

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

**Before  
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**TIMOTHY A. COX, JR.  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000413  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 21 May 2010.

**Military Judge:** Maj Clay A. Plummer, USMC.

**Convening Authority:** Commanding Officer, Battalion Landing Team 3/2, 22d Marine Expeditionary Unit, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** LtCol J.W. Hitesman, USMC.

**For Appellant:** CDR R.D. Evans, Jr., JAGC, USN.

**For Appellee:** LCDR Gregory R. Dimler, JAGC, USN; Capt Mark V. Balfantz, USMC.

**30 November 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of conspiracy to commit burglary, unauthorized absence, false official statement, five specifications of larceny, three specifications of burglary, and two specifications of solicitation to receive stolen property, in violation of Articles 81, 86, 107, 121, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 907, 921, 929, and 934. The approved sentence included confinement for 12 months, forfeiture of

\$964.00 pay per month for 12 months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant asserts one assignment of error: that Charge VI and the specifications thereunder (solicitation) do not state an offense, as the specifications do not allege that the appellant's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Appellant's Brief of 14 Sep 2010 at 1.

Upon review, we find that corrective action is necessary with regard to certain findings relating to the larceny specifications, which we will take in our decretal paragraph. Following our corrective action, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

#### **Terminal Element under Article 134**

In light of our decision in *United States v. Fosler*, \_\_\_ M.J. \_\_\_, 2010 CCA LEXIS 357 (N.M.Ct.Crim.App. 28 Oct 2010), the matter of the necessity of pleading the "terminal element" in Article 134 for clause 1 and 2 offenses, has been resolved. In the present case, each of the two specifications under Charge VI allege that the appellant "wrongfully" solicited another Marine to receive stolen property belonging to Marines and Sailors living in bachelor enlisted quarters, in violation of Article 134, UCMJ. "Wrongful" was employed as a word of criminality in the two specifications and, when alleged in concert with the specified conduct, necessarily implies the terminal element. *Fosler*, 2010 CCA LEXIS 357, at \*26. Under the circumstances of this case, the Government was not required to expressly allege the terminal element for the Article 134, UCMJ, offenses.

#### **Larceny of Multiple Items**

Although not raised as error by the appellant, we find that the providence inquiry concerning Specifications 1 and 3, and Specifications 2 and 4, of Charge IV, support only two specifications of larceny, rather than the four specifications for which the appellant was convicted. The providence inquiry and stipulation of fact, Prosecution Exhibit 1, reveal that the appellant and his co-conspirator, Lance Corporal (LCpl) Fichter, broke into a barracks room owned by Hospitalman (HN) [A], room number 319. While in this room, the appellant and LCpl Fichter, searched the unlocked secretaries, cut locks off the wall lockers and stole the personal property belonging to HN [A] and Corporal (Cpl) [M], at essentially the same time. While the record does not affirmatively state that Cpl [M] was an occupant of room 319, the record does indicate that the personal belongings specified in Specification 1 owned by Cpl [M] were present in the room, and were taken by the appellant and LCpl Fichter. Likewise, the

providence inquiry and stipulation of fact reveal that the appellant and LCpl Fichter broke into barracks room number 329, shared by LCpl [C] and LCpl [B], pried the locks off the secretaries, cut locks off the wall lockers, and stole the personal property specified in Specifications 2 and 4 at essentially the same time. None of the parties at trial raised the issue, and the specifications were not merged for findings or for sentencing. The Manual for Courts-Martial specifically provides that "[w]hen a larceny of several articles is committed at substantially the same time and place, it is a single larceny . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 46c(1)(h)(ii). Accordingly, the appellant is guilty of only one specification of larceny with respect to his theft of items taken from barracks room 319, and a second specification of larceny with respect to his theft of items taken from the barracks room shared by LCpl [B] and LCpl [C]. See *United States v. Harris*, 53 M.J. 514, 522 (N.M.Ct.Crim.App. 2000), *aff'd*, 55 M.J. 433 (C.A.A.F. 2001); *United States v. Lepresti*, 52 M.J. 644, 653 (N.M.Ct.Crim.App. 1999).

### **Sentence Appropriateness**

Although not assigned as error, the appellant, by way of a footnote, asserts in his brief that there is a sentence disparity in his case. He also asks this court for relief from his sentence in the form of a three-month reduction in confinement. Appellant's Brief at n.3. While it would have been better practice for the appellant to raise sentence disparity as an assignment of error, we nevertheless consider his footnote as a summary assignment of error.<sup>1</sup> We determine that the appellant's claim of sentencing disparity has no merit.

The appellant's co-conspirator, LCpl Fichter, was convicted of similar offenses relating to the theft of items from barracks rooms (conspiracy, burglary, and larceny) and actually a greater number of larcenies, but the appellant was found additionally guilty of an unauthorized absence, a false official statement for lying to investigators, and two specifications of soliciting other Marines to receive the stolen property.

The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). We are not required to engage in comparison of 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 *Ballard*, 20 M.J. at 283). The burden is upon the appellant to make that showing. *Id.* If the appellant satisfies his burden, the

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<sup>1</sup> Regardless of the styling of this assertion, we note that the Government was adequately on notice and joined issue. Government's Brief of 14 Oct 2010 at 15.

Government must then establish a rational basis for the disparity. *Id.* "Closely related cases" are those that "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994); see also *Lacy*, 50 M.J. at 288 (examples of closely related cases include co-actors in a common crime, servicemembers involved in a common or parallel scheme, or "some other direct nexus between the servicemembers whose sentences are sought to be compared"). Under the first step of the *Lacy* analysis, we find that the appellant's case and LCpl Fichter's are closely related. Both Marines were involved in the same conspiracy whereby they burglarized various barracks rooms of fellow Marines and a Sailor and stole numerous personal high value electronics items.

Next, we must examine whether the appellant's sentence is highly disparate, and whether there is a rational basis for any disparity. *Lacy*, 50 M.J. at 288. Under the *Lacy* analysis, we do not find the sentence in the appellant's case to be highly disparate. The sentences between the appellant and LCpl Fichter are not so different to be outside "a range of acceptability and a range of relative uniformity." *Lacy*, 50 M.J. at 287. In fact, these two Marines received almost identical sentences from a military judge, although LCpl Fichter also received a reprimand. While LCpl Fichter was convicted of more larcenies, this fact alone is not persuasive.

The appellant asserts that LCpl Fichter received clemency from the convening authority and contends that he deserves a similar remedy in the form of disapproval of confinement in excess of nine months. The record is unclear as to whether LCpl Fichter received clemency or merely received suspension of confinement as a result of pretrial agreement protections. However, the appellant was also convicted of unauthorized absence, false official statement, and solicitation of others to receive stolen property, offenses of which LCpl Fichter was not convicted. Even if LCpl Fichter received clemency in his case, the convening authority was free to extend clemency to the appellant yet refrained from doing so. Our court does not have clemency granting authority, and therefore our only consideration is whether an otherwise legal sentence should be affirmed. See *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988). After considering these offenses and the entire record, we conclude that the sentence awarded by the military judge is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395; *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

### **Sentence Reassessment**

Having consolidated two of three specifications listed under Charge IV, we conclude that there has not been a dramatic change in the penalty landscape. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Applying the analysis set forth in *United*

*States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the military judge would have adjudged a sentence no less than that approved by the convening authority in this case. Accordingly, no further action is deemed necessary.

### **Conclusion**

Specification 1 of Charge IV is amended to reflect that the appellant stole, in addition to the items delineated in the original specification, "a laptop computer, an XBOX 360 game console and a television, the property of Hospitalman [A], U.S. Navy." Specification 2 of Charge IV is amended to reflect that the appellant stole, in addition to the items delineated in the original specification, "a laptop computer, a printer, a digital external hard drive, an external hard drive, a cellular phone, a computer briefcase, and a book of about fifty digital video discs, the property of Lance Corporal [B], U.S. Marine Corps." Specifications 2 and 4 of Charge IV are ordered dismissed. The remaining guilty findings, as modified herein, and the sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court