

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

**Before  
B.L. PAYTON-O'BRIEN, J.R. PERLAK, M.D. MODZELEWSKI  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**RICHARD A. GARCIA-TOLSON  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000610  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 1 July 2010.

**Military Judge:** CAPT James Redford, JAGC, USN.

**Convening Authority:** Commanding Officer, 3d Assault Amphibian Battalion, Marine Corps Base, Camp Pendleton, CA.

**Staff Judge Advocate's Recommendation:** Maj M.T. Smith, USMCR.

**For Appellant:** LCDR Michael Torrissi, JAGC, USN; LT Ryan Santicola, JAGC, USN.

**For Appellee:** LCDR Sergio Sarkany, JAGC, USN; Capt Samuel C. Moore, USMC.

**31 May 2012**

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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 special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of wrongfully using oxymorphone, a Schedule II controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 30 days, reduction to pay grade E-1, and a

bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.<sup>1</sup>

On 6 September 2011, we issued our opinion in this case wherein we affirmed the findings and sentence.

Following our opinion, the appellant submitted a Petition for Grant of Review to the Court of Appeals for the Armed Forces (CAAF) averring that he was denied a meaningful opportunity for clemency because the CA believed, based upon erroneous legal advice, that disapproval of the appellant's bad-conduct discharge would result in the appellant receiving an honorable discharge. Supplement to Petition for Grant of Review at 4-10. On 5 January 2012, CAAF set aside our opinion and the CA's action and remanded the case for new post-trial review and action. Following that new post-trial review and CA's action, this case is before us for review a second time. There are no additional allegations of error.<sup>2</sup>

After carefully examining the record of trial, and the pleadings of the parties, we conclude, for the reasons set forth in our earlier opinion of 6 September 2011, that the findings and sentence are correct in law and fact, and that as a result of the new post-trial processing no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

The findings and sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>1</sup> To the extent that the CA's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

<sup>2</sup> We recognize that the original CA may have been inclined to grant clemency to the appellant in the form of disapproval of the bad-conduct discharge but for the erroneous legal advice he received. Although the new CA did not take that action, clemency is a matter solely within the prerogative of the convening authority and not this court. *United States v. Healy*, 26 M.J. 394, 295 (C.M.A. 1988).