

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

**Before  
K.J. BRUBAKER, M.C. HOLIFIELD, A.C. RUGH  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MICHAEL A. HOOD  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201500264  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 27 May 2015.

**Military Judge:** Maj N.A. Martz, USMC.

**Convening Authority:** Commanding Officer, Headquarters  
Battalion, 2d Marine Division, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** LtCol K.S. Woodard,  
USMC.

**For Appellant:** CDR Gregory R. Dimler, JAGC, USN.

**For Appellee:** CAPT Dale Harris, JAGC, USN; Maj Tracey L.  
Holtshirley, USMC.

**30 November 2015**

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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, found the appellant guilty, pursuant to his pleas, of two specifications of conspiracy, one specification of selling military property without authority and four specifications of larceny of military property, in violation of Articles 81, 108 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881,

908, and 928. The adjudged sentence was 120 days' confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, but pursuant to a pretrial agreement, suspended all confinement in excess of 90 days for the period of confinement served plus six months.

The appellant raises two assignments of error (AOE): (1) the appellant's sentence was disproportionately severe to that of a closely related case; and (2) the staff judge advocate's recommendation and court-martial order (CMO) failed to discuss a companion case. We disagree on both counts.

### **Background**

In early 2014 while deployed as an armory custodian to Camp Leatherneck, Afghanistan, the appellant conspired with Sergeant (Sgt) Harmon to steal two pocket laser range finders from the armory, one for each of them.<sup>1</sup> The appellant subsequently took two miniature reflex weapon sights while still deployed and four advance flashlight kits and five flip-up iron weapon sights once he returned to Camp Lejeune, North Carolina.

After obtaining these items, the appellant learned that Sgt Harmon made a large sum of money selling his range finder once back in the United States. As a result, the appellant again conspired with Sgt Harmon, this time to sell the appellant's range finder to an undercover Naval Criminal Investigative Service agent in exchange for \$3,500.00.

At a special court-martial convened by a separate CA, Sgt Harmon pleaded guilty to similar misconduct and was sentenced to 150 days' confinement, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, automatic forfeitures were waived for the benefit of Sgt Harmon's dependent. As an act of clemency, Sgt Harmon's CA disapproved the bad-conduct discharge, but approved the remaining sentence as adjudged.

### **Sentence Disparity**

The appellant argues that his sentence is disparately severe when compared to the sentence received by Sgt Harmon.

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<sup>1</sup> These military-issued, handheld devices assist marksmen with determining distance, height and other targeting measurements.

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) (additional citation omitted).

“Closely related” cases are those that “involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design.” *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994); see also *Lacy*, 50 M.J. at 288 (citing examples of closely related cases as including co-actors in a common crime, service members involved in a common or parallel scheme, or “some other direct nexus between the service members whose sentences are sought to be compared”). 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. *Lacy*, 50 M.J. at 288; see also *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

In conducting this analysis, it is important to note that “[s]entence comparison does not require sentence equation.” *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). Additionally, co-conspirators are not entitled to equal sentences simply due to their status as co-conspirators. See *id.* at 261. Sentence disparity exists when a sentence exceeds “relative uniformity” or represents an “obvious miscarriage of justice or an abuse of discretion.” *United States v. Swan*, 43 M.J. 788, 793-94 (N.M.Ct.Crim.App. 1995) (citations and internal quotation marks omitted). It is with these concepts in mind that we review the appellant's sentence.

The parties agree that Sgt Harmon's case is closely related to the appellant's case.<sup>2</sup> However, the appellant has failed to demonstrate that the sentences were highly disparate.

At court-martial, both men were adjudged similar sentences with Sgt Harmon receiving 150 days' confinement compared to the appellant's 120 days' confinement. But the appellant was the

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<sup>2</sup> Government's Brief of 9 Nov 2015 at 11.

beneficiary of a more favorable pretrial agreement, which further suspended all adjudged confinement in excess of 90 days.

Sgt Harmon's adjudged discharge was disapproved solely through his CA's act of clemency. The provenance of this largesse is unknown, although the appellant makes passing reference in his sentencing statement to Sgt Harmon's "combat experience including awards for valor."<sup>3</sup> Granting mercy for any reason, or no reason, is within the purview of the CA. *United States v. Nerad*, 69 M.J. 138, 143 (C.A.A.F. 2010). This CA's act of mercy did not unsettle the relative uniformity of the sentences of the appellant and Sgt Harmon. And such an exercise in one case but not the other by a separate CA does not represent an "obvious miscarriage of justice or an abuse of discretion" in these specific cases. *Swan*, 43 M.J. at 794.

#### **Notation of Companion Case in CMO**

The appellant also alleges error in that the CA failed to note Sgt Harmon's case in the appellant's CMO. Section 0151a(5) of the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F (26 June 2012), directs CAs who order separate trials of companion cases to indicate such an order in the action on the record in each companion case. This administrative requirement only applies to cases convened by the same CA. In this case, as the two courts-martial were convened by separate CAs, the regulation does not apply. There was no error in not noting Sgt Harmon's case in the appellant's CMO.

#### **Conclusion**

After careful consideration, 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

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<sup>3</sup> Defense Exhibit E at 2; see also Record at 69.

appellant was committed. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence are therefore affirmed.

For the Court

R.H. TROIDL  
Clerk of Court

