c) Suspension of certain sentences upon recommendation of military judge.

(1) Upon recommendation of the military judge, as included in the Statement of Trial Results, together with an explanation of the facts supporting the recommendation, the convening authority may suspend—

- (A) a sentence of confinement, in whole or in part; or

Appendix E, App. 21

(B) a sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

(2) The convening authority may not, under paragraph (1)—

(A) suspend a mandatory minimum sentence; or

(B) suspend a sentence to an extent in excess of the suspension recommended by the military judge.

Sections 66(e)(1)(D), (f)(2), UCMJ, 10 U.S.C. § 866(e)(1)(D), (f)(2) state:

(e) Consideration of sentence.

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

...

(D) whether the sentence is plainly unreasonable[.]

(f) Limits of authority

...

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

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

(B) order a rehearing.

18 U.S.C. § 3553(a), states:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not

Appendix E, App. 22

greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy

Appendix E, App. 23

statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.