IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 202000108
Christopher J. NELSON Lance Corporal (E-3) U.S. Marine Corps Appellant	)	USCA Dkt. No. 21-0304/MC

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Issue Presented

DID THE MILITARY JUDGE AND THE COURT BELOW ERR IN FINDING THAT APPELLANT VOLUNTARILY PROVIDED HIS SMART PHONE PASSCODE TO LAW ENFORCEMENT WHEN THE LAW ENFORCEMENT OFFICIAL CONDUCTING THE INTERROGATION ASSERTED THAT HE POSSESSED A SEARCH AUTHORIZATION FOR THE PHONE AND APPELLANT ONLY PROVIDED HIS PASSCODE BECAUSE APPELLANT BELIEVED HE HAD "NO CHOICE?"

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2016), because Appellant's approved sentence includes two years of confinement and a bad-conduct discharge. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of conspiracy to commit wrongful distribution of controlled substances, conspiracy to commit wrongful introduction of controlled substances with intent to distribute, wrongful distribution of controlled substances, wrongful introduction of controlled substances with intent to distribute, and wrongful use of controlled substances, in violation of Articles 81 and 112a, UCMJ, 10 U.S.C.

§§ 881, 912a (2016). The Military Judge sentenced Appellant to twenty-four months of confinement, reduction to paygrade E-1, and a bad-conduct discharge. Under a Pretrial Agreement, the Convening Authority suspended all confinement in excess of eighteen months and, except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed at the lower court on April 20, 2020. Appellant and the United States submitted briefs. On May 4, 2021, the lower court found no prejudicial error and affirmed the findings and sentence. *United States v. Nelson*, No. 202000108, 2021 CCA LEXIS 215, at *15 (N-M. Ct. Crim. App. May. 4, 2021).

On June 30, 2021, Appellant petitioned this Court for review, which this Court granted on August 31, 2021. Appellant filed his Brief on November 1, 2021.

Statement of Facts

A. The United States charged Appellant with multiple drug offenses based on evidence found on his phone.

The United States charged Appellant with conspiracy to commit wrongful distribution of controlled substances, conspiracy to commit wrongful introduction of controlled substances with intent to distribute, wrongful distribution of controlled substances, wrongful introduction of controlled substances with intent to distribute, and wrongful use of controlled substances. (J.A. 45.)

Law Enforcement found most of the relevant evidence from searching Appellant's phone. (J.A. 70.)

B. Pretrial, Appellant moved to suppress the evidence found on his phone. The Military Judge denied the Motion in a written Ruling.

[redacted]

1. The United States presented evidence Appellant voluntarily entered his phone passcode.

In opposition to the Motion, the United States [redacted], and elicited testimony from Law Enforcement, (J.A. 53–84).

a. Appellant waived his Article 31(b) rights and made incriminating statements that provided probable cause to search his phone.

[redacted]

While Appellant followed along on paper, the Agent read the Form aloud. (J.A. 56.) After reviewing Appellant's rights, the Agent asked him whether he understood his rights, if he was willing to speak with them, and if he wanted a lawyer. (J.A. 56.) Appellant stated he understood his rights, was willing to discuss the allegations, and did not want a lawyer. (J.A. 56.)

[redacted]

b. The following day, Law Enforcement presented Appellant with a Command Authorization for Search and Seizure and Appellant voluntarily entered his passcode.

[redacted]

[redacted] The Agent did not tell Appellant he did not have to unlock the phone because Appellant did not ask. (J.A. 65.) Appellant's passcode was "a very simple code" consisting of four digits. (J.A. 61, 75.) The Agent did not re-advise him of Article 31(b) at this meeting, which lasted "maybe three minutes." (J.A. 60–62.)

[redacted]

2. The Agent testified he would have inevitably discovered the contents of Appellant's phone.

The Agent testified that in cases where they did not have a phone's passcode they sent the phone to the Defense Criminal Forensic Laboratory because "they have the capability of breaking passcode[s]." (J.A. 65.)

The Agent "did not know at the time [of the seizure] whether or not [the Laboratory] would be able to successfully unlock the phone." (J.A. 66–67.) However, in the Agent's experience the number of digits in a passcode was a factor in how quickly the Laboratory could unlock an iPhone. (J.A. 66.) He had sent at least two iPhones of the same model as Appellant's to the Laboratory, and they were unlocked within days. (J.A. 66.)

There was only a single occasion in two or three years where the Laboratory did not eventually unlock an iPhone, but it was an iPhone 8—a newer model than Appellant's iPhone 6—and had a six-digit passcode. (J.A. 66, 76.) Moreover, the Laboratory stopped the process of unlocking the iPhone 8 with the six-digit passcode only because Law Enforcement cancelled the request when the service member completed his enlistment contract—not because the Laboratory could not unlock it. (J.A. 77.) In fact, the Agent testified the Laboratory "would have eventually obtained the pass code" of the iPhone 8 if it had continued its efforts. (J.A. 77.)

3. The Military Judge issued a written Ruling with Findings of Fact and Conclusions of Law.

The Military Judge issued a written Ruling and included Findings of Fact and Conclusions of Law. (J.A. 127–45.)

The Military Judge's Findings of Fact relevant to the Issue Presented are summarized as follows:

(1) on April 30, 2018, Appellant waived his rights after being advised of them;

(2) Appellant did not allow the Agent to search his phone;

(3) the Agent told Appellant he would seek a search authorization, to which Appellant replied, "I guess at that point I'd have no choice" but to let the Agent search the phone;

(4) when the Agent again asked to search his phone, Appellant responded, "not without knowing whether I'd be incriminating myself";

(5) the Agent seized Appellant's phone;

(6) on May 1, 2018, the Agent got a search authorization and met with Appellant;

(7) the Agent did not re-advise Appellant of his rights;

(8) Law Enforcement told Appellant his commanding officer found probable cause to search his phone, placed the phone before Appellant, and asked Appellant "if he was willing to unlock the iPhone 6 with the passcode";

(9) Appellant said, "I guess I don't have a choice" and entered the passcode;

(10) Appellant is "articulate with the ability to communicate clearly";

(11) the Agent did not use threats, physical abuse, or coercion during the interrogation.

(*See* J.A. 128–30, 144.)

In his Conclusions of Law, the Military Judge determined that because Appellant "understood his rights" when he "knowing[ly] and voluntar[ily]" waived them on April 30, 2018, Law Enforcement did not need to re-advise him on May 1, 2018, "[d]ue to the relatively short time period between questioning, the

questioning involving the same subject matter, and the questioning being conducted by the same Law Enforcement officer." (J.A. 141–42.)

After considering Appellant's characteristics and the details of the interrogation, the Military Judge concluded Appellant voluntarily provided the passcode because he was a twenty-five-year-old E-3 with four years of service who understood "his rights and the ability to refuse requests from [Law Enforcement]," and "[t]here were no threats, physical abuse, or coercion from Law Enforcement" in the meeting that "was brief, lasting only minutes." (J.A. 143–44.)

Because the Military Judge found Appellant entered his passcode voluntarily, the Military Judge did not address whether the discovery was inevitable. (*See* J.A. 142.)

C. Appellant signed a conditional Pretrial Agreement and pled guilty to all Charges and Specifications.

Appellant "enter[ed] a conditional plea of guilty . . . to all charges and specifications, preserving the right to review or appeal of any adverse determination on the motion to suppress evidence." (J.A. 149, 170.) The Military Judge found Appellant guilty, consistent with his pleas, and sentenced him to confinement for twenty-four months, reduction to paygrade E-1, and a bad-conduct discharge. (J.A. 173, 176.)

D. The lower court affirmed, finding no error.

On appeal, Appellant argued the Military Judge erred by finding Appellant voluntarily provided his phone passcode to Law Enforcement. (J.A. 2.)

The lower court reviewed the Military Judge's findings of fact in Appellant's suppression motion for abuse of discretion, "but review[ed] his conclusions of law de novo." (J.A. 4.)

The lower court found the Military Judge's "findings are supported by the evidence and not clearly erroneous." (J.A. 5.) In reviewing the Conclusions of Law, the lower court found the Military Judge correctly weighed the totality of the circumstances—including Appellant characteristics and the details of the interrogation—and concluded Appellant voluntarily provided his passcode. (J.A. 6–7.)

Argument

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE CONCLUDED, AFTER CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, APPELLANT VOLUNTARILY PROVIDED HIS PASSCODE TO LAW ENFORCEMENT. EVEN ASSUMING ERROR, APPELLANT SUFFERED NO PREJUDICE BECAUSE DISCOVERY WAS INEVITABLE.

A. Standard of review.

Appellate courts "review a military judge's denial of a motion to suppress for an abuse of discretion." *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F.

2017) (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (citation omitted). "The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (citations and internal quotation marks omitted).

A military judge abuses his discretion when: "(1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) he fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted).

"[O]n a mixed question of law and fact . . . a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

B. The lower court applied the correct standard, but regardless, this Court pierces through and reviews the Military Judge's ruling directly.

Whether a lower court applied the correct standard is a question of law that is reviewed de novo. *See United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005).

"When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling," this Court "pierce[s] through that intermediate level and examine[s] the military judge's ruling, then decide[s] whether the Court of

Criminal Appeals was right or wrong in its examination of the military judge's ruling." *United States v. Sheldon*, 64 M.J. 32, 37 (C.A.A.F. 2006).

In its opinion below, the lower court applied the correct standard, citing this Court: "We will accept a military judge's findings of fact unless clearly erroneous, but review his conclusions of law de novo." (J.A. 4 (citing *United States v. Cote*, 72 M.J. 41, 44 (C.A.A.F. 2013).) The lower court then held:

> Reviewing the video recording of the initial interview on 30 April, as well as the testimony of both [the Agent] and Appellant on the motion, we are satisfied that the military judge's findings are supported by the evidence and not clearly erroneous. And, reviewing each conclusion of law, we are satisfied that the military judge properly applied the correct law to the issues.

(J.A. 5.)

The lower court then conducted a careful analysis of the totality of circumstances and concluded Appellant voluntarily provided his phone's passcode to Law Enforcement. (J.A. 5–7.) The court noted Appellant's statement "'I guess I don't have a choice,' could just as likely have signified a belief and concession that further invocation of his right to withhold his passcode would not benefit him." (J.A. 6.) The lower court found that statement was but "one data point" that was outweighed by the other factors indicating voluntariness. (J.A. 6–7.)

Appellant misunderstands the lower court's observation that there was a "close call" within this analysis and its citation to the abuse of discretion standard. (Appellant's Br. at 11–15, Nov. 1, 2021.) The lower court was not saying the

ultimate question of voluntariness was a "close call" and applying the abuse of discretion standard to it. Rather, the lower court was discussing the finding that Appellant's prior invocations were evidence that he fully understood his rights. (*See* J.A. 7, 141, 144.) Whether Appellant understood his rights is a factual issue that contributes to the legal question of voluntariness. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (noting "knowledge of the right to refuse consent is one factor to be taken into account" as part of "the totality of all the circumstances"); *see also United States v. Lewis*, 78 M.J. 447, 455 (C.A.A.F. 2019) (considering appellant's knowledge of his rights as a factor in voluntariness analysis).

The United States agrees voluntariness is a legal question reviewed de novo, *see Arizona v. Fulminante*, 499 U.S. 279, 287 (1991), but that conclusion is based on the totality of the circumstances—each of which is a factual finding, *see, e.g.*, *Bustamonte*, 412 U.S. at 226–27 (listing factors, all of which were factual issues, such as age of the accused, length of detention, and knowledge of rights); *Lewis*, 78 M.J. at 453–55 (same). The lower court correctly reviewed whether each factual finding was clearly erroneous but analyzed the legal question of voluntariness de novo. (*See* J.A. 4–7.)

Even assuming the lower court incorrectly applied the abuse of discretion standard, this Court can "pierce[] through that intermediate level and examine[] the military judge's ruling" directly. *Sheldon*, 64 M.J. at 37.

C. The Military Judge correctly concluded Appellant voluntarily provided his passcode.

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court of Nev*., 542 U.S. 177, 189 (2004) (citation omitted).

This Court has held that asking a servicemember to input his phone passcode implicates the Fifth Amendment privilege against self-incrimination. *United States v. Mitchell*, 76 M.J. 413, 418 (C.A.A.F. 2017). *But see id.* at 419 (declining to address whether "delivery of his passcode was 'testimonial' or 'compelled'" (citing *Hiibel*, 542 U.S. at 189)).[1]

[1] The Court need not address whether Appellant's passcode entry was "testimonial" or "incriminating" because the Military Judge and lower court correctly found it was not "compelled," (J.A. 4–7, 127–45), and the Granted Issue focuses solely on voluntariness, (Order Granting Review, Aug. 31, 2021). Appellant appears to agree. (*See* Appellant's Br. at 17.) If the Court finds the passcode entry was "compelled" and discovery was not inevitable, it should remand the case or order additional briefing to address whether the passcode entry was both "testimonial" and "incriminating."

"[A]n involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial . . . ." Mil. R. Evid. 304(a). "'Involuntary statement' means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a)(1)(A).

"The necessary inquiry is 'whether the [statement] is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of his [statement] would offend due process.'" *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F 1996) (citing *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

"Voluntariness turns on whether an accused's will has been overborne." *Lewis*, 78 M.J. at 453 (citations and internal quotation marks omitted). "In determining whether a[n appellant]'s will was over-borne in a particular case, [courts] ha[ve] assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Bustamonte*, 412 U.S. at 225.

This "anticipate[s] a holistic assessment of human interaction," not "cold and sterile lists of isolated facts." *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002) (citation omitted). "Ploys to mislead a suspect or lull him into a

false sense of security do not render a statement involuntary provided they do not rise to the level of compulsion or coercion." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). Courts consider the accused's age, education, and intelligence; whether law enforcement advised him of his rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as depriving him of food or sleep. *See Bustamonte*, 412 U.S. at 226.

1. After considering the totality of the circumstances—including Appellant's characteristics and the details of the interrogation—the Military Judge correctly concluded Appellant voluntarily entered his passcode.

In *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008), the appellant—a twenty-three-year-old E-3 who could read and write and completed high school—waived his rights and spoke to law enforcement. *Id.* at 454. During a nearly ten-hour interrogation, law enforcement lied about having eyewitnesses and finding fingerprints, and they threatened to refer the case to civilian authorities to increase the appellant's punitive exposure if he did not confess, which he did. *Id.* at 456. On appeal, the court found the confession was voluntary under the totality of the circumstances. *Id.* at 457.

In *Lewis*, the appellant—an E-4 in his early twenties with "low average or below average intelligence" and later diagnosed with adjustment disorder—confessed during his third interrogation by law enforcement. 78 M.J. at 453. This Court found—even though there had been an Article 31(b) violation in the first

interview and that the appellant was never given a cleansing statement—his confession was voluntary. *Id.* at 455. The Court noted the appellant chose to speak with investigators after they informed him of his rights, and the appellant chose not to seek legal counsel between interrogations. *Id.*

Here, as the Military Judge and lower court found, the totality of the circumstances—both Appellant's characteristics and the details of the interrogation—demonstrate Appellant voluntarily provided his passcode. *See Bustamonte*, 412 U.S. at 226. First, as in *Freeman*, Appellant's characteristics indicate he provided his passcode voluntarily. *See* 65 M.J. at 454. At the time, Appellant was a twenty-five-year-old E-3 who had served for four years and was "one month from leaving active duty." (J.A. 143–44.) By waiving his rights and agreeing to an interrogation yet not allowing the Agent to search his phone, Appellant "demonstrat[ed] an understanding of his rights and the ability to refuse requests from the interviewing Investigator." (J.A. 144.) Unlike *Lewis*, there is no indication Appellant is of "low average or below average intelligence," 78 M.J. at 453. To the contrary, the Military Judge noted Appellant is articulate and communicates clearly. (J.A. 144.)

Second, the details of Appellant's interrogation were far less egregious than in *Freeman* and indicate Appellant voluntarily provided the passcode. *See* 65 M.J. at 456. Appellant's interrogation "was brief, lasting only minutes," and there was

no evidence of "threats, physical abuse, or coercion from law enforcement." (J.A. 144.) Nor did the Agent use ploys to mislead Appellant; rather, the Agent framed the request in voluntary terms: "Are you still willing to unlock your phone?" (J.A. 62.) Even assuming that approach qualifies as a ploy, given that Appellant never asked if he could refuse to unlock the phone, it did not compel Appellant's voluntary act. (J.A. 65); *see Perkins*, 496 U.S. at 297 (allowing "[p]loys to mislead a suspect or lull him into a false sense of security").

Because the statements in *Freeman* and *Lewis* were voluntary under the totality of the circumstances, so too was Appellant's passcode entry. *See Freeman*, 65 M.J. at 456–57; *Lewis*, 78 M.J. at 455.

As the lower court explained, the statement, "I guess I don't have a choice," is not conclusive proof that Appellant's will was overborne. (J.A. 7.) (Appellant's Br. at 23–24.) Rather, the statement "could just as likely have signified a belief and concession that further invocation of his right to withhold his passcode would not benefit him." (J.A. 6.) Regardless, this single factor "is outweighed by the other factors present, including the signed rights wavier, that fact that [the Agent] never stated or implied that the [Search Authorization] meant Appellant could not refuse, and the multiple previous instances in which Appellant demonstrated his understanding of his right by invoking them." (J.A. 6–7.)

The totality of the circumstances—including both Appellant's characteristics and the details of the interrogation—demonstrate Appellant's will was not "overborne." *Lewis*, 78 M.J. at 453. Thus, his statement was voluntary, and the Military Judge did not abuse his discretion. (J.A. 7, 142.)

2. Appellant's attempts to argue involuntariness fail.

a. Cases where law enforcement used the threat of a warrant to coerce consent are inapplicable here. Not only did Law Enforcement have a valid search authorization to search Appellant's phone—which obviated any need for consent—but also the Agent never lied to or threatened Appellant.

Appellant's reliance on *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968); and *United States v. White*, 27 M.J. 264 (C.M.A. 1988), is misplaced. (Appellant's Br. at 19–21.) In those cases, law enforcement either lied about having a warrant or search authorization, *Bumper*, 391 U.S. at 546–49, or threatened to obtain one, *White*, 27 M.J. at 264–65, in order to coerce the appellant's consent to search.

In *Bumper*, after law enforcement lied by asserting they had a search warrant, the appellant's grandmother allowed them to search the home. 391 U.S. at 546–49. At trial, the prosecution relied on the grandmother's consent for the search after acknowledging law enforcement did not have a search warrant. *Id*. at 546. The Supreme Court found that consent by "mere acquiescence" to a law enforcement lie is invalid consent. *Id*. at 550.

In *White*, the appellant's commander asked her to consent to a urinalysis "to clear her name." 27 M.J. at 264. The commander told the appellant that if she would not consent, he would order her to provide a sample, but he did not explain that a command-direct urinalysis without probable cause could not be used against her in a court-martial. *Id*. at 264–65. When the appellant asked what the command would do if she simply refused, the commander said she would be catheterized. *Id*. The Court, citing *Bumper*, found the consent had not been "freely and voluntarily given." *Id*. at 266. The Court emphasized the commander could have lawfully ordered the appellant to provide a sample, but that "[b]ecause the [g]overnment relied only on consent," the Court did not consider other theories of admissibility. *Id*. at 267.

By contrast, here, Law Enforcement did not rely on Appellant's consent to search his phone. (J.A. 130.) As Appellant does not dispute, Law Enforcement had proper authority to search Appellant's phone. (Appellant's Br. at 8.) The remaining question was whether Appellant would unlock it for them or Law Enforcement would have to unlock it by "brute force." (J.A. 66.)

Appellant's citation to *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990), is likewise unhelpful. (Appellant's Br. at 19–20.) The chart cited by Appellant concerns various scenarios where consent to urinalysis was obtained, 31 M.J. at 133, but this case does not fall into any of those scenarios. This case does

not involve urinalysis and the unique features it carries, *see id.*, but even more critically, the Agent did not rely on Appellant's consent to search his phone: he had a valid search authorization, (*see* J.A. 130). Appellant did not consent to a search; he assisted in the execution of a valid search authorization. As the chart in *McClain* notes, such evidence is "admissible by virtue of warrant." 31 M.J. at 133.

This situation is akin to Law Enforcement having authorization to search a suspect's padlocked locker and asking that suspect whether he is willing to remove the padlock rather than have Law Enforcement cut it off, which would not run afoul of the Fifth Amendment. *Cf. Michigan v. Summers*, 452 U.S. 692, 703 (1981) (noting occupants may wish to be present at search "to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand"). Appellant's approach contradicts the routine law enforcement practice contemplated in *Summers* by making any request to assist in the execution of a search warrant a potential Fifth Amendment violation. (Appellant's Br. at 20–21.)

Regardless, whether the presentation of the search authorization placed pressure on Appellant is just one factor to consider. *See Bustamonte*, 412 U.S. at 227. As the lower court noted, Appellant reviewed and signed a rights waiver, the Agent never stated or implied that Appellant could not refuse because of the search authorization, and "the multiple previous instances in which Appellant

demonstrated his understanding of his rights by invoking them" weigh in favor of voluntariness. (J.A. 6–7.)

b. This case is distinguishable from *Mitchell*.

In *Mitchell*, after the appellee invoked his right to counsel, law enforcement confronted appellee—without counsel—with a search authorization and asked him to unlock his phone. 76 M.J. at 416. Appellee initially refused, but after law enforcement explained that the appellee could either unlock it or a digital forensics expert would unlock it, the appellee acquiesced. *Id.* The Court did not reach the question of voluntariness because it found the appellee's rights to counsel under *Edwards v. Arizona*, 451 U.S. 477 (1981), had been violated. *See id.* at 419.

By contrast here, Appellant never invoked his right to counsel; rather, he "knowing[ly] and voluntar[ily]" waived his rights. (J.A. 142.) Thus, despite some factual similarities, this critical difference makes the holding and reasoning of *Mitchell* inapplicable here. (Appellant's Br. at 21.)

Even if the *Mitchell* Court had reached the question of voluntariness, it would be factually distinguishable. When presented with the search authorization, Appellant did not initially refuse to unlock the phone only to be coerced into compliance. *Compare Mitchell*, 76 M.J. at 416, *with* (J.A. 130). Instead, Appellant immediately responded to the Agent's question—as to whether he was still willing to unlock the phone—by unlocking the phone. (J.A. 130.)

A more appropriate case comparison comes from *United States v. Oloyede*, 933 F.3d 302 (4th Cir. 2019). There, while executing a search warrant, an agent "handed [the appellant] a locked cell phone that had been found in her bedroom and asked her, 'Could you please unlock your iPhone?'" *Id.* at 308. The appellant "took the phone, entered the passcode, and handed the phone back to [the agent.]" *Id.* "[The agent] did not ask for the passcode . . . ." *Id.* The court—after expressing doubts about whether the passcode entry was testimonial—found the appellant's acted voluntarily, despite not receiving a *Miranda* warning. *Id.* at 308–10.

Likewise, here, the Agent presented Appellant with a search warrant and asked if he would unlock his phone, which he did without hesitation—despite being advised of his rights and previously exercising those rights by declining to the Agent request to review his phone before he had a search authorization. *Compare* (J.A. 3–7), *with Oloyede*, 933 F.3d at 308–10. Thus, Appellant voluntarily entered his passcode to aid in the execution of a valid search authorization. *Oloyede*, 933 F.3d at 308–10.

c. Appellant misapprehends what constitutes voluntariness and coercion.

Appellant also misapplies the standard from *Bustamonte*, by arguing that because he said, "I guess I don't have a choice," the act of providing his passcode was conclusively not a "free and unconstrained choice." (Appellant's Br. at 24.) In *Bustamonte*, the Court explained: "[T]he traditional definition of 'voluntariness'

does not require proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search." 412 U.S. at 234. Rather, the Military Judge and the lower court properly looked to the totality of the circumstances—not "cold and sterile lists of isolated facts," *Ellis*, 57 M.J. at 379—to determine Appellant's passcode entry was voluntary. *See Bustamonte*, 412 U.S. at 227.

Moreover, Appellant's reliance on *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008), to argue he "mere[ly] acquiesce[d] to the color of authority," is misplaced. (Appellant's Br. at 23.) In *Wallace*, the appellant initially consented to the search of his home and computer and seizure of evidence. 66 M.J. at 8. However, after it became apparent that the agents were removing his computer, the appellant revoked his consent to its seizure. Appellant told law enforcement, "[y]ou can't take it." *Id*. at 6. Law enforcement—who had no search authorization—replied that "they *had* to take it" as a matter of routine. *Id*. at 7. Only after being told it was a *fait accompli* did appellant acquiesce responding, "[W]ell, okay." *Id*. (emphasis added).

Here, on the other hand, the Agent did not tell Appellant he "had" to provide the passcode; rather, he asked Appellant if he was "still willing to unlock his cell phone." (J.A. 58–60.) Unlike in *Wallace*, the Agent "never stated or implied that the [Search Authorization] meant that Appellant could not refuse." (J.A. 7.)

Furthermore, *Wallace* is distinguishable because it involved a consent to seizure, whereas here the Agent had a valid search authorization. (J.A. 81.)

Thus, presenting Appellant with a valid search authorization did not "rise to the level of compulsion or coercion," which would make his passcode entry involuntary. *Perkins*, 496 U.S. at 297.

d. Appellant's prior refusals weigh in favor of voluntariness.

Appellant mistakenly relies on his five previous refusals to argue his passcode entry was involuntary. (Appellant's Br. at 24–26.) As the lower court identified, the prior refusals "indicate a knowing and intelligent waiver regarding the passcode." (J.A. 7.) The fact that Appellant refused in the past demonstrated he understood his rights and his decision to enter the passcode was a "free and unconstrained choice." *Bubonics*, 45 M.J. at 95.

While the lower court acknowledged this fact could "support the opposite conclusion," it correctly noted that a finding of fact such as this should be accepted unless clearly erroneous. (J.A. 7); *see supra* Section B. Thus, the finding of fact that Appellant's prior refusals indicate he understood his rights weighs in favor of the legal conclusion that Appellant's passcode entry was voluntary. *See supra* Section B (explaining distinction between finding of fact and conclusion of law); *see also Bustamonte*, 412 U.S. at 227 (noting "knowledge of the right to refuse consent is one factor to be taken into account" as part of "the totality of all the

circumstances"); *Lewis*, 78 M.J. at 455 (considering appellant's knowledge of his rights as a factor in voluntariness analysis).

D. Even assuming the Military Judge abused his discretion, Appellant suffered no prejudice because discovery was inevitable: Law Enforcement had the ability to unlock Appellant's phone.

"Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." Mil. R. Evid. 311(c)(2). The inevitable discovery exception applies when the United States "demonstrate[s] by a preponderance of the evidence that 'when the illegality occurred, the [United States'] agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence' in a lawful manner." *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (citation omitted). "When the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation." *United States v. Owens*, 51 M.J. 204, 210–11 (C.A.A.F. 1999) (citations omitted).

1. If Appellant had not entered his passcode, Law Enforcement had the means and intention to unlock it themselves.

In *Owens*, the appellant revoked his consent to search his car mid-search, but not before law enforcement had identified some stolen items. *Id.* at 207. Law enforcement threatened to seize the car and get a warrant unless the appellant

consented to finishing the search, and he acquiesced. *Id.* The trial court concluded the appellant's consent was involuntary but found the inevitable discovery exception applied because law enforcement had probable cause to seize the items and "would have obtained a warrant." *Id.* at 208. This Court agreed because law enforcement "had stronger probable cause" when they identified stolen property, and "[t]here is no reasonable likelihood that [law enforcement] would have abandoned [their] efforts to search the vehicle." *Id.* at 210–11.

By contrast, in *Mitchell*, after the appellant unambiguously invoked his right to counsel, law enforcement seized his phone with a valid search authorization and asked him to unlock it. 76 M.J. at 416. The Court rejected the United States' argument that law enforcement would have inevitably unlocked the phone with the appellant's fingerprints because law enforcement "did not even learn about the possibility of fingerprint access" until "over fifteen months after the offending interrogation." *Id.*

Here, similar to *Owens* and unlike in *Mitchell*, Law Enforcement would have inevitably discovered the incriminating text messages in Appellant's phone. Not only did the Agent have probable cause to search, as in *Owens*, 51 M.J. at 208, but also he had already obtained a search authorization for the phone. (J.A. 81.) "There is no reasonable likelihood that [Law Enforcement] would have abandoned [their] efforts to search the [phone]." *Owens*, 51 M.J. at 210–11.

Unlike in *Mitchell*, the Agent testified he would have sent the phone to the Laboratory, which "ha[s] the capability of breaking passcode[s]," and this capability was well known to him at the time of the search. (J.A. 65.) The Agent testified that in the "four or five" cases where he sent an iPhone to the Laboratory, "they were able to unlock" all of them within a matter of days, except one. (J.A. 65–66.) The exception was an iPhone 8 with a six-digit passcode, which was more difficult to unlock than Appellant's iPhone 6 with a four-digit passcode. (J.A. 76–77.) Thus, every phone of a similar complexity that the Agent had sent to the Laboratory had been unlocked within a matter of days. (J.A. 76–77.) Therefore, there is no reason to believe the Laboratory would not have unlocked Appellant's phone.

Moreover, the Agent did not say the Laboratory was unable to unlock the iPhone 8; rather, Law Enforcement had cancelled the request. (*See* J.A. 75–77.) In fact, the Agent testified the Laboratory would have eventually unlocked the iPhone 8. (J.A. 77.) Regardless, Appellant's phone was an older model, iPhone 6, and had a simpler passcode, four digits. (J.A. 75.)

Thus, even if Appellant refused to enter his passcode, Law Enforcement would have inevitably unlocked and searched his phone. (J.A. 75–77.).

2. Appellant's attempts to challenge inevitable discovery rely on a misunderstanding of the Record.

Appellant's arguments that the inevitable discovery exception does not apply fail for three reasons. (Appellant's Br. at 27–30.) First, Appellant misstates the Agent's testimony about the Laboratory's capabilities. The Agent did not say the Laboratory "was only able to 'unlock' one out of two iPhones that were the same model as Appellant's [iPhone]." (*Id.* at 28.) He testified that while Appellant's case was his first specifically involving an iPhone 6 with a four-digit passcode, (J.A. 77–78), the Laboratory had unlocked both iPhone 6s he had sent within days and "would have eventually obtained the pass code" for the iPhone 8 with the six-digit passcode had Law Enforcement not cancelled the request, (J.A. 66–67, 77). Thus, discovery was inevitable.

Second, Appellant relies on an distinguishable case—an iPhone 8 with a complex, six-digit passcode versus his iPhone 6 with a simple, four-digit passcode (J.A. 61, 75–76)—when he argues Law Enforcement "may not have had time" to complete the extraction "until after the military no longer had jurisdiction over him" because Appellant's enlistment contract was set to expire. (Appellant's Br. at 29.) The Record suggests the Laboratory would have unlocked Appellant's phone quickly—it had unlocked other iPhone 6s within days. (*See* J.A. 66, 76.)

Third, regardless of whether the Laboratory would have unlocked Appellant's phone quickly, the Marine Corps has the authority to maintain

jurisdiction over a Marine while it awaits the results of an investigation. *See* Marine Corps Order 1900.16, *Separation and Retirement Manual* para. 1008.1.c (Feb. 15, 2019). It is true Law Enforcement cancelled the extraction of a phone in another case "based on the severity of th[at] case," (J.A. 77), but there is no reason to believe such a decision would have been made here. The Agent had already obtained a search authorization for the phone, and his broader investigation was ongoing. (*See* J.A. 210–16.) "There is no reasonable likelihood that [the Agent] would have abandoned [his] efforts to search the [phone]" if Appellant had declined to unlock it. *Owens*, 51 M.J. at 210.

Although the Agent, under cross-examination, agreed that "all [he] suspected was a single one time cocaine use," (J.A. 70), there is evidence in the Record that he actually suspected Appellant of use, possession, distribution, and conspiracy. (*See* J.A. 56 (suspecting Appellant of "wrongful use, possession, etc."); there is nothing in the Record to support Appellant's assertion that use of a controlled substance is "generally handled as an administrative matter," (Appellant's Br. at 29), and case law suggests otherwise, *see, e.g.*, *United States v. Gober*, No. 201100632, 2012 CCA LEXIS 759, at *4 (N-M. Ct. Crim. App. Mar. 29, 2012) (noting Marine appellant was placed on legal hold when suspected of possession and use of cocaine); *United States v. Palomares*, No. 200602496, 2007 CCA LEXIS 319 (Aug. 23, 2007) (reviewing Marine conviction for single

specification of use of diazepam on divers occasions); *United States v. Camacho*, 58 M.J. 624, 626 (N-M. Ct. Crim. App. 2003) (noting Navy appellant was placed on legal hold pending results of urinalysis).

Finally, there is reason to believe Appellant would have been placed on legal hold regardless of when his phone was searched because he was, in fact, placed on legal hold within weeks of the interview. (J.A. 174.) This demonstrates the Marine Corps was not willing to allow him to escape prosecution.

Thus, even if Appellant's entry of the passcode was not voluntary, he suffered no prejudice and merits no relief because Law Enforcement would have inevitably unlocked Appellant's phone and discovered the incriminating messages.

Conclusion

The United States respectfully requests this Court affirm the findings and sentence as adjudged and approved below.

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 6,965 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared in a proportional typeface using Microsoft Word Version 2016 with 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on December 22, 2021.

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United States v. Gober

United States Navy-Marine Corps Court of Criminal Appeals

March 29, 2012, Decided

NMCCA 201100632

Reporter
2012 CCA LEXIS 759 *

UNITED STATES OF AMERICA v. JEFFERY H. GOBER, CORPORAL (E-4), U.S. MARINE CORPS

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: **[*1]** SPECIAL COURT-MARTIAL.

Sentence Adjudged: 25 August 2011. Military Judge: Col Deborah M. McConnell, USMC. Convening Authority: Commanding Officer, 2d Marine Regiment, 2d Marine Division, Camp Lejeune, NC. Staff Judge Advocate's Recommendation: Maj J.T. Leggett, USMC.

Core Terms

sentence, squad, specification, reduction, military, combat, meritoriously, bad-conduct, confinement, Depressive, forfeiture, promoted, controlled substance, unauthorized use, entire record, pay grade, inlaw, inappropriately, court-martial, nonjudicial, diagnosed, enlisted, offender, Leaders, losses, severe

Case Summary

Overview
A bad-conduct discharge was an inappropriately severe sentence for a service member's offenses since the service member had an exceptional combat service history and developed mental health problems which led to the misconduct following combat losses in the service member's squad.

Outcome
Findings affirmed; sentence set aside in part.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Courts Martial, Sentences**

In accordance with Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, 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 service member gets the punishment he deserves. This requires individualized consideration of the particular service member on the basis of the nature and seriousness of the offense and the character of the offender.

Counsel: For Appellant: CDR R.D. Evans, Jr., JAGC, USN.

For Appellee: LCDR Craig A. Poulson, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

Judges: Before J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence terminated by apprehension, one specification of violating a lawful general order, one specification of wrongful possession of a controlled substance, and one specification of wrongful use of a controlled substance, in violation of Articles 86, 92, and 112a, Uniform Code of Military Justice, *10 U.S.C. §§ 886*, *892*, and *912a*. The military judge sentenced the appellant to six months confinement, forfeiture of $978.00 per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence **[*2]** as adjudged.

In the appellant's sole assignment of error, he contends that the bad-conduct discharge is inappropriately severe given the circumstances of his 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 in light of the appellant's combat service and evidence of his mental health problems following combat losses in his squad. We will take corrective action in our decretal paragraph.

Sentence Appropriateness

HN1[] 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 **[*3]** 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, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)*).

The appellant enlisted in the Marine Corps in April 2007. He distinguished himself in his first combat tour in Iraq in 2008, was selected to attend the Infantry Squad Leaders Course as a lance corporal, and was meritoriously promoted to corporal in March 2009. In October 2009, the appellant was meritoriously promoted to sergeant. During the same short time frame, he received two meritorious masts and a personal award.

Immediately following his promotion to sergeant, the appellant deployed to Afghanistan as a patrol squad leader. The following month, his squad was ambushed and lost two men, one of them the appellant's best friend. Following that event, the appellant quickly succumbed to depression, and began a spiral downward that led to his special court-martial.

In theater, the appellant was charged with unauthorized use of sleeping medications, and awarded nonjudicial punishment that included a reduction to corporal. During **[*4]** the same period, the appellant was diagnosed with Major Depressive Disorder and Post Traumatic Stress Disorder (PTSD). Shortly after his unit's return stateside, the appellant was charged with possession and use of cocaine. When placed on legal hold for these drug

charges, the appellant left Camp Lejeune for his hometown, where he remained for approximately two months before he was apprehended by local authorities pursuant to a federal warrant. At his court martial, the appellant's company commander and his platoon commander submitted statements that highlighted both the appellant's remarkable accomplishments early in his first enlistment and his inability to cope with his squad's losses in Afghanistan. The staff noncommissioned officer noted that the appellant "had the highest pro/con average that I have ever personally seen in my career," and that the appellant served in positions of exceptional responsibility during his deployment to Iraq, although only a lance corporal at the time.

In addition to considering the nature and seriousness of the specific offenses committed by the appellant, we have carefully considered the individual characteristics of the offender. This includes this **[*5]** Marine's distinguished performance in combat and his disciplinary record, which consists of the nonjudicial punishment imposed for the unauthorized use of pharmaceuticals in Afghanistan at a time when he was suffering from what has been diagnosed as PTSD and Major Depressive Disorder. Considering the entire record, we conclude that justice is done by affirming only the approved confinement, reduction, and forfeitures.

Conclusion

The findings are affirmed. So much of the approved sentence as provides for confinement for six months, reduction to pay grade E-1, and forfeiture of $978.00 pay per month for six months is affirmed. The bad-conduct discharge is set aside.

End of Document

United States v. Palomares

United States Navy-Marine Corps Court of Criminal Appeals

August 23, 2007, Decided

NMCCA 200602496

Reporter
2007 CCA LEXIS 319 *; 2007 WL 2405293

UNITED STATES v. Eduardo P. PALOMARES, Lance Corporal (E-3), U.S. Marine Corps

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Review denied by *United States v. Palomares, 2008 CAAF LEXIS 307 (C.A.A.F., Mar. 11, 2008)*

Prior History: **[*1]** Sentence adjudged 2 August 2006. Military Judge: J.A. Wynn. Staff Judge Advocate's Recommendation: LtCol K.J. Brubaker, USMC. Review pursuant to *Article 66(c)*, UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Division (-)(Rein), Okinawa, Japan.

Core Terms

sentence, confinement, convening, disparate, plain error, court-martial, military, offenses, cases

Case Summary

Procedural Posture

Appellant servicemember challenged an order from a general court-martial that convicted him of the wrongful use of a controlled substance in violation of Unif. Code Mil. Justice art. 112a, *10 U.S.C.S. § 912a*.

Overview

The servicemember contended that the military judge committed plain error by allowing the testimony of a company commander about matters in aggravation that did not directly relate to the servicemember's misconduct. On appeal, the court concluded that the testimony concerning the effect of the misconduct on the company was admissible in aggravation under R.C.M. 1001(b)(4), Manual Courts-Martial (2005). The offense had an unnecessary and deleterious impact on the mission, discipline, and efficiency of the command. Evidence of the operational circumstances surrounding the servicemember's drug use and the subsequent treatment of other members of the unit were directly related to and resulting from his offense. The court also concluded that the servicemember failed to show a high disparity between his sentence and that of other Marines and a Sailor from the same unit convicted of similar misconduct. Thus, the servicemember was not entitled to a further examination of the reasons for any differences in the companion cases.

Outcome

The court affirmed the findings and sentence.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of

Review

HN1[] **Plain Error, Evidence**

In the absence of a defense objection, the U.S. Navy-Marine Corps Court of Criminal Appeals reviews a claim of erroneous admission of evidence for plain error. Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. The appellant has the burden of persuading the court that the three prongs of the plain error test are satisfied.

Military & Veterans Law > ... > Courts Martial > Evidence > General Overview

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN2[] **Courts Martial, Evidence**

R.C.M. 1001(B)(4), Manual Courts-Martial (2005) allows the trial counsel to present evidence of aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Such evidence includes the significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. the meaning of "directly related" under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted.

Evidence > Burdens of Proof > Burden Shifting

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

HN3[] **Burdens of Proof, Burden Shifting**

The U.S. Navy-Marine Corps Court of Criminal Appeals is required to engage in sentence comparison only in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases. The appellant has the burden of demonstrating that any cited cases are "closely related" to the appellant's case, and that the sentences are "highly disparate." If the appellant meets that burden, the burden shifts to the Government to show a rational basis for the disparity. Sentence comparison does not require sentence equation.

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

HN4[] **Judicial Review, Clemency & Parole**

Clemency is a prerogative reserved for the convening authority.

Counsel: Maj RICHARD BELLISS, USMC, Appellate Defense Counsel.

Maj KEVIN HARRIS, USMC, Appellate Government Counsel.

Judges: BEFORE D.A. WAGNER, V.S. COUCH, E.B. STONE. Senior Judge WAGNER and Judge STONE concur.

Opinion by: V.S. COUCH

Opinion

COUCH, Judge:

A general court-martial comprised of officer members convicted the appellant, pursuant to his plea, of one specification of wrongful use of diazepam (the generic name for Valium), a

Schedule IV controlled substance, on divers occasions and while receiving special pay under *37 U.S.C. § 310*, in violation of Article 112a, Uniform Code of Military Justice, *10 U.S.C. § 912a*. The appellant was acquitted of seven specifications of wrongful distribution of diazepam. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but in an act of clemency, suspended all confinement **[*2]** in excess of nine months.

After considering the record of trial, the appellant's sole assignment of error and reply brief, the Government's response, the convening authority's actions in companion cases (appended to the record by motion of the Government), and the oral argument of counsel, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c),* UCMJ.

The appellant's two assignments of error contend that (1) the military judge committed plain error by allowing the testimony of the appellant's company commander to testify about matters in aggravation that did not directly relate to the appellant's misconduct, and (2) the appellant's sentence is unjustifiably severe when compared with similar offenses by other members of his command. The appellant alternatively seeks relief under *Article 66(c)*, UCMJ, for sentence severity. For the reasons discussed below, we disagree and decline to grant relief.

Sentencing Evidence

The appellant served in an infantry battalion deployed to Afghanistan and engaged in combat operations at the time of his offenses. While his **[*3]** platoon was assigned to provide a guard force, the appellant admitted to purchasing four pills of Valium from a local Afghani boy, and ingesting the pills on two separated occasions in order to help him sleep.

The Government called the appellant's company commander during the presentencing phase of trial, and the trial defense counsel did not object to his testimony. He testified about the nature of his unit's combat operations in Afghanistan, and described the difficult nature of their responsibilities at the time of the appellant's offenses. The company commander related how the illegal use of Valium by the appellant and other members of his unit complicated the "relief in place" by a subsequent company who replaced them in the area of operations. He testified that the company had been briefed about the security ramifications of illegal drug use, and the threat posed by local children as potential intelligence collection agents for the enemy.

Finally, the witness testified that while the company was lauded by higher authority for their exceptional combat performance, it was singled out and subjected to a unit-wide urinalysis and search of personal gear immediately upon their return **[*4]** to Kaneohe Bay, Hawaii. This event was directly related to the Valium use of the appellant and other Marines, and delayed the reunification of the whole company with their family members by at least six hours. The company commander testified that his company's morale suffered significantly as a result.

HN1[↑] In the absence of a defense objection, we review a claim of erroneous admission of evidence for plain error. *United States v. Powell, 49 M.J. 460, 463-65 (C.A.A.F. 1998)*; *United States v. Hays, 62 M.J. 158, 166 (C.A.A.F. 2005)*. Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007)*(citing *Powell, 49 M.J. at 463-65*). The appellant has the burden of persuading the court that the three prongs of the plain error test are satisfied. *Id.* (citing *United*

States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005)).

HN2[] Rule for Courts-Martial 1001(b)(4), Manual for Courts-Martial, United States (2005 ed.) allows the trial counsel to present evidence of aggravating circumstances "directly relating to or resulting from the offenses **[*5]** of which the accused has been found guilty." Such evidence includes the "significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." *Id.* Our superior court has held that the meaning of "directly related" under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted. Hardison, 64 M.J. at 281.

Even though the appellant was not the only Marine within the unit who wrongfully used Valium while in a combat zone, we are satisfied that his offense still had an unnecessary and deleterious impact on the mission, discipline, and efficiency of the command. Evidence of the operational circumstances surrounding the appellant's drug use, and the subsequent treatment of the other members of his unit in uncovering it, are directly related to and resulting from his offense. We conclude that the testimony of the company commander was admissible evidence in aggravation under R.C.M. 1001(b)(4), and are confident that the probative value of the evidence was not outweighed by its likely prejudicial **[*6]** impact. *Id.* (citing United States v. Wilson, 35 M.J. 473, 476 n.5 (C.M.A. 1992)). We hold that the military judge did not commit plain error by allowing the testimony of the company commander.

Sentence Disparity

The appellant's second assignment of error alleges that his sentence is inappropriately severe when compared to the sentences of other Marines and a Sailor from the same unit convicted for similar misconduct.

HN3[] We are required to engage in sentence comparison only "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. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)(quoting United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985)). The appellant has the burden of demonstrating that any cited cases are "closely related" to the appellant's case, and that the sentences are "highly disparate." *Id.* (citing United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)). If the appellant meets that burden, the burden shifts to the Government to show a rational basis for the disparity. *Id.* Sentence comparison does not require sentence equation. United States v. Durant, 55 M.J. 258, 260 (C.A.A.F. 2001)(citing **[*7]** Ballard and United States v. Snelling, 14 M.J. 267 (C.M.A. 1982)).

The Government apparently concedes, and we find, that the companion cases cited by the appellant are in fact closely related to the appellant's case. Turning to sentence disparity, we note that three Marines - - Lance Corporal (LCpl) Comey, Private First Class (PFC) Carruth, and LCpl Machado - - each pled guilty at special courts-martial before a military judge alone, pursuant to pretrial agreements, to single specifications of wrongful use of Valium on divers occasions while receiving special duty pay. [1] In each case, the convening authority approved sentences that included confinement (six months for Comey and Carruth and 150 days for Machado), reduction to pay grade E-1, a fine of $ 5000.00, and a bad-conduct discharge. A fourth Marine, LCpl Peters, pled guilty to both use and distribution of 300 pills of Valium, and the convening authority approved his sentence of 24 months confinement, reduction to pay grade E-1, a $ 5000.00 fine, and a bad-conduct discharge. The lone Sailor, Hospitalman Third Class (HM3) Figueroa, pled guilty at a summary

[1] The appellant did not cite LCpl Machado's case in his assignment of error.

court-martial to a single use of Valium, and testified against the appellant **[*8]** at trial.

We note that the appellant is the only Marine who did not receive a $ 5000.00 fine, although he did receive three months more confinement than Comey and Carruthers, and was convicted at a general court-martial. The appellant's sentence to 9 months confinement is considerably less than the 24 months confinement awarded to Peters. We also note that the appellant was sentenced by officer members, while the other Marines were sentenced by a military judge alone. We presume that HM3 Figueroa's case was resolved at a summary court-martial due to his single use and in exchange for his testimony against the appellant at a contested court-martial.

Based upon our review of the record, we find that the appellant has not met his burden of demonstrating that his sentence is highly disparate when compared with the sentences of the companion cases. Having failed to show a high disparity in his sentence, the appellant is not entitled to a further examination of the reasons for any differences in the sentences. *Lacy, 50 M.J. at 289*.

We conclude that the sentence approved by the convening authority is appropriate for this **[*9]** offender and his offense. *United States v. Baier, 60 M.J. 382 (C.A.A.F. 2005)*; *United States v. Healy, 26 M.J. 394 (C.M.A. 1988)*; *United States v. Snelling, 14 M.J. 267 (C.M.A. 1982)*. Granting additional sentence relief at this point would be to engage in ***HN4***[↑] clemency, a prerogative reserved for, and in this case previously exercised by, the convening authority. *Healy, 26 M.J. at 395-96*.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge WAGNER and Judge STONE concur.

Senior Judge WAGNER and Judge STONE participated in this case prior to detaching from the court.

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