

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
W.L. RITTER, E.S. WHITE, R.E. VINCENT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOHN M. BURRELL  
PERSONNEL SPECIALIST FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200700404  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 08 February 2007.

**Military Judge:** CAPT Dennis Bengtson, JAGC, USN.

**Convening Authority:** Commander, U.S. Naval Forces, Japan, Yokosuka, Japan.

**Staff Judge Advocate's Recommendation:** LCDR Irve Le Moyne, Jr., JAGC, USN.

**For Appellant:** LT Edward George, JAGC, USN.

**For Appellee:** CDR Karen Gibbs, JAGC, USN; LT Justin Dunlap, JAGC, USN.

**27 March 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

WHITE, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of violating a lawful general regulation, wrongfully possessing a computer disc containing child pornography in violation of 18 U.S.C. § 2252A(a)(5), wrongfully possessing child pornography on computer discs (10 specifications), and wrongfully possessing child pornography on a computer hard drive (8 specifications), in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. He was sentenced to 10 months

confinement, reduction to pay grade E-1, and a dishonorable discharge. The pretrial agreement did not affect the sentence.

The appellant assigns two errors. First, he argues the staff judge advocate erred by failing to opine, as required by RULE FOR COURTS-MARTIAL 1106(d)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), on whether the legal error raised by the appellant in his R.C.M. 1105 submission required corrective action. Second, he contends the military judge erred by considering inadmissible sentencing evidence. In arguing this contention, the appellant alleges his sentence is highly disparate from that in similar cases.

We have examined the record of trial, the appellant's two assignments of error, his brief, and the Government's answer. We conclude the findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.<sup>1</sup>

### Facts

At trial, the Government introduced a stipulation of fact as Prosecution Exhibit 1. The vast majority of the stipulation described the child pornography the appellant had possessed. It also included, however, various facts about sex offender treatment at Naval Consolidated Brig, Miramar, where, the stipulation stated, the appellant would be confined were he sentenced to confinement. Among other details, the stipulation stated that "45 months post-trial confinement is necessary to fully complete the Sex Offender Treatment Program" at the brig. PE 1 at 12. In the pretrial agreement, the appellant agreed to enter into this stipulation and not to object to its admission into evidence at trial. Appellate Exhibit I at 4. Consistent with his pretrial agreement, the appellant explicitly waived any object to the stipulation's admission. Record at 21.

On 5 April 2007, the staff judge advocate issued his R.C.M. 1106 recommendation, indicating he saw no legal error in the record and that none had been raised by the appellant.

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<sup>1</sup> We do note two errors not addressed by either party. We conclude, however, that neither materially prejudiced the appellant's substantial rights. First, the seventh paragraph under Clause 16 of the Pretrial Agreement (Appellate Exhibit I), though less than crystal clear, appears to waive any motion pursuant to R.C.M. 707. Such a term is prohibited by R.C.M. 705(c)(1)(B). Nevertheless, it is clear from the record the appellant had no basis on which to make an R.C.M. 707 motion, as he was arraigned well within the 120 day limit established by the rule. (The appellant was arraigned on the 77th day after preferral of the charges.). Consequently, this error was harmless. Second, the convening authority ordered the entire sentence, including the dishonorable discharge, executed in his action. Of course, a punitive discharge may not be ordered executed until appellate review is complete. R.C.M. 1113(c)(1). The convening authority's order to execute the dishonorable discharge is, however, a nullity, and does not require correction. *United States v. McGee*, 30 M.J. 1086, 1088 (N.M.C.M.R. 1989).

Subsequently, on 12 April 2007, the appellant submitted a combined petition for correction of legal error and request for clemency, alleging the evidence concerning the Miramar brig's sex offender treatment program contained in PE-1 had been improperly considered, in light of this court's ruling in *United States v. Goldberg*, No. 200601093, 2007 CCA LEXIS 8 (N.M.Ct. Crim.App. 24 Jan 2007). The appellant requested that the convening authority (CA) set aside the dishonorable discharge. The record of trial contains no addendum to the staff judge advocate's recommendation (SJAR) addressing the alleged legal error, and the Government has not produced one during the pendency of this appeal.

On 20 April 2007, the CA took action in the case. He stated he had considered the "Petition for Correction of Legal Error" and clemency request submitted by the appellant, as well as the SJAR. The CA also specifically noted the appellant's argument that the military judge sentenced the appellant too severely based on inadmissible evidence in PE 1. After approving the sentence as adjudged, the CA stated: (1) the military judge was presumed to know and act in accordance with the law; and (2) "[i]t is clear that the judge did not consider that evidence, as he only awarded confinement for a period of ten months, far below the time required to complete the [sex offender treatment] program." CA's Action of 20 Apr 2007.

We shall take up the two assignments of error in reverse order.

### **Inadmissible Evidence and Sentence Disparity**

The appellant's second assignment of error contends the military judge considered inadmissible evidence on sentence, i.e. portions of PE 1, in violation of R.C.M. 1001, resulting in a sentence which "clearly exceeded what is typically adjudged in similar cases." Appellant's Brief of 6 July 2007 at 6. As noted above, the appellant affirmatively waived any objection to PE 1, both in his pretrial agreement with the CA, and through counsel when the military judge explicitly asked if there was any objection to PE 1.

The waiver of evidentiary objections is a permissible term of a pretrial agreement. *United States v. Rivera*, 46 M.J. 52, 54 (C.A.A.F. 1997); *United States v. Gibson*, 29 M.J. 379, 382 (C.M.A. 1990). Further, error may not be predicated on a ruling which admits evidence unless the ruling materially prejudices a substantial right and a timely objection is made. MILITARY RULE OF EVIDENCE 103(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

The court may, however, take notice of plain errors that materially prejudice substantial rights. MIL. R. EVID. 103(d). To prevail under a plain error analysis, the appellant must persuade this court that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Tyndale*, 56 M.J. 209, 217

(C.A.A.F. 2001); *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

The appellant has not demonstrated plain error. The availability of treatment programs is a collateral matter that normally should not be considered in determining a proper sentence, unless presented in rebuttal. *United States v. Lapeer*, 28 M.J. 189, 190 (C.M.A. 1989); *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989). Nevertheless, any error in considering such evidence is not plain or obvious where the appellant himself participated in creating the evidence (in the form of a stipulation of fact) and expressly waived objection to its consideration.

Further, the appellant has not shown that admitting this evidence materially prejudiced a substantial right. First, the appellant made a deliberate and conscious tactical decision, with the advice of counsel, that waiving any objection to PE 1 was in his best interest. Such a calculated decision strongly suggests the appellant himself did not view PE 1 as materially prejudicial to his substantial rights. Second, given the military judge sentenced the appellant to only 10 months confinement -- far less than the stipulation said was required for enrollment in sex offender treatment -- it appears PE 1 had no influence on the sentence adjudged.<sup>2</sup>

Before moving to the appellant's remaining assignment of error, we will briefly address the question of sentence disparity, which the appellant raises collaterally in this assignment of error, as well as the related question of sentence appropriateness.

In performing our duty under Article 66, UCMJ, to ensure sentence appropriateness in particular cases and relative uniformity in sentences generally, this court has discretion to consider and compare court-martial sentences. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). We are not, however, required to compare sentences in specific cases, "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)(quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). The appellant bears the burden of demonstrating any particular case is "closely related" to his own and that the sentences are "highly disparate." *Id.*

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<sup>2</sup> Nor does the appellant's argument that a dishonorable discharge is disproportionately severe in his case support his contention the judge erroneously relied on PE 1. The questioned evidence solely concerned the length of post-trial confinement necessary for treatment, and had no logical bearing on the appropriateness of a punitive discharge.

In the case *sub judice*, the appellant has not met this burden. While each of the cases the appellant cites involved possession of child pornography, the similarity ends there. There is no evidence of either a common scheme or a direct nexus between the appellant and the service members whose sentences he asks us to compare. *Id.* Nor has the appellant demonstrated sufficient common facts to convince us these cases are, in fact, closely related to his.

We will, nevertheless, "utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] appellant's delict, his sentence was appropriate." *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)(quoting *United States v. Judd*, 28 C.M.R. 388, 394 (C.M.A. 1960)(Ferguson, J., concurring in the result)). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Over a period of many months, the appellant actively sought out numerous explicit photographs and videos of children, some as young as 4 or 5 years old, engaging in a variety of sex acts, including vaginal and anal intercourse, felatio and cunnilingus, with adult males and with each other. Some of those images depicted scenes of bondage in which the child was handcuffed or tied with rope. In many instances, he paid a commercial Internet supplier for those images and videos. He downloaded this child pornography to his home computer, and downloaded written material describing sex acts between adults and children to a Government computer on board USS LASSEN (DDG 82). Once caught, the resulting loss of his Internet access at work precluded him from performing his disbursing job, requiring other, less experienced personnel to assume those duties, and resulting in numerous pay discrepancies and disbursing problems for his shipmates.

Balanced against these facts, the appellant had served nearly 18 years on active duty, with over 9 years of sea duty. He had twice been awarded the Navy-Marine Corps Achievement Medal, as well as a long list of other awards and decorations. He was a first class petty officer with no prior disciplinary history. As well, he provided financial support of at least \$50 a month to his mother.

After carefully reviewing the entire record, we conclude that the adjudged sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395; *Snelling*, 14 M.J. at 267.

### **Defective SJAR and Missing Addendum**

In his remaining assignment of error, the appellant asserts the staff judge advocate erred by failing to opine, as required by R.C.M. 1106(d)(4), on whether the legal error the appellant alleged in his R.C.M. 1105 submission required corrective action.

R.C.M. 1106(d)(4) provides: "When the recommendation is prepared by the staff judge advocate, ... a staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the finding or sentence should be taken when an allegation of legal error is raised in matter submitted under R.C.M. 1105 or when deemed appropriate by the staff judge advocate." Prior to taking final action, the CA must consider, *inter alia*, clemency matters submitted by the accused and the recommendation of the staff judge advocate. R.C.M. 1107(b)(3)(A).

In this case, the appellant alleged legal error in his 12 April 2007 submission. The record contains no SJAR addendum addressing this allegation, and the Government has not produced one. Consequently, we assume no SJAR addendum was prepared. Undoubtedly, it was error not to prepare an SJAR addendum addressing the alleged legal error raised by the appellant. The next question is whether or not that error was harmless. For the following two reasons, we conclude the error was harmless.

First, the CA specifically addressed the claim of legal error in his action, and provided sound reasons for discounting the appellant's argument. Second, as noted above, we have concluded the underlying error alleged by the appellant, i.e. that the judge improperly relied on inadmissible evidence, was harmless. Since the alleged error was harmless, the appellant was not entitled to any corrective action by the CA, and the CA's refusal to take corrective action itself is harmless.

### **Conclusion**

Accordingly, we affirm the findings and the sentence, as approved by the CA.

Chief Judge RITTER and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court