IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim. App. Dkt. No. 202100311
Sean M. SWISHER, Lance Corporal (E-3) U.S. Marine Corps Appellant	)	USCA Dkt No. 24-0011/MC

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

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7295, fax (202) 685-7687
Bar no. 36701

JAMES P. WUZHU
LCDR, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
Bar no. 36943

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01

1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682 , fax (202) 685-7687
Bar no. 31714

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NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

UNITED STATES CIRCUIT COURTS OF APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946

Issue Assigned

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

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of a dishonorable discharge and confinement for more than two years. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2016). This Court has jurisdiction under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual assault, attempted sexual assault, and wrongful use of cocaine, in violation of Articles 80, 112a, and 120, UCMJ, 10 U.S.C. §§ 880, 912a, 920 (2016). The Military Judge sentenced Appellant to reduction to paygrade E-1, fifty-four months of confinement, and a dishonorable discharge. The Convening Authority took no action on the sentence,[1] and the Military Judge entered the judgment into the Record.

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[1] When the Convening Authority purported to "approve[]" the sentence, (Post-Trial Action at 2, Sept. 24, 2021), his action was ultra vires, *see* R.C.M. 1109(c) (2019) (outlining possible actions by convening authorities); R.C.M. 1109(g) (2019) (same); Art. 60a, UCMJ, 10 U.S.C. § 860a (2016) (same). Thus, he took no lawful action on the sentence under Article 60a, and this Court acquired jurisdiction

Statement of Facts

A. The United States charged Appellant with sexual assault, attempted sexual assault, and wrongful cocaine use.

The United States charged Appellant with (1) penetrating the Victim's mouth with his penis and her vulva with his finger when she was incapable of consenting due to impairment by alcohol; (2) attempting to penetrate the Victim's vulva with his penis when she was incapable of consenting due to impairment by alcohol; and (3) wrongfully using cocaine. (J.A. 307–11.)

B. The United States presented testimony from eyewitnesses, the other assailant, law enforcement, and an expert in forensic toxicology—as well as Appellant's own statements to law enforcement.

1. A security officer testified to finding the Victim, who was highly intoxicated, being sexually assaulted by Appellant and Mr. Simmons.

Officer Scott testified he saw three women, including the Victim, come out of the bar appearing very intoxicated. (J.A. 362.) He also noticed two men, Appellant and Mr. Simmons, hovering around the Victim as if "they want to take her, like, they wanted to just basically come at her." (J.A. 363.) After the women used the bathroom, Officer Scott escorted them to the taxicab stand but noticed the Victim, Appellant, and Mr. Simmons were missing. (J.A. 370.)

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following the entry of judgment. *See* Art. 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3); *United States v. Brubaker-Escobar*, 81 M.J. 471, 474–75 (C.A.A.F. 2021)

Upon finding them, Officer Scott saw "four shoes laying down, like one person laying on their back, and other person laying of top of her." (J.A. 374.) He saw Appellant and Mr. Simmons sexually engaged with the Victim. (J.A. 377.) He also saw Appellant on top of the Victim with his pants down and penis out while she was laying on her back with vomit on the collar of her shirt. (J.A. 378–79.) He saw Mr. Simmons "hunched back against the cooler with his . . . penis in his hand" and "trying to put his penis in her mouth." (J.A. 380.)

Appellant initially resisted Officer Scott's direction to get off the Victim and pull his pants up, claiming he was trying to help her. (J.A. 381.) Officer Scott responded, "How are you trying to help her with your penis [in] your hand and she's drunk? How are you trying to help her?" (J.A. 381.)

2. The Victim's friend recalled the events of the night up until the Victim went missing. The Victim testified about the events of the night before she blacked out.

Ms. Perez, the Victim's best friend, testified to the buddy system the women adopted that night as "a safety thing. Just being girls, alone at a bar, drinking." (J.A. 383.) She and the Victim went to the bathroom to take shots of the "mini bottles" multiple times, and the last shot they took was right before they were kicked out of the bar for over-intoxication. (J.A. 388.)

When asked about why she thought the Victim was overly intoxicated, Ms. Perez responded, "The very last shot she did, she had thrown up right after, she

was slurring her words, she was stumbling, we would have to hold on to each other for support. Like, she'd have my arm and I would have hers." (J.A. 388.)

The Victim testified she smoked marijuana before going out. (J.A. 399.) She recalled having at least two or three drinks and had "one or two tequila shots" but knew she had more later on. (J.A. 400.) She had never blacked out before, and she did not remember vomiting nor being kicked out of the bar. (J.A. 403.) She had no memory of walking to the bench outside the bar, walking towards the drink stand by the playground, or anything that happened there. (J.A. 404.)

3. Mr. Simmons recounted meeting Appellant and using cocaine with him. A toxicology report confirmed the presence of cocaine in Appellant's blood.

While at the bar, Mr. Simmons asked Appellant if he wanted to get some cocaine, and Appellant agreed. (J.A. 410.) Upon securing the drugs, Appellant and Mr. Simmons went inside a bathroom to snort the cocaine off a key. (J.A. 414–16.)

Appellant's blood toxicology report was positive for cocaine. (J.A. 564.)

4. Mr. Simmons recounted how he and Appellant had sex with the Victim while she was very intoxicated.

Mr. Simmons testified to seeing a group of girls he and Appellant had noticed earlier in the night sitting on the benches outside the bar because they were kicked out of the bar for over-intoxication. (J.A. 419.)

Mr. Simmons went over to the women; eventually, he and the Victim left the bench and headed toward the bathroom to use more cocaine with Appellant. (J.A. 419–20.) Mr. Simmons testified that he wanted his "dick sucked" for cocaine, and the Victim agreed. (J.A. 442.) The three of them walked away from the bathroom and Mr. Simmons saw Appellant with his arm around the Victim. (J.A. 422.) They walked past the playground in search of "somewhere confined" because he did not want "to do it . . . in the open." (J.A. 423.)

Mr. Simmons pulled down the Victim's pants, and he and Appellant took turns inserting their penises in her mouth and vagina. (J.A. 425.) He explained, "Like if I was up top, I was at the head, then he was trying the vagina. If I was at the vagina, then he was trying the opposite way." (J.A. 425.) Mr. Simmons also observed Appellant put his finger in the Victim's vagina. (J.A. 426.) During this sexual encounter, neither Mr. Simmons nor Appellant asked the Victim if she was okay. (J.A. 428.) The Victim vomited, which did not deter either man from continuing to orally and vaginally penetrate her. (J.A. 427–28.)

Mr. Simmons testified that neither he nor Appellant asked for permission to insert their fingers in the Victim's vagina, nor did they ask for permission to pull her pants down. (J.A. 456.)

5. Law enforcement testified about what they witnessed upon arriving on the scene.

Officer Nycum testified that he responded to the scene. (J.A. 459.) When he arrived, he saw Appellant and Mr. Simmons detained by security guards. (J.A. 459.) He saw the Victim "in a slumped over state where she was sitting down, had the thousand yard stare, just a little disoriented." (J.A. 459.) He observed the Victim was slow to answer questions, was missing a shoe, and had pieces of vomit on her body, her hair, and clothing. (J.A. 460.) The Victim had the "odor of alcohol emanating from her" and the officer could smell it "greatly coming off of her breath" when he spoke to her. (J.A. 460.)

6. The United States offered Appellant's interview, in which he stated, "I fingered her," and the Victim "suck[ed] me off."

Detective Amos testified he interviewed Appellant. (J.A. 493.) The United States offered the audio recording of the interview. (J.A. 493–94; J.A. 554.)

During the interview, Appellant admitted, "I fingered her," but that was "all I did to her." (J.A. 554, audio at 11:40–11:45, 13:40–13:51.) Appellant later stated the Victim "did try to suck me off," and then he clarified that "she did" perform oral sex. (J.A. 554, audio at 13:57–14:11.)

7. The United States offered expert testimony about the blood alcohol level of the Victim.

The United States' expert testified the Victim's blood alcohol content was 0.161—twice the legal limit—when tested after the incident. (J.A. 495–99.) The

expert also explained the concept of retrograde extrapolation, whereby forensic experts can accurately estimate a blood alcohol concentration at a prior time. (J.A. 500-02.) Using this method, the Victim's blood alcohol content was estimated to be between 0.176 and 0.199 at the time of the incident. (J.A. 502.) Additionally, the Victim's blood tested positive for cocaine and marijuana. (J.A. 497–98.)

C. The Members found Appellant guilty, and the Military Judge sentenced Appellant.

The Members found Appellant guilty of sexual assault, attempted sexual assault, and wrongful use of cocaine. (J.A. 313.)

Against a maximum sentence of thirty years' confinement for the sexual offenses and five years for the drug offense, the Military Judge sentenced Appellant to fifty-four months of confinement on the merged Specifications and two months of confinement for the cocaine Charge, to be served concurrently. (J.A. 504, 543.) Appellant also received a dishonorable discharge and a reduction to paygrade E-1. (J.A. 543.)

D. Mr. Simmons accepted responsibility and pled guilty in a civilian jurisdiction.

Mr. Simmons accepted responsibility by pleading guilty to criminal sexual conduct in the third degree. (J.A. 545.) As part of his plea, he presented evidence in extenuation and mitigation, including his lack of a criminal record and need to take care of his family. (J.A. 551–52.) The offense had a maximum sentence of

ten years' confinement, but Mr. Simmons pled guilty in exchange for a suspended five-year sentence, three years' probation, and child abuse and sex offender registration. (J.A. 545.) His probation required random drug and alcohol testing and that he maintain employment. (J.A. 552.) At the time of his plea, Mr. Simmons had already spent 232 days in detention. (J.A. 551.)

E. The lower court, sitting en banc, dismissed one Charge, reassessed the sentence, and otherwise affirmed the findings and sentence.

On May 15, 2023, the lower court affirmed the findings and sentence. (J.A. 03.) After this ruling, Appellant retained civilian counsel who identified a new issue. Appellant filed a motion for en banc reconsideration. On August 8, 2023, the lower court granted Appellant's Motion for en banc reconsideration and withdrew its May 15, 2023, opinion. (J.A. 03.)

On August 16, 2023, the lower court, sitting en banc, set aside Charge II for failure to state an offense. (J.A. 09.) The lower court affirmed the remaining findings and reassessed and affirmed the sentence. (J.A. 18.) The lower court declined to compare Appellant's sentence to that of his co-actor Mr. Simmons. (J.A. 17.)

Argument

THE LOWER COURT DID NOT ERR AS IT WAS NOT REQUIRED TO ENGAGE IN SENTENCE COMPARISON WITH A CIVILIAN CASE.

A. The standard of review is abuse of discretion.

The lower court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383–84 (C.A.A.F. 2005).

This Court, in turn, reviews the lower court's decision on sentence appropriateness for abuse of discretion or "obvious miscarriage of justice." *United States v. Behunin*, 83 M.J. 158, 161 (C.A.A.F. 2023) (citing *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)); *see also United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010) (reviewing the lower court's sentence appropriateness determination for abuse of discretion, or whether it acted arbitrarily, capriciously, or unreasonably, as a matter of law).

Abuse of discretion occurs when the lower court's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the court's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Behunin*, 83 M.J. at 161 (quoting *United States v. Ayala*, 81 M.J. 25, 27–28 (C.A.A.F. 2021)).

In reviewing the lower court's sentence comparison analysis, this Court is limited to three questions of law: (1) whether the cases are "closely related"; (2)

whether the cases resulted in "highly disparate" sentences; and (3) if the requested relief is not granted, whether there is a rational basis for the differences. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

But Congress has given this Court no sentence appropriateness powers. Art. 67, UCMJ; *see also United States v. Keith*, No. 226, 1952 CMA LEXIS 709, *24–25 (C.M.A. July 3, 1952). Where the lower court has failed to complete its sentence appropriateness duties with a correct view of the law, this Court has remanded "to ensure that the lower court reviews the… sentence… in a manner consistent with a 'correct view of the law.'" *United States v. Nerad*, 69 M.J. 138, 147–48 (C.A.A.F. 2010) (citation omitted). On the other hand, this Court has also, in other cases, determined that because the sentence comparison analysis is but part of the larger sentence appropriateness analysis, sometimes remand is not required. *See United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001).

B. Sentencing authorities must give individualized consideration to the nature and seriousness of the offenses to which an accused has been convicted.

"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). However, a court-martial is free to impose any sentence it considers fair and just within the limits of punishment

prescribed by the Code or the President. *United States v. Dedert*, 54 M.J. 904, 909 (N-M. Ct. Crim. App. 2001).

This analysis requires "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quotations and citations omitted).

C. Sentence appropriateness review is unique to the military justice system.

The Article 66 sentence appropriateness review authority has no parallel in the federal system, which instead relies on sentencing guidelines. *Lacy*, 50 M.J. at 288.

For courts-martial, Congress has instead "furthered the goal of uniformity in sentencing in a system that values individualized punishment" by empowering and relying on Court of Criminal Appeals judges to use their military justice experience to determine if a sentence was appropriate based on the facts of that particular case. *Id*. While the Court of Criminal Appeals has the discretion to review the appropriateness of the adjudged sentence, it may not engage in acts of clemency. *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010).

By contrast, the civilian justice system employs sentencing guidelines to limit disparate treatment of similarly situated defendants. *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001). However, prosecutors have "great discretion in

deciding what cases to pursue and what charges to bring," which can result in acceptable disparity. *Id.* (citing *United States v. Rodriguez*, 162 F.3d 135, 151 (1st Cir. 1998)) (prosecutorial discretion and plea-bargaining is a legally permissible source of sentence disparity)).

D. Courts of Criminal Appeals only engage in sentence comparison in closely related cases. This Court has never restricted the lower courts' discretion to decline to analyze civilian federal or state criminal cases, foreign cases, for whether they are closely related.

1. Courts of Criminal Appeals may, but are not required to, engage in sentence comparison. However, sentence comparison of courts-martial sentences is required in "closely related cases."

Courts of Criminal Appeals "typically have '*discretion* to consider and compare other [specific] courts-martial sentences when [they are] reviewing a case for sentence appropriateness and relative uniformity.'" *Behunin*, 83 M.J. at 161 (citing *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001)) (emphasis added); *Sothen*, 54 M.J. at 297.

However, sentence comparison is "*required*… 'in those *rare instances* in which sentence appropriateness can be fairly determined *only* by reference to disparate sentences adjudged in closely related cases." *Behunin*, 83 M.J. at 161–62 (quoting *Sothen*, 54 M.J. at 296) (emphasis in original).

This Court has never explicitly required the Courts of Criminal Appeals to conduct a closely related analysis to cases outside the military justice system, such

as civilian federal or state criminal cases, foreign criminal cases, or other types of judicial or administrative proceedings.

2. An appellant has the burden to prove the comparison case is "closely related" under the *Lacy* factors.

When requesting sentence comparison, an appellant bears the burden of demonstrating that the case with which he seeks comparison is "closely related" to his case. *Lacy*, 50 M.J. at 288. A case is closely related if it fits in one of the *Lacy* categories: (1) "the *servicemembers* were 'co-actors involved in a common crime,'" (2) "*servicemembers* [were] involved in a common or parallel scheme," or (3) there was "some other direct nexus between the *servicemembers* who sentences are sought to be compared." *Behunin*, 83 M.J. at 162 (citing *Lacy*, 50 M.J. at 288) (emphasis added).

"The mere similarity of offenses is insufficient to demonstrate that the cases are closely related." *United States v. Washington*, 57 M.J. 394, 401 (C.A.A.F. 2002). "Closely related" cases involve "offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994).

3. Sentence comparison, where proper, is only one aspect of sentence appropriateness review.

The test for whether sentences are highly disparate is not limited to a "narrow comparison of the relevant numerical values," but may also consider

disparity in relation to the potential maximum punishment. *United States v. Durant*, 55 M.J. 258 (C.A.A.F. 2001) (citing *Lacy*, 50 M.J. at 289). Thus, where sentence comparison is proper, it is only one aspect of sentence appropriateness review. *Snelling*, 14 M.J. at 268.

E. The lower court did not abuse its discretion or cause a miscarriage of justice: this Court has never restricted the Courts of Criminal Appeals' discretion to decline to apply a "closely related" analysis to civilian convictions. History counsels against extending such a requirement.

1. The general distaste for sentence comparison originated in 1959 with sentencing instructions.

The general distaste for sentence comparison can be traced to *United States v. Mamaluy*, 10 C.M.A. 102 (C.M.A. 1959), which noted that "it has long been the rule of law that the sentences in other cases cannot be given to court-martial members for comparative purposes." *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985) (quoting *Mamaluy*, 10 C.M.A. at 106). Accordingly, the court rejected the sentencing argument: "In special circumstances to meet the needs of local conditions, sentences more severe than those normally adjudged for similar offenses may be necessary." *Mamaluy*, 10 C.M.A. at 105. "[P]roper punishment should be determined on the basis of the nature and seriousness of the offense and the character of the offender, not on many variables not susceptible of proof." *Id.* at 107.

2. In 1985, the *Ballard* court determined that sentence comparison was not required by the Eighth Amendment, which was then understood to require a sentence be proportional. The Court of Military Appeals declined to question the Court of Criminal Appeals' decision to avoid sentence comparison.

The *Ballard* court noted that the Eighth Amendment prohibition against cruel and unusual punishment required a sentence be proportional to the conviction. 20 M.J. at 284 (citing *Solem v. Helm*, 463 U.S. 277 (1983)). In reviewing civilian convictions, federal and state alike, the Supreme Court considered: (1) "the gravity of the offense and the harshness of the penalty"; (2) a comparison with "the sentences imposed on other criminals in the same jurisdiction"; and (3) a comparison of "the sentences imposed for commission of the same crime in other jurisdictions." *Helm*, 463 U.S. at 290–91; *but see Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (overturning *Helm* in that "the Eighth Amendment contains no proportionality guarantee").

In *Helm*, the Court reversed the appellant's sentence for bouncing a $100 check, "one of the most passive felonies," as "more severe[] than in . . . any other [s]tate." *Id.* at 296, 302.

However, in *Pulley v. Harris*, 465 U.S. 37 (1984), the Court rejected the appellant's argument, not that the death penalty was disproportionate for his crime, but that the death penalty was disproportionate only considering others' sentences. 465 U.S. at 43–44.

The *Ballard* court found the appellant's facts and argument analogous to *Harris*, and held the lower court did not err in refusing to engage in sentence comparison. *Ballard*, 20 M.J. at 285–86. Further, the court held noted that because sentence comparison was permissible but not required, should the lower court "conclude[] that further edification in the area of sentence averages is unnecessary, we will respect that judgment." *Id.* at 286.

3. This Court in 1999 first imposed a requirement to engage in sentence comparison with "closely related cases."

The requirement to engage in sentence comparison with "closely related" cases was first declared in *Lacy* and restated in *Sothen*. *Lacy*, 50 M.J. at 288 (citing *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)); *Sothen*, 54 M.J. at 296 (citing *Ballard*, 20 M.J. at 283). Although both courts relied on *Ballard*, such a requirement appears nowhere in *Ballard*.

But far from imposing any requirement, the *Ballard* court said sentence appropriateness should be conducted "without reference to… other offenders" "*except in those rare instances* in which sentence appropriateness can be *fairly determined only by* reference to disparate sentences adjudged in closely related cases, such as those of accomplices." 20 M.J. at 283 (citing *Snelling*, 14 M.J. at 268; *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982)) (emphasis added).

Notably, the *Snelling* court only tacitly approved of such sentence comparison, which had been percolating in the lower courts. 14 M.J. at 268. This

tacit approval was also given by the *Olinger* court, which acknowledged "[t]he intermediate courts have recognized [as] an exception to th[e] general rule" forbidding sentence comparison. 12 M.J. at 460 (listing seven Board of Review cases as examples of this developing precedent).

4. This Court in *Sothen* held only that the Courts of Criminal Appeals are "not preclude[d]" from considering civilian convictions that are closely related.

The *Sothen* court held Article 66 "does not preclude consideration of cases involving military and civilian co-actors." 54 M.J. at 297. However, the Court did not and has not held that Courts of Criminal Appeals are *required* to engage in a "closely related" analysis for *civilian* cases.

Thus, the lower court's understanding that no "precedent requires us to find parity between a military court-martial sentence and a sentence awarded by a state or local jurisdiction" is legally correct. *See* 2023 CCA LEXIS 339, at *26.

5. The plain language of Article 66 does not require the Courts of Criminal Appeals to engage in sentence comparison with civilian cases.

In sentence appropriateness review of non-capital cases, the Courts of Criminal Appeals "may affirm . . . the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2016). Just as the plain language of Article 66 does not prohibit

consideration of civilian sentences, it does not require it. *See Sothen*, 54 M.J. at 297.

6. The lower court did not abuse its discretion or create a miscarriage of justice. Civilian sentence comparison was not required.

Thus, the lower court did not abuse its discretion or cause a miscarriage of justice. Nothing requires the Courts of Criminal Appeals to analyze if federal or state civilian cases are "closely related," or to conduct a sentence comparison with non-servicemembers' convictions or judicial or administrative proceedings and determine if a court-martial sentence should be on par with a civilian sentence. *See Swisher*, 2023 CCA LEXIS 339, at *26.

F. Under *Wacha*, the sentence comparison analysis is but one part of the sentence appropriateness analysis: even if the lower court read Sothen too restrictively, the lower court's overall finding that Appellant's sentence was appropriate was not an abuse of discretion or miscarriage of justice.

In *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001), the appellant argued that the lower court erred by "limit[ing] its comparison of sentences to closely related cases with disparate sentences among co-actors." The *Wacha* court noted that "[a]ssuming *arguendo* that the lower court applied Lacy in an unduly restrictive manner, we must test that court's finding, that appellant's sentence was… appropriate, for abuse of discretion." *Id*. at 268. The court held that because the lower court "found that appellant's sentence was appropriate for the

crimes he committed," there was "no abuse of discretion or miscarriage of justice in the Article 66(c) analysis." *Id*.

So too here. Even if the court parsimoniously read *Sothen* and had no discretion under Article 66 to decline to determine if a non-court-martial civilian criminal case was "closely related," the lower court's finding that the sentence was appropriate demonstrates that no abuse of discretion or miscarriage of justice occurred.

Appellant was convicted attempted and actual sexual assault against an incapacitated Victim, and wrongful use of cocaine. (J.A. 307–11, 313.)

Appellant, along with Mr. Simmons, lured the victim to a dark corner, separated her from her friends and without her consent, attempted to—and did—sexually assault her despite knowing she was extremely inebriated from both the alcohol and drugs he witnessed her consume. (J.A. 409–25.)

In light of the predatory nature of Appellant's multiple offenses, the effect on the Victim, his likelihood to reoffend, and his lack of remorse, Appellant received "the punishment he deserve[d]." *Healy*, 26 M.J. at 395.

Therefore, the lower court's sentence appropriateness review was not an "obvious miscarriages of justice or abuses of discretion." *See Lacy*, 50 M.J. at 288.

G. Despite "declin[ing] to compare Mr. [Simmons'] case" to Appellant's, the lower court–in substance–considered whether the cases were closely related, finding that Mr. Simmons' case lacked "parity" as he was tried for "different crimes… by a civilian jurisdiction."

Substance, not form, is controlling in appellate law. S*ee United States v. Mateo*, No. 20-13658, 2022 U.S. App. LEXIS 2471, at *6 (11th Cir. Jan. 26, 2022) (finding substance, not form, of adequacy of plea colloquy controls); *United States v. True*, 28 M.J. 1, 3 (C.A.A.F. 1989) (legal analysis of an order); *United States v. Shamel*, 22 C.M.A. 361, 362 (C.M.A. 1973) (confinement conditions); *United States v. Cadenhead*, 14 C.M.A. 271, 276 (C.M.A. 1963) (Japanese decision to release jurisdiction).

Courts of Criminal Appeals "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.'" *Behunin*, 83 M.J. at 162 (*citing Sothen*, 54 M.J. at 296 (emphasis added). Therefore, as this Court has held, cases being closely related in itself is not sufficient, the comparison between the closely related cases must be the only way to evaluate the disparity between them, and therefore the appropriateness of the sentence. And in determining if cases are "closely related," Courts of Criminal Appeals "have broad latitude." *Behunin*, 83 M.J at 162.

Appellant's request for this Court to compare his case to Mr. Simmons' rests on the fact that he and his co-actor engaged in substantially the same conduct. (Appellant's Br. at 12.) The lower court "declin[ed] to compare Mr. [Simmons'] case with Appellant's sentence… [as it] was for different crimes and was adjudicated by a civilian jurisdiction." (J.A. 17.) The lower court stated that it was "unaware of any precedent that requires us to find parity between a military court-martial sentence and a sentence awarded by a state or local jurisdiction." (J.A. 17.) In so stating, the lower court, in substance, conducted a case comparison and found that there was no "parity" and the cases were no closely related.

In *Sothen*, this Court upheld the Court of Criminal Appeals' sentence appropriateness review, which—while not required to do so—engaged in case comparison and approved the sentence despite a disparity. 54 M.J. at 295–96. The civilian co-actor received a sentence of three years' confinement and a $500 fine, and the appellant was sentenced to sentenced to twenty-five years' confinement, reduction to paygrade E-1, total forfeitures, and a dishonorable discharge. *Id.*

The record contained "many good and cogent reasons in the record of trial that explain the disparity": (1) the co-actors were tried by two different sovereigns; (2) sentence comparison between civilian and military cases is less persuasive because of the differences between civilian and military approaches to sentencing and punishment; (3) the appellant was convicted of multiple serious offenses while

the co-actor pled to only one count; (4) the charges against the appellant were contested, whereas "the conviction of the civilian co-actor was based on a voluntary, negotiated plea of guilty"; and (5) the sentence of the co-actor reflected the fact that she agreed to assist in the prosecution of the appellant through testifying at his trial. *Id*.

All of these factors apply here. Unlike Appellant, Mr. Simmons accepted responsibility by pleading guilty to criminal sexual conduct in the third degree and agreeing to testify against Appellant. (J.A. 545.) This offense had a maximum sentence of ten years' confinement, but Mr. Simmons pled guilty in exchange for a suspended five-year sentence, three years' probation, and child abuse and sex offender registration. (J.A. 545.) His probation required random drug and alcohol testing and that he maintain employment. (J.A. 552.) At the time of his plea, Mr. Simmons had already spent 232 days in detention. (J.A. 551.) In extenuation and mitigation, Mr. Simmons presented his lack of a criminal history; he accepted responsibility for his actions; he had four children; his fiancé was recently injured in a motor vehicle accident; and he needed to be able to get back to work to support his family. (J.A. 551–52.)

Like *Sothen*: (1) the co-actors were tried by two different sovereigns; (2) the comparison is between a civilian and military case which is less persuasive; (3) Appellant was convicted of multiple serious offenses whereas his co-actor pled to a

single lesser offense; (4) his co-actor negotiated and voluntarily accepted a deal in which he would plead guilty; and (5) his co-actor participated in the prosecution of Appellant by testifying at his court-martial. *See* 54 M.J. at 295–96.

Appellant fails to address how a civilian case under different sovereigns, laws, pleas, charges, and maximum punishments would be "closely related" enough to render comparison appropriate, even had the lower court exercised its discretion to do so: "[t]he mere similarity of offenses is insufficient to demonstrate that the cases are closely related." *See Washington*, 57 M.J. at 401. Given these distinctions, this is not one of those "rare instances" where sentence appropriateness can *only* be determined by reference to the other case at issue. *See Behunin*, 83 M.J. at 162. The differences between the cases render them not closely related, and therefore would make sentence comparison between them not helpful for purposes of sentence appropriateness review.

Appellant's reliance on *Lacy* is misplaced. While the appellant there was engaged in the same course of conduct with two co-actors, they were all Marines, all three pled guilty, all three were tried by the same military judge sitting alone, and two had the same convening authority. *Lacy*, 50 M.J. at 287; *see also Sothen*, 54 M.J. at 296–97. Except for Appellant and Mr. Simmons being co-actors here, there are no other similarities which would render the cases "closely related" like in *Lacy*.

Appellant's reliance on *United States v. Kelly*, 40 M.J. 558 (N-M. Ct. Crim. App. 1994), is also misplaced. While the appellant there and his co-actor were both Sailors engaged in the same course of conduct, appellant faced a court-martial while his co-actor faced nonjudicial punishment because he was the son of the Secretary of the Navy. *Id.* at 570–71. This case is far different from *Kelly*: not only was Mr. Simmons not a service member subject to the Code, but no nefarious reason for disparate treatment was even suggested. *See id.* Unlike *Lacy* and *Kelly*, Mr. Simmons was a civilian tried in state court for violating state laws with different maximum penalties. *See Lacy*, 50 M.J. at 287; *Kelly*, 40 M.J. at 570–71.

Therefore Appellant fails to show the cases are "closely related." *See Lacy*, 50 M.J. at 288. The lower court did not abuse its discretion by not comparing Appellant's sentence with Mr. Simmons' sentence, and properly determined Appellant's sentence was appropriate. *Swisher*, 2023 CCA LEXIS 339, at *26.

Any differences in sentences are justified, as the lower court implicitly found, in finding that they were tried for different crimes by different sovereigns. *See id.*

Therefore, the lower court's sentence appropriateness review was not an obvious miscarriage of justice or abuse of discretion. *See Lacy*, 50 M.J. at 288.

H. If the lower court was required to analyze whether Mr. Simmons' case was "closely related" and if this Court disagrees that the lower court's sentence appropriateness determination resolves the matter, this Court should remand for a determination of whether Mr. Simmons' case is closely related and a new sentence appropriateness analysis.

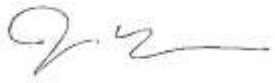
This Court has repeatedly held that it has "no authority to affirm such . . . parts of a sentence as we determine . . . *should be approved* [because] . . . [only] the . . . [Courts of Criminal Appeals] have been granted that power." *United States v. Doherty,* 5 C.M.A. 287, 296 (C.M.A. 1954). *Cf. United States v. Holt,* 52 M.J. 173, 186 (C.A.A.F. 1999) (declining to conduct factual sufficiency analysis because it "is outside the statutory parameters of our review."). When reviewing the lower court's erroneous application of its unique "should be approved" and old de novo "factual sufficiency" powers, this Court has routinely remanded for corrective action. *See Nerad,* 69 M.J. at 147 (listing examples where this Court has remanded directing the lower court to correctly exercise its Article 66 powers); *United States v. Hutchinson,* 59 M.J. 250, 251 (C.A.A.F. 2004) (this Court reviews sentence appropriateness decisions for abuse of discretion and may "order a *de novo* review when the lower court has erred as a matter of law.").

If this Court finds that the lower courts have no discretion to decline to determine if a civilian conviction is "closely related," it should remand to the lower court for a new sentence appropriateness analysis. *See, e.g., Nerad,* 69 M.J. at 148.

Conclusion

The United States respectfully requests this Court affirm the lower court's decision.

CANDACE G. WHITE
Major, U.S. Marine Corps
Government Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687
candace.g.white.mil@us.navy.mil
Bar no. 36701



JAMES P. WU ZHU
Lieutenant Commander, JAGC, U.S. Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678, fax (202) 685-7687
james.p.wuzhu.mil@us.navy.mil
Bar no. 36943

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
brian.k.keller3.civ@us.navy.mil
Bar no. 31714

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-2947, fax (202) 685-7687
joseph.m.jennings.mil@us.navy.mil
Bar no. 37744

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Candace G. White Digitally signed by Candace G. White

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel