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

**Before**
**R.Q. WARD, J.E. STOLASZ, G.G. GERDING**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOSHUA F. SEYMOUR**
**LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201300125**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 2 November 2012.
**Military Judge:** CDR Anthony Johnson, JAGC, USN.
**Convening Authority:** Commanding General, 2d Marine Division, Camp Lejeune, NC.
**Staff Judge Advocate's Recommendation:** Maj J.N. Nelson, USMC.
**For Appellant:** CAPT Stephen White, JAGC, USN.
**For Appellee:** Maj Paul Ervasti, USMC.

**24 September 2013**

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**OPINION OF THE COURT**

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PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of attempted possession of Percocet in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. The military judge sentenced the appellant to 30 days of confinement, reduction to pay grade E-1, and a bad-conduct discharge. A pretrial agreement had no effect and the convening authority (CA) approved the sentence as adjudged.

The appellant raises two issues on appeal: 1) that in taking his action, the CA improperly considered a prosecution exhibit that the military judge ruled was partially inadmissible during presentencing; and 2) that the bad-conduct discharge is inappropriately severe given the circumstances of this case.

After carefully considering the record of trial, and the submissions of the parties, we are convinced 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. Art. 59, UCMJ. However, we find that the approved sentence was inappropriately severe. We will take corrective action in our decretal paragraph.

**Background**

During the providence inquiry, the appellant admitted to attempting to purchase 15 pills of Percocet from a civilian, Ms. W, in March 2010. As he explained to the military judge, when he arrived at the agreed upon location, local police arrested him before he ever met with Ms. W.

During presentencing, the Government sought to introduce Prosecution Exhibit 3, the appellant's complete, hand-written statement to law enforcement upon his arrest. Trial defense counsel objected to portions of the appellant's statement that referenced other misconduct to include the appellant's prior interaction with Ms. W. The military judge sustained the defense objection and indicated on the record which portions of the statement he would not consider. Record at 91-93. However, the military judge failed to make redactions on the original Prosecution Exhibit 3 submitted by the Government, and the authenticated record of trial includes Prosecution Exhibit 3 without any redaction.

**The CA's Consideration of the Appellant's Confession**

The appellant contends that because the military judge sustained the appellant's objection to the admission of significant portions of Prosecution Exhibit 3, the CA's consideration of the unredacted copy of Prosecution Exhibit 3 in the record of trial amounts to error. We disagree.

The CA indicated in his action that he considered the record of trial in addition to the matters submitted by the appellant. The matters submitted by the appellant called to the CA's attention the fact that the record of trial contains a non-

redacted copy of Prosecution Exhibit 3, despite the military judge's ruling that significant portions of Prosecution Exhibit 3 were inadmissible. The CA therefore knew that there was information in Prosecution Exhibit 3 that he should not consider. The record of trial makes clear which portions of Prosecution Exhibit 3 the military judge ruled inadmissible, and which portions that the CA should not consider in taking his action. Without more, we are left to presume that the CA took his action based only on the evidence that the military judge ruled admissible, along with the other matters that he noted in his action that he properly considered.

**Sentence Appropriateness**

The appellant contends that a bad-conduct discharge is inappropriately severe under the circumstances of his case. We agree.

In accordance with Article 66(c), UCMJ, a military appellate court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *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 enlisted in the Marine Corps in July 2007. He deployed to Iraq in 2009, where he participated in combat operations in the Al-Anbar province. After returning from Iraq, he soon began workups for another combat deployment to Afghanistan. It was during this predeployment training that he severely injured his shoulder. That injury, in addition to other service-connected injuries, later resulted in a Physical Evaluation Board (PEB) determination that he was unfit for continued service and should be separated with a proposed 80% permanent disability rating.[1]

[1] At trial, defense counsel offered and the military judge admitted the appellant's Disability Evaluation System (DES) package dated 14 May 2012. The DES proposed rating listed is 80%. Attached to the DES package is a forwarding endorsement dated 13 August 2012 from the PEB liaison officer to the appellant's commanding officer. This endorsement advises that the

From his enlistment in 2007 until the instant offense in March 2010, a period of over two years, the appellant's record of service reflects that he performed well. Upon his arrest, the appellant immediately accepted responsibility and gave a full statement to law enforcement. Despite his cooperation, the appellant was not charged until January 2012, nearly two years after the offense and one month after his end of active service (EAS) date. Throughout this time, he continued to serve without incident. Statements from his noncommissioned and staff noncommissioned officers describe how he served productively and was a positive influence on his unit despite this prolonged time awaiting trial. He ultimately pleaded guilty to the offense, admitting that he exercised poor judgment and apologizing for his misconduct. Three months prior to trial, he received approval for medical separation with a proposed disability rating of 80%. However, his subsequent punitive discharge in this case precludes any related benefits he would otherwise be eligible to receive.[2] Coupled with the appellant's performance both before and after his offense, as well as the nature of his offense as limited by the military judge's evidentiary ruling,[3] these circumstances convince us that the appellant's sentence to a bad-conduct discharge is inappropriately severe.

**Conclusion**

The findings are affirmed. So much of the approved sentence as provides for confinement for 30 days and reduction to pay grade E-1 is affirmed.

For the Court

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appellant's disability determination has been finalized through the DES and the appellant will be involuntarily separated by Headquarters Marine Corps within 30 to 90 days. Defense Exhibit A. The appellant was sentenced on 2 November 2012.

[2] *See* Title 38 U.S.C. §101(2) (defining eligible veteran to be a person who served in the active military and who was discharged under conditions other than dishonorable); 38 C.F.R. §3.12(c)(2) (precluding benefits where former service member was discharged by reason of the sentence of a general court-martial).

[3] We make no determination as to the correctness of the military judge's ruling. His ruling, however, constrains our Article 66(c), UCMJ, analysis to only that evidence admitted at trial. *See United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003) ("[t]he Courts of Criminal Appeals are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c)." (citations omitted)); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (Article 66(c) precludes services courts from considering "extra record" matters when determining guilt or sentence appropriateness).

R.H. TROIDL
Clerk of Court