UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant MICHAEL J. DAHL
United States Air Force

ACM 36582

30 January 2008

Sentence adjudged 13 October 2005 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: James Roan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 years, reduction to E-1, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain John S. Fredland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Captain Daniel J. Breen, Captain Ryan N. Hoback, and Captain Jamie L. Mendelson.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

WISE, Chief Judge:

In accordance with his pleas, the appellant was convicted, by a military judge of one specification of conspiracy to wrongfully possess cocaine with the intent to distribute, one specification of wrongful possession of 15 kilograms of cocaine with intent to distribute, one specification of use of his official duty position to create false courier letters for use in the illegal transportation of cocaine, and one specification of wrongful solicitation of Staff Sergeant (SSgt) K to participate in the possession, transportation and distribution of cocaine, in violation of Articles 81, 112a, and 134,

UCMJ, 10 U.S.C. §§ 881, 912a, 934. A military judge sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged while crediting the appellant with 10 days for illegal pretrial punishment and making financial allowances for the appellant's family regarding adjudged and automatic forfeitures.

On appeal, the appellant assigns the following errors: 1) The appellant's plea was improvident because the military judge erred by inadequately addressing the possibility of an entrapment defense; 2) The appellant's sentence was inappropriately severe; and 3) The appellant's convictions should be set aside because the FBI "reverse undercover" operation was sufficiently outrageous to violate the appellant's Fifth Amendment due process rights.[1]

Background

The FBI planned and executed a "reverse undercover" drug operation called "Operation Lively Green." The purpose of the undercover operation was to uncover corrupt public officials, including law enforcement officials and military members, willing to commit serious criminal offenses for money. Ultimately, the operation identified 101 suspects willing to engage in drug trafficking, federal bribery, extortion, forgery, fraud, and illegal immigration.

"Frank" was an undercover informant for the FBI who served as the front man for a wholly fictitious drug cartel created by the FBI for the drug trafficking portion of the undercover sting operation. Frank recruited individuals in public service willing to transport cocaine from Tucson, AZ to Phoenix, AZ or Las Vegas, NV. Those individuals who participated in the scheme were paid varying amounts of cash for different types of services as will be further described below.

Frank's standard operating procedure was to inform individuals employed in public service that he was the front man for a Mexican drug trafficking cartel recruiting individuals to transport drugs. Frank, early in his discussions, would tell the person that the organization was not involved in violence, did not carry weapons, and the individual could "walk away" from the operation at any time. However, to participate, the recruit was himself required to recruit other individuals, also employed in public service, to participate in the transportation of the cocaine. None of the individuals recruited by Frank knew that he was working as an undercover informant for the FBI.

Military members were promised $3000 for transporting the cocaine and paid an additional sum for each additional individual recruited. Military personnel received an

[1] This issue was raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

additional $2000 for each NCO and $5000 for each officer brought into the operation. As will be shown, the "cartel" also paid additional sums for other goods and/or services provided.

The group once formed, including the individual recruited by Frank and others employed in the public service sector recruited by that individual, would meet with Frank. The meeting was to assess whether the individuals recruited were predisposed to transport cocaine. Frank was "wired" and the conversations were recorded. FBI agents would listen to the tapes and send them to their higher headquarters and a United States Attorney's office for review and legal guidance. If an individual expressed or indicated hesitancy about participating in the scheme, the FBI would not permit that individual to participate in the operation. Once a group was properly vetted, the FBI would orchestrate their transport of FBI-provided cocaine from Tucson to Phoenix or Las Vegas.

Frank, in January 2003, recruited SSgt S assigned to Davis-Monthan Air Force Base (AFB), AZ. The two met on 31 January 2003 to discuss a proposed movement of cocaine from Tucson to Phoenix. During the conversation, SSgt S said that he was in the process of recruiting the appellant although he did not mention him by name. SSgt S said that the appellant had a lot of experience in transporting drugs as the appellant had once run drugs for his father. SSgt S said the appellant was "iffy" because the appellant did not know how "legit" the operation was. SSgt S assured Frank that he would continue to discuss the matter with the appellant.

SSgt S successfully recruited the appellant. The appellant and SSgt S met with Frank on 1 February 2003 to discuss the details of transporting the cocaine from Tucson to Phoenix on 13 February 2003. Their conversation was recorded per standard operating procedure. Significant parts of the conversation were:

Frank: Did he tell you what you'd be carrying?

[Appellant]: Yeah.

Frank: What did he tell you?

[Appellant]: He told me – [expletive] what – coke – I would imagine.

Frank: It's coke.

[Appellant]: I've got some questions about that though.

Frank: Go ahead.

[Appellant]: Go ahead.

Frank: No, go ahead. I just wanted to make sure you knew what you were getting into – you know what I mean?

[Appellant]: yeah – yeah – yeah

Frank: All right. It will be 20 keys of cocaine per car.

[Appellant]: Okay. Yeah – I was going to ask – you know –what –where's it going to be?

Frank: It's going to be at –

[Appellant]: Although I've done it before back when I was in school.

Frank: In that quantity – that kind of quantity?

[Appellant]: I don't even know how much we were rolling with. All we did – we pulled up, we swapped out spare tires, and the [drugs were] in the [expletive] tires. We threw a tire in the car, and we rolled.

SSgt S: He's the one I told you about was popped – his dad –

Frank: Oh – got popped for this [expletive]? Damn.

SSgt S: He's the one that's got a lot of experience, Frank. This guy right here – he knows his [expletive].

Frank: You know your [expletive] though – huh?

SSgt S: Oh yeah.

[Appellant]: I've done it before – but not since I've been in the military, obviously. I was overseas. I didn't know [expletive] over there – in the military – I was up at Hill. I didn't know [expletive] up there. But –

Frank: Well, now that you're in the military – why do you want to go back to that lifestyle – if you don't mind me asking – I mean – you're a good Jedi Knight now. Now, you're starting to hang out with Darth Vader man. What's the change there?

[Appellant]: Oh, no – I liked doing it. It was fun.

Frank: Yeah.

[Appellant]: I had a good time and – obviously – money. [Expletive] I got my own bills to pay; it's like [expletive] the military ain't cutting it.

Frank and the appellant then discussed specific details of the run including the requirement that the appellant wear a battle dress uniform (BDUs) and travel in an official government vehicle when he transported the cocaine. The conversation continued:

Frank: We don't carry guns, I rather – you know – you're here because you want to be, and because you want to work and make money. I don't want you here because [SSgt S] threatened you or you know –

[Appellant]: No, I just want to find out – okay, so who – who am I delivering to up here? But, I was like [expletive] I ain't got nothin' – it – like [expletive] – like hold up. That's why I want to know who – who I'm going to – that's all.

Frank: . . . You'll go into the hotel room. When it's your turn, you come out. It will be me and my cousin. We'll count the 20 keys out. You get paid. At that time, you will renegotiate your contract for the next run – if you want to work. You stop working anytime you want. Once you make the money you want, I'm not going to blackmail you – I'm not going to threaten you – you know – if you say – hey, I made enough money – thank you – I don't know you. You don't know me. And we don't talk about what we did.

[Appellant]: Cool.

The appellant then asked Frank if the organization used "courier letters." Frank responded in a manner indicating that had no idea what the appellant was talking about. The appellant explained that courier letters are used by the military when transporting classified material and inform anyone wanting to view the materials, including law enforcement officials, that the contents to which they are attached cannot be examined by anyone not properly cleared. The appellant indicated that these letters could thwart attempts by law enforcement officials to inspect bags containing cocaine. The appellant said that he was the security officer and, as such, prepared the letters for his organization and could forge courier letters for the cartel. The conversation ended with Frank promising to pay the appellant $3000 for participating in the drug run scheduled for 13 February 2003 and asking the appellant to follow up on the possibility of preparing the courier letters.

Subsequent to this meeting, the appellant became dissatisfied with the financial arrangement and sought another meeting with Frank to include SSgt S. The three met on 8 February 2003. The appellant came to the point early in the conversation:

> Frank: [SSgt S] called me yesterday. He called me last night – Hey, remember the Sarge? I was like – yeah which one? The white guy. I said – yeah. He figured something out man he wants to talk to you. I said – okay – well set up for dinner.
>
> [Appellant]: No – I didn't figure nothing out. I was like – [explitive], man, I wanted to negotiate price. Like [explitive] – you know what – back – in '88 – I did this [explitive] – I was getting two grand a trip then. It was like [expletive] – I go – inflation is stiffer than fricken – stiffer punishments – man – I deserve at least another thousand. He goes – look – we'll talk to Frank.
>
> . . .
>
> [Appellant]: I go – [expletive] – I want to go on this run, but I want – I want to ask him for four.

Frank deftly turned the conversation to the courier letters and asked whether the appellant could prepare them in time for the 13 February 2003 run. The appellant assured Frank he could. A discussion then ensued as to efforts made by the appellant to bring the third (SSgt K) of four Air Force members into the conspiracy and whether the appellant was entitled to split the $2000 recruitment fee. The conversation ended with Frank agreeing to pay the appellant $3000 for participating in the run, $1000 for bringing SSgt K into the conspiracy, and perhaps some additional money for preparing the courier letters.

The appellant again met with Frank alone on 10 February 2003 to deliver the fraudulently prepared courier letters. The appellant explained that he had prepared the fraudulent letters using military terminology (a fictitious joint organization) to enable use of the letters by Army as well as Air Force personnel in all future drug transactions committed on behalf of the cartel. The appellant and Frank discussed the possibility of using the letters to transport illegal drugs on commercial airplanes. Frank agreed to pay an extra $1000 for the letters bringing the appellant's pay to $5000. The appellant then talked about his wife's support for his involvement in the transaction:

> [Appellant]: My wife is [expletive] tripping. She was like – you can do what you got to do.
>
> Frank: She's happy you're going to make some money?

[Appellant]: I go – that's what I said – you don't give a [expletive] what happens to me – as long as you get some cash – huh. She was like – [Expletive] – yeah – she goes – you better go and buy a safe because you're not going to go and put it in the bank. I'm like – duh. She goes – you need to get a safe. I was – like – oh, now, you know how to run [expletive]. I said – shut the [expletive] up.

Frank: Now, you're become a pro.

[Appellant]: Yeah – I was like – [expletive] – who the [expletive] are you – man. She goes – phsst – you can't put it nowhere – what – are you just going to do – just leave it in the house? She goes – get your [expletive] a safe. I'm like – it's under control – man.

The meeting ended with Frank challenging the appellant to do some more research on how the courier letters could be used on commercial airplanes. The appellant assured Frank that he would do so.

On 13 February 2003, the appellant, SSgt S, SSgt K, and Airman First Class (A1C) F met Frank in Tucson, Arizona and took possession of 15 kilograms of cocaine. The four, wearing BDUs, then drove the cocaine in a government vehicle to a hotel in Phoenix, Arizona. The appellant carried one of two bags containing the cocaine into a hotel room and unloaded it in front of two undercover FBI agents posing as cartel members. The meeting was video and audio taped. Upon arrival, one of the agents asked the appellant "How do you feel about this?" referring to transporting the cocaine. The appellant responded, "Ain't nothing but a thing."

The undercover agents dismissed the four service members from the room and called them back individually to make payment. The agents only paid the appellant $4000 when he was called into the room. The appellant objected arguing that he was entitled to an extra $1000 for his partial recruitment of SSgt K. SSgt S was called into the room and confirmed the appellant was entitled to the extra $1000. The appellant was paid a total of $5000 and left the room.

The military judge heard all of this evidence prior to ruling on the appellant's pre-trial motion to dismiss the charges and specifications on the basis that the government violated the appellant's Fifth Amendment due process rights. The appellant argued that the FBI's "reverse sting" operation was such an outrageous affront to cultural values that dismissal of the charges was required in order to punish the government for orchestrating the operation. The military judge denied the appellant's motion and the appellant then entered unconditional guilty pleas to the charges and specifications. It was against this backdrop of information that the appellant entered into the providency inquiry.

The military judge addressed the elements of Charge I and its Specification, conspiracy to wrongfully possess and distribute cocaine, and asked the appellant to explain why appellant believed he was guilty of the offense. During the course of his response the appellant said:

> At that point, I agreed to participate; but I still didn't think that it was actually going to happen. I thought that I could possibly find a way out of it later on; but, at the same time, I was scared that these people – they now know who I am – and that I kind of owed them something – and they'd leave me alone if I participated.[2] *But, most of all, I knew that [SSgt S] needed three people, and he couldn't go if he didn't have three people. So I agreed to go with them.* [Emphasis added.]

The military judge immediately asked trial defense counsel if he wished to raise a factual entrapment defense to which the trial defense counsel said "Your Honor, we discussed it with Sergeant Dahl, and he wants to continue with his guilty plea."

Undeterred, the military judge did discuss with the appellant his motivation and whether the appellant believed he was free to refuse to enter the conspiracy had he so chosen. The following exchange occurred:

> MJ: Now, when you met with [SSgt S], you did not know of the Lively Green operation - I assume – is that correct?
>
> Appellant: Yes, sir.
>
> MJ: Did he put any pressure – in your mind – on you to join this enterprise? Now, by "pressure" – I mean – go ahead describe – whatever you believe – and we'll talk about that.
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> Appellant: The only pressure I felt, sir – one with [SSgt S] – was – I knew him, and I knew his family, and I knew he was having a lot of money problems at the time. He was also having plenty of marital problems, and he believed – from us talking – I believe that he thought this was going to solve some of his problems – by him participating in this. And, he told me he couldn't go unless he got three other people to go.
>
> MJ: So, was this part of an attempt to help him – was that in your mind?
> Appellant: Yes, sir.

[2] The appellant has not asserted nor do we find that the appellant's guilty pleas were improvident because the military judge inadequately addressed the possibility of a duress defense.

MJ: Despite your friendship with [SSgt S], could you have backed out of this at the time he asked you – in your mind? Could you have said – no?

Appellant: Yes, sir.

MJ: So, was it a decision by you – notwithstanding the friendship – but – when you were faced with this question of whether to do it or not to do it, did you make a conscious decision to go ahead and do it – to engage in this activity?

Appellant: Yes, sir.

Ultimately, the appellant completed the providency inquiry and his guilty pleas were accepted. The appellant made an unsworn statement during the sentencing portion of the trial. At one point, the appellant said: "I still can't believe that at 33 years old I was still susceptible to peer pressure and didn't stand up for what I knew was right." After the appellant completed his statement, the military judge said: "Sergeant Dahl brought up the issue of peer pressure in his unsworn, and I want to go back and reexamine and make sure there's no issue of duress or entrapment – just one more time – to make sure everybody is convinced of that." The military judge asked trial defense counsel if he believed such an inquiry was necessary. The trial defense counsel said "no" arguing that the issues had been "fairly well fleshed out." Regardless, the military judge addressed questions to the appellant on these issues:

MJ: Sergeant Dahl, you mentioned peer pressure; and, again, I want to make sure – in your own mind – that you believe that this peer pressure – whether it was through friendship, whether it was – whatever – well – all right – I'll start – peer pressure – please define that for me – and, how do you believe peer pressure was apparent?

Appellant: Just our relationship – between each other – he was doing it – and I knew he was going to participate. I could have not went, but – he did not force me to go – however, we were friends, and that's kind of what I meant by that, sir.

MJ: I know you've said it before, but – this peer pressure – this friendship that you felt that may have led you to do this –this was not something that you were prevented from stopping yourself – is that right? I mean – you could have – had you so chosen – not to have engaged in any of the actions for which you've been convicted?

Appellant: Yes, sir.

MJ: Okay.

MJ: Does either side believe further inquiry is necessary?

TC: No, Your Honor.

ADC: No, Your Honor.

MJ: Based on that, I don't find that there's entrapment – nor duress – in this case.

Providency of the Plea

The appellant claims on appeal that his plea was improvident because the military judge "failed to explain the entrapment defense and obtain Appellant's assent that the government did not entrap him." We review a military judge's decision to accept a guilty plea for abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). In *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), our superior court imposed an affirmative duty on military judges during providence inquiries to conduct a detailed inquiry into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to plead guilty. Guilty pleas will not be set aside on appeal unless there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). If an accused, after a plea of guilty, sets up a matter inconsistent with the plea, a plea of not guilty shall be entered into the record, and the court shall proceed as though he had pled not guilty. Article 45(a), UCMJ, 10 U.S.C. § 845(a); *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004); *United States v. Clark*, 28 M.J. 401, 405 (C.M.A. 1989). Furthermore, "an accused servicemember cannot plead guilty and yet present testimony that reveals a defense to the charge." *Clark*, 28 M.J. at 405.

A. Entrapment

Rule for Courts-Martial (R.C.M.) 916(g) states: "It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." Entrapment then has two elements: (1) Government inducement and (2) no predisposition on the part of an accused. The *Discussion* section under the Rule states: "The 'Government' includes agents of the Government and persons cooperating with them (for example, informants)."

Inducement was defined in *United States v. Howell,* 36 M.J. 354, 359-60 (C.M.A. 1993). In *Howell*, our superior court stated:

> Inducement is government conduct that "creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense." Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship." Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice and stratagem.

Id. (citing *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992) (internal citations omitted).

Predisposition relates to a law-abiding citizen. *United States v. Lubitz*, 40 M.J. 165, 167 (C.M.A. 1994). "A law abiding person is one who resists the temptations, which abound in our society today, to commit crimes." *Id.* (quoting *United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991)). "When a person accepts a criminal offer without being offered extraordinary inducements, he demonstrates his predisposition to commit the type of crime involved." *Id.* (quoting *Evans*, 924 F.2d at 718).

B. Analysis

The appellant's testimony during the *Care* inquiry was in stark contrast to his stated intent, captured on tape, during numerous conversations leading up to and during the cocaine distribution. Not once during his recorded conversations did he ever state or imply that he engaged in these criminal activities to "help a friend" or that he succumbed to "peer pressure." In fact, when Frank asked the appellant specifically why he wanted to distribute cocaine, the appellant said, "I liked doing it. It was fun." The appellant then said, "I had a good time and – obviously – money. [Expletive] I got my own bills to pay; it's like [expletive] the military ain't cutting it." Other recorded conversations, from those when the appellant attempted to renegotiate his fee to those when he discussed his wife's support for his criminal activities as long as he brought home the "cash," compellingly show that the appellant was not induced into the criminal activity by his friendship with SSgt S or by peer pressure. These recorded conversations of the appellant, in all likelihood, were significant factors behind trial defense counsel's assurances to the military judge that the defense of entrapment had been discussed with the appellant and that the appellant "wants to continue with his guilty plea." However, the issue is not whether the appellant had a viable entrapment defense. The issue is did the appellant, during the *Care* inquiry, establish a "substantial conflict" between his pleas and his statements or "present testimony that reveals a defense" of entrapment that were not "resolved" during the providency inquiry?

A military judge is required to reject a guilty plea if the accused "sets up matter inconsistent with the plea." Article 45(a), UCMJ. However, in order to reach the level of inconsistency contemplated by Article 45(a), the matters presented must reasonably raise a defense. It is not sufficient that an accused present "the mere possibility that the defense exists." *United States v. Logan*, 47 C.M.R. 1, 2 (1973). The appellant essentially stated during the *Care* inquiry that he participated in these crimes, in part, to help SSgt S who the appellant knew was having unspecified financial and marital difficulties. The appellant stated during his unsworn statement, "I still can't believe that at 33 years old I was still susceptible to peer pressure." We agree.

It is simply implausible that an individual of the appellant's age and rank, having achieved what was, until then, a stellar military record, and being married with one child would agree to engage in this insidious criminal misconduct with its corresponding significant criminal penalties because of "peer pressure." This is particularly true in this case where the military judge had already received significant amounts of evidence pertaining to the appellant's real motivation for committing these crimes. Under the facts of this case, we view the appellant's comments during the *Care* inquiry and unsworn statement as his attempt to mitigate and minimize his criminal acts providing only the "mere possibility" of an entrapment defense. As such, the military judge was not required to further explore the entrapment defense during the *Care* inquiry.

However, the military judge being sensitive to the possibility that the appellant had raised the entrapment defense did, repeatedly, question the appellant as to the significance peer pressure and his friendship for SSgt S played in inducing the appellant's decision to commit these crimes. The appellant repeatedly admitted that he could have said "no" regarding committing these crimes; that he could have resisted had he wanted to; that he made the decision to carry on in his own mind; and that he could have chosen not to engage in any of the crimes for which he was convicted. The appellant's responses to the questions from the military judge conclusively show that SSgt S "merely provided the opportunity" for the appellant to commit these crimes and the appellant accepted the "criminal offer without being offered extraordinary inducements" thus demonstrating "his predisposition to commit" the crimes to which he pled guilty.

Finally, a military judge is entitled to rely to some degree on assertions by trial defense counsel that no legal defenses exist. *Clark*, 28 M.J. at 407. After the appellant first raised his friendship with SSgt S as having influenced his decision to participate in these crimes, the military judge asked trial defense counsel if he wished to raise a factual entrapment defense to which the trial defense counsel said: "Your Honor, we discussed it with Sergeant Dahl and he wants to continue with his guilty plea." After the appellant brought up "peer pressure" during his unsworn statement, the military judge said: "Sergeant brought up the issue of peer pressure in his unsworn, and I want to go back and reexamine and make sure there's no issue of duress or entrapment – just one more time – to make sure everybody is convinced of that." The military judge asked trial defense

counsel if he believed such inquiry was necessary. The counsel said "no" arguing that the issues had been "fairly well fleshed out."

We find that the military judge properly resolved any possible conflict between the appellant's guilty plea and his statements made during the *Care* inquiry and unsworn statement. The military judge also satisfactorily resolved the potential defense of entrapment as it related to the appellant's pleas. Further, that resolution was buttressed by assurances from trial defense counsel that the entrapment defense had been fully discussed with the appellant and the appellant did not want to raise the entrapment defense. There was no abuse of discretion on the part of the military judge in accepting the appellant's guilty plea to the charges and specifications.

Inappropriately Severe Sentence

The appellant asserts that the portion of his sentence including six years confinement is inappropriately severe in light of the sentences received by others in closely related cases and his exemplary service record. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

Although we generally consider sentence appropriateness without reference to other sentences, we are required to examine sentence disparities in closely related cases and permitted—but not required—to do so in other cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *pet. Granted on other grounds*, 65 M.J. 320 (C.A.A.F. 2007) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "At [this Court], an appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.*

The appellant has submitted the promulgating orders for 11 Air Force members who were convicted and sentenced for crimes committed pursuant to "Operation Lively

Green." The appellant also alleges that SSgt S was involuntarily discharged and cannot be court-martialed for the crimes he committed relative to "Operation Lively Green" but provides no supporting documentation or further explanation. Finally, the appellant invites this Court to consider the plight of civilian public officials who committed crimes pursuant to "Operation Lively Green" who, according to newspaper accounts submitted, faced less time in confinement than that received by the appellant.

While all 11 Air Force cases, according to the promulgating orders, had common offenses of conspiracy to wrongfully possess cocaine with intent to distribute and wrongful possession of cocaine with intent to distribute,[3] only three individuals had convictions for additional serious criminal offenses. Senior Airman (SrA) S, in addition to the common offenses identified above, was convicted of prohibited disclosure and offer for sale of records containing Privacy Act information obtained by virtue of her employment. She was sentenced to a dishonorable discharge, confinement for 5 years (later reduced to 4 years by this Court), reduction to E-1, total forfeitures, and a $4000 fine. SSgt H, in addition to the common offenses identified above, was convicted of selling "secret" cover sheets and stickers for classified material and two specifications of wrongful solicitation of another to wrongfully possess cocaine with the intent to distribute. He was sentenced to a bad-conduct discharge, confinement for 8 years, and reduction to E-1. Technical Sergeant (TSgt) N, in addition to the common offenses identified above, was convicted of two specifications of wrongful solicitation of another/others to wrongfully distribute cocaine and one specification of wrongful solicitation of another to purchase and wrongfully possess marijuana. He was sentenced to a dishonorable discharge, confinement for 5 years, reduction to E-1, and forfeiture of all pay and allowances.

SrA S, SSgt H, TSgt N, and the appellant engaged in and were convicted of serious crimes in addition to the crimes common to all accused. We find that only these cases are "closely related." We further find that the appellant's sentence is not "highly disparate" to the sentences received by SrA S, SSgt H, and TSgt N either on a comparison of the "relative numerical values of the sentences at issue" or in "consideration of the disparity in relation to the potential maximum punishment" of each. *Id.* at 289.

The appellant has failed to provide this Court with sufficient information for us to determine whether SSgt S's alleged administrative discharge or the cases of those civilians identified in newspaper articles are "closely related" to the appellant's case. We, therefore, find that those cases are not "closely related."

[3] Some of the specifications allege attempted wrongful possession of cocaine with intent to distribute rather than wrongful possession of cocaine with intent to distribute. The maximum authorized punishment for either crime is the same and we will consider them equal offenses for purposes of this issue.

We next consider whether the appellant's sentence was appropriate judged by "individualized consideration" of appellant "on the basis of the nature and seriousness of the offense and the character of the accused." After carefully reviewing the entire record of trial, we find the appellant's approved sentence, including confinement for 6 years, appropriate.

Denial of Due Process

The appellant argues that the government's "reverse undercover" operation was so outrageous that it violated his Fifth Amendment due process rights requiring this Court to set aside his conviction on all charges and specifications. We review this issue de novo. *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994). While the defense of entrapment pursuant to R.C.M. 916(g) looks at the state of mind of the accused, the defense of entrapment pursuant to outrageous government conduct in violation of appellant's due process rights looks at the government's actions. *United States v. Diggs*, 8 F.3d 1520, 1525 (10th Cir. 1993). That level of outrageous government conduct requiring action to overturn a conviction has been defined as "government enforcement procedures" that are "fundamentally unfair or shocking to a universal sense of conscience which generally includes: coercion, violence or brutality to the person." *United States v. Patterson*, 25 M.J. 650, 651 (A.F.C.M.R. 1987) (citing *United States v. Andrews*, 765 F.2d 1491 (11th Cir. 1985); *United States v. Jenrette*, 744 F.2d 817 (C.A.D.C. 1984)). Government agents are permitted to provide the opportunity to commit a crime using "artifice and stratagem." *Jacobson v. United States*, 503 U.S. 540, 548 (1992). Finally, our superior court has said: "The latitude given the Government in 'inducing' the criminal act is considerably greater in contraband cases (drugs, liquor)—which are essentially 'victim-less' crimes—than would be permissible as to other crimes, where commission of the acts would bring injury to members of the public. *United States v. Vanzandt*, 14 M.J. 332, 344 (C.M.A. 1982) (footnotes omitted).

We have carefully reviewed the evidence of record and the military judge's extensive and detailed Findings of Fact and Conclusions of Law addressing this issue pursuant to pre-trial motion practice. Although recorded statements made by SSgt S indicate that the appellant was initially hesitant to engage in the transaction possibly fearing the "Mexican drug cartel" was an undercover law enforcement organization, there is no evidence that undue pressure was ever placed on the appellant to commit the crimes for which he was convicted. Indeed, significant steps were taken by the FBI to ensure that subjects were predisposed to commit these crimes before they were permitted to further participate. Conversations, including the appellant's, were surreptitiously recorded and reviewed by FBI and Department of Justice officials to ensure that individuals who participated did so voluntarily and were not coerced.

The FBI's "reverse undercover" operation merely provided the opportunity to the appellant to commit the crimes for which he was convicted. The scheme was not

"fundamentally unfair or shocking to the conscience;" was a permissible exercise of law enforcement authority; and did not violate the appellant's Fifth Amendment due process rights.

Conclusion

The findings and the sentence are correct in law and fact and no error prejudicial to the appellant's substantial rights occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

Judge HEIMANN did not participate.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court