

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,

Appellee

v.

Sean M. Swisher
Lance Corporal (E-3)
United States Marine Corps

Appellant

**BRIEF ON BEHALF OF
APPELLANT**

Crim.App. Dkt. No. 202100311

USCA Dkt. No. 24-0011/MC

**TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES:**

S. Marshall Griffin, Jr.
Commander, USCG (Ret)
The Griffin Law Firm
999 Waterside Dr.
Suite 2500
Norfolk, VA 23510
(757) 434-0198
marshall@griffinlawdefense.com
CAAF Bar no. 37937

Matthew E. Neely
Lieutenant Colonel, USMC
Appellate Defense Counsel Navy-
Marine Corps Appellate Review
Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7663
matthew.e.neely.mil@us.navy.mil
CAAF Bar no. 37746

Index of the Brief

Index of the Brief.....	ii
Table of Authorities.....	iii
Issue Presented	1
Introduction.....	1
Statement of Statutory Jurisdiction.....	2
Statement of the Case	2
Statement of Facts.....	5
Summary of Argument	8
Argument.....	10
Standard of Review	10
Discussion	10
1. Sentence comparison analysis is a component of a sentence appropriateness review and the lower Court was without authority to decline to conduct the analysis.	10
2. This Court should redress the lower court’s error.	12
a) The cases are “closely related.”.....	13
b) The cases resulted in “highly disparate” sentences.	14
c) There is no rational basis for the difference between the two sentences.	14
Conclusion.....	15
Certificate of Filing and Service.....	17
Certificate of Compliance.....	18

Table of Authorities

Statutes

Art. 66, UCMJ, 10 U.S.C. § 866 (2022)	2, 8
Art. 67, UCMJ, 10 U.S.C. § 867 (2021)	2

Court of Appeals for the Armed Forces

<i>United States v. Behunin</i> , 83 M.J. 158 (C.A.A.F. 2023).....	11, 12, 13
<i>United States v. Lacy</i> , 50 M.J. 286 (C.A.A.F. 1999)	8, 10, 13
<i>United States v. Sothen</i> , 54 M.J. 294 (C.A.A.F. 2001).....	11, 12

United States Court of Military Appeals

<i>United States v. Dukes</i> , 5 M.J. 71 (C.M.A. 1978).....	10
<i>United States v. Olinger</i> , 12 M.J. 458 (C.M.A. 1982)	11

Issue Presented

**DID THE LOWER COURT ERR BY APPLYING THE
WRONG LEGAL STANDARD TO ITS SENTENCE
APPROPRIATENESS ANALYSIS?**

Introduction

The issue presented in this case is simple, and the relevant precedent is well-settled. Service courts of criminal appeal routinely review of sentences applied by the trial court. They perform this duty in recognition of their statutory responsibility to ensure that criminal punishments are uniform and free from obvious miscarriages of justice or abuses of discretion.

The lower court was obligated to fulfill that necessary function in this case but declined to do so. This decision was without authority or basis in law and was internally inconsistent with prior rulings from that court. The lower court was obligated to assess LCpl Swisher's sentence to determine its appropriateness. Due to the unique factual circumstances of this case, a sentence comparison was required to ensure that LCpl Swisher's sentence was appropriate.

Accordingly, this Court should set aside the lower court's opinion and remand for corrective action so that Lance Corporal (LCpl) Swisher can receive a fair, just, and appropriate sentence in light of the much lower sentence imposed on his co-actor.

Statement of Statutory Jurisdiction

The Convening Authority approved a court-martial sentence that included a dishonorable discharge. Accordingly, the lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).¹ This Court has jurisdiction under Article 67(a)(3), UCMJ.²

Statement of the Case

On 29 July 2021, a general court-martial composed of members with enlisted representation convicted LCpl Swisher, contrary to his pleas, of:

- Charge I, Specification 1, for penetrating the complaining witness's mouth with his penis when she, allegedly, could not consent due to impairment (Article 120, UCMJ).
- Charge I, Specification 2, for penetrating the complaining witness's vulva with his finger when she, allegedly, could not consent due to impairment (Article 120, UMCJ).
- Charge II, Sole Specification for attempted penetration of the complaining witness's vulva with his penis when she, allegedly, could not consent due to impairment (Article 80, UMCJ).

¹ Art. 66, UCMJ, 10 U.S.C. § 866 (2022).

² Art. 67, UCMJ, 10 U.S.C. § 867 (2021).

- Additional Charge I, Sole Specification for wrongful use of cocaine (Article 112a, UCMJ).³

After the findings, the military judge merged Charge II (attempted sexual assault) with Charge I (sexual assault). LCpl Swisher elected to be sentenced by the military judge alone.⁴ The military judge conducted segmented sentencing and awarded fifty-four months' confinement, a dishonorable discharge, and a reduction to E-1 for the now-merged Charge I (Article 120, UMCJ). For Additional Charge I (Article 112a, UMCJ), the military judge awarded two months' confinement. All confinement was to be served concurrently, and LCpl Swisher was awarded eight days of confinement credit.⁵

On May 15, 2023, the lower court affirmed the findings and sentence. However, in the meantime, LCpl Swisher's detailed appellate defense counsel PCS'd and handed off the case to the undersigned detailed counsel, and LCpl Swisher retained civilian counsel. The new counsel identified an issue that had been missed – Charge II failed to state an offense and should not have resulted in a conviction – and filed a motion for *en banc* reconsideration with the lower court. On August 8, 2023, the lower court granted the new appellate defense counsels' motion for *en banc* reconsideration and

³ J.A. at 307, 313.

⁴ J.A. at 504-05, 543.

⁵ J.A. at 543.

withdrew its May 15, 2023, decision.⁶ On August 16, 2023, the lower court, sitting *en banc*, found Charge II failed to state an offense and was, therefore, legally insufficient. The lower court affirmed the remaining findings and, after reassessing the sentence based on the error, the lower court affirmed the sentence.⁷ In so finding, the lower court declined to compare LCpl Swisher’s sentence to that of his co-actor, a civilian tried and convicted within the South Carolina judicial system because the court was “unaware of any precedent that required [them] to find parity between a military court-martial sentence and a sentence awarded by a state or local jurisdiction.”⁸

⁶ J.A. at 306.

⁷ J.A. at 18.

⁸ J.A. at 17.

Statement of Facts

LCpl Swisher and Kenneth Simmons were at Señor Frogs, a Myrtle Beach, SC, bar one the evening.⁹ LCpl Swisher was an active-duty member of the Marine Corps, and Kenneth Simmons was a civilian.¹⁰ Both Swisher and Simmons were consuming alcohol.¹¹ They met and began flirting with a group of women, one of whom was K.B..¹² Simmons ultimately arranged with K.B. for her to engage in sexual acts with him and LCpl Swisher in exchange for cocaine, which ultimately led to the instant charges and convictions for the two men.¹³

Kenneth Simmons was called as a witness by the Government at Swisher's trial.¹⁴ Simmons testified that it was he – Simmons – who suggested getting cocaine.¹⁵ Simmons testified that it was he who called the drug dealer who provided the cocaine.¹⁶ Simmons testified that Swisher provided the cash for the cocaine, but it was Simmons who arranged and completed the purchase of cocaine.¹⁷ Simmons testified that his goal that night was "to get laid."¹⁸ Simmons was asked why he went to the

⁹ J.A. at 328.

¹⁰ J.A. at 328, 405-06.

¹¹ J.A. at 328.

¹² J.A. at 418-19.

¹³ J.A. at 420.

¹⁴ J.A. at 405.

¹⁵ J.A. at 410-11.

¹⁶ *Id.*

¹⁷ J.A. at 411-14.

¹⁸ J.A. at 419.

“external bathrooms.” He replied, “Because I was with a girl—the one girl that I was talking to, we went over there and I asked her, could I get my dick sucked if I gave her some cocaine.”¹⁹ Simmons testified that Swisher did not have much conversation with K.B.²⁰ Simmons testified that he was doing most of the talking.²¹ Simmons testified that he, Swisher, and K.B. all did cocaine together.²² Simmons testified that “I was giving everybody bumps [of cocaine]. I was the one.”²³ Trial Counsel then had the following exchange with Simmons:

Q. Who takes the young lady's pants down?

A. That would be me.

Q. Okay. Why are you the one that takes her pants down?

A. Because I am in the one with the cocaine. [sic]

Q. Because you're the one who had the cocaine?

A. Yes.²⁴

Simmons testified at trial that neither he nor Swisher could get an erection.²⁵

Simmons testified that both he and Swisher received oral sex from K.B. Simmons

¹⁹ J.A. at 420.

²⁰ *Id.*

²¹ J.A. at 421.

²² J.A. at 421.

²³ J.A. at 422.

²⁴ J.A. at 423.

²⁵ J.A. at 424.

testified that neither he nor Swisher was able to penetrate K.B.'s vagina.²⁶ Simmons testified that K.B. vomited and that he was the one who cleaned it up.²⁷ Simmons testified that when K.B. vomited, it was his penis in her mouth, and that after he cleaned it up, K.B. continued to give him oral sex.²⁸ On cross-examination, Simmons confirmed that it was he who propositioned K.B. to exchange sex acts for cocaine and that she agreed.²⁹

Kenneth Simmons was convicted in South Carolina state court of criminal sexual conduct, third degree, for his acts that night.³⁰ Kenneth Simmons was required to register with the Central Registry of Child Abuse and Neglect and the Sex Offender Registry.³¹ He was given a five-year suspended sentence, three years' probation, credit for pretrial time served, but no active confinement.³² Lance Corporal Swisher was convicted of two specifications of sexual assault, one specification of attempted sexual assault, and one specification of cocaine use, for his acts that night.³³ He was dishonorably discharged from the Marine Corps, reduced to paygrade E-1, and confined for fifty-four months of active confinement with no probation or

²⁶ J.A. at 424-27.

²⁷ J.A. at 427-28.

²⁸ J.A. at 428.

²⁹ J.A. at 442.

³⁰ J.A. 552.

³¹ *Id.*

³² *Id.*

³³ J.A. at 307-313.

suspension.³⁴ He also will be a registered sex offender.

Summary of Argument

The service courts of criminal appeals serve an important function in reviewing military sentences.³⁵ Their function is without parallel in the federal criminal justice system, which relies on sentencing guidelines to ensure sentences are uniform across the individual courts. Military members rely on the courts of criminal appeals to review their sentences to ensure they are both just and consistent across the diverse population of convening authorities. Congress intentionally vested the courts of criminal appeals with the power to determine whether a sentence is correct in law and fact, but also whether a sentence should be approved.

In this case, the Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) declined to perform this vital function twice, despite having the power to review the sentence, precedent to support that review, and a specific request for the mandatory review. The purported basis for the lower court's avoidance was its finding “no *requirement* to do so.”³⁶ The court maintained this opinion in their initial opinion and while sitting *en banc* following the motion to reconsider.³⁷ The Court elected to ignore

³⁴ J.A. at 543.

³⁵ *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); Art. 66, UCMJ, 10 U.S.C. § 866 (2022).

³⁶ J.A. at 17.

³⁷ J.A. at 17, 279.

the obvious implications of the precedent presented by LCpl Swisher and arbitrarily declined to conduct a review for sentence appropriateness. Had the lower court conducted the required review, they would have seen that the two cases are closely related, had highly disparate sentences, and that there is no rational basis for the difference between them. This Court should find that the cases are closely related, that the sentences are disparate, that there is no rational basis for the difference, and return the case to the lower court for a review consistent with those findings.

Argument

THE LOWER COURT APPLIED THE WRONG LEGAL STANDARD TO ITS SENTENCE APPROPRIATENESS ANALYSIS.

Standard of Review

This Court’s review of a decision from a Court of Criminal Appeals regarding sentence appropriateness is limited to three questions of law: (1) whether the cases are “closely related” (*e.g.*, 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); (2) whether the cases resulted in “highly disparate” sentences; and (3) if the requested relief is not granted in a closely-related case involving a highly disparate sentence, whether there is a rational basis for the differences between or among the cases.³⁸ The purpose of this Court’s review is to determine whether there has been an “obvious miscarriage of justice or abuse of discretion.”³⁹

Discussion

1. Sentence comparison analysis is a component of a sentence appropriateness review and the lower Court was without authority to decline to conduct the analysis.

“In enacting the Uniform Code of Military Justice, Congress gave the Boards of

³⁸ *Lacy*, 50 M.J. at 288.

³⁹ *United States v. Dukes*, 5 M.J. 71, 73 (C.M.A. 1978).

Review the powers to “set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate.”⁴⁰ “This power was granted to the Courts of Military Review in order to establish uniformity of sentences...[T]he appropriateness of an accused's sentence is to be determined without reference or comparison to sentences in other cases.”⁴¹

This general rule against sentence comparison has one exception.⁴² In closely related cases, “[t]he Courts of Criminal Appeals are *required* to engage in sentence comparison” when “sentence appropriateness can be fairly determined only by reference to disparate sentences.”⁴³ When the circumstances of a case require sentence comparison, the analysis is not discretionary.⁴⁴ Cases involving civilian co-actors are not precluded from this mandatory sentence comparison.⁴⁵ Instead, the “key determinant” is not jurisdictional but is simply “the nexus between the convicted

⁴⁰ *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982) (quoting S. Rep. No. 486, 81st Cong. 1st Sess. 28 (1949), *reprinted in* Index and Legislative History, Uniform Code of Military Justice (1949-50)).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quotation marks and citations omitted).

⁴⁴ *See United States v. Behunin*, 83 M.J. 158, 162 (C.A.A.F. 2023) (the CCAs “are required to engage in sentence comparison . . . ‘in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.’” (quoting *Sothen*, 54 M.J. at 296) (emphasis original) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985))).

⁴⁵ *Sothen*, 54 M.J. at 296-97.

offenses.”⁴⁶

Lance Corporal Swisher twice sought sentence appropriateness review from the N.M.C.C.A. and was most recently denied in the *en banc* decision published on August 16, 2023.⁴⁷ In that decision, the lower court declined to compare LCpl Swisher’s sentence with that of Kenneth Simmons, his co-actor in the charged offenses. The N.M.C.C.A. provided the following rationale via footnote:

In his motion for en banc reconsideration, Appellant takes issue with this conclusion and cites *United States v. Sothen*, 54 M.J. 294 (C.A.A.F. 2001) and *United States v. Behunin*, 83 M.J. 158 (C.A.A.F. 2023) for the proposition that we are required to compare a court-martial sentence with a sentence awarded by a state or local jurisdiction in closely related cases. Appellant’s Motion for En Banc Reconsideration at 12. We disagree. While our Court in *Sothen* chose to compare appellant’s court-martial conviction with his co-conspirator’s state court conviction, there was no requirement to do so. Appellant’s reliance on dicta in *Sothen* and a single footnote in *Behunin*, 83 M.J. at 158 n.2 (which in turn cites back to *Sothen*) does not support his argument.⁴⁸

Thus, the lower court refused to compare Simmons’ sentence to LCpl Swisher’s sentence simply because a civilian jurisdiction sentenced Simmons. This refusal was an error because, as stated above, civilian co-actors’ cases are not precluded from the Courts of Criminal Appeals’ Article 66, UCMJ, sentence comparison analysis.⁴⁹

2. This Court should redress the lower court’s error.

⁴⁶ *Behunin*, 83 M.J. at 163 n.2.

⁴⁷ J.A. at 1.

⁴⁸ J.A. at 17.

⁴⁹ *Sothen*, 54 M.J. at 296-97.

This Court’s review of a decision from a Court of Criminal Appeals is limited to three questions of law: (1) whether the cases are “closely related” (*e.g.*, 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); (2) whether the cases resulted in “highly disparate” sentences; and (3) if the requested relief is not granted in a closely related case involving a highly disparate sentence, whether there is a rational basis for the differences between or among the cases.⁵⁰

a) The cases are “closely related.”

In *United States v. Lacy*, this Court found the appellant there “and two other Marines engaged in the same course of conduct with the same victim in each other’s presence” and were thus closely related.⁵¹ So too here—Kenneth Simmons and LCpl Swisher were co-actors. The facts cited above show that Simmons was the lead actor and objectively more culpable than LCpl Swisher in their criminal enterprise. Simmons had the idea, brokered the deal, and actively led the criminal acts. Simmons undressed K.B. and considered himself in charge because “he had the cocaine.” Simmons testified at trial and confessed to his role as the co-actor. Indeed, it could be fairly argued that without Simmons, there would have been no crime. There is no

⁵⁰ *Behunin*, 83 M.J. at 162.

⁵¹ *Lacy*, 50 M.J. at 289.

serious argument that the case against Simmons and LCpl Swisher are not closely related. Because these cases *are* closely related, a sentence comparison is not discretionary.

b) The cases resulted in “highly disparate” sentences.

Kenneth Simmons received a five-year suspended sentence with no active period of incarceration. He was placed on probation for three years. Lance Corporal Swisher was sentenced to fifty-four months of active incarceration, dishonorably discharged from the Marine Corps, and reduced to paygrade E-1. The common denominator between the two sentences is active time incarcerated. Zero is highly disparate to fifty-four months.

For comparison, fifty-four months is longer than the American Civil War lasted, longer than America’s involvement in World War II, longer than it takes to complete a standard four-year college degree, and longer than many Marine Corps active-duty enlistments. Kenneth Simmons and LCpl Swisher received highly disparate sentences.

c) There is no rational basis for the difference between the two sentences.

The obvious difference between the two men is that LCpl Swisher was on active duty in the Marine Corps, and Simmons is a civilian. However, LCpl Swisher’s status as a Marine is accounted for in the remaining part of his sentence, where he is punished via a dishonorable discharge, a status he will hold for the rest of his life designed to stigmatize him within greater American society and place him in a worse

position within society than if he had never served at all. This is the worst service characterization possible and is unique to him as a result of committing these offenses while on active duty. In addition, LCpl Swisher was reduced to the lowest enlisted pay grade and suffered automatic forfeiture of all pay, both also military-specific punishments that a civilian never faces.

Lance Corporal Swisher is not arguing that the sentences must be identical; some confinement disparity could be justified within a correct analysis. But fifty-four months is too great a disparity between the two sentences and cannot be explained rationally by LCpl Swisher's military status. Lance Corporal Swisher's status in the Armed Forces does not outweigh the fact that he was not the lead actor in the criminal enterprise. Simmons' clear role as the lead actor heightens the inequity worthy of correction by this Court.


Conclusion

Because the N.M.C.C.A. declined to conduct the required sentence comparison analysis, LCpl Swisher respectfully requests that this Court set aside the lower court's opinion and remand for corrective action so that Lance Corporal (LCpl) Swisher can receive a fair, just, and appropriate sentence, in light of the much lower sentence imposed on the co-accused in this case.

Respectfully submitted,



S. Marshall Griffin, Jr.
Commander, USCG (Ret)
The Griffin Law Firm
999 Waterside Dr.
Suite 2500
Norfolk, VA 23510
(757) 434-0198
marshall@griffinlawdefense.com
CAAF Bar no. 37937



Matthew E. Neely
Lieutenant Colonel, USMC
Appellate Defense Counsel Navy-
Marine Corps Appellate Review
Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7663
matthew.e.neely.mil@us.navy.mil
CAAF Bar no. 37746

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically mailed to the Court and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on January 25, 2024.



S. Marshall Griffin, Jr.
Commander, USCG (Ret)
The Griffin Law Firm
999 Waterside Dr.
Suite 2500
Norfolk, VA 23510
(757) 434-0198
marshall@griffinlawdefense.com
CAAF Bar no. 37937



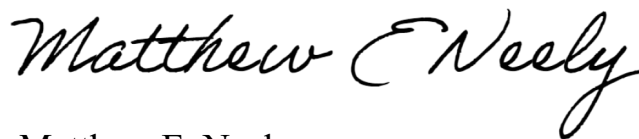
Matthew E. Neely
Lieutenant Colonel, USMC
Appellate Defense Counsel Navy-
Marine Corps Appellate Review
Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7663
matthew.e.neely.mil@us.navy.mil
CAAF Bar no. 37746

Certificate of Compliance

This Brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.



S. Marshall Griffin, Jr.
Commander, USCG (Ret)
The Griffin Law Firm
999 Waterside Dr.
Suite 2500
Norfolk, VA 23510
(757) 434-0198
marshall@griffinlawdefense.com
CAAF Bar no. 37937



Matthew E. Neely
Lieutenant Colonel, USMC
Appellate Defense Counsel Navy-
Marine Corps Appellate Review
Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7663
matthew.e.neely.mil@us.navy.mil
CAAF Bar no. 37746