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*	**REPLY TO APPELLEE'S ANSWER 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

Responsive Argument on Behalf of Appellant

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

A. The Government's recitation of the facts concedes that the cases are closely related and that Mr. Simmons' role in the criminal enterprise was more significant than Appellant's.

The Government spent almost one-third of its reply reciting the facts of the case, most of which are irrelevant to the question pending before the Court. However, the facts help show that the two cases here are not just closely related. They are identical. If anything, Mr. Simmons' essential role in the offenses makes the lower court's responsibility to conduct a complete review of outcomes more essential and less discretionary.

As the Government concedes, it was Mr. Simmons who had the idea for the criminal act because he wanted to "get his dick sucked" (J.A. 442). Mr. Simmons identified the location of the crime to avoid detection (J.A. 422-23). Mr. Simmons removed the victim's clothing before taking turns with Appellant in attempting sex with the victim (J.A. 424-26).

The Government, however, misstated two important facts: (1) Mr. Simmons presented his "lack of a criminal record" at his trial (Appellee Br. at 7). No such evidence was adduced, and Mr. Simmons' criminal history is unknown; (2) That "Appellant's blood toxicology report was positive for cocaine (J.A. 564)." The

toxicology report at 564 of the Joint Appendix is from the *victim's* report. No toxicology was ever performed on *Appellant*, and there is no record that he failed a urinalysis.

Mr. Simmons conceived the criminal enterprise, procured the cocaine, brokered the sex-for-drugs deal, identified the location of the crime, removed the clothes of the victim, and then had sex with the victim – along with Appellant (J.A. 420-424). Mr. Simmons stated that his leadership and initiative in the crime was due to his possession of the bargained-for cocaine (J.A. 424). Mr. Simmons was convicted in state court of criminal sexual conduct and given a suspended sentence to confinement with three years of probation (J.A. 552). Appellant was convicted at a general court-martial and received a dishonorable discharge and fifty-four months confinement with no probation (J. A. 543). The delta between Appellant's sentence to fifty-four months confinement and Mr. Simmons's no actual confinement is highly disparate. The lower Court improperly construed the state of the law to conclude that they were not required to analyze the case and consequently failed to do so. This Court should correct the resulting injustice.

B. The lower Court's obligation to conduct a complete appropriateness analysis under Article 66 was not made discretionary because the closely related case involved a civilian conviction.

The Government argued, and Appellant agrees that sentence comparison is a part of the appropriateness analysis (Appellee Br. at 13-14). Courts must compare

sentences in cases that are "closely related." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). This obligation to review "closely related" cases is not extinguished when the related case is a civilian case. *United States v. Sothen*, 54 M.J. 294, 297 (C.A.A.F. 2001). The lower court declined to conduct the required review because Mr. Simmons' case was "for different crimes." (J.A. at 17). The lower court also found that civilian authorities adjudicated his case. *Id*. The Government argued that this was the lower Court "in substance" conducting a case comparison and finding a lack of parity, i.e. that the two cases were "no (sic) closely related." (Appellee Br. at 21). This approach is inconsistent with *Sothen*, which stated that civilian adjudication of a closely related case does not preclude review. *Sothen*, 54 M.J. at 296-97.

The Government and lower Court have taken the discretion in *Sothen* and applied it (without authority) to a predicate statutory and precedential mandate (*i.e.*, because the Court is not *required* to compare sentences in a criminal case, it is also not required to determine if the cases are closely related or that they have disparate sentences). Article 66 and *Lacy* require courts of criminal appeals to conduct a sentence comparison analysis in closely related cases with highly disparate sentences when an appropriateness analysis can only be done by comparing the sentences. *See United States v. Behunin*, 83 M.J. 158, 162 (C.A.A.F. 2023); *Lacy*, 50 M.J. at 288. The lower Court's refusal to conduct this

analysis is inexplicable. Appellant presented evidence to meet the required threshold (closely related to a disparate sentence), but the Court simply refused to rule. It is well settled that the courts of criminal appeals must ensure that sentences are appropriate. This obligation applies to Appellant's case. Because these cases were closely related, with highly disparate sentences (with the more culpable actor receiving a significantly lighter sentence), they were obligated to compare the sentences. *Sothen* makes it clear that their obligation was not extinguished because civilians tried Mr. Simmon's case. *Sothen* 54 M.J. at 296–97 ("there is nothing in the plain language of Article 66, in its legislative history, or in our case law that would preclude the Courts of Criminal Appeals from engaging in sentence comparison when there is a closely related case with a highly disparate sentence.").

There is no serious argument that Mr. Simmon's and Appellant's cases are not closely related. Indeed, they are co-actors in the exact same criminal enterprise. The state of South Carolina had personal and subject matter jurisdiction over the Appellant and Mr. Simmons. Jurisdictional authorities and prosecutorial discretion do not necessarily make cases related. Facts do. Indeed, when the Government included its proposed analysis, it did not focus on the charges used to describe the acts of Appellant, it referred to the facts. Criminal conduct makes cases related. *Post hoc* jurisdictional authorities and discretionary prosecutorial

charging decisions are immaterial to the analysis. The cases are closely related in this case because they arose from the exact same interaction in which Mr. Simmons and Appellant both participated. The lower Court erred by refusing to compare the cases to determine if they were closely related or if the sentences were disparate, and the Government's argument that they did so implicitly is hopelessly wishful, without support in the record, and fails.

This is one of those rare instances where an appropriateness analysis must be done. Appellant's and Mr. Simmon's actions were nearly identical, with Mr. Simmon's culpability being objectively greater because he created and led the criminal enterprise. The two were tried for the same behavior. The more culpable actor got zero active jail time. Appellant was sentenced to 54 months confinement and several other serious punishments based on his status as a servicemember. The lower Court erred because it did not conduct its required comparison, and this inaction was an abuse of discretion.

C. This Court does not need to change existing precedent but should affirm its intent to ensure complete appellate reviews are done in closely related cases, even when civilian authorities adjudicate closely related cases.

The current authorities on Article 66, *Lacy*, and *Sothen*, are sufficient to compel a grant of relief in this case. This Court need not change the case law or issue fresh mandates. Indeed, the Government's argument here is the one that

would upset precedent. This Court should affirm the holdings of those cases and clarify that the obligation to conduct sentence appropriateness review in every case is present even when civilian authorities try the closely related case. This Court should require the lower court to conduct the *Lacy* analysis, and require the Government to show if the burden shift occurred. The lower court did so previously in *Behunin*, and its failure to do so here must now be corrected. This Court should find that the cases are closely related and the sentences disparate and that the lower Court's refusal to conduct the analysis was an abuse of discretion and an obvious miscarriage of justice.

Conclusion

Because the lower court declined to conduct the required sentence comparison analysis, Appellant respectfully requests that this Court set aside the lower court's opinion and remand for corrective action so that Appellant can receive a fair, just, and appropriate sentence, in light of the much lower sentence imposed on the more culpable 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
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Matthew E. Neely
Lieutenant Colonel, USMC
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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 March 28, 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
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CAAF Bar no. 37746

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This Brief complies with the type-volume limitations of Rule 24(c) because it contains 1,778 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)
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999 Waterside Dr.
Suite 2500
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