2021 Term in Review

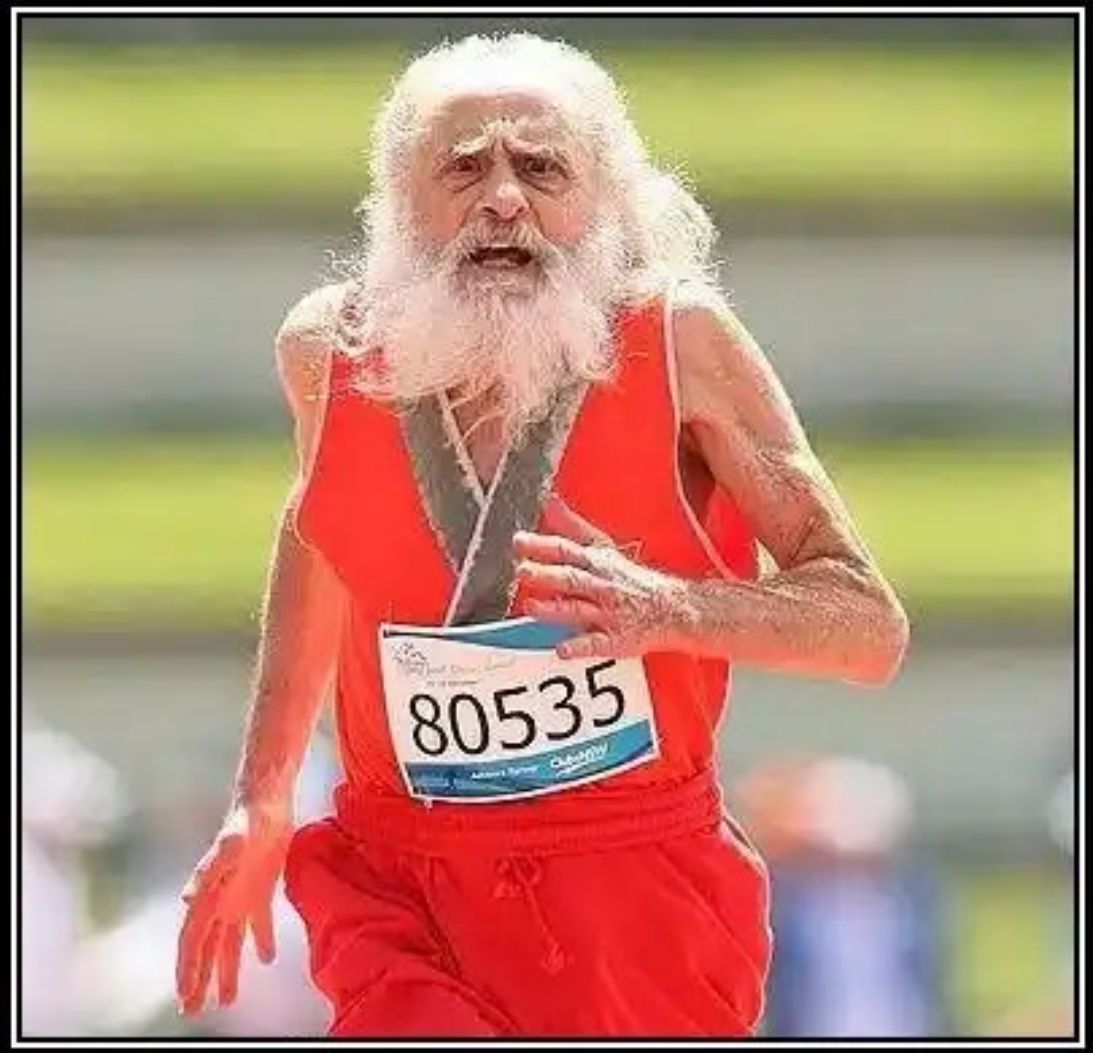
Kurt Brubaker

Judge, U.S. Coast Guard Court of Criminal Appeals

Fulton Conference 2022

Statistics
1 Oct 20 - 30 Sep 21

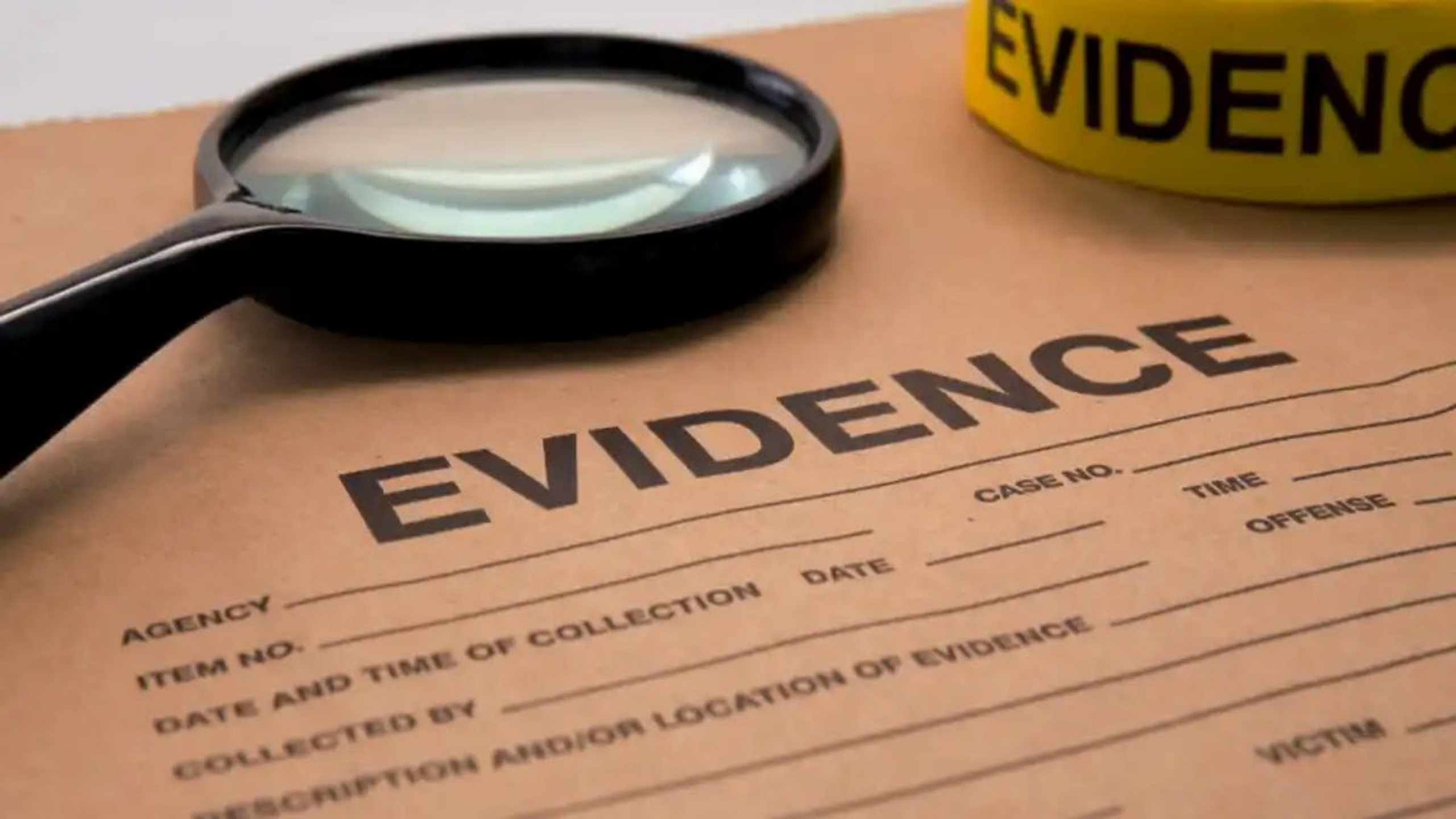
- 2021: **25** opinions, **12** summ. dispo. = **37** total decisions
  - 7 of 12 summary dispositions were *Brubaker-Escobar* trailers
- 2020: **35** opinions, **26** summ. dispo. = **61** total decisions
- 2019: **25** opinions, **14** summ. dispo. = **39** total decisions
- Impact of lack of fifth judge? (July 2021 – present)



THE BIGGEST LOSER

Santa Edition

Court	Affirmed	Not Affirmed	Total	% Affirmed (non-summary)
ACCA	13	7	20	65%
AFCCA	4	3	7	57%
NMCCA	7	3	10	70%
CGCCA	0	0	0	N/A
TOTAL	24	13	37	65%


EVIDENC
EVIDENCE
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ITEM NO.
DATE AND TIME OF COLLECTION
COLLECTED BY
DESCRIPTION AND/OR LOCATION OF EVIDENCE
DATE
CASE NO.
TIME
OFFENSE
VICTIM

Evidence

- *United States v. Beauge*, 82 M.J. 157 (scope of MRE 513)
- *United States v. Mellette*, No. 21-0312, 2022 WL 3036184 (scope of MRE 513)
- *United States v. Edwards*, 82 M.J. 239 (admissibility of victim-impact statements under RCM 1001A)
- *United States v. Sigrah* (remedies for RCM 914 violations)

Scope of Patient-Psychotherapist Privilege

United States v. Beauge

- MRE 513(a): A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist ... if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.
- 513(d): There is no privilege under this rule when federal law, state law, or service regulation imposes a duty to report information contained in a communication.
- Issue: Does the "duty-to-report" exception apply just to what is reported or to all patient-psychotherapist communications that led to the report?
- Scenario:
  - Child reports to psychotherapist that Appellant sexually abused her.
  - Per FL law, psychotherapist makes recorded hotline report
  - Recording of call disclosed to Defense
  - Defense moves for compelled production of all comm's between child and psychotherapist leading to the report
  - MJ denies

Scope of Patient-Psychotherapist Privilege

United States v. Beauge (2)

- NMCCA: Affirms. Under "plain meaning" of exception, privilege only vitiated with respect to the information that is mandatorily reported.
- CAAF(5-0)*: Affirmed.
  - Disagree the meaning is plain. But interpreted in broader context of the rule, reaches the same conclusion: the language of the duty-to-report exception should be read to mean that the privilege is vitiated *only* in regard to the specific *information* that *was contained in the communication to state authorities* and *was required by law or regulation to be reported.*
  - Because Appellant received the full audio of the psychotherapist's report to the state agency, Appellant received all of the information he was entitled to discover under the duty-to-report exception.

Scope of Patient-Psychotherapist Privilege)

United States v. Mellette

- MRE 513 protects confidential communications, but what about diagnoses and treatments?
- MJ: Protects diagnoses and treatments. Motion to compel denied.
- NMCCA: Agree. Affirmed.
- CAAF (3-2): Disagree. Reversed. Only confidential *communications* are protected, not diagnoses or treatments.
  - Construe privileges narrowly.
  - But: if a medical record contains not only diagnosis and treatment, but memorializes actual communications, the communications remain protected.
- Dissent (Maggs, Sparks)
  - Close question, but read the privilege more broadly

Admissibility of Victim Impact Statements

United States v. Edwards

- RCM 1001A [now 1001(c)]: crime victim has right to make unsworn statement, which can be *oral, written, or both*.
- Issue: abuse of discretion to allow TC to offer video she helped produce w/ slideshow set to acoustic background music as part of V unsworn statement?
- AFCCA: No. Affirmed.
- CAAF (3-2): Yes. Reversed.
  - Pictures and music are neither a written nor an oral statement.
  - Right to make unsworn statement belongs solely to the victim or designee, not TC.
  - Video was, at least in part, TC's statement, not victims'.
  - Error substantially influenced sentence.
  - Concur in part, dissent in part (Ohlson, Sparks)
    - Agree video inadmissible.
    - But conclude the error was harmless.

Remedies for RCM 914 violations

United States v. Sigrah

- RCM 914:
  - (a) After a witness has testified, upon motion, MJ shall order Govt to produce any statement possessed by the US that the witness has made.
  - (e) If party elects not to comply w/ MJ's order to produce, MJ shall either strike testimony of the witness or declare mistrial.
- At trial:
  - Defense motion to strike V's testimony b/c CID recorded interviews of her, 2 other witnesses, but allowed them be overwritten.
  - MJ: Motion denied. No violation of RCM 914. Further, no bad faith or negligence, written statements constituted adequate substitute.
- ACCA: MJ erred. Recordings were statements, good faith did not excuse requirement to turn them over. But no prejudice, so affirmed conviction.

Remedies for RCM 914 violations

United States v. Sigrah (2)

- CAAF (5-0): Reversed
  - Sole questions: what was the required remedy? What is the prejudice from failing to provide that remedy?
  - Under *Kohlbek* framework for nonconstitutional error, weigh: (1) strength of Govt case; (2) strength of Def case; (3) materiality of the evidence in question; (4) quality of the evidence in question.
  - *Clark*: Applying *Kohlbek*, no prejudice to 914 violation. "Additionally, in *Rosenberg v. United States*, the Supreme Court noted that a failure to produce may be held harmless if the defense otherwise had access to the same information."
  - Reference to *Rosenberg* not intended to create separate prejudice test. *Kohlbek* is the appropriate prejudice analysis for preserved nonconstitutional error.
- Ohlson, Maggs, concurring:
  - This is a rule-driven result rather than constitutionally required. Current language of RCM 914 compels conclusion that MJ erred by not striking the testimony of the Government witnesses, but nothing stopping President from amending the language.
- Maggs, Hardy, concurring
  - RCM 914 ill-suited for cases where Govt calls witnesses but cannot provide prior statements because they were lost.
  - "Despite inventive judicial efforts to address this issue, and to some extent because of these efforts, confusion and disagreement will likely persist if military judges are expected to continue to apply R.C.M. 914 to cases involving lost records, unless the text of R.C.M. 914 is revised to address the problem of lost records explicitly."
  - Critical of CAAF's prior holding in *Muwwakkil*.
    - "Maybe this Court should have left the policy making to the Department of Defense and the President. But that is not the issue here because neither party has asked us to overrule any precedent."

Authority of CCAs

Authority of CCAs

- *United States v. Cooper*, 82 M.J. 6
  - Can we disregard waiver?
- *United States v. Badders*, 82 M.J. 299
  - Can we hear Art 62 appeals of mistrial declarations?

Can We Ignore Waiver?

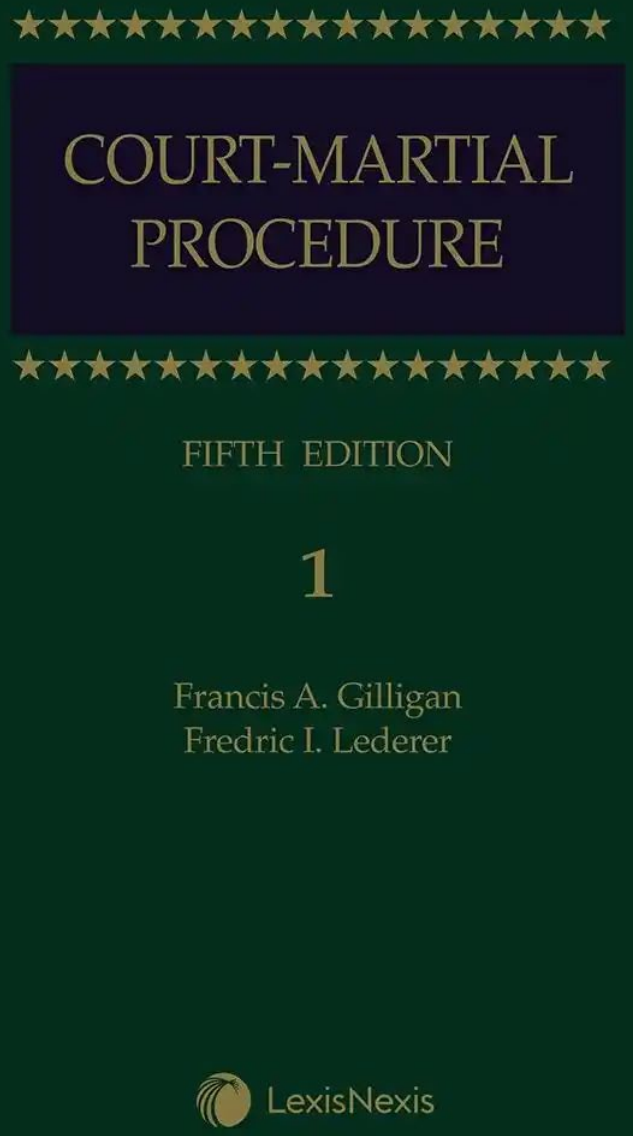
United States v. Cooper

- *Cooper I*
  - NMCCA: Cooper deprived of statutory right to IMC, set aside findings. Did not reach claim that counsel was ineffective for failing to forward IMC request.
  - CAAF: Reversed. Issue was waived.
    - "That leaves unanswered other issues the CCA determined were mooted by its decision that Appellee was denied his statutory right to IMC. We leave those issues for the CCA to resolve on remand."
- *Cooper II*
  - NMCCA: Per *Chin*, we disregard the waiver and conclude counsel was ineffective.
- CAAF (5-0): Affirmed.
  - Do not need to answer certified question about whether NMCCA erred in applying *Chin*.
  - IAC remained within NMCCA's scope of review on remand.
  - NMCCA could have reached IAC claim w/o relying on *Chin*.
  - Decline to address Govt's arguments about whether NMCCA decided the IAC issue correctly b/c the Govt did not certify that issue.

Can We Hear Govt Appeals of Mistrial Declarations?

United States v. Badders

- Article 62(a)(1)(A), UCMJ: the government may appeal to the CCA "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification."
- Issue: does this include mistrial determinations?
- ACCA: Yes. MJ erred, reversed.
- CAAF (5-0): Yes. ACCA affirmed.
  - What does "terminates the proceedings" mean?
    - Ambiguous as to whether that means temporarily or permanently. Thus look to broader statutory context, which supports that the article refers to *that particular court-martial*.
  - Does a mistrial declaration terminate proceedings *with respect to a charge or specification*?
    - Previous cases give the answer: yes.
  - No opinion on merits of mistrial determination. May raise that during ordinary course of appeal.



- *United States v. Tate*, 82 M.J. 291
  - Remedies for Incomplete Record
- *United States v. Anderson*, 82 M.J. 82
  - Right to speedy post-trial review

Remedies for Incomplete Record

United States v. Tate

- Recording device fails for part of proceeding. What now?
- Pre-2019 MCM, three CCA-recognized choices: (1) declare mistrial; (2) reconstruct record of trial; or (3) "start anew."
- At trial:
  - MJ: starting sentencing hearing anew.
  - Govt presents slightly different sentencing case, including some new information.
  - MJ (announcing sentence): disregarded new testimony outside scope of previous, unrecorded testimony.
- ACCA (during en banc reconsideration): MJ acted w/in his authority, created verbatim transcript, affirmed.
- CAAF (5-0): Reversed. MJ's approach resulted in "a hybrid proceeding."
  - Court has never expressly endorsed starting anew: "a judicially created procedure without clear basis in the Manual."
  - Is starting anew is a valid remedy? Not going to answer that. Even assuming it is, MJ's hybrid approach created an "amorphous mélange." Thwarts ability for CCA to review appropriateness of sentence.
- Current R.C.M. 1112(d): (1) reconstruct record; (2) dismiss affected specifications; (3) reduce sentence; (4) declare mistrial. Discussion: if discovered during trial and either party objects to summary or reconstruction, MJ should start trial anew from where interruption began.

Post-Trial Delay

United States v. Anderson

- 497 days between end of trial and CA's action (pre-MJA)
- Presumptively unreasonable delay
  - Court acknowledges that recent amendments "call into question the continued validity of the Moreno time lines."
- After analyzing *Barker* factors, no due process violation.
- Maggs, concurring
  - Write separately to emphasize that the parties did not challenge continuing validity of *Moreno*. "Our decision not to address such issues in this appeal, however, should not preclude litigants from arguing about the effects of recent legislative action or judicial decisions in future cases."
  - Do *Barker* factors even apply to post-conviction processing? After *Moreno,* SCOTUS decided *Betterman v. Montana*.

Offenses and Elements

- *United States v. Hiser*, 82 M.J. 60
  - Wrongfully broadcasting intimate visual images, Art 117a
- *United States v. Schmidt*, 82 M.J. 68
  - Lewd act on a child
- *United States v. Richard*, No. 22-0091, 2022 WL 4112788
  - Clause 1, Art 134

Offenses and Elements

United States v. Hiser

- Art 117a: wrongfully broadcasting intimate visual images
  - V must be "identifiable"
  - Conduct must have "reasonably direct and palpable connection to a military mission or environment"
- ACCA: Affirmed.
- CAAF (5-0): Affirmed.
  - No substantial basis for questioning plea
    - We do not review sufficiency of "evidence" in guilty plea—there is none!
  - Substantial basis for concluding V was **identifiable**
    - V recognized herself
    - Identifiable from combination of images and info displayed
    - Text of Art 117a does not support contention that "identifiable" means member of general public can ID V.
  - Substantial basis for concluding **connection to military environment**
    - Reject contention that this requirement satisfied only if broadcasted images are "directed at" or "likely to reach" members of the military.
    - May be established if images reach a servicemember. Images reached V, a member of military.

Offenses and Elements

United States v. Schmidt

- Lewd act upon a child (indecent conduct by intentionally masturbating in his presence)
  - "Lewd act": Any indecent conduct intentionally done with *or in the presence of* a child
- What does "in the presence of" mean?
  - Does it require the child to be aware of the lewd act, or merely that the accused be aware of the child's presence?
- NMCCA: Affirmed
  - Agree w/ Appellant "in the presence of" means accused must intend for child to be aware of the conduct. Mistake of fact of V's awareness is thus a defense.
  - But here, evidence did not support mistake of fact.
  - Alleged instructional error waived.
  - IAC: assumed deficient performance, but no prejudice because evidence strongly supported guilty finding, V clearly aware of the conduct.

Offenses and Elements

United States v. Schmidt (2)

- CAAF (1-2-2): Affirmed
- Sparks
  - Issue not waived
    - TDC affirmatively declined to object to the instructions and to the answer to members' question. Ordinarily would be waiver.
    - However, court reviews for plain error when there is a new rule of law, when the law was previously unsettled, and when the trial court reached a decision contrary to a subsequent rule.
    - At time of trial, was unsettled whether phrase "in the presence of" required the child be aware of the act. Therefore, TDC's failure to object was not waiver.
  - For conduct to be done "in the presence" of a child, the child must be aware of it.
  - But would hold this error was not plain or obvious. An "error cannot be plain or obvious if the law is unsettled on the issue at the time of trial and remains so on appeal."

Offenses and Elements

United States v. Schmidt (3)

- Concur (Ohlson, Erdmann)
  - Agree issue not waived.
  - Plain language of the statute only requires an accused to be aware of the child's *presence*; does not require the child victim to be *aware* of the accused's lewd act.
  - Misplaced reliance on secondary definition of "presence" in *Black's Law Dictionary*.
  - Other courts have interpreted similar federal statutes as not requiring victim awareness.
  - Interpreting "presence" in this ordinary sense presents no particular danger for prosecutorial overreach. Still has to be "indecent."
- Concur (Maggs, Hardy)
  - Issue waived.
  - Case indistinguishable from *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020)
  - Lack of applicable precedent did not negate waiver in *Davis*, nor does it here.
  - All precedents Appellant cites predate his trial.
- Post-script: *United States v. Tabor*, 82 M.J. 637 (N-M. Ct. Crim. App. 2022) (en banc)

Offenses and Elements

United States v. Richard

- Producing, possessing, distributing CP under clause 1, Art 134:
  - (1) that the accused did or failed to do certain acts; and
  - (2) that, under the circumstances, the accused's conduct was **to the prejudice of good order and discipline in the armed forces**.
- Issue: sufficient evidence of PGOD?
- AFCCA: Yes. Affirmed
  - *Davis*, C.M.A. 1988: conduct generally recognized as illegal "is prejudicial to good order and discipline or is service-discrediting for the very reason that it is (or has been) generally recognized as illegal; such activity, by its unlawful nature, tends to prejudice good order or to discredit the service."

Offenses and Elements

United States v. Richard (2)

- CAAF (5-0): No. Reversed.
  - Terminal element like any other element of an offense: must be proven beyond a reasonable doubt, cannot be conclusively presumed based on the accused's conduct
  - "To whatever extent some of this Court's (or its predecessor's) older cases may have treated the terminal element of Article 134, UCMJ, as something less than an essential element, those cases have been expressly overruled."
  - Meaning of "to the prejudice of good order and discipline"
    - Distinct from service discrediting
    - Must have "direct and palpable" effect on good order and discipline
    - Means something more than misconduct that has a nexus to the military
    - "Prejudice" = "detriment, depreciation, or an injuriously affecting"
    - "Good order" = "condition of tranquility, security and good government" of the military service
  - Here, Govt failed to proffer any evidence conduct had any negative effect on good order and discipline
  - The Govt's reliance on "various historical cases" from CAAF/CMA "neglects … the sea change that occurred in the Court's Article 134 jurisprudence between 2008 and 2011."

Cases to Watch for 2022 Term

- *United States v. Hasan* (death penalty case)
- *United States v. Harrington* (MJ err by allowing victim's parents to make unsworn statements in form of question and answer with trial counsel?)
- *United States v. Anderson* (do military accused have right to unanimous verdict under *Ramos*?)
- *United States v. Day* (is *attempted* conspiracy an offense under the UCMJ)
- *United States v. Pullings* (violate 8th Amendment for military officials to routinely send military inmate to civilian confinement facilities w/ history of poor living conditions?)

Questions/Discussion