IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **C.A. PRICE** **J.J. MULROONEY**

UNITED STATES

v.

Leo CABABA
Gunnery Sergeant (E-7), U.S. Marine Corps

NMCCA 9901417 Decided 7 October 2004

Sentence adjudged 5 December 1997. Military Judge: R.E. Hilton. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Lejeune, NC.

GEORGE GALLENTHIN, Civilian Appellate Defense Counsel
CDR F BUSTAMANTE, JAGC, USN, Appellate Defense Counsel
LT CLARICE JULKA, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MULROONEY, Judge:

Contrary to his pleas, the appellant was convicted before officer and enlisted members, of conspiracy to wrongfully appropriate a grenade launcher, conspiracy to steal military property (2 specifications), conspiracy to violate 18 U.S.C. § 922(a)(6) by having Marines fill out blank Bureau of Alcohol Tobacco and Firearms (ATF) firearm registration forms, conspiracy to violate 18 U.S.C. § 2314 by soliciting Marines to steal various items of government property for shipment out of the United States, willfully suffering the wrongful disposition of military property, larceny of government property (6 specifications), wrongful appropriation of government property, solicitation to steal grenades, solicitation to steal night vision goggles (2 specifications), solicitation to steal weapon magazines, wrongfully receiving a weapon with its serial number obliterated, in violation of 26 U.S.C. § 5861(h), wrongful possession of a machine gun, in violation of 18 U.S.C. § 922(o), wrongful manufacture of machine guns, in violation of 18 U.S.C. § 922(o) and 26 U.S.C. § 5861(f), wrongful completion of various treasury and ATF forms, in violation of 18 U.S.C. § 922(a)(6),

and transportation of stolen government property in foreign commerce in violation of 18 U.S.C. § 2314. The foregoing offenses violated Articles 81, 108, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 908, 921, and 934 respectively. He was awarded a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 25 years for a period of 5 years from the date of his action.

Although the military judge repeatedly warned the appellant about the consequences of failure to appear for court-martial, the appellant voluntarily absented himself and was convicted *in absentia*.[1]

The appellant avers that the charge sheet reflected an unreasonable multiplication of charges, that the evidence is not legally or factually sufficient to support his convictions, that he was prejudiced by prosecutorial misconduct, and that the adjudged sentence was inappropriately severe.

We have examined and considered the record of trial, the appellant's assignments of error, and the Government's response. We conclude that, after taking corrective action, the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

The appellant avers that the evidence against him was not factually and legally sufficient to allow this court to sustain his convictions.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

[1] Although no error has been assigned regarding this issue, we have examined the military judge's ruling and findings of fact and have determined that the issue was ably litigated and correctly decided below. RULE FOR COURTS-MARTIAL 804(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.).

The appellant, a gunnery sergeant, was assigned as an audio and visual repairman at Twentynine Palms, California. He was also a part-time employee at RNJ Guns and Ammo (RNJ Guns), one of the largest retail gun establishments in the State of California. Over a period of approximately three years, the appellant wrongfully acquired enormous quantities of military equipment by convincing five junior Marines (Albright, Clinard, Wisniowicz, Davila, and Bridgeman)(the Marine co-conspirators) to conspire with him to do so.

The Marine co-conspirators acted at the appellant's direction to provide him with weapons, parts of weapons, magazines, large quantities of military gear and apparel, as well as radios, and even some sophisticated high technical equipment. The stolen equipment was thereafter provided to Romulo Reclusado, the appellant's employer at RNJ Guns. Reclusado sold the material both within and without the United States. Much of the equipment was shipped to the Philippines. Additionally, the appellant convinced two of the Marine co-conspirators to temporarily procure a grenade launcher so that it could be provided to an RNJ Guns customer named Nicholas Florio. Mr. Florio was provided with the grenade launcher for several days so that he could demonstrate its use to individuals in Mexico. At the time of the appellant's court-martial, both Florio and Reclusado were incarcerated on federal convictions. The appellant also had several of the Marine co-conspirators sign blank firearms forms to create a paper trail for the future transfer of weapons by RNJ Guns.

In exchange for their complicity in his crimes, the appellant provided the Marine co-conspirators free weapons and money. In addition to using their access to weapons to steal for the appellant, they loaded vehicles with stolen military equipment during their off-duty hours, and accompanied the appellant to gun shows. Additionally, Albright testified that on one occasion the appellant asked Clinard and him to obtain grenades for the grenade launcher. This request was declined.

When Albright's wife became concerned about her husband's activities, she confided in the wife of Sergeant (Sgt) Pearson, a military policeman. After his wife told him about it, Sgt Pearson immediately notified the Provost Marshal and the Naval Criminal Investigative Service (NCIS). At the request of the NCIS agents, Sgt Pearson agreed to work undercover on the matter.

Sgt Pearson approached Clinard and Albright and they referred him to the appellant. After a brief conversation, the appellant readily accepted a quantity of weapons magazines from Sgt Pearson and had him sign a blank firearms transfer form. The appellant asked Sgt Pearson to provide more magazines, and several days thereafter, the appellant rewarded Sgt Pearson with a new .45 caliber pistol.

All five of the Marine co-conspirators testified at the appellant's court-martial. Each of them testified about what material was taken, when it was taken, how it was taken, what the appellant gave them in exchange, and what each was hoping to receive in exchange for testifying. All five Marines pled guilty prior to the appellant's court-martial. Albright, Wisniowicz, and Davila entered into pretrial agreements wherein they agreed to provide truthful testimony. Clinard's pretrial agreement had no such clause, and Bridgeman testified that he was not sure about his testimonial obligations under his pretrial agreement. All five testified that they hoped their testimony would favorably affect the sentences that would ultimately be approved by the convening authority. In light of the potential self-interest/clemency motivations attendant upon the testimony of all five Marine co-conspirators, we have scrupulously examined their testimony and find their testimony to be detailed, plausible, consistent and credible.

The Government also called Private (Pvt) Santana. This Marine testified that on one occasion, while he was serving as the Motor T driver, the appellant directed him to take his three-ton Marine truck, after hours, to a Marine supply warehouse. At the warehouse, the truck was loaded with gear issued by Davila. The gear was then transferred to the appellant's private vehicle. A few days later, Pvt Santana received a pair of desert boots for his efforts. The testimony provided by Pvt Santana, as well as the testimony of Sgt Pearson, who is now a civilian police officer, was detailed and credible.

The Government also called Major (Maj) Williams, the supply officer at the Communications Electronics School at Twentynine Palms. Maj Williams testified that during the period in question, over $155,000.00 in military equipment was missing from the areas in which the Marine co-conspirators had access. Maj Williams indicated that an initial determination to forego a criminal investigation was reversed when it was learned that a global positioning device (GPS) and SINGARS radio that had the potential to contain cryptographic information were also missing.[2]

Also testifying on behalf of the Government were Special Agents (SA) Robert and See, of the Bureau of Alcohol, Tobacco, and Firearms (ATF) and NCIS, respectively. Robert testified that Reclusado and Florio were both in jail on federal convictions. Both agents also provided details surrounding the appellant's oral admissions and written confession, which was received into evidence. The appellant orally admitted to manipulating the Marine co-conspirators, all of whom were junior to him in grade. He indicated to the agents that at Reclusado's request, he test-fired a weapon for a man he knew to be a major narcotics trafficker from Mexico named Espinosa. The appellant also told

[2] It was subsequently determined that the cryptographic chip was not in the stolen radio.

the agents that some of the false firearms transfer forms that the Marine co-conspirators were signing were generated to facilitate the transfer of assault rifles to Mexico for Espinosa. The appellant admitted that he had converted basic weapons into automatic weapons and told the agents that in 1996 he went to the Philippines on Reclusado's behalf to test-fire machine guns for possible sale to armed forces and police authorities there. The appellant told the agents that he knew the people he had been dealing with were dangerous and that he was afraid of them.

In his written confession, the appellant detailed his role in procuring the grenade launcher for Florio, and indicated that he knew Florio was a narcotics trafficker. He related that he became alarmed when Florio kept the grenade launcher longer than planned. The appellant described some of the gear exchanged over the course of his arrangement with the Marine co-conspirators, but denied any knowledge about the night vision goggles.

Nicholas Florio testified for the Government, and acknowledged his convictions related to possession of explosives, conspiracy, and narcotics trafficking. He corroborated the account in the appellant's confession regarding the access he was given to the grenade launcher. Florio explained that he took the launcher to Mexico. He also testified that he purchased many legal and illegal weapons as well as weapons parts from RNJ Guns and shipped them to Mexico and South America. He remembered watching the appellant converting weapons to fully automatic.

The appellant invites our attention to several aspects of the evidence. The first of these concerns is the fact that the property that was the subject of the conspiracy with Sgt Pearson was not stolen property. This is undoubtedly true, since Sgt Pearson was working on behalf of the government. However, the appellant was not charged or convicted of a conspiracy to possess stolen property provided by Sgt Pearson. Rather, he was charged and convicted of conspiring with Sgt Pearson to steal weapons magazines. For a different reason, we are likewise compelled to set aside the conspiracy offense alleged in specification 3 of Charge I. This specification alleges a conspiracy with Sergeant Pearson, who, at the time, was acting on behalf of the NCIS. Inasmuch as Sgt Pearson, the alleged co-conspirator, did not have the requisite *mens rea* with regard to the object of the conspiracy, we find that he could not have been part of it. It is clear that Sgt Pearson's only object was to apprehend the appellant and prevent the object of the conspiracy. *See United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000)(requiring a meeting of minds to establish a conspiracy in affirming the lower court's decision to set aside conspiracy charge based upon a marijuana sale to an undercover agent); *United States v. Jiles*, 51 M.J. 583, 586 (N.M.Ct.Crim.App. 1999). The Government has conceded error and the necessity of relief. We affirm a conviction of the lesser included offense of attempted conspiracy. *Valigura*, 54 M.J. at 191; *United States v. Riddle*,

44 M.J. 282, 285 (C.A.A.F. 1996); *Jiles*, 51 M.J. at 586. We will reassess the appellant's sentence accordingly.

In another allegation involving Sgt Pearson, we specifically find that the solicitation offense (Specification 11, Charge IV) is legally and factually sufficient. There is no legal authority that indicates that one may not be convicted of soliciting an undercover agent to commit an offense. *See Valigura*, 54 M.J. at 191 n.6 (noting the viability of a solicitation offense when an appellant was charged with conspiracy with a government agent); *see also United States v. Anzalone*, 43 M.J. 322, 326 (C.A.A.F. 1995)(Gierke, J., concurring in the result).

The appellant also asks us to closely examine the testimony of Clinard as it relates to overt acts 3-6 of Specification 2 of Charge I (conspiracy to steal military property.) Overt acts 3-5 allege that Clinard provided the appellant with a combined total of approximately 425 M-16 magazines, which is consistent with the testimony of Clinard except that Clinard also testified that the 500 magazines alleged to have been provided in overt act 6 were not provided. Because the members excepted overt act 6 in their findings, this aspect of the appellant's brief provides no basis upon which to find error or grant relief.

We have also closely examined Specification 8 of Charge IV, which alleges that the appellant solicited Clinard and Albright to steal grenades. This specification was proven beyond a reasonable doubt by the credible and uncontroverted testimony of Albright, who was recalled by the Government on this specific issue.

The appellant has asked us to examine Specification 8 of Charge III. Inasmuch as the members acquitted the appellant of this specification, this aspect of the appellant's brief provides no basis upon which to find error or grant relief.

The appellant also challenges the factual sufficiency of Specification 5 of Charge III based on the testimony of Wisniowicz. Initially, we note that the language of the specification, which alleges the theft of magazines, weapons, and parts of weapons, is couched in terms of an approximate number ("about two hundred fifty (250)") of magazines and other weapons parts. Wisniowicz testified that he provided 6 sets of M-1/M-14 parts and 6 sets of parts to a .45 caliber pistol. Record at 393-94. He further testified that the number of magazines that the appellant took was "[p]robably around 250." *Id.* at 392. Under cross-examination the witness testified that he never kept an actual count of magazines that the appellant took, but that 250 was his estimate, but it was "no lower than 200." *Id.* at 404. We find that this specification was proven beyond a reasonable doubt.

This court has an independent obligation, under Article 66, UCMJ, to review the record and determine the legal and factual

sufficiency of the evidence, even in the absence of alleged error. *See Turner*, 25 M.J. at 324. Although not raised as an assignment of error, we are compelled to set aside the conviction for larceny under Specification 4, Charge III, which alleged the theft of 15 pistol magazines and instead affirm a conviction of an attempt to steal those magazines. The offense, as charged, was factually impossible. One cannot be convicted of larceny of government property when the Government is willfully providing the property in a "sting" type operation. *Anzalone*, 43 M.J. at 325. However, he may be convicted of an attempted larceny of government property. *Riddle*, 44 M.J. at 286 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), Part IV, ¶ 4c(3) that "A person who purposely engages in conduct which would constitute an offense if the attendant circumstances were as that person believed them to be is guilty of an attempt."); *Anzalone*, 43 M.J. at 325. The Government has conceded error and the necessity of relief. We will reassess the appellant's sentence accordingly.

Although likewise not raised as an assignment of error, we hold that the appellant's convictions for conspiring to violate 18 U.S.C. § 922(a)(6), and the underlying offense (Specification 4 of Charge I and Specification 17 of Charge IV, respectively), are also legally infirm. These specifications involve the appellant's actions in having Marines partially fill out firearm acquisition forms for weapons they never actually received. The Government's theory of the case was that these weapons actually were transferred to other individuals and the Marines who signed for them were being represented to authorities as the actual purchasers of the weapons. These weapons included mostly assault rifles.

To sustain a conviction for a violation of 18 U.S.C. § 922(a)(6), the prosecution must establish, *inter alia*, that the false statements (in this case the signatures on the ATF weapons purchase forms) were "intended or likely to deceive" the dealer into believing that the firearms purchase is lawful. *United States v. Ivey*, 53 M.J. 685, 695 (Army Ct.Crim.App. 2000), *aff'd,* 55 M.J. 251 (C.A.A.F. 2001). The dealer in this case, Reclusado, was the owner of RNJ Guns. The evidence unequivocally established that Reclusado was not deceived, nor was he likely to be deceived. Not only was the paperwork never intended to deceive him; it was being generated for Reclusado's benefit and at his behest. Hence, this element was not, and could not be established, and the convictions under Specification 4 of Charge I and Specification 17 of Charge IV must be set aside. We will reassess the appellant's sentence accordingly.

Multiplicity and Unreasonable Multiplication of the Charges

The appellant also seeks dismissal of unspecified specifications based upon his assertion that some of them are either multiplicious with each other or constitute an unreasonable multiplication of charges. Rather than identifying any charges and specifications, the appellant simply complains that the military judge failed to employ the tests for multiplicity and unreasonable multiplication of charges. We agree, in part, and will grant relief accordingly.

The appellant was convicted of five specifications which center around the exodus of a large inventory of specified military equipment. Under Specification 2 of Charge I, the appellant was convicted of conspiring to steal the specified military equipment. Under Specification 5 of Charge I, the appellant was convicted of conspiring to transport the specified military equipment in interstate or foreign commerce. Under the Specification in Charge II, the appellant was convicted of suffering the loss of the specified military equipment. Under Specification 7 of Charge III, the appellant was convicted of stealing the specified military equipment. Under Specification 18 of Charge IV, the appellant was convicted of knowingly transporting the stolen specified military equipment in foreign commerce, in violation of 18 U.S.C. § 2314.

The appellant was also convicted of 2 specifications related to the fifteen magazines he acquired from Sgt Pearson. Specifically, the appellant was convicted of a conspiracy to steal the magazines (Specification 3 of Charge I) and stealing the magazines (Specification 4 of Charge II.) Elsewhere in our decision we have modified these convictions to reflect attempts to commit the charged offenses based on Sgt Pearson's status as a government agent.

Dealing first with the juxtaposition of the conspiracy convictions against the underlying offenses, we note, "[a] conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished." *See* MCM, Part IV, ¶ 5(c)(8). Inasmuch as a conspiracy and the criminal object of the conspiracy may be separately charged, tried, convicted, and punished, these specifications do not present a basis to provide relief under a multiplicity theory. Likewise, there is no multiplicity infirmity in separately charging attempted conspiracy and the attempted underlying act. Thus, the larceny specifications under Charge III are not multiplicious with the conspiracy specifications in Charge I or the transportation of stolen goods in foreign commerce set forth in Specification 18 of Charge IV.

While true that the same specified military property is the focus of two conspiracy specifications under Charge I, we note

that each conspiracy requires proof of a different element. Specification 2 requires proof of a conspiracy to steal. Specification 5 requires proof of a conspiracy to transport the items in interstate or foreign commerce. Under these facts, we are satisfied that these two specifications are completely separate offenses. *United States v. Oatney,* 45 M.J. 185, 188-89 (C.A.A.F. 1996); *United States v. Teters,* 37 M.J. 370, 377 (C.M.A. 1993).

Under Specification 7 of Charge III, the appellant was convicted of stealing military property in excess of $100.00. Under the Specification of Charge II, the appellant was convicted of suffering the loss of the same specified military equipment. The property lost under both specifications is the identical specified military property. However, a conviction for stealing military property in excess of $100.00 requires proof of a specific intent to permanently deprive the victim of the use and benefit of the property. A conviction for suffering military property to be lost requires proof that the defendant "suffered" the property to be lost, which implies that that actor had sufficient authority or ability to stop the act. *See* MCM, Part IV, ¶ 32(c)(2). These elements are separate requirements of proof and sufficiently distinguish the convictions to protect either from dismissal on the basis of multiplicity. *Oatney,* 45 M.J. at 188-89; *Teters,* 37 M.J. at 377.

While multiplicity of charges does not exist in this case, the charges at issue may nevertheless constitute an unreasonable multiplication of charges. *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

In determining whether there is an unreasonable multiplication of charges, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *Id*. at 585-86.

Regarding the first factor, trial defense counsel objected effectively and repeatedly, both orally and in writing, at the appellant's court-martial. On the final occasion, the military judge declined to make findings, denied the motion to dismiss, and noted that "offenses which are not multiplicious for findings are not multiplicious for sentencing." Record at 893.

The second *Quiroz* factor does not favor the appellant. As we have explained above, the specifications that form the basis of the convictions contain sufficiently distinct elements to allege separate offenses.

The third, fourth and fifth *Quiroz* factors present some concern to us. The appellant was initially charged with seven specifications surrounding the removal of the same specified military property. He was charged with stealing it and conspiring to do so, knowingly receiving it as stolen property (this lesser included offense was charged to the members in the alternative and appeared as a separate specification on the charge sheet as Specification 7 of Charge IV), suffering the loss of it, knowingly transporting it in foreign commerce and conspiring to do so. We feel that the charging methodology employed in this case did exaggerate the extent of the appellant's criminality. Likewise, the appellant's punitive exposure was unreasonably increased. We are unable to conclude that the charging technique employed here is without a certain level of overreaching.

In this case, the criminal conduct the appellant engaged in hardly needs amplification through the use of the charging methodology. The appellant engineered a system wherein a veritable mountain of military equipment was liberated from the Marine Corps and sent to places and persons known and unknown. Regarding the specified military equipment, the facts show that the appellant stole it, transported it in interstate and foreign commerce, and entered into conspiracies to accomplish each of the foregoing. Under the circumstances, we will dismiss the Specification under Charge II (suffering the loss of military property), and will reassess the sentence accordingly.

Prosecutorial Misconduct

The appellant asserts that the trial counsel committed prosecutorial misconduct by allegedly coercing Government witnesses to testify falsely. In support of this assignment, the appellant has supplied an affidavit from Timothy Witham. Mr. Witham's affidavit states that he was a detainee in the Camp Lejeune Brig at the time of the appellant's court-martial. According to Mr. Witham, he overheard the trial counsel conversing with several witnesses. The witnesses are not named in the affidavit. Mr. Witham states that he believes that he overheard a conversation that pertained to the wrongful appropriation of the grenade launcher and its transportation to Mexico. By Mr. Witham's account, the trial counsel pressured a witness to testify that he knew in advance that the grenade launcher would be transported out of the country. According to Mr. Witham, the witness ultimately agreed to provide this testimony.

Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). If there is prosecutorial misconduct, "the trial record as a whole [is reviewed] to determine whether

such a right's violation was harmless under all the facts of a particular case." *Id*.

Even if the facts in the affidavit were accepted as accurate, the matters raised therein provide no basis upon which to grant relief. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Testimony concerning the acquisition and movement of the grenade launcher came from Clinard and Albright. Neither of these individuals testified that he knew in advance that the grenade launcher was bound for Mexico. In fact, both witnesses affirmatively stated that they were unaware of its destination until after the adventure was completed. Thus, this assignment of error provides no basis upon which relief may be granted.

Sentence Appropriateness and Disparity

The appellant, citing *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999), complains that his sentence is inappropriately severe when compared to the sentences received by the Marine co-conspirators who testified against him.

Sentence appropriateness involves the "'*individualized* consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Inasmuch as the facts surrounding the misconduct which formed the basis of the appellant's convictions have been detailed at considerable length elsewhere in this decision, they need not be repeated here. Suffice it to say, that the appellant's sentence was completely appropriate as adjudged, even absent the reassessment of other aspects of our decision compels us to undertake. *See United States v. Sales*, 22 M.J. 305, 307-08 (C.A.A.F. 1986). It would be difficult to imagine a more reckless and destructive manner in which to commit the crimes of which this appellant stands convicted. The appellant traded a virtual warehouse of military equipment, as well as the careers and honor of five junior Marines, solely for personal gain. Moreover, the appellant used his grade to prey upon those he had sworn to lead. They stole for him, moved material for him, and forged their names on ATF forms to facilitate the provision of countless weapons into the hands of persons unknown and untraceable. The appellant also arranged to have a grenade launcher entrusted to a dangerous, foreign narcotics trafficker, and sent reams of stolen equipment overseas. The sentence the appellant received reflected an individualized consideration of what he did and who he was when he did it.

It is true that, in discharging our statutory duty to ensure that a sentence is appropriate, we are obliged to consider general interests of sentence uniformity, particularly in the

absence of measures such as sentencing guidelines found in criminal trials in the United States District Courts. Art. 66(c), UCMJ; *United States v. Durant*, 55 M.J. 258, 260-61 (C.A.A.F. 2001); *United States v. Sothen*, 54 M.J. 294, 296-97 (C.A.A.F. 2001). Sentence comparison is appropriate in closely related cases involving highly disparate sentences. *Durant,* 55 M.J. at 260-61; *Lacy*, 50 M.J. at 287-88. Where we find sentences to be highly disparate in closely related cases, we evaluate whether there is a rational basis for the differences between the sentences. *Durant*, 55 M.J. at 260-62. In those cases where we find no rational basis for the differences, sentence relief is appropriate. In raising the issue of sentence disparity, the appellant has the burden of "demonstrating that any cited cases are 'closely related' to his . . . case and that the sentences are 'highly disparate.'" *Lacy*, 50 M.J. at 288; *accord United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). To be closely related, "the cases must 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).

Even if we were to assume, without deciding, that the appellant's case is closely related to the cases of the Marine co-conspirators and that the sentences are disparate, we would still not grant relief. When sentences are highly disparate, the appellant may only be entitled to relief if the Government cannot demonstrate "a rational basis for the disparity," *Lacy*, 50 M.J. at 288, or, provide "good and cogent reasons" for the disparity. *Kelly*, 40 M.J. at 570.

On these facts, there is more than ample support to justify a rational basis for any disparity between the appellant's sentence and the sentences imposed upon the Marine co-conspirators. Unlike the Marine co-conspirators, each of whom plead guilty and accepted responsibility for his actions, this appellant contested his case in front of members. *See Sothen*, 54 M.J. at 296-97 (indicating that the circumstances of a guilty plea versus a contested case, as well as the cooperation to assist the prosecution in testifying against the appellant, were part of the proper reasons that the sentences were disparate). Thus, in mitigation, the Marine co-conspirators were able to argue rehabilitative potential as well as the benefits attendant upon saving government time, effort, and expense by their pleas of guilty. The Marine co-conspirators apparently were willing to aid in the prosecution of the appellant, another fact that could be considered to mitigate their punishment.

Furthermore, we note that the appellant, a staff noncommissioned officer, was the senior Marine among the co-conspirators. It was not only in grade that the appellant was senior to the Marine co-conspirators. He was clearly the architect, leader, and linchpin of the entire web of conspiracies. The appellant engaged in multiple conspiracies with many individuals while each of the Marine co-conspirators

engaged in fewer conspiracies, and only with the appellant. It is important to note that many of the Marine co-conspirators apparently did not know what the appellant was doing with the weapons, parts, magazines, and related equipment. That was not true of the appellant. He clearly had the "big picture." He was fully cognizant of where the purloined material was headed and who would ultimately have access to it.

The appellant received the individual consideration that he was due. His sentence is not inappropriately severe, nor is it unlawfully disparate from the sentences imposed upon the Marine co-conspirators.

Conclusion

Accordingly, the finding of guilty to Specification 3 of Charge I is set aside. In its place we affirm a conviction for the lesser included offense of an attempted conspiracy. The finding of guilty to Specification 4 of Charge III is set aside. In its place we affirm a conviction for the lesser included offense of attempted larceny. The findings of guilty as to Specification 4 of Charge I, Specification 17 of Charge IV, and Charge II and its Specification are set aside. That charge and these specifications are dismissed. The remaining findings are affirmed.

Having set aside some findings of guilty, we must reassess the sentence. In conducting reassessment, we are guided by the following principles: When a court of criminal appeals reassesses a sentence, its task differs from that which it performs in the ordinary review of a case. Under Article 66, UCMJ, we must ensure that the sentence adjudged is appropriate for the offenses of which the appellant has been convicted; if the sentence is excessive, we must reduce the sentence to make it appropriate. However, when prejudicial error has occurred in a trial, not only must we ensure that the sentence is appropriate in relation to the affirmed findings of guilty, but we must also ensure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *Sales*, 22 M.J. at 307-08; *see also United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Having reassessed the sentence, we affirm only so much of the sentence extending to a dishonorable discharge, confinement for 22 years, forfeiture of all pay and allowances, and a reduction to E-1.

We also direct that the corrected court-martial order be promulgated to indicate that, in Specification 8 of Charge III, the appellant was found not guilty of this offense[3] as well as the modified findings and sentence as set forth in this decision.

Senior Judge CARVER and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court

[3] The appellant did not raise this as error. We note that the staff judge advocate's recommendation correctly lists the finding of the court. Although we discern no prejudice, the appellant is entitled to an accurate court-martial order.