CODE 20
SIDEBAR

DECEMBER 2019 APPELLATE UPDATE

This Sidebar is Code 20's monthly appellate case update, reporting on all NMCCA cases from December of 2019.[1]

Authored and Published NMCCA Opinions:

The Supreme Court's Ruling in US v Padilla is Not Retroactive.

In Re Juan C. Carrillo, 79 M.J. 716 (N-M. Ct. Crim. App. Oct. 30, 2019) (writ denied 2020 CAAF LEXIS 1000 (C.A.A.F. Feb. 27, 2020.)

In March 1998, pursuant to a pre-trial agreement, Juan Carrillo entered pleas of guilty at a general court-martial to violations of Articles 81, 92, 124, and 128, UCMJ. His adjudged bad conduct discharge was ordered executed following completion of appellate review. In 2014, Carrillo received a notice to appear before an immigration judge to show cause why he should not be removed from the United States based on his court-martial convictions.

Carrillo sought extraordinary relief from the Court in the nature of a writ of error *coram nobis*. Citing *Padilla v. Kentucky*, 559 U.S. 356 (2010), Carrillo asserted that the Court should set aside his convictions because he was not a citizen of the United States when he entered pleas of guilty and was not advised of the immigration consequences of his convictions. In *Padilla*, the Supreme Court held "that constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation."

Although the military judge did not warn Carrillo that his convictions could affect his immigration status, the Court first found that *Padilla* does not apply retroactively. Citing the Supreme Court's decision in *Chaidez v. United States*, 568 U.S. 342, 357 (2013), the Court determined that "defendants whose convictions became final prior to *Padilla*… cannot benefit from its holding." Therefore, if analyzed in terms of a claim of ineffective assistance of counsel, Carrillo was not entitled to relief under *Padilla*.

However, in citing *Padilla*, Carrillo did not challenge the effectiveness of his counsel. Instead, he simply alleged that his pleas were not provident, because he was not aware that his convictions could result in removal from the United States. Reviewing Carrillo's petition in this light, the Court determined that that the military judge's failure to notify Carrillo of the potential collateral consequences of his plea did not create a "substantial basis in law" to question the plea. The Court further determined that the military judge's inquiry was fully consistent with the legal requirements in existence at the time. Carrillo's petition, therefore, was denied.

Dual-Sovereignty Doctrine Permits Court-Martial After State Prosecution; No Prejudice in Procedural Error.

United States v. Respondek, 2019 CCA LEXIS 481 (N-M. Ct. Crim. App. Dec. 4, 2019) (NOCAR sent Mar. 5, 2020)

A Lieutenant was convicted at a general court-martial, pursuant to his pleas, of violating Article 134, UCMJ, for knowingly and wrongfully possessing child pornography. Appellant was identified during a Maryland State Police (MSP) investigation as the owner of an IP address that was believed to have downloaded child pornography from a peer-to-peer file sharing site. After obtaining a warrant,

[1] There were no published SCOTUS or CAAF opinions for Navy or Marine Corps cases during December 2019.

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MSP seized a variety of electronics from Appellant's home and arrested him for possession and distribution of child pornography. When MSP interviewed Appellant, he admitted to searching, downloading, and viewing child pornography. On appeal, Appellant raised two assignments of error (AOEs): (1) that the Government violated the double jeopardy clause of the Fifth Amendment to the United States Constitution when it prosecuted him at general court-martial after the State of Maryland prosecuted him for the same offense, and (2) that the military judge failed to call upon Appellant to enter a plea during pre-sentencing.

The Court relied on the dual-sovereignty doctrine to find no constitutional error when the Government court-martialed Appellant after Maryland prosecuted him for the same offenses. The Court noted that the Supreme Court re-affirmed the dual-sovereignty doctrine in *Gamble v. United States* during the pendency of Appellant's case. Citing *Gamble* and well-established CAAF precedent, the Court held that "[a] convening authority acting on behalf of the sovereign United States may prosecute servicemembers for the same offense for which a different sovereign, such as a state, already prosecuted them."

For the second AOE, the Court found there was procedural error when the military judge did not have Appellant explicitly make his pleas on the record. However, there was no material prejudice to Appellant's rights because the military judge did conduct the normal lengthy colloquy concerning Appellant's rights, and referenced Appellant's desire or intent to plead guilty over 50 times. Finding no prejudice, the Court affirmed the findings and sentence.

Military Judge Abused Her Discretion in Accepting a Guilty Plea While Applying a Legally Incorrect Definition of the Offense.

United States v. Murray, 2019 CCA LEXIS 483 (N-M. Ct. Crim. App. Dec. 5, 2019)

A military judge sitting as a special court-martial convicted an Aviation Boatswain's Mate Airman Apprentice, in accordance with his pleas, of one specification of violating a lawful general regulation and one specification of making a false official statement in violation of Articles 92 and 107 UCMJ. In his sole AOE, Appellant contended that his sentence was inappropriately severe. In addition, the Court directed the Government to show cause why the Court should find the military judge did not abuse her discretion by accepting Appellant's plea of guilty to violation of a lawful general regulation (sexual harassment in violation of Navy Regulations).

The Court concluded that the military judge abused her discretion by relying on a legally incorrect definition of sexual harassment. Further, the Court determined that the facts elicited by the military judge during the providence inquiry did not establish Appellant's guilt, even applying the correct definition of sexual harassment, as Appellant's act of posting sexually explicit videos of the victim online did not create a hostile workplace under the facts elicited in Appellant's plea colloquy. As such, the Court set aside Appellant's conviction to the Article 92 offense, authorizing a rehearing or, alternatively, authorizing the convening authority to approve a sentence of no punishment for the Article 107 conviction.

Two Specifications of Conspiracy Consolidated When Only One Agreement Was Reached

United States v. Strobridge, 2019 CCA LEXIS 503 (N-M. Ct. Crim. App. Dec. 13, 2019)

A Corporal was convicted, consistent with his pleas, of conspiracy, dereliction of duty, larceny, forgery, and money laundering, in violation of Articles 81, 92, 121, 123, and 134, UCMJ. The Court specified four issues pertaining to factual sufficiency and consolidation of specifications.

Upon review, and considering the record as a whole, the Court concluded that the facts elicited during the providence inquiry were sufficient to support Appellant's pleas related to conspiracy to commit money laundering and money laundering specifications. As such, the Court found that the military judge did not err in accepting those pleas, answering Specified Issues 1 & 4 in the negative. However, the Court further found that, "while Appellant's pleas were otherwise provident… Specified Issues II and III reveal prejudicial error that must be remedied." Specifically, because Appellant only admitted to entering a single agreement, the Court deleted the words "on divers occasions" from one specification of conspiracy and consolidated the two specifications of conspiracy. The Court then reassessed and affirmed Appellant's sentence.

Sexual Assault Conviction Set Aside for Factual Insufficiency.

United States v. Gilpin, 2019 CCA LEXIS 515 (N-M. Ct. Crim. App. Dec. 30, 2019)

A general court-martial convicted a U.S. Naval Academy Midshipman, contrary to his pleas, of violating Article 120, UCMJ. The charge arose when Appellant and another midshipman, KS, had an alcohol-involved sexual encounter in her room at Bancroft Hall. KS did not

remember any of the encounter other than being on top of Appellant. KS subsequently alleged he had sexually assaulted her. After a bench trial, the military judge acquitted Appellant of sexually assaulting KS when she was incapable of consenting due to her intoxication (Specification 1), but found him guilty of sexually assaulting her when she was "asleep" and "otherwise unaware" (Specification 2). On appeal, Appellant asserted four AOEs, including one involving jurisdiction and one involving factual and legal sufficiency.

Upon review, the Court found the jurisdictional AOE to be without merit, but found the evidence to be factually insufficient, rendering the remaining AOEs moot. Specifically, after a *de novo* review of the factual record, the Court concluded that there was "simply too much reasonable doubt associated with the evidence…" and that the government had failed to prove that KS was asleep or otherwise unaware beyond a reasonable doubt. As such, the Court set aside the finding and sentence and dismissed the charge and specification with prejudice.

No Prejudicial Error in the Admission of Evidence During the Sentencing Hearing.

United States v. Borgelt, 2019 CCA LEXIS 519 (N-M. Ct. Crim. App. Dec. 31, 2019)

A military judge sitting as a general court-martial convicted a Corporal, pursuant to his pleas, of one specification of reckless operation of a vehicle, four specifications of wrongful possession of a controlled substance, two specifications of wrongful use of a controlled substance, and two specifications of wrongful introduction of a controlled substance onto a military installation, in violation of Articles 111 and 112a, UCMJ. On appeal, Appellant asserted AOE relating to the admission of sentencing evidence, counsel performance, and cumulative error. Upon review, the Court found no prejudicial error. However, the Court did note that the court-martial order did not accurately reflect the outcome of the court martial, and thus ordered a correction to the record.

Per Curium and Summary Disposition With Comment:

United States v. Hudson, 2019 CCA LEXIS 406 (N-M. Ct. Crim. App. Oct. 23, 2019)

A Sergeant was found guilty at a special court-martial by a military judge, contrary to her pleas, to violations of Articles 86, 89, 91, and 107, UCMJ. She asserted three AOE pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which the Court found to be without merit.

United States v. Taylor, 2019 CCA LEXIS 460 (N-M. Ct. Crim. App. Nov. 20, 2019)
United States v. Addis, 2019 CCA LEXIS 484 (N-M. Ct. Crim. App. Dec. 4, 2019)

Both cases were submitted without AOE, but upon its own review, the Court noted errors in the Entry of Judgment (EOJ). The Court modified the EOJ in both cases and directed that the modified EOJ be included in the record.

United States v. Lauzier, 2019 CCA LEXIS 493 (N-M. Ct. Crim. App. Dec, 11, 2019)

A Lance Corporal submitted his case without AOE. However, the Court noted that the military judge incorrectly adjudged forfeitures in the amount of "two thirds pay per month" for twelve months. A sentence to forfeitures must "state the exact amount in whole dollars to be forfeited each month." RCM 1003(a)(2). The Court corrected the adjudged forfeitures and affirmed the sentence.

United States v. Arnoldt, 2019 CCA LEXIS 500 (N-M. Ct. Crim. App. Dec. 12, 2019)

A Lance Corporal was convicted, contrary to her pleas, of one specification of wrongful use of cocaine under Article 112a, UCMJ. The Court held the evidence was factually insufficient to support the finding. The government relied solely upon the permissive inference associated with a positive urinalysis and testimony from a Urinalysis Program Coordinator (UPC) who was not the UPC who supervised the collection and labeling of the tested specimen bottle. As a result, the UPC on the witness stand could not verify that the test collection procedures were followed in this case. The Court set aside the guilty finding and sentence and dismissed the sole Charge and Specification with prejudice.

United States v. Anne, No. 201900072 (N-M. Ct. Crim. App. Dec. 18, 2019)

A Corporal was convicted, consistent with his pleas, of three specifications of conspiracy, two specifications of larceny of military property, two specifications of wrongful sale of military property, attempted wrongful sale of military property, dereliction of duty, and obstruction of justice, in violation of Articles 80, 81, 92, 108, 121, and 134, UCMJ. On appeal, Appellant claimed that he received a

highly disparate sentence compared to that of his co-conspirator. The Court disagreed, found no prejudicial error, affirmed the findings and sentence, and *sua sponte* ordered correction to the Court-Martial Order due the Order inaccurately reflecting the disposition of the charges.

Summary Disposition Without Comment:

United States v. Villarreal, No. 201900025 (Dec. 11, 2019)
United States v. Doyle, No. 201900051 (Dec. 11, 2019) (NOCAR sent Mar. 5, 2020)
United States v. Colegrove, No. 201900095 (Dec. 11, 2019) (NOCAR sent Mar. 5, 2020)

Appellate Review Completed:[2]

October 2019
United States v. Joseph B. Rios, USN, No. 201900029
United States v. Michael C. Plewinski, USMC, No. 201900041
United States v. Freddie J. Gallegos, USMC, No. 201900088
United States v. Luke W. Johnson, USMC, No. 201900097

November 2019
United States v. Randy E. Quiroa, USMC, No. 201800093
United States v. Gabriel A. Davis, USMC, No. 201900012
United States v. Wilmer Vasquez, USMC, No. 201900057
United States v. Joshua N. Pruitt, USN, No. 201900071
United States v. Eric M. Brasberger, USMC, No. 201900084
United States v. Victor Caballerogarcia, USMC, No. 201900092
United States v. Andrew W. Miller, USN, No. 201900093
United States v. Morgan E. Henson, USN, No. 201900104
United States v. Nicholas J. McElroy, USN, No. 201900106
United States v. Stevens R. Dysland Jr., USMC, No. 201900116
United States v. Casey T. Balausky, USN, No. 201900121

December 2019
United States v. Jose D. OrtaSantiago, USMC, No. 201900114
United States v. Jacob F. Aaron, USMC, No. 201900117
United States v. Darren F. Dinsmore, USMC, No. 201900122
United States v. German A. Chavez, USMC, No. 201900147
United States v. Antonio J. Dambra, USN, No. 201900074
United States v. Sierra N. Muldrow, USMC, No. 201900091
United States v. Laundre D. Kirdland, USMC, No. 201900108
United States v. Charles Moore, USN, No. 201900119
United States v. Joshua D. Eoff, USN, No. 201900151

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

[2] All cases for which a Notice of Completion of Appellate Review (NOCAR) was sent during the 1st Quarter of FY20.