



UNITED STATES MARINE CORPS

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IN REPLY REFER TO:
5800
DC
16 Mar 08

From: Detailed Defense Counsel
To: Convening Authority
Via: Staff Judge Advocate

Subj: REQUEST FOR CLEMENCY ICO UNITED STATES V. SERGEANT
LAWRENCE G. HUTCHINS III XXX XX 1953 UNITED STATES
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Ref: (a) R.C.M 1105 and 1106, M.C.M. (2005 ed.)
(b) Clemency Ltr dtd 31 Oct 07
(c) Record of Trial, United States v. Hutchins
(d) Staff Judge Advocate's Recommendation dtd

1. Pursuant to reference (a), Sergeant Hutchins previously submitted matters to be considered in clemency, reference (b). Sergeant Hutchins now submits additional matters to be considered in light of the recent receipt of references (c) and (d). Sergeant Hutchins respectfully requests that both the previous submission and the present submission be considered by the Convening Authority and that, in light of this information and in line with the discretionary authority granted to him, that he suspend all confinement in excess of time already served in custody.

2. On 3 August 2007, Sergeant Hutchins was tried by general court-martial at MCB Camp Pendleton regarding several charges and specifications stemming from an incident on 26 April 2006 in Hamdaniyah, Iraq. Sergeant Hutchins was found guilty of several charges, the most significant of which was a lesser charge of second degree murder of an unidentified Iraqi male pursuant to Article 118 (2) of the UCMJ. For his actions, Sergeant Hutchins was sentenced to 15 years of confinement, a reprimand, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge.

3. Sergeant Hutchins requests clemency in the form of an early release from confinement. In support of this request, Sergeant Hutchins previously submitted matters in reference (b), which provide numerous bases for the exercise of clemency by the convening authority in this case. This supplemental clemency request highlights issues relevant to clemency based upon a

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review of the record of trial and the Staff Judge Advocate's Recommendation.

4. The Defense respectfully requests the convening authority's consideration of all of the above, along with additional matters which the Defense understands Congressman William Delahunt has presented to the convening authority. Further, we ask for consideration of the arguments outlined below in determining whether to grant the requested clemency.

5. Disproportionate Sentences: Although this issue was previously addressed in reference (b), in light of the Staff Judge Advocate's Recommendation's failure to even address this issue the Defense feels compelled to reiterate this argument and provide additional factual, and legal background on this issue.

a. As of this day, Sergeant Hutchins stands as the only Marine of his 8 man squad that remains in confinement. His two fire team leaders from the night of the incident, Cpl Thomas and Cpl Magincalda, were released with no further confinement on the dates of their courts-martial in July of 2007. Several junior Marines, all of whom admitted to firing their weapons on that evening, and one sailor were given plea agreements that secured their release with sentences of between 12 months and 21 months confinement. Further, Lcpl Jackson and Lcpl Shumate, who both had agreed to serve 21 month sentences as part of their plea agreements, were in fact released early from those sentences almost immediately after the trial of Sgt Hutchins was complete. All of those individuals also had full protection from a punitive discharge as well. Lcpl Pennington, who pled guilty and was serving an 8-year sentence, was also granted an early release from confinement once the court-martial of Sgt Hutchins was complete and after Pennington had only served 15 months of his eight year sentence. Importantly, there was no pre-trial agreement or other bargained-for-exchange which mandated such action in Pennington's case. It could only have logically been done on the basis of ensuring equity in sentences, given the sentences that Cpl Thomas and Cpl Magincalda received. This reduction in his sentence certainly couldn't have been based upon any minimal involvement by Pennington in the charged crimes, nor upon his junior rank. Lcpl Pennington was, by his own account, one of the most enthusiastic and deeply involved participants in the charged events. (Record of Trial (ROT) 1329) Further, his rank of Lance Corporal was not based upon a limited amount of time he had in service, but rather the result of having been convicted of the crime of carnal knowledge at a prior Summary

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Court-martial. Lcpl Pennington's sentence was reduced to one sixth of what he had agreed to serve for the simple reason that the sentences in the case need to be proportionate. The Defense submits that the law requires the same such consideration for Sgt Hutchins.

b. The law requires that sentences in closely related cases not be unfairly disparate. United States v. Lucy (50 M.J. 286, 288 (1999)). In making this determination the first step is to determine whether or not there are closely related cases. Next, a determination needs to be made as to whether or not the sentences are highly disparate. Lastly, unless there is a rational basis for the disparity, relief from the sentence should be granted.

c. In this case there can be no doubt that there are a number of closely related cases to Sgt Hutchins' case. All seven other principals in the charged offenses were tried by court-martial. Further, the Defense submits that there was another related case, that of their platoon commander, Second Lieutenant Nathan Phan. That case was handled at the non-judicial punishment level.

d. The next step, determining whether or not there are highly disparate sentences which were received, is also satisfied. Sgt Hutchins received a custodial sentence ten times greater than the next highest sentence served by any of his co-accused (18 months in custody). In the case of United States v. Sothen, 54 M.J. 294 (2001) the Court of Appeals for the Armed Forces had no problem accepting the lower level court's determination that a sentencing disparity even less stark than the present one qualified as being highly disparate.

e. The last step required is to determine whether or not there is a rational basis for the disparity. The Defense submits that there is not a rational basis for the disparity in this case. In the Sothen case, the Court of Appeals for the Armed Forces ultimately found the sentencing disparity in that case as being justified based upon a combination of factors; a brief discussion of these factors is important because none of them exist in the present case. First, the Court found that the parties in the Sothen case were tried by two separate sovereigns (one was a civilian state court and the other was a military court-martial). Such is clearly not the case here. All of the co-accused were tried by military court-martial. Second, the Court found that comparing sentences between civilian and

military courts was less persuasive given the differences in the two systems. Again, such is not the case here. Third, the court found that the accused in that case was convicted of multiple serious offenses while the co-actor was convicted of a single offense. In this case the individuals who pled guilty essentially either pled guilty to, or admitted to in their stipulations of fact, the same conduct to which Sgt Hutchins was convicted. Further, both Cpl Maginacalda and Cpl Thomas were convicted of similar offense conduct at their contested members trials. The minor fact that both Thomas and Maginacalda were convicted of Conspiracy to Commit Murder and not the substantive offense of unpremeditated murder is even less significant than it may initially appear in light of the facts of the case and the findings of the members in their cases as to what they did on that evening.

F. The court in Gotzen next looked at the fact that the sentence of the accused was as the result of a contested case while that of his co-actor was as a result of a negotiated guilty plea. It also looked at the fact that his co-actor received the sentence in exchange for her agreement to testify against the accused. While such reasoning might arguably provide a justification for the sentencing disparity between Sgt Hutchins and Lcpl Jackson, Lcpl Shumate, PFC Jodka, and HM3 Bacos, it isn't relevant at all to the sentences received by Cpl Maginacalda and Cpl Thomas, as they both pled not guilty and went to trial. Even more important is the comparison to Lcpl Pennington's case. Lcpl Pennington's negotiated sentence, based upon his promise to testify against Sgt Hutchins, was eight years. Had an eight year sentence been approved by the convening authority there could be an argument that the disparity (8 years to 15 years) was properly based upon that factor. However, Lcpl Pennington's approved sentence from the convening authority was

1 It is significant to note that it not as if Sgt Hutchins did not attempt to resolve this case without the need to go to trial. Efforts were made by the Defense on more than one occasion to resolve this case, and the only offer which was ever conveyed to the Defense from the trial counsel was a plea to pre-meditated murder, a charge of which Sgt Hutchins was acquitted, and a confinement cap of 30 years. To the extent that the convening authority considers Sgt Hutchins' unwillingness to accept a plea offer as indicative of a lack of remorse or failure to accept responsibility, the Defense respectfully requests the convening authority consider the nature of the only Government offer made.

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multitudes lower than that, as he served less than 15 full months in custody. This drastic reduction from eight years to 15 months was not based upon his agreement to testify; it could only have been based upon an overriding desire for equity and fairness among sentences.

5. The disparity of the ultimate terms of confinement awarded, as it stands today, does not square with that sense of equity and fairness, as Sgt Hutchins presently suffers the burden of a sentence which is a full 10 times that of any other individual involved.

6. Command Climate: As was suggested in the argument above, Sgt Hutchins' platoon commander could also be considered an individual with a closely related case. This is because he, as the leader who had the most profound and direct ability to mold and shape these young Marines, abused this position of trust and provided a climate in which such offenses could happen. Second Lieutenant Phan was initially charged at a court-martial for some of the acts which helped create this climate, though he ultimately was given the opportunity to go to non-judicial punishment to resolve his case. It is absolutely undisputed that Lt Phan engaged in an escalating pattern of abusing Iraqis and violating the rules of engagement in the month leading up to the shooting. At trial he admitted to ordering Sgt Hutchins to blood choke a detainee (ROT 1497-98), then admitted to later holding a pistol to the mouth of another detainee during an interrogation in which Sgt Hutchins participated. (ROT 1509-10) He also conceded that he had openly discussed with Sgt Hutchins and others in the platoon his desire to murder Saleh Gowad. (ROT 1513-17) While he claimed at trial that these desires were only discussed by him after the other Iraqi man was killed, eyewitness testimony from another Marine with no motive to lie placed one of those conversations before the shooting. (ROT 1648-50) Of note, Lt Phan not only received nothing more than non-judicial punishment for his actions, but it is the understanding of the Defense that he is now deployed once again, entrusted with the lives of young Marines. This from a man whose actions, in his own words, gave his Marines the impression that "if my platoon commander is willing to do this to get the job done, you know, then I should be able to do what I need to do to get the mission done as well." (ROT 1553) Sgt Hutchins' company commander, Capt Eduardo Correa, was also responsible, in substantial part, for creating an atmosphere where such abuses could seem justified. Numerous Marines testified at Sgt Hutchins' trial that prior to the events of April 26, Capt Correa brought another platoon

8. Sergeant Hutchins wants to rejoin his family and live the remainder of his life honorably. The punishment he has received and served thus far, a federal criminal conviction, a substantial period of time in jail, reduction to E-1, full forfeiture of all pay and allowances, and a dishonorable discharge, are ample punishment for his wrongs given the circumstances, and far exceed the punishment served by any of his co-defendants. This request for clemency, if granted, would allow Sergeant Hutchins to begin

7. Of note, there isn't a single piece of evidence that the Government presented at trial that suggested Sgt Hutchins ever believed that the man in the IBD hole whom the squad fired on that night was anyone other than the known insurgent Saleh Gowad. LCpl Pennington, testifying as a Government witness, even stated that the four that went to grab Saleh Gowad never informed the others, including Sgt Hutchins, that they had gone to another house and grabbed another individual. (ROT 1379) Further, HM3 Bacos, another of the four who grabbed this other man, said at trial that Sgt Hutchins radioed them and asked for them to bring the detainee (whom Hutchins believed to be Gowad) back to the ambush position prior to initiating fire. Bacos went on to say that Cpl Magincaida "didn't want that to happen" so they did not bring him back and instead just placed him in the crater. (ROT 1448-49) Given these facts, it appears apparent that Sgt Hutchins and the three others at the ambush site (Jackson, Jodka, and Shumate) all thought that they were firing on Saleh Gowad. While it is certainly not justifiable to plan to kill even a known high value insurgent in this manner, it is not the type of crime which should carry the punishment Sgt Hutchins received in light of the inexcusably poor leadership which he and the others were provided from both their platoon commander and their company commander.

commander and one that platoon's squads up to Lt Phan's Area of Operations, and to Saleh Gowad's very house, to send a message to Gowad that the Marines weren't going to be pushovers. While Gowad wasn't there at his house the message was sent to one of his brothers, who was roughed by the Marines, and a message was also conveyed to Phan's platoon. (ROT 1498-1507, 165-56) Captain Correa, to the Defense's knowledge, has not suffered any adverse consequences from his acts.

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~~O. G. Smith~~

to put his life back together and allow him to, once again, be a productive member of our society.

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