

**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.

**JOSE LOPEZMOTA
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100289
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 17 March 2011.

Military Judge: Col Michael Richardson, USMC.

Convening Authority: Commanding Officer, Headquarters
Battalion, Marine Air Ground Task Force Training Command,
MCAGCC, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: Maj J.V. Munoz,
USMC.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: LCDR Matthew T. Schelp, JAGC, USN; Maj W.C.
Kirby, USMC.

10 November 2011

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 special court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiracy to commit larceny, three specifications of theft of military property, and three specifications of fraud against the United States in violation of Articles 81, 121, and 132, Uniform Code of Military Justice,

10 U.S.C. §§ 881, 921, and 932. The appellant was sentenced to confinement for 100 days, forfeiture of \$978.00 pay per month for three months, reduction to the pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in accordance with the pretrial agreement, suspended all confinement in excess of 60 days for a period of six months.¹

In his sole assignment of error, the appellant argues that his sentence is unjustifiably severe. We disagree and find that no error materially prejudicial to a substantial right of the appellant occurred. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

Background

A travel clerk at the Installation Personnel Administration Center (IPAC), the appellant began to suspect that other clerks in his section were stealing money through fraudulent travel claims. Record at 35-38. With the assistance of another clerk, Lance Corporal (LCpl) S, the appellant prepared and submitted a false travel claim. *Id.* at 40-46. Soon thereafter, he conspired with two other Marines, LCpl G and LCpl L, to participate in the same illicit venture, processing their fraudulent travel claims in return for a portion of the proceeds. *Id.* at 46-50. In total, over 20 Marines from within the IPAC participated in similar ventures from 2009 to 2010. Prosecution Exhibit 1 at 2.

Standard of Review

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." This court reviews the appropriateness of a sentence *de novo*. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).

Sentence Appropriateness

¹ To the extent that the convening authority'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).

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 character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (internal quotation marks and citation omitted). In this case, the appellant, along with over 20 other Marines, participated in a widespread scheme to steal government travel funds from their command. Instead of reporting the widespread theft of travel funds to his chain of command, or simply refusing to join, the appellant actively sought out one of the suspects and insisted on participating. Record at 35-36, 40. After submitting his own fraudulent travel claim, he then conspired with two other Marines to process their false claims. *Id.* at 46-48.

These crimes are serious enough to warrant the adjudged sentence, including the bad-conduct discharge. After reviewing the entire record, we find that the adjudged sentence was appropriate for this offender and his offenses. *Baier*, 60 M.J. at 384. Relief at this juncture would be an act of clemency, a wholly separate function allocated by Congress to the convening authority. *Healy*, 26 M.J. at 395-96.

Sentence Disparity

The appellant also asserts that his sentence was disproportionately severe compared to that received by others involved in the same travel fraud scheme. Appellant's Brief of 21 Jul 2011 at 1. The appropriateness of a sentence should be determined without reference or comparison to sentences in other 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) (citations omitted). The appellant must show that his case is closely related to other cases and that his sentence is "highly disparate." *Id.* Cases that are closely related include 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). That may include "co-actors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288.

We have no doubt that this and the other cases stemming from this broad scheme are closely related, as over 20 other Marines participated in a common, or at least parallel, criminal scheme to defraud the United States through these fraudulent travel claims. The next question is whether the appellant has shown that his and other sentences from these closely related cases are highly disparate. *Id.* Of all the Marines implicated, 20 were handled at nonjudicial punishment (NJP) and the remaining four (including the appellant) were referred to special courts-martial. Clemency Petition of 29 Apr 2011, Enclosure 5 at 2. However, no evidence of other sentences was introduced at trial.

Since the record is devoid of any information concerning the outcome of the three other special courts-martial, we cannot engage in any sentence comparison. But the appellant's claim does raise the issue of differences in initial disposition of co-actors, an issue that can be viewed by this court in determining sentence appropriateness under Article 66(c), Uniform Code of Military Justice. *Noble*, 50 M.J. at 295. In this regard, "absent evidence of discriminatory or otherwise illegal prosecution or referral, we have broad discretion in deciding whether or not to remedy this disparity." *United States v. Stotler*, 55 M.J. 610, 612 (N.M.Ct.Crim.App. 2001) (internal quotation marks and citation omitted).

Here we find a rational basis for the difference in disposition;² furthermore, we find no evidence of any discriminatory or otherwise illegal prosecution or referral decision. First, the appellant was not singled out for a higher forum; instead, he along with three others were categorized based on a higher degree of culpability. Second, the appellant himself recruited others into this scheme. Last, on three separate occasions he endeavored to defraud the United States through fraudulent travel claims totaling approximately \$1,700.00. And while his actual net proceeds may have been less than some of his co-actors who received NJP, we cannot say that his forum selection was unreasonable or the result of some "invidious, constitutionally impermissible discrimination."³

Considering the entire record, we find that these factors provide a rational basis for the disparity in disposition and do

² The distinguishing criterion was who received cash payments for processing others' claims in addition to submitting their own. Clemency Petition of 29 Apr 2011, enclosure 5 at 2.

³ *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001).

not seriously detract "from the appearance of fairness or integrity in military justice proceedings." *Kelly*, 40 M.J. at 570. Accordingly, we decline to grant relief.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court