

# CODE 20

## SIDEBAR

### OCTOBER 2019 APPELLATE UPDATE

This Sidebar is Code 20's monthly appellate case update, reporting on all NMCCA cases from October of 2019.<sup>1 2</sup>

#### *Authored and Published NMCCA Opinions:*

##### ***No Entrapment Where the Government Did Not Induce the Conduct and the Accused Was Acting According to a Predisposition.***

***United States v. Grubbs***, 2019 CCA LEXIS 385 (N-M. Ct. Crim. App. October 4, 2019)

A Sergeant was convicted at a general court-martial, contrary to his pleas, of attempted sexual assault of a child, attempted sexual abuse of a child, and solicitation of child pornography in violation of Articles 80 and 134, UCMJ. Grubbs was apprehended when he attempted to meet a girl named "Monroe," who he believed to be a 14-year-old female dependent. Grubbs had been communicating with the girl online and was meeting her for a sexual encounter. However, "Monroe" was actually an NCIS special agent posing as a child. On appeal, Grubbs raised a single assignment of error (AOE): that the findings were legally and factually insufficient because the government failed to prove, beyond a reasonable doubt, that Grubbs was not entrapped.

After a factual review of the record, the Court concluded that the government had not induced Grubbs to commit the offenses. The Court noted that merely providing an opportunity to commit a crime does not rise to the level of inducement. The Court further found that Grubbs demonstrated a predisposition to commit the crime, in that he accepted a criminal offer "without being offered extraordinary inducements." Because the Court concluded that Grubbs was not induced, and was acting according to his predisposition, there was no entrapment.

The Court went on to review the record for factual sufficiency *de novo*. It concluded that the government had failed to produce sufficient evidence for clause 1 of the terminal element of the 134 offense—that Grubbs's actions were prejudicial to good order and discipline. However, the Court noted that while clause 1 requires the government to prove direct prejudice to good order and discipline, evidence of the conduct itself may be enough to support a conviction under clause 2—that the conduct was of a nature to bring discredit upon the armed forces. The Court concluded that the evidence was sufficient to support a conviction under clause 2, and therefore excepted out the clause 1 language to affirm the conviction. The Court also ordered a supplemental court-martial order (CMO) to correctly reflect Grubbs's pleas and then findings.

##### ***Findings and Sentence Reversed for Discovery Violations During the Voir Dire Process.***

***United States v. Kunishige***, 79 M.J. 693 (N-M. Ct. Crim. App. October 17, 2019)

A Sergeant was convicted at a general court-martial of 13 total specifications alleging conspiracy; violation of a lawful order; rape; sexual assault; sexual assault of a child; sexual abuse of a child; aggravated assault; assault and battery; receiving, possessing, viewing, and soliciting child pornography; obstructing justice; and adultery in violation of Articles 81, 92, 120, 120b, 128, and 134, UCMJ. On appeal, Kunishige asserted that the government violated

<sup>1</sup> There were no published SCOTUS or CAAF opinions in October 2019.

<sup>2</sup> Starting with FY20, Code 20 appellate updates will reflect all cases that have completed appellate review each month.

his right to discovery related to the selection of the members panel. Upon review, the Court agreed.

The Court concluded that the convening authority used grade as a proxy to nominate the senior member for Kunishige's court-martial panel. The civilian defense counsel timely and specifically requested discovery of all communications with the potential members, and the military judge ordered the government to produce them. The Government did not comply and repeatedly failed to disclose crucial information concerning the selection process, even after the trial was completed and Kunishige had been sentenced. The withheld emails revealed that the panel president was nominated solely because he was a colonel, and he was informed that this was the reason he was chosen. The emails also revealed that the colonel solicited and forwarded member nominees from within his battalion, two of whom sat on Kunishige's panel.

The Court found that the government's discovery violation, and the military judge's failure to enforce his order to compel discovery, precluded effective voir dire of the panel president. The Court explained that, had the government fulfilled its discovery obligations in a timely manner, the panel president would have been subject to excusal due to implied bias. Because the defense was foreclosed from making this challenge at the appropriate time, the Court concluded that, in the eyes of the public, Kunishige did not receive a court of fair and impartial members. As a result, the Court reversed the findings and

sentence and remanded the case with re-hearing authorized.

***A Deficient Promulgating Order is not Prejudicial but Must Be Corrected.***

***United States v. Hill***, No. 201800161 (N-M. Ct. Crim. App. October 18, 2019)

A Lance Corporal was found guilty by a military judge sitting alone, pursuant to his pleas, of one specification of abusive sexual contact in violation of Article 120(d), UCMJ. He was also found guilty by the military judge, contrary to his pleas, of one specification of sexual assault, one specification of abusive sexual contact, and one specification of indecent visual recording, in violation of Articles 120(b), 120(d), and 120c(a), UCMJ. On appeal, the Court found merit in one AOE: the promulgating order was deficient in that it failed to reflect all the charges and specifications on which Hill was arraigned and failed to reflect the consolidation of Specifications 3 and 4 of Charge III.

The Court found that the promulgating order contained errors that must be corrected, but these errors were not prejudicial. The Court ordered a supplemental CMO to correctly indicate the charges and specifications on which Hill was arraigned and the consolidation of Specifications 3 and 4 of Charge III.

***Per Curium and Summary Disposition With Comment:***

***United States v. Barclay***, 2019 CCA LEXIS 410 (N-M. Ct. Crim. App. October 29, 2019)

A Staff Sergeant pleaded guilty at a general court-martial to violations of Articles 92, 93, and 120, UCMJ. The Court found no prejudicial error in his AOE and affirmed, however, the Court noted the CMO did not accurately reflect the disposition of all charges and specifications and ordered a supplemental CMO to accurately reflect that the military judge granted the trial counsel's request to withdraw the language, specifications, and charges to which Barclay pleaded not guilty.

***United States v. Quinlan***, No. 201900142 (N-M. Ct. Crim. App. October 30, 2019)

A Lance Corporal was found guilty, pursuant to his pleas, of attempted sexual abuse of a child by indecent exposure, attempted receipt of child pornography, and attempted sexual abuse of a child by communicating indecent

language, in violation of Article 80, UCMJ. The record was submitted without AOE. However, in conducting its own review under Articles 59 and 66, UCMJ, the Court noted a deficiency in the drafting of one of the specifications that created a conflict between the specification and the evidence adduced through providence inquiry and stipulation of fact. The Court excepted the contradictory language and found that, as excepted, there was no substantial basis in law or fact to question Quinlan's plea

*United States v. Strandberg*, 2019 CCA LEXIS 426 (N-M. Ct. Crim. App. October 31, 2019)

*United States v. Parsons*, 2019 CCA LEXIS 427 (N-M. Ct. Crim. App. October 31, 2019)

*United States v. Kay*, 2019 CCA LEXIS 435 (N-M. Ct. Crim. App. October 31, 2019)

*United States v. Alcantar*, 2019 CCA LEXIS 431 (N-M. Ct. Crim. App. October 31, 2019)

In all four cases, the records were submitted without AOE, but the Court found deficiencies in the CMO or Entry of Judgment (EOJ) upon its own review. Each case dealt with guilty pleas by exceptions and/or substitutions that were not accurately reflected on the CMO or EOJ. In each case with a CMO, the Court ordered that a supplemental CMO be included in the record to properly reflect the disposition of the excepted language. In each case with an EOJ, the Court returned the record to the Judge Advocate General for correction of the EOJ.

### *Summary Disposition Without Comment:*

*United States v. Fowler*, No. 201900133 (Oct. 30, 2019)

*United States v. Rivas*, No. 201900162 (Oct. 30, 2019)

*United States v. Sanchez*, No. 201900150 (Oct. 30, 2019)

*United States v. Carriker*, No. 201900205 (Oct. 30, 2019)

*United States v. Smith*, No. 201900038 (Oct. 30, 2019)

*United States v. Oliveira*, No. 201900171 (Oct. 30, 2019)

*United States v. Barlow*, No. 201900155 (Oct. 30, 2019)

*United States v. Gough*, No. 201900055 (Oct. 30, 2019)

*United States v. Tyson*, No. 201900109 (Oct. 30, 2019)

*United States v. Marshall*, No. 201900251 (Oct. 30, 2019)

*United States v. Ramsey*, No. 201900149 (Oct. 31, 2019)

*United States v. Mitchell*, No. 201900134 (Oct. 31, 2019)

*United States v. Loraine*, No. 201900138 (Oct. 31, 2019)

*United States v. Lomeli*, No. 201900170 (Oct. 31, 2019)

*United States v. Holguin*, No. 201900167 (Oct. 31, 2019)

*United States v. Burke*, No. 201900146 (Oct. 31, 2019)

*United States v. Lara-Rodriguez*, No. 201900188 (Oct. 31, 2019)

### *Appellate Review Completed<sup>3</sup>:*

*United States v. Hernandez*, No. 201900112 (Oct. 28, 2019)

*United States v. Johnson*, No. 201900097 (Oct. 31, 2019)

**Questions.** Please direct any questions to LT Allyson Breech, JAGC, USN, at [allyson.breech@navy.mil](mailto:allyson.breech@navy.mil) or 7202-685-7430.

<sup>3</sup> All other cases for which a Notice of Completion of Appellate Review (NOCAR) has been sent.