IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States, *Appellant/Cross-Appellee*, v. **Patrick Carter** Master Sergeant (E-7) U.S. Air Force, *Appellee/Cross-Appellant*.	REPLY TO GOVERNMENT BRIEF ON ISSUES GRANTED FOR REVIEW USCA Dkt. No. 17-0086/AF Crim.App. No. 38708

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Patrick Carter, the Appellee/Cross-Appellant, hereby replies to the government's brief concerning the granted issues, filed April 19, 2017.

I. Violation of the standards set by this Court in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) warrants relief.

A system of appeal is a fundamental right instituted to assure that only those validly convicted have their freedom drastically curtailed. *Moreno*, 63 M.J. at 140 (citing *Evitts v. Lucey*, 469 U.S. 387, 399-400 (1985). "[I]f an appellant's substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive." *Id.* at 139.

MSgt Carter generally relies on the arguments presented in his opening brief, while addressing three arguments of the government.

First, the government here, as it did below, repeatedly refers to "defense delay" as a basis for denying relief. Gov't Br. at 7, 10-11, 14; JA 309. This Court has held "[t]he Government bears responsibility for unreasonable delay during appeal occasioned by the workload of appellate defense counsel." *Moreno*, 63 M.J. at 138. The delays requested by counsel detailed from the appellate defense division did not benefit MSgt Carter in any way other than ensuring he was afforded the representation on appeal required by Article 70, UCMJ. If that representation was unreasonably delayed, it is attributable to the government.

Second, the government contends that MSgt Carter should be penalized because he "initially consented" to the motions for enlargements of time. Gov't Br. at 11. MSgt Carter only consented because he was required by the Air Force Court of Criminal Appeals' internal rules to reflect whether he consented. *See* JA 301. Where his only representation was that detailed by the government, MSgt Carter was left with no meaningful choice but to consent or acquiesce to less-than-adequately prepared counsel.

Third, the government contends that MSgt Carter should be denied relief because he did not submit an "acceptable" mandatory release plan,

thus remaining incarcerated beyond his minimum release date of August 12, 2012. Gov't Br. at 15-16. The "military's Mandatory Supervised Release [(MSR)] program is based on executive authority, and involves terms that are imposed by executive branch officials well after completion of trial." *United States v. Pena*, 64 M.J. 259, 262 (C.A.A.F. 2007). The imposition of MSR can involve significant restrictions imposed at the personal expense of the military member. *See id.* at 263.

Although the government attempted to attach documents to the record in response to MSgt Carter's petition for extraordinary relief contending he did not provide an acceptable release plan, its motion did not include the conditions imposed on MSgt Carter for such a plan to be deemed "acceptable." JA 434-40. This Court denied the government's motion to submit documents. JA 441. In the absence of any information in the record detailing the degree of restriction imposed on MSgt Carter as part of the MSR program, his failure to provide "acceptable" plans to the government should not be deemed to ameliorate the prejudice stemming from the unreasonable post-trial delay in his case.

Because of the unreasonably lengthy delay, the lack of any constitutionally justifiable reasons for the delay, and the prejudice suffered by MSgt Carter, balancing of the four *Barker* factors indicates he was denied

his due process right to speedy review and appeal. MSgt Carter should be provided appropriate relief.

II. Prosecution for Child Endangerment (Specification 1 of the Charge) Was Barred by the Statute of Limitations.

A. The government cannot avail itself of Article 43(g)'s savings clause where it failed to file a petition for certiorari.

In criminal cases, statutes of limitations are "to be liberally interpreted in favor of repose." *United States v. Scharton*, 285 U.S. 518, 522 (1932); *see also United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (discussing the policy in favor of repose). Before the military judge, the government stressed the "earliest date" the "appellate process ended" was "on 24 December 2013 when JAJM was notified that [the Supreme Court of the United States] denied the government's petition for writ of certiorari." JA 293. The military judge accepted this argument. JA 299. Now, the government appears to modify its position, implying it had until May 26, 2014 for the officer exercising summary court-martial jurisdiction to receive the sworn charges, *i.e.*, 180 days after the 90 day time to file a petition for writ of *certiorari* expired on November 27, 2013. *See* Gov't Br. at 22-23. *Cf.* Sup. Ct. R. 13; 28 U.S.C. § 2101(g).

The problem with this argument is the government never chose to file a petition for *certiorari*. JA 107-09. On December 24, 2013, *i.e.*, close to a

month after the November 27, 2013 deadline for a *certiorari* petition, the appellate government division indicated the case should be forwarded to the convening authority. *See id*. It was not until March 31, 2014 that an officer exercising summary court-martial jurisdiction received the charges. JA 21.

In the opening brief, counsel calculated a date for expiration of the period provided in the Article 43, UCMJ savings clause that assumed tolling during the pendency of an active appeal. *See* Appellee/Cross-Appellant's Br. at 18 (Mar. 20, 2017) (calculating February 24, 2014 as the latest date to fall within the savings clause). After this Court denied reconsideration on August 29, 2013, there was no active appeal because the government chose not to petition the Supreme Court and simply allowed more than 180 days to pass with no act sufficient to place this case within the safe harbor of Article 43(g). Under these facts, this Court need not decide that Article 43(g) provides for tolling of the 180 day deadline for receipt of the charges by an officer exercising summary court-martial jurisdiction. Rather, it need only conclude that government *inaction, i.e.*, failing to appeal, is insufficient.

The government's reliance on *United States v. Miller*, 47 M.J. 352, 261 (C.A.A.F. 1997) (holding the "decisions of this Court and the court below are 'not self-executing'") and Rules for Court-Martial (RCM) 1209(a)(1)(C) and 1204(c)(4) should not be read to excuse the government

from actively prosecuting an appeal or initiating new charges in a timely manner. RCM 1209(a) refers to the finality of a court-martial "conviction," which is inapplicable here because appellate review set aside and dismissed the conviction. JA 248. Likewise, nothing in RCM 1209(a)(1)(C) suggests the time period for the Article 43(g) savings clause should not run concurrently with the time period to petition the Supreme Court where a party elects not to exercise the right to file a petition for writ of *certiorari*. That is what the government did here.

The Air Force CCA's January 4, 2013 opinion declared that the charges "are set aside and dismissed." JA 248. Article 43(g)'s plain language, triggering the 180 day savings clause period when "charges or specifications *are dismissed*," and requiring receipt of the new charges "within 180 days *after the dismissal* of the charges or specifications" may yield to some allowance for tolling during an active appeal. *See* Article 43(g), UCMJ (emphasis added). But the government's argument, pleading excusal for its inaction, strains the text beyond what is reasonable.

The plain language of the statute makes no particular allowances for the finality argument on which the government relies. *See* Gov't. Br. at 21-22. If Congress desired to provide a more lenient safe harbor, it easily could have relaxed the requirement for receipt of new charges until "180 days after

the dismissal of the charges or specifications [becomes final]." Congress has done as much in a separate federal statute, providing that an indictment charging a felony may be returned after expiration of the statute of limitations "in the event of an appeal, within 60 days of the date of the dismissal of the indictment or information *becomes final* . . . ." 18 U.S.C. § 3288 (emphasis added); *see also United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005) (declining to apply "equitable tolling" to save an indictment from the statute of limitations when the government argued it relied in "good faith" on an "unpersuasive statutory interpretation," and noting the doctrine of equitable tolling applies "only sparingly") (internal quotation and citation omitted).

B. Child endangerment is not listed as one of the enumerated offenses constituting "child abuse" under Article 43(b)(2)(B).

The government appears to have abandoned the military judge's ruling that Article 43(b)(2)(B) contemplates the offense of child endangerment on the ground that it "falls within the ambit of child abuse." JA 299. Instead, the government argues that essentially any offense could be tried as "child abuse" if the act could hypothetically implicate any of the listed offenses in Article 43(b)(2)(B), even if the offense alleged on the charge sheet does not. Gov't Br. at 25-26 (contending "the protection of a

statute of limitations is on the facts and the acts, not on the name of the statute").

Article 43, UCMJ repeatedly uses language focusing on the charging instrument such as "charged," "offense," and "sworn charges and specifications." *See* Article 43, UCMJ. The government's invitation to disregard "the way the government alleges the act on the charge sheet," thus fails to faithfully apply the statutory text. Gov't Br. at 25. Article 43(b)(2)(A) addresses requirements for receipt of "the sworn *charges* and *specifications*" to impose criminal liability for a "person *charged* with having committed a child abuse *offense* . . . ." (Emphasis added.) The definition of "child abuse *offense*" is further delineated as an "*act* that involves abuse of a person who has not attained the age of 16 years and *constitutes*" or "would *constitute*" a specific listing of "*offenses*" under both the UCMJ and title 18 of the U.S. Code. *See* Article 43(b)(2)(B), (C) (emphasis added).

Child endangerment, as reflected in Specification 1 of the Charge, does not "constitute" a listed offense under Article 43(b)(2)(B). Applying ordinary principles of statutory construction, this Court recently reiterated that when a rule or statute provides an exclusive list of definitions cross-referencing specific statutes, a reviewing Court will give effect to the

enumerated list. *See United States v. Fetrow*, __ M.J. __, No. 16-0500, slip op. at 6-9 (C.A.A.F. Apr. 17, 2017). The government's argument ultimately fails to apply ordinary principles of statutory construction because it focuses in isolation on the word "act" without giving effect to accompanying statutory language highlighting the centrality of the offenses alleged in the charging instrument. In light of the rule that statutes of limitation are interpreted to favor an accused's interest in repose, there is an insufficient textual basis here to adopt the government's preferred construction. *See Scharton*, 285 U.S. at 522; *Marion*, 404 U.S. at 322 n.14.

Respectfully submitted,

BRIAN L. MIZER
Senior Appellate Defense Counsel
C.A.A.F. Bar No. 33030
brian.l.mizer@civ.mail.mil

JOHNATHAN D. LEGG, Major, USAF
Appellate Defense Counsel
C.A.A.F. Bar No. 34788
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
johnathan.d.legg.mil@mail.mil

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on May 1, 2017, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

Respectfully submitted,

JOHNATHAN D. LEGG, Major, USAF
Appellate Defense Counsel
C.A.A.F. Bar No. 34788
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
johnathan.d.legg.mil@mail.mil