CODE 20
SIDEBAR

JANUARY 2020 APPELLATE UPDATE

This Sidebar is Code 20's monthly appellate case update, reporting on all CAAF and NMCCA cases from January of 2020.[1]

CAAF:

Payment as an E-1 While Awaiting Rehearing Was Not Punishment Warranting Article 13 Relief.

United States v. Guardado, 79 M.J. 301 (C.A.A.F., Jan. 15, 2020)

In 2014, Appellant, then a Master Sergeant (E-8) in the Army, was convicted at a general court-martial, with enlisted representation, of multiple specifications of Articles 120, 128, and 134, UCMJ. He was sentenced to confinement for eight years, forfeiture of all pay and allowances, and reduction to pay grade E-1. In 2016, the lower court partially affirmed the findings, dismissing several specifications on grounds of multiplicity or unreasonable multiplication of charges, and affirmed only so much of the sentence as provided for confinement for seven years and eight months, forfeiture of all pay and allowances, and reduction to pay grade E-1. In 2017, on a subsequent appeal, the CAAF affirmed several specifications but set aside the finding of guilty to one specification of aggravated sexual contact with a child and two specifications of committing a general disorder. Correspondingly, the Court set aside the sentence, and authorized a rehearing on the specification of aggravated sexual contact with a child and the sentence.

Appellant was returned to duty pending his rehearing and, in accordance with DFAS policy, was paid as an E-1. He filed an Article 13, UCMJ, motion asserting that *Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2016), bound the Government to restore him to his original E-8 pay status while he awaited rehearing. In *Howell*, the CAAF stated that "if an accused is released from confinement awaiting rehearing, his pay status—at least insofar as the Uniform Code of Military Justice is concerned— should be the same as if he had never been tried in the first instance." DFAS, however, maintained that it was not bound by CAAF's holding in *Howell*. Instead, DFAS relied on the interpretations of Article 75, UCMJ, by the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit; determining that it must pay Appellant as an E-1 pending the rehearing results.

In reviewing Appellant's Article 13 challenge, the Court considered whether DFAS's decision to pay him as an E-1, as opposed to his pretrial E-8 grade, while he awaited rehearing was contrary to *Howell* and therefore unreasonable and not in furtherance of a legitimate nonpunitive governmental objective. The Court found that DFAS's reliance on legal precedent from the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims served a legitimate nonpunitive governmental objective, in light of the jurisdiction of those courts to adjudicate military pay disputes. And, although the CAAF is within its statutory authority to interpret Article 75(a), UCMJ, to determine whether an Article 13, UCMJ, violation occurred, as it did in *Howell*, the Court determined that it did not have jurisdiction to adjudicate military pay disputes. Thus, the Court's interpretation of Article 75(a), UCMJ, in *Howell* was not binding on DFAS, and DFAS's pay determination was not intended to punish Appellant. As such, the Court concluded that Appellant was not entitled to relief under Article 13.

[1] There were no relevant published SCOTUS opinions in January 2020.

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Authored and Published NMCCA Opinions:

No Abuse of Discretion in Certain Evidentiary Rulings.

United States v. Marquez, 2019 CCA LEXIS 409 (N-M. Ct. Crim. App., Oct. 28, 2019)

A Sonar Technician (Submarine) First Class was found guilty by a military judge sitting alone, contrary to his plea at a general court-martial, of a single specification of indecent visual recording in violation of Article 120c, UCMJ, for surreptitiously video recording his 13-year-old stepdaughter naked in her bedroom after a shower. When his stepdaughter found the video on Appellant's phone, he denied any knowledge of it and then had her help him delete it. However, a copy of the deleted video was recovered from Appellant's computer, where it was located within backup files of an application designed to store hidden data using the last four digits of Appellant's social security number as its passcode. On appeal, Appellant asserted four AOE: (1) that admission of the backup copy of the deleted video violated the best evidence rule; (2) that the military judge erred in admitting other video recordings under MIL. R. EVID. 404(b) showing Appellant positioned a video recording device on another occasion in the family bathroom; (3) that the evidence against the accused is factually insufficient to sustain his conviction; and (4) that the military judge erred in denying an *in camera* review of the victim's mental health records.

The Court found no prejudicial error, and ultimately affirmed the findings and sentence. The Court addressed each AOE. In response to the first AOE, the Court noted that an original is not required under MIL. R. EVID. 1002 where "all the originals are lost or destroyed, and not by the proponent acting in bad faith." Analyzing the second AOE, the Court found that the military judge admitted the evidence of the additional video recordings after appropriately applying the law, and finding it relevant for certain non-propensity uses, and determining its probative value to those non-propensity uses was not substantially outweighed by the danger of unfair prejudice. With regards to the sufficiency of evidence, the Court was convinced beyond a reasonable doubt of Appellant's guilt. Finally, the Court found no abuse of discretion in the military judge's reasoning in denying the *in camera* view of the victim's mental health records.

Convictions Set Aside for Factual Insufficiency

United States v. Dawkins, 2019 CCA LEXIS 386 (N-M. Ct. Crim. App., Oct. 4, 2019)

A Lieutenant Commander was convicted at a general court-martial, contrary to his pleas, of attempted sexual assault, two specifications of abusive sexual contact by bodily harm, and indecent exposure in violation of Articles 80, 120, and 120c, UCMJ. The charges arose from interactions with two different female alleged victims. On appeal, Appellant raised twelve AOEs. The Court provided an analysis of several of the AOEs, ultimately determining that they had no merit.

However, in addressing Appellant's second AOE—that the evidence was legally and factually insufficient to support any of the appellant's convictions—the Court conducted a detailed review of the record and determined that, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, it was not convinced that there was any sexual contact with the first alleged victim after she voiced her non-consent and, therefore, the Court was not convinced beyond a reasonable doubt of Appellant's guilt. The Court further found that testimony of the second alleged victim was unsupportable, taking into account all other evidence, and determined that the evidence was factually insufficient to convict Appellant of an abusive sexual contact upon the second victim. As a result, the Court set aside Appellant's convictions for attempted sexual assault and abusive sexual contact and remanded the case for re-sentencing.

Assault Specification, as Amended by the Members, Failed to State and Offense; Specification Dismissed with Prejudice.

United States v. Ayalacruz, 79 M.J. 747 (N-M. Ct. Crim. App., Jan. 10, 2020)

A Sergeant was convicted at a special court-martial, contrary to his pleas, of one specification of dereliction of duty, one specification of simple assault, and one specification of disorderly conduct, in violation of Articles 92, 128, and 134, UCMJ. On appeal, Appellant raised six AOEs: (1) that the military judge violated Appellant's constitutional protection against double jeopardy when he directed the members to clarify their findings; (2) that the military judge abused his discretion by improperly impeaching the members' initial findings; (3) that the assault specification, as amended by the members, fails to state an offense; (4) that a bad-conduct discharge is

inappropriately severe for the offenses of which the Appellant was found guilty; (5) the finding of guilty to the disorderly conduct specification is not legally or factually sufficient; (6) it was plain error for the military judge to not conditionally dismiss the disorderly conduct specification as an unreasonable multiplication of charges with the other charges. Upon review, the Court found merit in Appellant's third AOE.

Appellant was originally charged with assault consummated by a battery. At trial, however, the military judge instructed the members on the elements of simple assault as a potential lesser-included offense of the charged assault and provided guidance regarding how to render findings by exceptions and substitutions. The members attempted to do so, but struggled with the findings worksheet. The military judge twice noted errors in the exceptions and substitutions and sent the members back to correct the worksheet. On the third attempt, the military judge declared the findings worksheet to be in proper form. The members then announced that they had found the Appellant guilty of the lesser-included offense of simple assault, by exceptions alone. For the specification, the members announced: "guilty, except the words 'that the accused did so by touching and holding down [Sergeant E.H.'s] leg with his hands and arms and that the attempt or offer was done with unlawful force or violence." The court-martial then recessed for the evening.

During the overnight recess the military judge determined that the members' finding for the assault specification, as announced in court, amounted to acquittal since the members excepted two elements of the charge. In court the next day, the military judge held that the announcement may have been in error and was "certainly ambiguous." He provided additional instructions to the members and, once again, asked them to return to the deliberation room and revise the findings worksheet. The members returned with a revised worksheet and proceeded to make a second announcement; apparently finding Appellant guilty of an offer-type simple assault.

The Court noted that "[t]he way the members announced their findings, however, was most unusual." In particular, the Court pointed out that the members excepted words that were not in the referred specification, but rather language used by the military judge to list elements of the lesser included offense in his instructions. Further, the members substituted words that were an amalgam of the military judge's lesser included offense elements, all of which they had just excepted. Ultimately, the Court concluded that all of these errors made the amended findings fatally defective, and therefore, set aside the finding of guilty for the assault specification and the sentence, and dismissed the assault specification with prejudice. A sentence rehearing on the remaining findings was authorized.

Sexual Assault Conviction Found Factually Insufficient.

United States v. Masa, 2020 CCA LEXIS 4 (N-M. Ct. Crim. App., Jan. 13, 2020)

A Naval Aircrewman (Helicopter) Second Class was convicted at a general court-martial, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, UCMJ. The charges arose from interactions with two different alleged female victims. On appeal, Appellant raised three AOEs: (1) that the evidence was factually insufficient to support the convictions; (2) that the military judge erred when he refused to admit opinion evidence that one of the victims engaged in "attention seeking behavior;" and (3) that "dilatory post-trial processing" warranted relief. After a detailed review of the record, the Court concluded that one of the two sexual assault convictions was factually insufficient. The Court set aside one of the convictions with prejudice, and the sentence, and remanded the case for re-sentencing.

Sentence Found to be Inappropriately Severe

United States v. Jordan, 2020 CCA LEXIS 10 (N-M. Ct. Crim. App., Jan. 17, 2020)

A Lance Corporal entered mixed pleas; pleading guilty to one specification of violating Article 91, UCMJ for disobeying the order of a noncommissioned officer, and two specifications of aggravated assault in violation of Article 128, UCMJ. He pleaded not guilty to two specifications of rape and one specification of aggravated assault, in violation of Articles 120 and 128, UCMJ. A general court-martial with enlisted representation acquitted him of the charges and specifications to which he pleaded not guilty and then sentenced him to the maximum punishment of confinement for seven years and a dishonorable discharge on the specifications to which he had pled guilty.

On appeal Appellant asserted four AOEs: (1) that the military judge abused his discretion when he denied Appellant's motion for relief under Article 13, UCMJ, due to poor brig conditions during pretrial confinement, (2) that the trial counsel committed prosecutorial misconduct when he commented on the victim's unsworn statement during his sentencing argument, (3) that the military judge abused his discretion when he denied Appellant's request, made after assembly of the court-martial, to be sentenced

by the military judge instead of the members, and (4) that the sentence imposed by the members was inappropriately severe. Upon review, the Court found no errors in the court's findings and affirmed the conviction. However, the Court concluded that the sentence was inappropriately severe and exercised its authority to reduce the sentence to 36 months of confinement, a dishonorable discharge, and a reduction to pay-grade E-1.

Per Curium and Summary Disposition With Comment:

United States v. Lohr, 2020 CCA LEXIS 15 (N-M. Ct. Crim. App., Jan. 17, 2020)

An Intelligence Specialist First Class was found guilty by members with enlisted representation, contrary to his pleas, of one specification of indecent visual recording, one specification of assault consummated by a battery, and one specification of patronizing a prostitute, in violation of Articles 120c, 128, and 134, UCMJ. On appeal, he asserted eleven AOEs: (1) that the evidence to support his conviction of indecent visual recording was legally and factually insufficient; (2) the military judge erred when he failed to give a mistake of fact as to consent instruction for the assault charge; (3) that the trial counsel made improper argument; (4) that the evidence to support his conviction of assault was legally and factually insufficient; (5) that the evidence to support his conviction of patronizing a prostitute was legally and factually insufficient; (6) that the military judge abused his discretion in denying a challenge to one of the members; (7) that the military judge erred when he allowed evidence under Military Rule of Evidence 404(b) without providing a limiting instruction; (8) that trial defense counsel was ineffective by failing to procure the services of an independent and unconflicted interpreter; (9) that the record of trial was incomplete; (10) that the First Amendment protects an individual's right to associate with prostitutes where there is no military nexus to the association; and (11) that the evidence failed to prove the scienter element of the indecent visual recording charge, as required by *Rehaif v. United States*. The Court found no merit in the AOEs and affirmed the findings and sentence

United States v. Mahmoud, 2020 CCA LEXIS 6 (N-M. Ct. Crim. App., Jan. 10, 2020)
United States v. Langill, 2020 CCA LEXIS 28 (N-M. Ct. Crim. App., Jan. 29, 2020)

Both cases were submitted without AOE, but the Court found deficiencies in the Entries of Judgment (EOJs) upon its own review. The Court exercised its authority in both cases to modify the EOJs to accurately reflect the proceedings.

Summary Disposition Without Comment:

United States v. Joshua, No. 201900222 (Jan. 9, 2020)
United States v. Crabb, No. 201900192 (Jan. 29, 2020)

Appellate Review Completed[2]:

United States v. Barclay, No. 201800271 (Jan. 28, 2020)
United States v. Smith, No. 201900041 (Jan. 28, 2020)
United States v. Standberg, No. 201900094 (Jan. 28, 2020)
United States v. Tyson, Jr., No. 201900109 (Jan. 28, 2020)
United States v. Fowler, No. 201900133 (Jan. 28, 2020)
United States v. Mitchell, No. 201900134 (Jan. 28, 2020)
United States v. Loraine, No. 201900138 (Jan. 28, 2020)
United States v. Ramsey, No. 201900149 (Jan. 28, 2020)
United States v. Kay, No. 201900161 (Jan. 28, 2020)
United States v. Rivas, No. 201900162 (Jan. 28, 2020)
United States v. Holguin, No. 201900167 (Jan. 28, 2020)

Questions. Please direct any questions to LT Allyson Breech, JAGC, USN, at allyson.breech@navy.mil or 202-685-7430.

[2] All other cases for which a Notice of Completion of Appellate Review (NOCAR) has been sent.