

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

**Before  
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHRISTOPHER A. EURICH  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100308  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 9 March 2011.

**Military Judge:** LtCol Michael Mori, USMC.

**Convening Authority:** Commanding General, 1st Marine  
Aircraft Wing, Marine Corps Base Hawaii, Kaneohe Bay, HI.

**Staff Judge Advocate's Recommendation:** Col J.R. Woodworth,  
USMC.

**For Appellant:** CDR Luis Leme, JAGC, USN.

**For Appellee:** Capt David Roberts, USMC.

**13 December 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of multiple specifications of wrongfully using controlled substances in violation of Article 112(a), Uniform Code of Military Justice, 10 U.S.C. § 912(a). The approved sentence included confinement for two hundred days, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises one assignment of error, that his sentence was unreasonably disparate when compared to other related cases and accordingly warrants relief under Article 66(c), UCMJ. We have examined the record of trial, the assignment of error, and the pleadings of the parties. We conclude that the findings and the 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.

### **Factual Background**

Between October 2009 and April 2010, the appellant used various illegal drugs on numerous occasions. Prosecution Exhibit 3. While he occasionally obtained the drugs from civilian acquaintances, he also obtained drugs from other Marines. *Id.* A cooperating witness identified the appellant as one of several Marines from within the appellant's unit using drugs. Appellate Exhibit III at 7.

After trial, defense counsel submitted a clemency request to the convening authority (CA), requesting that the bad-conduct discharge be disapproved based on disparate punishment between the appellant and other related offenders. Clemency Request of 29 Apr 2011. Although the clemency request identified several others implicated and the forum where they purportedly received their punishment, it lacked specific information regarding the charges, pleas, findings, and sentences. *Id.* The only case trial defense counsel cited with some specificity was the case of Lance Corporal (LCpl) N, who ostensibly supplied drugs to the appellant and other Marines and who was sentenced at general court-martial to 270 days confinement and reduction to pay grade E-1, but no discharge. *Id.* After considering the clemency matters submitted, the CA chose to characterize only LCpl N's case as a companion case and declined to grant relief. Special Court-Martial Order No. 03-2011 of 13 May 2011 at 2.

### **Sentence Disparity**

#### **A. Standard of Review**

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 appellant must show that 1) his case is closely related to other cases, and 2) his sentence is "highly disparate." *Id.* If the appellant meets these two challenges, then the Government must show a rational basis for the disparity. *Id.*

## B. Analysis

We begin by noting that the record lacks any specific information on related cases save for the generalized assertions by the trial defense counsel in the clemency request.<sup>1</sup> Absent a record of charges, pleas, findings and sentence, we cannot determine if any of these other cases are in fact "closely related" to the appellant's case. See *United States v. Noble*, 50 M.J. 293, 294-95 (C.A.A.F. 1999) (holding where no record of findings and sentence exist in a related case, there is no issue of sentence uniformity). The CA did identify LCpl N's case as a companion case, thus we assume, without deciding, that his case is closely related to the appellant's case. However, we again are left to speculate on the nature of the offenses for which LCpl N was found guilty, a key consideration in determining disparity.

But even assuming the averments in the clemency petition are accurate, we find the appellant fails to meet his burden of demonstrating highly disparate sentences. The charges against the appellant were initially referred to trial before a general court-martial. After entering into a pretrial agreement to plead guilty before a special court-martial without any sentence limitation, he was sentenced to confinement for two-hundred days, reduction to pay grade E-1, and a bad-conduct discharge. According to the clemency request, the charges against LCpl N were referred to general court-martial and he was sentenced to confinement for two-hundred and seventy days and reduction to pay grade E-1, but no punitive discharge. In comparing these two sentences, we find that they are not so different to be outside the range of relative uniformity. *Lacy*, 50 M.J. at 288 (goal in determining sentence appropriateness under Article

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<sup>1</sup> While trial defense counsel asserts in his clemency petition that LCpl N was "the dealer who supplied drugs to [the appellant] and numerous other Marines", the actual charges, pleas, and findings in his case, or any other case are unknown. The only reference in this record to any related case is the acknowledgement in the CA's action of LCpl N's case. We remind trial and appellate practitioners that mere averments of counsel are not evidence. By supplementing the record with affidavits, declarations, or other documents, we can make informed determinations. See N.M.CT.CRIM.APP. RULE 23.4.

66(c), UCMJ, is "to attain *relative* uniformity rather than an arithmetically averaged sentence." (quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)).

We have long recognized that our military justice system must accept some disparity in the sentences of related cases. *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001). The only real distinction between these two cases is that LCpl N purportedly did not receive a bad-conduct discharge at his general court-martial; a conviction at a general court-martial carries with it possibly a greater stigma than a special court-martial conviction even when a punitive discharge is not adjudged. See *United States v. Mann*, 32 M.J. 883, 890 (N.M.C.M.R. 1991) (quoting *United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987)). To set aside the appellant's punitive discharge merely because LCpl N may not have received one would amount to sentence equation vice sentence comparison, which we decline to do. See *Durant*, 55 M.J. at 260 (citation omitted).

As the appellant has failed to show highly disparate sentences, the Government need not provide a rational basis for any difference. *Lacy*, 50 M.J. at 289. No relief is warranted in this case.

#### **Conclusion**

The findings and sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court