

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

**Before
C.L. REISMEIER, R.E. BEAL, D.O. VOLLENWEIDER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SEAN R. MCCANNON
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000106
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 September 2009.
Military Judge: Col John Ewers, USMC.
Convening Authority: Commanding Officer, 5th Marine
Regiment, 1st Marine Division (REIN), FMF, Camp Pendleton,
CA.
Staff Judge Advocate's Recommendation: Col B.D. Landrum,
USMC. **Addendum:** Maj M.J. Kent, USMC.
For Appellant: CDR Don Evans, JAGC, USN.
For Appellee: Mr. Brian Keller, Esq.

3 June 2010

OPINION OF THE COURT

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

PER CURIAM:

The appellant pled guilty at a special court-martial to two specifications of graft by accepting money in return for tampering with the urine specimens of two other Marines.¹ During the providence inquiry into the first specification, trial defense counsel notified the military judge that the appellant asked the other Marine for money in return for his intervention, but that the Marine refused to pay. The military judge then

¹ The elements of the offense of graft includes that the individual "wrongfully asked, accepted, or received a thing of value" from another.

stated that the change affected the Government's theory of liability, but not the appellant's liability for the offense. The appellant did not amend his plea to the first specification and provided adequate information to show he committed that offense by asking for money from the other Marine. The military judge found the appellant guilty of both specifications as charged. Although we find beyond a reasonable doubt that this variance between the language of the specification and the proof did not prejudice the appellant, we will take corrective action in our decretal paragraph.

After carefully considering the record of trial, submitted without assignment of error, we conclude that no error materially prejudicial to the substantial rights of the appellant was committed and that the findings, as modified, and sentence are correct in law and fact. Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

As to Specification 1 under Charge II, we affirm the finding of guilty except for the word "accept" and substituting the words "ask for." We affirm the remaining findings and after reassessing the sentence in accordance with *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Buber*, 63 M.J. 476 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), affirm the sentence.

For the Court

R.H. TROIDL
Clerk of Court