IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Sergeant (E-5) **THOMAS M. ADAMS** United States Army Appellant	)	Crim. App. Dkt. No. 20130693 USCA Dkt. No. 20-0366/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Granted Issue

WHETHER THE 2016 AMENDMENTS TO ARTICLE 43, UCMJ, RETROACTIVELY MADE THE STATUTE OF LIMITATIONS FIVE YEARS FOR INDECENT LIBERTIES AND SODOMY OFFENSES CHARGED UNDER ARTICLES 134 AND 125, UCMJ, RESPECTIVELY.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On October 3 and November 5, 2012; and March 25 – 26, and July 29 – August 2, 2013, at Fort Riley, Kansas, a panel of officers with enlisted representation convicted Sergeant Thomas Adams (appellant), contrary to his pleas, of one specification of rape of a child, one specification of carnal knowledge, two specifications of aggravated sexual assault of a child, one specification of aggravated sexual abuse of a child, two specifications of aggravated sexual contact with a child, nine specifications of indecent liberties with a child, two specifications of sodomy with a child, one specification of producing child pornography, one specification of possessing child pornography,

and one specification of possessing child erotica, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, and 934. *United States v. Adams*, ARMY 20130693, 2017 CCA LEXIS 6 (Army Ct. Crim. App. Jan. 6, 2017) (mem. op.).

The panel sentenced appellant to a reduction to the grade of E-1, total forfeitures of pay and allowances, confinement for life with eligibility for parole, and a dishonorable discharge from the service. *Id*. The convening authority disapproved the conviction for possessing child erotica, and approved the remaining findings and the sentence. *Id*.

On January 6, 2017, the Army Court of Criminal Appeals (Army Court) set aside the findings of guilty and the sentence and authorized a rehearing in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). *Adams*, 2017 CCA LEXIS 6 at *8.

On May 11 and August 3, 2017, the government preferred "new" charges against appellant (the "2017 Charges").[1] (JA036-043). On August 4, 2017, the convening authority dismissed the original charges (the "2012 Charges"), and referred the 2017 Charges to a general court-martial. (JA215-218).

[1] The 2017 charges were not based on any new misconduct committed after the first court-martial, but were based solely on alleged misconduct occurring prior to the 2012 court-martial.

On September 8, 2017, and February 2, April 25, September 15, October 26 and 29-31, and November 1-3 and 5-6, 2018, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of aggravated sexual assault of a child, six specifications of indecent liberties with a child, one specification of indecent acts with a child, one specification of production of child pornography, one specification of sodomy, one specification of aggravated sexual abuse of a child, and one specification of abusive sexual contact with a child, in violation of Articles 120, 125, and 134, UCMJ. (JA044-049). The military judge sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for forty-three years, and to be dishonorably discharged from the service. (JA205). The convening authority approved the adjudged sentence, and credited appellant with 2,086 days of credit against his sentence to confinement. (JA049).

On July 13, 2020, the Army Court set aide and dismissed the specification of production of child pornography, and affirmed the remaining convictions and the sentence. (JA002-018). Appellant was notified of the Army Court's decision, and in accordance with Rules 19 and 20 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on September 11, 2020. This Court granted appellant's petition on December 3, 2020. (JA001).

Summary of Argument

A plain reading of the 2016 amendments to Article 43, UCMJ, compels one conclusion: appellant's prosecution for indecent liberties charged under Article 134 and sodomy with a child charged under Article 125 was time barred because Congress retroactively made the statute of limitations for those offenses five years. That conclusion is sound because neither of those offenses are enumerated in the list of "child abuse offenses" that qualify for the extended statute of limitations, and the amendment was explicitly made retroactive.

Some of these time-barred specifications of indecent liberties and sodomy with a child were re-preferred on the 2017 charge sheet, after the convening authority dismissed the 2012 charges. The savings clause of Article 43(g)(1) is inapplicable, and therefore does not spare the 2017 version of those specifications because—by the government's own admission at trial—the 2012 specifications in issue were not dismissed because they were "defective or insufficient."

Statement of Facts

The granted issue arises from the convening authority's unorthodox decision to dismiss the 2012 charges remanded for a rehearing, and to prefer and refer a new set of 2017 charges in their place.

1. After remand, the government refers a new set of charges and dismisses the charges sent back for a rehearing.

Following the Army Court's remand for a rehearing on the 2012 charges, the government preferred charges against appellant on May 11, 2017. (JA036-041). Relevant to this appeal, the 2017 charges included allegations that appellant committed indecent liberties and sodomy with a child on HP between 2003 and 2005, in violation of Articles 125 and 134, UCMJ. The 2017 charges were received by the summary court-martial convening authority (SCMCA) on May 11, 2017. (JA036-041).

An Article 32, UCMJ, preliminary hearing was conducted on the 2017 charges. Although the PHO received a copy of the 2012 Article 32 hearing, he only examined and made recommendations on the 2017 charges. (JA050-051). The preliminary hearing officer made recommendations, which included suggested modifications of the 2017 Charges and the preferral of an additional charge. (JA051, 215). On August 3, 2017, the government preferred an additional charge against appellant based on the PHO's recommendation, which was received by the SCMCA on an unknown date in August 2017. (JA042-043). The government also modified some of the 2017 charges based on the PHO's recommendations. (JA036-042).

On August 4, 2017, the convening authority dismissed the 2012 charges. (JA216-218). On the same day, he referred the modified 2017 Charges on August

4, 2017. (JA037, 043). The deputy staff judge advocate testified in a motions hearing about the dismissal, but did not explain why the convening authority took this action. (JA52-54). The trial counsel informed the military judge that the government preferred a new charge sheet when the newly-detailed trial counsel "in reviewing the evidence, believed that the date ranges which were reflected on the 2017 charge more accurately reflect the misconduct." (JA55).

2. The break-down of appellant's convictions.

Of the offenses for which appellant was convicted, five are relevant to the granted issue. All of these specifications involved the same alleged child victim, HP.

In Specification 5 of Charge II, appellant was convicted of committing indecent liberties on HP between 2003 and 2005, in violation of Article 134, UCMJ. This offense was "new" in that it had not been charged on the 2012 charge sheet. (JA224).

In Specifications 2, 3, and 4 of Charge II, appellant was convicted of three further indecent liberty offenses against HP during the same time period, in violation of Article 134, UCMJ. These specifications had slight differences in wording from their 2012 iterations, but the trial counsel described them as "the same as those charged in 2012." (JA225). Specification 2, for example, had "minor crafting differences (causing vs. directing), but the language . . . is the

same. *Id*. Specification 3 "carries the same language" as its 2012 analogue. *Id*. Specification 4 "carries the same language" as its predecessor, minus the words "and stating 'feel this', or words to that effect." *Id*.

Finally, in the Specification of Charge IV, appellant was convicted of sodomy against HP during the same 2003 to 2005 time period, in violation of Article 125, UCMJ. This charge was copied word-for-word from the 2012 charge sheet. (JA226).

3. The lower court's decision.

The Army Court rejected appellant's argument that the statute of limitations had expired for Specifications 2-5 of Charge II and the Specification of Charge IV, due to the amendments made to Article 43 by the Military Justice Act of 2016. Specifically, the Army Court held that the amendment was retroactive and that its plain language appeared to unambiguously exclude sodomy with a child under Article 125 and indecent liberties under Article 134 from the list of "child abuse offenses" with an extended statute of limitations. (JA013). However, it then looked beyond the plain language of the amendments to legislative history and "common sense" to conclude the result—that the statute of limitations for those offenses was retroactively made the same as any other offense not enumerated as a "child abuse offense"—would be "absurd." (JA013). It also concluded that with the exception of Specification 5 of Charge II—which was charged for the first time

in 2017—the savings clause of Article 43(g) spared the remaining specifications that were reproduced from the 2012 charge sheet. (JA010-011).

Issue and Argument

THE 2016 AMENDMENTS TO ARTICLE 43, UCMJ, RETROACTIVELY MADE THE STATUTE OF LIMITATIONS FIVE YEARS FOR INDECENT LIBERTIES AND SODOMY OFFENSES CHARGED UNDER ARTICLES 134 AND 125, UCMJ, RESPECTIVELY.

Standard of Review

Statutory interpretation and the applicable statute of limitations are both questions of law, which this Court reviews de novo. *United States v. Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).

Where, as here, the statute of limitations is not raised at trial, this Court reviews for plain error. *United States v. Briggs*, 78 M.J. 289, 295 (C.A.A.F. 2019), *reversed on other grounds*, 141 S. Ct. 467, 2020 U.S. LEXIS 5989 (Dec. 10, 2020). To show plain error, appellant must demonstrate "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *Id*. (quoting *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018)).

Law

1. The history of Article 43, UCMJ.

In 1986, Congress amended Article 43, UCMJ, for the first time since its enactment thirty years earlier. National Defense Authorization Act for Fiscal Year 1987 (NDAA 1987), Pub. L. No. 99-661, § 805, 100 Stat. 3816, 3908 (1986); *see generally* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 51. This amendment expanded the statute of limitations from three to five years for all offenses committed on or after enactment of the statute. NDAA 1987, § 805(b)(1); *compare* 10 U.S.C. § 843 (1988) *with* 10 U.S.C. § 843 (1982). The only exceptions to this five-year limit were: (1) absence without leave in a time of war; (2) missing movement in a time of war; and (3) any offense punishable by death. NDAA 1987, § 805(a).

Congress next amended Article 43 in 2003 to expand the statute of limitations for child abuse offenses. National Defense Authorization Act for Fiscal Year 2004 (NDAA 2004), Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003). (JA231-232). This amendment expanded the statute of limitations for such offenses to the alleged victim's twenty-fifth birthday, and—for the first time—provided an enumerated list of offenses, identified both by section of the statute and by article. NDAA 2004, § 551 (b)(2)(A). The offense of "sodomy in

violation of section 925 of this title (article 126 [sic])" was specifically enumerated as a "child abuse offense." NDAA 2004, § 551(b)(2)(B)(iv).

Article 43 again changed in January 2006. National Defense Authorization Act for Fiscal Year 2006 (NDAA 2006), Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264 (2006). (JA233-242). Congress changed the statute of limitations for child abuse offenses to "the life of the child or within five years after the date on which the offense was committed . . . ." NDAA 2006, § 553(b)(1). (JA242). Congress also amended portions of the definition of a "child abuse offense" for purposes of Article 43, electing to continue to designate those offenses by section of the statute and article number. NDAA 2006, § 553(b)(2). In addition to these amendments to the definition, Congress created an entirely new category of "child abuse offense": an "act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense under chapter 110 or 117, or under section 1591, of title 18." NDAA 2006, § 553(b)(3).

Congress's next substantive amendment to the statute came in 2012, when it changed the listing of statute sections and articles listed in Article 43 (b)(2) to comport with changes it made elsewhere in the code. National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), Pub. L. No. 112-81, § 541(d)(1), 125 Stat. 1298, 1410 (2011). (JA243-251). In so doing, it deleted the offenses of indecent assault and indecent liberties with a child from those offenses

covered by Article 134, and added Articles 120a, 120b, and 120c (along with their corresponding statutory sections) to the definition of "child abuse offense." NDAA 2012, § 541(d)(1). (JA 250). Notably, Congress stated these changes "apply with respect to offenses committed on or after such effective date," thereby explicitly declining to make the changes retroactive. NDAA 2012, § 541(f).

As part of the National Defense Authorization Act for Fiscal Year 2014 (NDAA 2014), Pub. L. No. 113-66, § 1707, 127 Stat. 672 (2013), Congress amended Article 125, UCMJ, to prohibit only forcible sodomy and bestiality. However, it did not amend any of the references to sodomy in Article 43. (JA253). That happened the following year, when Congress amended Article 43(b)(2)(B), UCMJ, to strike the term "sodomy" from clauses (iii) and (v), and insert in its place "forcible sodomy" as an enumerated "child abuse offense." National Defense Authorization Act for Fiscal Year 2015 (NDAA 2015), Pub. L. No. 113-291 § 531(d)(2), 128 Stat. 3292, (2014).

Thus, on December 22, 2016, Article 43(b)(2)(B)(i-v) defined a "child abuse offense" as follows:

> (B) In subparagraph (A), the term 'child abuse offense' means an act that involves abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:
>
> > (i) Any offense in violation of section 920, 920a, 920b, or 920c of this title (article 120, 120a, 120b, or 120c), unless the offense is covered by subsection (a).

> (ii) Maiming in violation of section 924 of this title (article 124).
>
> (iii) Forcible sodomy in violation of section 925 of this title (article 125).
>
> (iv) Aggravated assault or assault consummated by a battery in violation of section 928 of this title (article 128).
>
> (v) Kidnaping, assault with intent to commit murder, voluntary manslaughter, rape, or forcible sodomy, or indecent acts in violation of section 934 of this title (article 134).

10 U.S.C.A. § 843(b)(2)(B)(i-v) (2016). (JA256).

On December 23, 2016, Congress once again waded into Article 43. *See* National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. No. 114-328, § 5225, 130 Stat. 2000, 2909–10 (2016). (JA254-258). This time, Congress made the largest substantive amendments to the Article since the 1986 amendments. *See generally* NDAA 2017, § 5225. This amendment eliminated clauses (i) through (v) of subsection (b)(2)(B) and replaced them with new language. NDAA 2017, § 5225(d). The new sections read:

> (B) In subparagraph (A), the term 'child abuse offense" means an act that involves abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:
>
> > (i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).
> >
> > (ii) Maiming in violation of section 928a of this title (article 128a).

> (iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).
>
> (iv) Kidnapping in violation of section 925 of this title (article 125).

NDAA 2017, § 5225(d). (JA255-256). Congress made these changes retroactive, stating they "shall apply to the prosecution of any offense committed *before*, on, or after the date of the enactment of [§ 5225] if the applicable limitation period has not yet expired." NDAA 2017, § 5225(f) (emphasis added). (JA256).

2. Retroactivity.

As a general rule, "an accused is subject to the statute of limitations in force at the time of the offense." *Mangahas*, 77 M.J. at 222 (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)). Subsequent amendments to the statute of limitations are presumed to not apply because "there is both a presumption against retroactive legislation and a presumption in favor of repose." *Briggs*, 78 M.J. at 293 (citing *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *United States v. Habig*, 390 U.S. 222, 227 (1968)). Naturally, this presumption is negated if the subsequent amendment contains express language from Congress directing retroactive effect, subject to the limits of the Ex Post Facto Clause. U.S. CONST. art. I, § 9, cl. 3; *Briggs*, 78 M.J. at 293 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)); *Lopez de Victoria*, 66 M.J. 67 (citing *Bowen*, 488 U.S. at 208–

09; *Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162–63 (1928)).

When previously faced with questions of retroactive applicability of a statute of limitations, courts look to the express language of the text of Article 43. *Lopez de Victoria*, 66 M.J. at 73–74. In *Lopez de Victoria*, this Court noted that Congress does have the authority to make a statute retroactive, and then examined the statute to determine whether Congress intended the 2003 amendment to apply retroactively. *Id.* at 72–73. It concluded Congress did not "based on the general presumption against retroactive legislation, the general presumption in favor of liberal construction of criminal statutes of limitation in favor of repose, and the absence of any indication of congressional intent to apply the 2003 amendment retrospectively." *Briggs*, 78 M.J. at 293 (citing *Lopez de Victoria*, 66 M.J. at 74). In plain terms, "congressional enactments. . . will not be construed to have retroactive effect unless their language requires this result." *Id*. at 293 (quoting *Bowen*, 488 U.S. at 208).

3. The savings clause of Article 43, UCMJ.

Article 43(b)(1) provides that in general, the statute of limitations is tolled when it is received by the officer exercising summary court-martial jurisdiction over the command.[2]

Article 43(g), UCMJ, the savings clause for the statute of limitations, lays out the procedure for tolling the statute of limitations when charges and specifications are dismissed and later re-preferred. It provides that when charges or specifications with an expired statute of limitations are dismissed as "defective or insufficient for any cause," retrial is not barred on the new charges and specifications, provided that they are received by the summary court-martial convening authority within 180 days after dismissal and they allege the same acts or omissions contained in the dismissed charges and specifications. *See* Article 43(g)(1)-(2).

Argument

"[O]ne principal benefit of statutes of limitations is that typically they provide clarity, and it is therefore reasonable to presume that clarity is an objective for which lawmakers strive when enacting such provision." *United States v. Briggs*, 141 S. Ct. 467, 2020 U.S. LEXIS 5989, at *8 (2020) (internal citations

[2] The other periods that toll a statute of limitations, such as the accused being absent or in civil confinement, are not applicable or relevant to this appeal. *See generally* Article 43(c)-(f).

omitted). This principle, coupled with a plain reading of the statute, leads to the following conclusion: Congress clearly and unambiguously made the 2016 amendments to Article 43 retroactive. As the amended list of "child abuse offenses" did not contain indecent liberties charged under Article 134 or sodomy charged under Article 125, the statute of limitations for those offenses was retroactively made five years—and had expired well before the summary court-martial officer received the charges in 2017.

1. The plain language of the statute is clear: the 2016 amendment was retroactive, and neither indecent liberties under Article 134 nor sodomy under Article 125 is a "child abuse offense."

The text of the 2016 amendments to Article 43—unlike any of the prior amendments to Article 43—clearly provide that the new statutes of limitations apply retroactively "to the prosecution of any offense committed *before*, on, or after the date of the enactment of [§ 5225] if the applicable limitation period has not yet expired." NDAA 2017, § 5225(f) (emphasis added). Because this language is clear and unambiguous, it is subject to only one logical interpretation: That NDAA 2017, § 5225's amendment applied to the prosecution of every crime, regardless of when it was committed.

As NDAA 2017, § 5225, retroactively applies, the only question is whether indecent liberties and sodomy with a child, as charged in this case, constituted "child abuse offense[s]" after the enactment of § 5225. Looking at the plain

language of Article 43, which defines "child abuse offense" by statute and punitive article, it is clear that neither indecent liberties under Article 134 nor sodomy with a child under Article 125 are listed as "child abuse offenses." Since they are not enumerated under the definition of "child abuse offense," the statute of limitations for those offenses when charged under those punitive articles is therefore the same as any other offense—five years.

This conclusion not only fits with the plain language of Article 43, but is harmonious with the canon of statutory construction that when Congress provides an enumerated list, that list is presumed exclusive unless otherwise stated. *See United States v. Chase*, 135 U.S. 255, 259 (1890); *United States v. Salen*, 235 U.S. 237, 249 (1914); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012) (The Negative-Implication Canon states the expression of one thing implies the exclusion of others). This presumption exists because *if* Congress does not mean for the list to be exclusive, it knows how to—and, indeed regularly does—include a residual clause or language indicating the list is non-exclusive. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (discussing the Armed Career Criminal Act's residual clause); *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 173 (1989) (noting Congress's use of words and phrases like "such as" and "any" indicates "enumeration by way of

example, not an exclusive listing."). Further, where Congress has provided an exclusive list, courts are not at liberty to add to that list. *Defenders of Wildlife*, 551 U.S. at 671; *see Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020).

In NDAA 2017, § 5225(a), Congress did not insert a residual clause or any other language indicating the list of child abuse offenses in Article 43 was non-exclusive. To the contrary, Article 43, as amended, defines a child abuse offense as an "act that involves abuse of a person who has not attained the age of 16 years *and constitutes any of the following*" enumerated offenses. In so doing, Congress provided unambiguous language that clearly cabins child abuse offenses, for purposes of Article 43, to those offenses listed by statute and article.

The court below determined that a "child abuse offense" depends on whether it *would* be charged as an enumerated Article if the misconduct occurred today. This interpretation is only feasible by reading in the conditional verb "would" before "constitutes" in the statute. Yet, courts may not alter a statute's reach "by inserting words Congress chose to omit." *Lomax*, 140 S. Ct. at 1725 (citing *Va. Uranium, Inc., v. Warren*, 139 S. Ct. 1894, 1906 (2019)); *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) ("Interpos[ing] additional language into a rule that is anything but ambiguous" violates the fundamental rule of statutory interpretation); *see Defenders of Wildlife*, 551 U.S. at 671.

If Congress had intended this interpretation, it would have inserted that conditional language. In fact, it did so in the very next subsection of Article 43, where it further defined a child abuse offense as "an act that involves the abuse of a person who has not attained the age of 18 and *would* constitute an offense" under certain Title 18 offenses. Article 43(b)(2)(C) (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion." *United States v. Bowersox*, 72 M.J. 71, 74 (C.A.A.F. 2013).

As amended, Article 43 is clear on what constitutes a "child abuse offense"—and neither indecent liberties under Article 134 nor sodomy under Article 125 is among that list. Thus, the statute of limitations for those offenses was made five years, to apply retroactively.

2. A plain meaning interpretation of § 5225 and Article 43 does not render an absurd result.

"[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*,

242 U.S. 470, 485 (1917))). The absurdity doctrine states a "provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234 (2012). Courts may deviate from the text where "there is *no* sense of a provision—*no* permissible meaning—that can eliminate an absurdity unless the court fixes a textual error." *Id.*

But the absurdity doctrine does not provide *carte blanche* to courts to do violence to texts it finds distasteful—or even those it thinks are merely unusual. *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1513 (2019) ("[A] result that may seem odd . . . is not absurd.") (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U. S. 546, 565 (2005)). The hallmark of an absurd result is one "no reasonable person could intend." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012) (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 414 n.13 (2010) ("Congress may well have accepted such anomalies as the price of a uniform system . . . .")).

The bar for invoking the absurdity doctrine to thwart the plain language of a statute is necessarily a high one. *Id*. Justice Story wrote that the absurdity must be "so monstrous that all mankind would, without hesitation, unite in rejecting the

application." *Id.* (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427, at 303 (2d ed. 1858)); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[T]o justify a departure from the letter of the law . . . the absurdity must be so gross as to shock the general moral or common sense."). This is so because "it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *see United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J. dissenting) ("For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."); *Crooks*, 282 U.S. at 60 (citations omitted) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.").

The court below found that, while the statutory language was clear and unambiguous, the result—a shorter statute of limitations—was "absurd." That the statute of limitations might be shortened is hardly odd, let alone "so monstrous" that "all mankind" would unite in rejecting such an outcome. The judges who decided a similar issue in *United States v. McPherson* did not find the result

absurd, for one. 2020 CCA LEXIS 350, at * 34-35 (Army Ct. Crim. App. Sep. 28, 2020) (mem. op.).[3] And their conclusion was well-founded for two reasons.

First, there is a longstanding presumption that criminal statutes of limitation are "to be liberally interpreted in favor of repose." *United States v. Scharton*, 285 U.S. 518, 521–22 (1932); *Mangahas*, 77 M.J. at 224. As the Supreme Court held over fifty years ago, and again in its most recent foray into the military justice system, statutes of limitations both provide clarity and protect individuals from having to defend themselves against "overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966); *United States v. Briggs*, 2020 U.S. LEXIS 5989, at *8 (2020) (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *Artis v. District of Columbia*, 138 S. Ct. 594, 607–08 (2018)). Who more than criminal defendants should be able to "rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020). This justification alone provides a non-absurd reason why Congress may have reduced the statute of limitations.

[3] The Judge Advocate General of the Army filed a certificate of review of this decision on the following issue: "DID THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS ERR WHEN IT DISMISSED THE SPECIFICATIONS IN CHARGE I ON THE GROUNDS THAT THE STATUTE OF LIMITATIONS HAD EXPIRED?" This case is currently pending before this Court. Docket No. 21-0042.

Second, Congress may well have accepted anomalies such as this one in the name of providing for a uniform system. *Shady Grove Orthopedic*, 559 U.S. at 414 n.13. As the Supreme Court has recently noted, statutes of limitations are "fundamental to a well-ordered judicial system," and often seek "to achieve a broader system-related goal, such as . . . promoting judicial efficiency." *Artis*, 138 S. Ct. at 607–08; *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). As a result, Congress may have assessed the need for uniformity—in the *Uniform* Code of Military Justice—as a paramount concern. This provides yet another non-absurd reason for Congress's action.

It is of no matter that the offenses for which appellant was convicted—indecent liberties and sodomy with a child—were removed from Article 43's list of "child abuse offenses" prior to the NDAA 17. One precept of statutory interpretation is that "Congress must be presumed to have known of its former legislation. . . and to have passed the new laws in view of the provisions of the legislation already enacted." *Owner-Operators Independent Drivers Ass'n v. Skinner*, 931 F.2d 582, 586 (9th Cir. 1991) (quoting *St. Louis I.M. & S. Ry v. United States*, 251 U.S. 198, 207 (1920)).

Congress presumably knew that its prior legislation had removed indecent liberties and sodomy with a child from the list of enumerated child abuse offenses. It therefore must have had an idea about what would happen to older offenses

when it decided to make the amendment retroactive. This is especially so because making a statute of limitations retroactive is a momentous decision that—given the potential consequences—is not to be taken lightly. If there is any absurdity in this case, it is this: the notion that Congress acted blindly and without consideration of what could happen when it made the uncommon and significant decision to enact a retroactive statute of limitations.

3. The savings clause of Article 43(g), UCMJ, is inapplicable for the 2017 specifications that were copied and pasted from the 2012 charge sheet.

With the exception of Specification 5 of Charge II—which was charged for the first time in 2017—the remaining specifications at issue were lifted from the 2012 charge sheet. Thus, for these specifications, there is an additional level of analysis required concerning whether they are spared by the savings clause of Article 43(g).

By its plain language, Article 43(g)(1) applies only "[i]f charges and specifications are dismissed as defective or insufficient for any cause." This Court must necessarily consider why the 2012 charges were dismissed. As the trial counsel explained to the military judge, the 2012 charge sheet was dismissed because the "date ranges which were reflected on the 2017 charge sheet more accurately reflect the misconduct committed by the accused." (JA055).

However, the government admitted that not all of the dismissed charges involved the shift in the date range. In fact, *none* of the specifications at issue for

this appeal had the shifted date range. As the government put it, Specifications 2-4 of Charge II were "the same as those charged in 2012." (JA255). The government correctly noted that the sodomy charge (Charge IV, Specification 1) was a "verbatim recitation of Charge III, Specification 1 from 2012." (JA226).

As is clear from the government's own explanation, those specifications were not dismissed for any deficiency or insufficiency; rather, they were reproduced "verbatim" or "the same as. . . charged in 2012." Absent a deficiency or insufficiency in those charges, Article 43(g)(1) does not save those specifications.

4. The expired statute of limitations was plain and obvious.

Since appellant did not object, and the military judge did not instruct on the statute of limitations issue, the error is forfeited and analyzed for plain error. *Briggs*, 78 M.J. at 296.

Here, the error is clear because the language of Article 43 is plain and obvious: neither Article 134 indecent liberties nor Article 125 sodomy with a child are enumerated "child abuse offenses" with an extended statute of limitations, and the 2016 amendments to Article 43 were clearly made retroactive. Even the court below concluded that the statute's language and effect was unambiguous—it simply disregarded that by improperly turning to legislative history and applying an improperly low threshold for the absurdity doctrine. This is not an instance

where the text of the statute is subject to reasonable dispute. Assessed at the time of appeal, the error in this case was plain. *See Briggs*, 78 M.J. at 295 (citing *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008)).

The issue should also have been plain at the time of trial, given the unique nature of this case. The military judge was on notice to pay close attention to Article 43. When the Army Court denied appellant's extraordinary petition for relief on the defective referral, it noted that there may be statute of limitations issues. *Adams v. Cook*, 2018 CCA LEXIS 30, at *5 (A. Ct. Crim. App. Jan. 23, 2018). (JA309-310). That warning, coupled with the fact that the charges were very old in this case and that NDAA 17's amendments to the statute of limitations had only recently been enacted, should have been a red flag to the military judge to look at the changes to Article 43. If he did, he would have plainly seen that the statute of limitations for these offenses had long since expired.

Regarding prejudice, no speculation is required to conclude appellant would have sought dismissal of these specifications had he been advised of the proper statute of limitations. *See Briggs*, 78 M.J. at 296. Accordingly, appellant has established that the error was plain and materially prejudicial to his substantial rights.

Conclusion

WHEREFORE, appellant respectfully requests this Court dismiss Specifications 2, 3, 4, and 5 of Charge II and the Specification of Charge IV, and return the record to the Judge Advocate General for referral to the convening authority to order a sentence rehearing. *See Lopez de Victoria*, 66 M.J. at 74.

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Certificate of Filing and Service

I hereby certify that a copy of the foregoing in the case of *United States v. Adams*, Crim. App. Dkt. No. 20130693, USCA Dkt. No. 20-0366/AR, was electronically filed with the Court and the Government Appellate Division on January 19, 2021.

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