

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

**Before  
B.L. PAYTON-O'BRIEN, R.G. KELLY, J.R. MCFARLANE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JONATHAN D. SCALF  
DAMAGE CONTROLMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201200245  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 23 February 2012.

**Military Judge:** CAPT Carole Gaasch, JAGC, USN.

**Convening Authority:** Commander, Navy Region Southwest, San Diego, CA.

**Staff Judge Advocate's Recommendation:** CDR J.N. Nilsen, JAGC, USN.

**For Appellant:** CAPT Diane Karr, JAGC, USN.

**For Appellee:** LT Ian MacLean, JAGC, USN.

**10 October 2012**

-----  
**OPINION OF THE COURT**  
-----

**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 general court-martial convicted the appellant, pursuant to his pleas, of two specifications of violating Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, by using interstate commerce to attempt to induce a minor to engage in wrongful sexual activity, in violation of 18 U.S. Code § 2422(b), and one specification of indecent language to a child under the age of

16, in violation of Article 134, UCMJ. The appellant was sentenced to confinement for 20 months, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the reduction and confinement as adjudged, but approved only a bad-conduct discharge. In accordance with the pretrial agreement, confinement in excess of 14 months was suspended.

The appellant raises a single assignment of error: that his sentence of confinement for 20 months is inappropriately severe.<sup>1</sup>

Having reviewed 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 occurred. Arts. 59(a) and 66(c), UCMJ.

### **Factual Background**

Over a four-month period in mid-2011, while on deployment with his ship, the appellant communicated via the internet with a 13-year-old girl from his hometown in Kentucky. The conversations between the appellant and the victim began as casual conversation but quickly turned sexual in nature and centered on the appellant's desires to have sexual and anal intercourse with her. The appellant used text messages, Facebook, and email to communicate with the victim, asking her for nude photographs and describing his intentions regarding sex with her. Over the course of hundreds of communications with her, the appellant attempted to induce the victim to meet with him when he came back home to Kentucky on leave so they could engage in sexual activities. At some point during the four-month period, the victim's mother learned of these communications when she inspected her daughter's cellular telephone. She immediately contacted the appellant demanding that he cease communications with her daughter. The appellant failed to heed the mother's warning, and instead used only email communications with the victim in his effort to thwart the mother's demand.

The appellant contends his sentence of 20 months confinement is inappropriately severe because the victim was not in his physical presence when the acts occurred, the victim's mother testified at sentencing that she was merely embarrassed and angry, and the victim's mother did not indicate the victim herself was impacted by the communications. He also contends

---

<sup>1</sup> Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

that his sentence is disparate when compared to one other case in the circuit wherein members awarded 90 days confinement and a bad-conduct discharge for sexual misconduct.

### Discussion

Congress has vested us with the power to review a case for sentence appropriateness, including relative uniformity. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); see also Art. 66(c), UMCJ. Sentence appropriateness "involves the judicial function of assuring that justice is done and the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

Taking into consideration this particular appellant, the nature and seriousness of the offenses, his record of service, and all matters contained in the record of trial, we do not find the sentence in this case inappropriately severe. *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)). The appellant targeted a young and vulnerable teenager for his indecent communications and demonstrated a willingness to carry out his proposals. When the victim's mother discovered the communications and instructed the appellant to cease contact with her daughter, he blatantly refused and thereafter used an alternative secretive method by which he could continue his communications with the girl. Considering all the circumstances of the case, we conclude that the sentence adjudged is appropriate. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Snelling*, 14 M.J. at 268.

Our inquiry does not end there. In closely related cases, however, we may afford relief where the sentences are "highly disparate." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Closely related cases include those with "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus" between the cases being compared. *Lacy*, 50 M.J. at 288. The appellant bears the burden of demonstrating that any cited cases are closely related to his case and that the sentences are highly disparate. If the appellant meets that burden, then the Government must show there is a rational basis for the disparity. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001). Here, the appellant points to a single case in the same circuit involving another service member and sexual misconduct where the sentence included only 90 days confinement and a bad-

conduct discharge, but he fails to cite any other factual details of the case.

It is apparent from the record before us that the appellant was a sole actor in the misconduct involving this 13-year-old girl from his hometown, and there is no nexus between the appellant's case and the one he would have us consider as highly disparate. The appellant has not met his burden that the cited case is closely related. Accordingly, we reject the assignment of error.

### **Conclusion**

We affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL  
Clerk of Court