IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant

v.

Staff Sergeant (E-6)
MCPHERSON, Danny L.,
United States Army,
Appellee

BRIEF ON BEHALF OF APPELLANT IN SUPPORT OF CERTIFICATE FOR REVIEW

Crim. App. No. ARMY 20180214

USCA Dkt. No. 21-0042/AR

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Index of Brief

Table of Authorities

Supreme Court Cases

Court of Appeals for the Armed Forces Opinions

Army Court of Criminal Appeals Opinions

Other Court Opinions

Statutes

National Defense Authorization Acts

Rules for Courts-Martial

Other Authorities

Legislative History

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

Issue Presented

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?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016). This Honorable Court has jurisdiction pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2019), which mandates review in "all cases reviewed by a Court of Criminal Appeals, which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces (C.A.A.F.) for review."

Statement of the Case

On March 13, 2018, a military judge sitting as a general court-martial convicted Appellee, contrary to his pleas, of six specifications of indecent acts with a child, in violation of Article 134, UCMJ (2002); two specifications of aggravated sexual contact with a child, in violation of Article 120(g), UCMJ (2008); and one specification of assault consummated by battery, in violation of

Article 128, UCMJ (2012). (JA 36–39, 86–87). The military judge acquitted him of one specification of aggravated sexual contact, three specifications of assault consummated by battery, and one specification of sexual abuse of a child, in violation of Article 120(g), UCMJ (2008), and Articles 128 and 120b, UCMJ (2012), respectively. (JA 36–39, 86–87). The military judge sentenced Appellee to 28 years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. (JA 88). The convening authority approved the sentence as adjudged. (JA 34).

On September 28, 2020, the Army Court set aside the findings of guilty to specifications 1–6 of Charge I because they were time-barred from prosecution due to a perceived reduction to the statute of limitations applicable to the offense of indecent acts with a child charged under Article 134, UCMJ. *United States v. McPherson*, 20180214 ARMY, 2020 CCA LEXIS 350 (Army Ct. Crim. App. 28 Sept. 2020) (mem. op.). The Army Court reassessed Appellee's sentence to 15 years of confinement, reduction to the grade of E-1, and a dishonorable discharge. *McPherson*, 2020 CCA LEXIS 350, at *41–42.

Statement of Facts

Appellee's biological daughter, K.R., was born on February 4, 1994. (JA 47–48). She lived in White Hall, Illinois in 2004. She visited Appellee at Ft. Campbell, KY sometime between May 1, 2004, and August 24, 2004, following

her completion of the 4th grade. (JA 50). During this visit, Appellee began to touch and kiss K.R. inappropriately. On one occasion, Appellee kissed K.R. "using his tongue." (JA 54). K.R. was 10 years old at the time. (JA 50). On a separate occasion, Appellee rubbed K.R.'s vulva over her clothing while he held her hand on his exposed, erect penis "so [she] would be stroking it." (JA 56–58). He also rubbed his exposed, erect penis on K.R.'s clothed vulva. (JA 59).

K.R. was confused by Appellee's sexual touching. She testified that she "didn't know what to do" and that she was very uncomfortable when Appellee kissed her while using his tongue. (JA 54). K.R. felt that it was wrong, but she nevertheless did not know what to do about it. (JA 53).

Appellee also visited K.R. at her grandparents' home later in 2004. (JA 61–62). There, on two occasions, Appellee, digitally penetrated K.R.'s vagina, and he made her "stroke" his exposed and erect penis. (JA at 65–66). Following these assaults, Appellee told K.R. in "a very stern voice" that she could never tell anyone. (JA 68).

K.R. testified why she did not report Appellee's offenses immediately. (JA 60–61, 69). She observed that his temper scared her. (JA 60). K.R. also testified that she did not tell her mom because she "was scared . . . [she] didn't want to hurt them, and [she] was scared [her mom] would do something stupid . . . ." (JA 61, 69). K.R. testified that she feared that her mom would do something "stupid" and

that she would lose her mom like she lost her father. (JA 61). Ultimately, K.R. reported this abuse in 2016; she was 22 years old. (JA 70–71). At the time of the offenses in 2004, the applicable charge was indecent acts with a child under Article 134, UCMJ, and the applicable statute of limitations for that offense was until the victim's twenty-fifth birthday.

At trial, Dr. M.S., testified as an expert in child forensic psychiatry. (JA 74). Specifically, Dr. M.S. observed that children delay reporting sexual abuse because:

> [T]hey just have to even have the developmental understanding that that which has happened to them is wrong, so the moral understanding—the understanding about sexuality and broken boundaries—they have to have the cognitive abilities to even speak of the event in a way that adults can record and understand it.

(JA 72, 74). He further testified children "really [do not] know how to make sense of that or what to do with that experience." (JA 80). Dr. M.S. testified, "when a child is touched inappropriately . . . they may or may not completely understand and appreciate how wrong or what is wrong with it." (JA 78).

Dr. M.S. testified further that it is common for children to hold secrets and "to accept the shame of it for themselves . . . in the name of . . . preserving family relationships." (JA 75–76). He further noted that you cannot underestimate the power of parental relationships to a child. (JA 76). Dr. M.S. also elaborated that "[c]hildren want to preserve those relationships," and that "they want to do it really

at any cost." (JA 76). He also observed that parents hold "a unique ability to really understand the victim, to understand their fragilities, their vulnerabilities." (JA 78). Testifying further, Dr. M.S. noted that parents understand their child's "weak spots, points of entry," and what it will "take to get them to keep [a] secret." (JA 78–79). He also informed the court-martial that because of a need to preserve family relationships "children are extra vulnerable when it comes to parents." (JA 79).

Summary of Argument

The Army Court incorrectly decided that Appellee's sexual crimes committed upon his minor daughter were subject to a mere five year statute of limitations. Indeed, it found against the weight of more than a decade of expressed Congressional purpose and intent that Congress intended to prematurely foreclose certain prosecutions for abuses against children charged under Article 134, UCMJ, Indecent Acts with a Child. What is more, the Army Court reached this conclusion despite the fact that since 2003, on three occasions—to include the very legislation that the Army Court found to curtail viable prosecutions—Congress had only increased the period of limitations in order to protect children. To reach this strained conclusion, the Army Court incorrectly found that the 2016 amendments to Article 43, UCMJ, plainly excluded Article 134, UCMJ, Indecent Acts with a Child, from every elongated limitation period ever enacted. This was error. Put

simply, the omission of Article 134, UCMJ from the statutory scheme implemented in 2016 did not exclude the Article from all previous schemes. That the omission resulted from a conforming amendment further demonstrates the omission should not be given such a radical effect. The Army Court's determination—despite an legislative enlargement of the statute of limitations for child abuse offenses—that the omission of Article 134, UCMJ from the list of child abuse offenses in order to conform the UCMJ with other details of the legislation, negated the elongated period inapplicable to that offense by somehow leap-frogging backwards over three previously expanded statutes of limitations for that same offense to reduce it to the default statute of limitations of only five years is flawed on every level of analysis.

Even if a tortured reading of the statute could be read to plainly state that Article 134 was no longer included in the elongated limitation period, the conclusion is so absurd as to be bizarre. To be sure, such a finding would defeat not only the intent but the very purpose of the legislation. Accordingly, this nonsensical conclusion should be eschewed.

Standard of Review

The statute of limitations applicable to a particular offense is a question of law 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)). Failure to raise a statute of limitations claim at a court-martial is reviewed for plain error. *United States v. Briggs*, 78 M.J. 289, 295 (C.A.A.F. 2019).

Argument

Appellee's prosecution for Indecent Acts with a Child under Article 134, UCMJ, was not barred by the statute of limitations because the summary court-martial convening authority received the sworn charges prior to the expiration of the statute of limitations. The conforming amendments made by Congress to Article 43, UCMJ, in the National Defense Authorization Act [NDAA] Fiscal Year 2017 [FY 2017] did not serve to prematurely and retroactively shorten the lengthy statute of limitations for Indecent Acts with a Child Under Article 134, UCMJ.

A. Appellee's Prosecution Was Not Time-Barred Because the Specifications of Charge I Were Timely Received in Accordance With the Version of Article 43, UCMJ, in Effect When He Abused His Daughter.

Article 43, UCMJ, defines the statute of limitations for court-martial offenses. "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)). In 2004, when Appellee abused his daughter, Article 43, UCMJ, permitted the prosecution of a "child abuse offense" so long as "the sworn charges and specifications are received before the child attains the age of 25 years by an

officer exercising summary court-martial jurisdiction with respect to that person." Article 43, UCMJ (2004), as amended by NDAA FY 2004, Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003). The statute defined a "child abuse offense" as "an act that involves sexual or physical abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses . . . indecent acts or liberties with a child in violation of section 934 of this title (article 134)." *Id*. Appellee was charged with indecent acts with a child under Article 134, UCMJ, for abusing his daughter in 2004; therefore, the limitation period for this offense required the summary court-martial convening authority (SCMCA) to receive the sworn charges before she turned 25 years old. The SCMCA received the charges on March 27, 2017; K.R. was 23 years old at the time. (JA 36–39, 47–48). Therefore, the charges were timely received by the SCMCA in accordance with the limitation period provided by Article 43, UCMJ, in effect at the time of Appellee's offenses. This is important to note because, contrary to the decision below which confined itself to a binary decision between the default limitations period or the newly expanded period, the government's position is not, and never has been, that the prosecution should receive the benefit of that longer period. Instead, the government seeks but only to apply the statute of limitations in effect at the time of the offense.

B. The NDAA for Fiscal Year 2017 Did Not Retroactively Shorten the Statute of Limitations for Appellee's Sexual Abuse of K.R.

The NDAA FY 17 did not prematurely expire the limitation period in effect for Appellee's sexual abuse of K.R., and the conforming amendments to Article 43(b)(2)(B)(i)–(v) were not intended to have substantive effect. Conversely, the Army found the December 23, 2016, enactment of the NDAA FY 17 curtailed the elongated limitation period for child abuse offenses charged under Article 134, UCMJ, Indecent Acts with a Child. Further, by the Army's logic and express holding, the statute of limitations for Appellee's sexual abuse of K.R. expired in 2009 when she was only 15. This conclusion is nonsensical and contrary to the plain meaning of the statute.

First, addressing what the law actually accomplished, it is clear the NDAA FY 17 directed sweeping changes to the UCMJ. NDAA FY17, Pub. L. No. 114-328 § 5001, 130 Stat. 2000 (identifying "DIVISION E—UNIFORM CODE OF MILITARY JUSTICE REFORM" as the Military Justice Act of 2016 [MJA 2016]).[1]

[1] An argument can be made that the NDAA FY 17 was not in effect during the pendency of Appellee's trial. Congress structured MJA 2016 such that the effective date differed from the enactment date of the legislation:

> *Except as otherwise provided in this division*, the amendments made by this division *shall take effect* on the date designated by the President, which date shall be not later than the first day of the first calendar month that begins two years after the date of the enactment of this Act.

Holistically, Congress increased the limitation period for child abuse offenses through a substantive change to Article 43, UCMJ. NDAA FY 17, Pub. L. No. 114-328 § 5225(a) ("Subsection (b)(2)(A) of [Article 43, UCMJ,] is amended by striking "five years" and inserting "ten years."). The Army Court ascribed no meaning to this expression of Congressional intent. Instead, the Army focused on the resulting omission of Article 134 from the list of offenses located in Article

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NDAA FY17, Pub. L. No. 114-328 § 5542(a) (emphasis added). Section 5225 noted that "[t]he amendments made by subsections (a) . . . and (d) shall apply to the prosecution of any offense committed before, on, or after the *date of the enactment* of this subsection if the applicable limitation period has not yet expired." NDAA FY 17, Pub. L. No. 114-328 § 5225(f) (emphasis added); *see also* Exec. Order No. [EO] 13,825, 46 Fed. Reg. 83, 9889–91 (March 1, 2018) (instructing that the changes do not become effective until 1 January 2019). Although a statute's date of enactment is usually the same as its effective date, this is not always the case. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404–05 (1991) ("Absent clear direction by Congress to the contrary, a law takes effect on the date of its enactment."). In the instant case, Congress established a later effective date for the amendments to Article 43, UCMJ. NDAA FY 17, Pub. L. No. 114-328 § 5542(a) ("Except as otherwise provided . . . the amendments made by this division shall take effect on the date designated by the president . . . not later than" 1 January 2019.); *But see*, NDAA FY 18, Pub. L. No. 115-91, 131 Stat. 1387 § 531(n) (2017) (clarifying that "[w]ith respect to offenses committed before the date designated by the President under section 5542(a) of the Military Justice Act of 2016 . . . Subsection (b)(2)(B) of [Article 43] . . . Shall be applied as in effect on December 22, 2016."). The Army Court interpreted this clarification to mean that the 2017 amendments had taken effect. Interestingly, NDAA FY 18, Pub. L. No. 115-91, § 531(p) observed that the effective date of the provisions of § 531 took "effect immediately after the amendments made by the Military Justice Act of 2016 . . . as provided for in section 5542 of that Act. . . ." Accordingly, it can be said that none of the provisions took effect until January 1, 2019, and that Congress merely clarified that the statute of limitations for child abuse crimes committed before that date were the same as they were before enactment (not implementation) of MJA 2016.

43(b)(2)(B), UCMJ—directed by a conforming amendment in the MJA 2016—to reach a conclusion that the crime was not only excluded from the statutory scheme going forward but from all prior iterations of the statute. This conclusion is wrong.

The Army Court mistakenly relied upon the omission of Article 134, UCMJ, from the list of child abuse offenses in Article 43, UCMJ, to conclude that the statute of limitations expired for Appellee's crimes against K.R. Contrary to the Army Court's holding, a review of the public law's role in setting the conditions for the redesign of the UCMJ leads to the easy conclusion that the resulting omission of Article 134, UCMJ did not mean to foreclose valid prosecutions of child abusers. Instead, the conforming amendments described in Section 5225(d) only meant to realign Article 43, UCMJ, with the structure and content of the punitive articles of the UCMJ as amended by MJA 2016, going forward. Thus, these changes were not intended to result in a substantive change to curtail the statute of limitations applicable to past criminal acts against children. *See Cyan, Inc. v. Beaver Cty Emp. Ret. Fund*, 138 S. Ct. 1061, 1071–72 (2018) ("Congress does not make radical—but entirely implicit—changes through technical and conforming amendments.") (internal quotation marks and citations omitted).

Lost in the Army Court's analysis is the important fact that a multitude of changes resulted from the MJA 2016. The MJA 2016 was the single most comprehensive change to the UCMJ in a generation. 162 Cong. Rec. S6871 (daily

ed. 8 Dec. 2016) (statement of Sen. John McCain) ("Taken together, the provisions contained in the NDAA constitute the most significant reforms to the [UCMJ] in a generation."). This generational revision included substantive and non-substantive changes to the UCMJ. Consequentially, in addition to substantively increasing the limitation period for child abuse crimes—for the third time since 2003—Article 43, UCMJ, required non-substantive modifications to reflect other revisions to the Code. Accordingly, certain amendments to Article 43, UCMJ, merely sought to conform the statute to the UCMJ's structure following implementation of the MJA 2016.

Tellingly, Congress sign-posted its intent behind its amendments. In so doing it specifically instructed that the changes to Article 43(b)(2)(B)(i)–(v), UCMJ, were made merely to conform the statute to the rest of the legislation. Indeed the legislation clearly stated, "CONFORMING AMENDMENTS–Subsection (b)(2)(B) of [Article 43, UCMJ,] is amended by striking clauses (i) through (iv) and inserting the following new clauses: "(i) Any offense in violation of [Articles 120, 120a, 120b, 120c, or 130, UCMJ,] unless the offense is covered by subsection (a); (ii) Maiming in violation of [Article 128a, UCMJ]; (iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offense in violation of [Article 128, UCMJ]; [and] (iv) Kidnapping in violation of .

. . [Article 125, UCMJ]." NDAA FY 17, Pub. L. No. 114-328 § 5225(d).[2] Similar language was not included when making a substantive change to increase the limitation period. *See*, NDAA FY 17, Pub. L. No. 114-328 § 5225(a) (not including the phrase "Conforming Amendment"). Rather than recognize Congress's directions of the manner, means, and why to update Article 43, UCMJ, the Army Court chose to give substantive effect to all changes irrespective of the expressed intent of Congress. *McPherson*, 2020 CCA LEXIS 350, at *23.

That the NDAA FY 17 amendments to Article 43(b)(2)(B)(i)–(v), UCMJ, were not intended to have substantive effect is plainly evident. Congress unequivocally stated that these particular amendments were conforming in nature. NDAA FY 17, Pub. L. No. 114-328 § 5225(d). Therefore, these were non-substantive amendments to bring Article 43, UCMJ, in line with the UCMJ after

[2] The conforming nature of the modifications to Article 43(b)(2)(B)(i)–(v), UCMJ, further suggests that this part of the MJA was not effective until January 1, 2019. Arguably, the changes could not have been effective on 23 December 2016 because they related to modifications that would not occur until the full implementation of the MJA 2016. *Compare* Article 43(b)(2)(B)(ii)–(v), UCMJ, 10 U.S.C. § 843 (2016) (describing the offense of maiming under Article 124, UCMJ; forcible sodomy under Article 125, UCMJ; and kidnapping under Article 134, UCMJ) *with* Pub. L. No. 114-328, § 5225(d)(ii–iv) (describing maiming under Article 128a, UCMJ, and kidnapping under Article 125, UCMJ). Accordingly, the amendments directed by Section 5225(d)(ii–iv) would not take place for more than two years in the future. This further brings into question whether the clarifying language found in NDAA FY 18, Pub. L. No. 115-91, § 531(n) compels a conclusion that date of enactment and date of implementation of NDAA FY 17 § 5225(d)(ii)–(iv) were the same.

the comprehensive changes took effect. *See Cyan, Inc.*, 138 S. Ct. at 1071–72; Donald Hirsh, Drafting Federal Law, 39–40 (the Office of Legislative Counsel, United States House of Representatives 2d ed.) (1989) ("[A] conforming amendment" is "an amendment of no independent legal significance that is intended [to] conform statutory language to substantive changes made elsewhere."). "[T]he Supreme Court has implied that when Congress designates an amendment as a 'conforming amendment' this constitutes valid evidence of legislative intent that the amendment should be read as a nonsubstantive reaction to related legislation." *Springdale Memorial Hospital Ass'n. v. Bowen*, 818 F.2d 1377, 1386 n.9 (8th Cir. 1987) (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981)).

Instead of giving due consideration to the express intent of Congress, the Army Court adopted an interpretive approach that resulted in an unintended "radical" effect. To assert that the effect was radical is not an overstatement. Ultimately, the Army Court found that an unexpired statute of limitation was suddenly terminated retroactively—the radical effect—by giving meaning to omitted language—an "entirely implicit" reading of the statute. This interpretation should be rejected. *See Cyan, Inc.*, 138 S. Ct. at 1071–72 ("Congress does not make radical—but entirely implicit—changes through technical and conforming amendments."). In expressly choosing to give substantive effect to a conforming

amendment, *McPherson*, 2020 CCA LEXIS 350, at *23, the Army Court frustrated Congress's intent. *See Cyan, Inc.*, 138 S. Ct. at 1071–72 ("Congress does not hide elephants in mouseholes.") (internal marks omitted) (citation omitted). Simply stated, the omission of Article 134, UCMJ, from the statutory scheme redesigned by MJA 2016, at most, was the result of a reorganization of the UCMJ, and should not be given substantive effect. The Army Court's opinion should be reversed.

C. Appellee's Indecent Act Committed Upon K.R. Constitutes a Child Abuse Offense Under the Plain Language of the Statute.

When interpreting a statute, courts analyze first, "the language itself [and] the specific context in which it is used." *McNeill v. United States*, 563 U.S. 816, 819 (2011) (citation omitted). When, as here, the language is clear, "judicial inquiry is complete." *Garcia v. United States*, 469 U.S. 70, 75 (1984).

The plain meaning of the statute controls. And here, the plain meaning leads to the natural conclusion that Congress did not inexplicably curtail the statute of limitations for child sexual abuse charged under Article 134, UCMJ. If anything, Congress evidenced its resolute intent that the statute of limitations should not hinder the prosecution of those who harm children. *See* NDAA FY 17 Pub. L. No. 114-328 § 5225(a) (prescribing amendment to "INCREASE IN PERIOD FOR CHILD ABUSE OFFENSES"). Further "when deciding whether language is plain [courts] must read the words in their context and with a view to their place in the overall

statutory scheme.'" *King v. Burwell*, 576 U.S. 473, 486 (2015)(quoting *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120, 133 (2000)).

A plain reading of the statute demonstrates that Appellee's crimes against K.R. are child abuse offenses subject to an enhanced limitation period as opposed to other offenses subject to the default limitations period. Congress deliberately used the phrase, "and constitutes any of the following offenses" instead of "and charged under any of the following provisions." *Compare* Article 43(a), UCMJ, (observing that a person *charged* with absence without leave or missing movement in time of war, murder, rape or sexual assault, or rape or sexual assault of a child could be tried or punished without limitation) (emphasis added) *with* Article 43(b)(2)(B), UCMJ (defining child abuse offense as one that *constitutes* listed offenses) (emphasis added). Accordingly, the *actus reus* of Appellee's criminal acts, not the article number ascribed to the charge, evidences Congress's intent. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) ("Congress's choice of words is presumed to be deliberate . . . ."); *Richards v. United States*, 369 U.S. 1, 19 (1962) (noting courts "are bound to operate within the framework of the words chosen by Congress"). The transitive verb "constitutes" means "to make up (the element or elements of which a thing, person, or idea is made up); form [or] compose." Webster's Third New Int'l Dictionary of the English Language 486 (1961). Appellee's 2004 conduct certainly "make[s] up, form[s] or compose[s]"

the offenses described in Article 43(b)(2)(B)(i) (2019), namely sexual abuse of a child under Article 120b, UCMJ (2019).

This natural reading of the text avoids the absurd finding that Appellee's acts of kissing K.R. with his tongue, rubbing her vulva with his penis over her clothes, having her stroke his exposed and erect penis, and his digital penetration of her vagina are excluded from an elongated limitation period merely because the article number at the time the offense changed after the criminal conduct proscribed was subsumed into the ambit of another. Further, a conclusion that the misconduct covered by the actual crime charged—rather than its numerical designator—should guide one's interpretation of the statute is evinced by the other conforming provisions found in Article 43, UCMJ. If one were to consider the numerical designation to be dispositive, then an equally illogical argument can be had that Congress also has now prematurely expired prosecutions for kidnappings, maimings, Article 134 assaults with intent to commit specified crimes (murder, voluntary homicide, rape or forcible sodomy), and forcible sodomy offenses committed prior to January 1, 2019. *See* NDAA FY 17, Pub. L. No. 114-328, § 5225(d)(ii)–(iv) (redesignating maiming from Article 124, UCMJ, as Article 128a; UCMJ, kidnapping from Article 134, UCMJ, to Article 125; Assaults with intent to commit specified offenses from Article 134, UCMJ to Article 128, UCMJ, and omitting forcible sodomy entirely). Such a patently absurd conclusion is avoided if

the statute's plain meaning is adduced by engaging in the entirely unremarkable approach of giving meaning to the malfeasance criminalized by the article. Put another way, by reading all of the language of the statute and considering the nature of the criminal act instead of solely looking at the numerical designation, the illogical result that kidnappings charged under Article 134, UCMJ, are subject to only a 5-year limitation period but kidnappings charged under Article 125, UCMJ, are subject to the expansive period of life of the child or 10-years is avoided. *See*, *King*, 576 U.S. at 486 (observing that a court's "duty after all is to construe statutes, not isolated provisions.").

The government acknowledges that the migration of indecent acts with a child from Article 134, UCMJ, to Article 120b, UCMJ, does not smack as simply as the migration of kidnapping under Article 134, UCMJ, to Article 125, UCMJ, at first blush. Nevertheless, the clarity of a similar migration is plainly evident upon review of the history and evolution of the prosecution of sex crimes. Child abuse offenses have migrated, over time, from Article 134, UCMJ, to Article 120b, UCMJ. Prior to October 1, 2007, child sexual abuse offenses were charged either as carnal knowledge under Article 120, UCMJ (sexual intercourse with a child); unnatural carnal copulation under Article 125, UCMJ (sodomy); or indecent liberties with a child under Article 134, UCMJ (2005) or indecent acts or liberties with a child under Article 134, UCMJ (2002). After October 1, 2007, Article 120,

UCMJ, replaced indecent acts with a child and augmented the offenses of carnal knowledge. Specifically, Article 134, UCMJ, "Indecent Acts or Liberties with a Child . . . was removed as it was subsumed into the new Article 120 provision." *Manual for Courts-Martial, United States* (2008 ed.), preface at p.4.

Had Appellee committed the 2004 misconduct against K.R. today, the government would charge him with sexual abuse of a child under Article 120b, UCMJ.[3] Thus, while his misconduct was charged under Article 134, UCMJ, because that was the operable article applicable at the time of his offense, his crime undoubtedly constitutes a child abuse offense under Article 120b today, because it "involve[d] a person who had not yet attained 16 years of age" and would have otherwise constituted sexual abuse of a child. Article 43(b)(2)(B), UCMJ. A plain read of the statute naturally concludes that Congress did not suddenly curtail the enhanced protections for children that it had spent more than a decade securing. When looking at "plain language" as to the changes to Article 43, UCMJ, the

[3] The government was required to prove that Appellee's conduct committed upon K.R. was "indecent." Indecent was defined as that "form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *Manual for Courts-Martial (MCM)*, pt. IV, para. 90.c. (2002 ed.). Today, Appellee would be charged with committing a "lewd act" upon K.R. There the government would need to prove "indecent conduct, intentionally done with or in the presence of a child . . . that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120b(a)(h)(5)(D); *MCM*, pt. IV, para. 62(h)(5)(D)(2019).

meaning most plain, overt, and simple is that the statute of limitations for one charged with "having committed a child abuse offense against a child" is distinct and apart from the five-year default period. In this case, there is no question that Appellee was charged with and convicted of a child abuse offense. Accordingly, the Army Court's decision should be reversed.

A plain reading of the statute results in the inescapable conclusion that the statute of limitations for Appellee's crimes against K.R. was not curtailed. He was subject to the limitation period in effect at the time of his malfeasance, *Mangahas*, 77 M.J. at 222, which did not expire until K.R. reached her 25th birthday. NDAA FY 2004, Pub. L. No. 108-136, § 551. The decision of the Army Court should be overturned.

D. Assuming Arguendo that a Plain Reading of the Statute Would Curtail the Statute of Limitations for Article 134, Indecent Acts or Liberties With a Child, Such a Result is so Absurd as to Defeat the Purpose of the Statute.

Assuming arguendo that a plain reading of NDAA FY 17, P.L. 114-328 § 5225, would result to curtail the statute of limitations for Appellee's crimes against K.R. the result would be absurd. Further, this absurdity is certainly unintended and thus should be avoided. In fact, Army Court's conclusion that the plain language of NDAA FY 17 curtailed otherwise viable prosecutions defeats the very purpose

of the legislation. This conclusion is in error and the Army Court's decision should be reversed.

"The circumstances surrounding the enactment of particular legislation . . . may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 453 (1989). Here the circumstances counsel a finding that the limitation period for Appellee's crimes against K.R. had not passed. First, Congress denoted its express intent, in the very legislation under review, that child abusers be subject to an even more expansive statute of limitation for their crimes. Second, substantial non-substantive modifications were made to the UCMJ as part of the generational restructuring of the Code dictated by the MJA 2016. Third the plain language asserted is not language, but rather the omission of language directed by a conforming amendment. Fourth, looking at the statutory scheme as a whole, Congress has not once shortened the limitation period for child abuse offenses and instead had increased it on three occasions since 2003. And lastly, the inherent reason justifying longer limitation periods for crimes committed upon child victims—as noted in legislative history and testified to by Dr. M.S. in Appellee's very trial—certainly had not changed. This pervasive and compelling evidence plainly indicates that Congress did not intend to prematurely extinguish the ability of the government to bring child sexual molesters to justice, and a finding

otherwise should be rejected. *See Public Citizen*, 491 U.S. at 455 (quoting *Boston Sand and Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) ("Looking beyond the naked text for guidance is perfectly proper when the result . . . seems inconsistent with Congress's intention, since the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'")).

The Army Court adopted an interpretation counter to the statute's expressed purpose and this approach is disfavored. "The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered." Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts*, 63 (1st ed. 2012); *King*, 576 U.S. at 492–93 ("We cannot interpret federal statutes to negate their own stated purposes.") (quoting *New York State Dep't of Social Services, v. Dublino*, 413 U.S. 405, 419–20 (1973). This canon of construction follows that: "(1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness." Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts*, 63. Simply stated, "if the 'language is susceptible of two constructions, one of which will carry out and the other defeat [its] manifest object, [the statute] should receive the former construction." *Id*. (alteration in original) (quoting *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979)). This focus on legislative

purpose is even more crucial than attempts to determine legislative intent, which admittedly can be difficult to determine (although not difficult at all to determine in the present case).

It is clear that Congress purposely and intentionally increased the limitation period for child abuse offenses. NDAA FY 17, Pub. L. No. 114-328, § 5225(a). Indeed, Congress has only increased, and never decreased, the limitation period for child abuse offenses since 2003. NDAA FY 2004, Pub. L. No. 108-136 § 551 (24 Nov. 2003) (increasing limitation period for child abuse offenses to child's age of 25 years); NDAA FY 2006, 109 Pub. L. No. 163, § 553(b)(1) (6 January 2006) (amending limitation period from "child attains the age of 25" to life of the child or within 5 years after offense, whichever is longer); NDAA FY 17, Pub. L. No. 114-328, § 5225(a) (increasing limitation period to life of child or within 10 years). Prematurely curtailing the limitation period, in effect at the time of Appellee's child abuse offenses, is clearly contrary to the manifest purpose of the statute—as repeatedly reaffirmed by Congress since 2003. In summary, the Court should consider the purpose of the legislation. The amendment's general purpose was to increase the statute of limitations for child abuse offenses, establish the statute of limitations for new offenses, and maintain the statute of limitations for all other historical offenses. No reading supports the notion that the purpose of the

amendment was to shorten the statute of limitations, especially for sexual offenses committed against children.

It does not naturally or logically follow that Congress would prematurely foreclose victims from seeking justice while simultaneously enlarging the window to other victims of the same criminal misdeeds. This is especially true here, because one of the purposes behind Congress's overhaul of the UCMJ was "enhancing victims' rights." H. REP. 114-537, at 5, 6, 600 (2016) (Comm. Rep.). The Army Court defeated this intent and interpreted the legislation in a manner directly opposite from the legislation's stated purpose. H. REP. 114-537, at 606 (observing intent to extend statute of limitations for child abuse offenses). Moreover, Congress has maintained this intent since 2003. To be sure, the legislative history in 2016 echoes back to Senator Bill Nelson's comments in 2003 that described the purpose behind the legislation that began to increase the limitation period:

> Child victims of sexual crimes sometimes struggle to come to terms with the crimes committed against them and often are not willing, or able, to bring the crime to the attention of authorities until they are much older. Applying the longer statute of limitations provided by the VCAA to courts martial will allow military prosecutors to throw the book at sexual predators.

149 CONG. REC. S2051-2053 (statement of Sen. Nelson). This purpose was true then and remains true now.

Indeed, Dr. M.S.'s testimony directly stated as much. His expert testimony contextualized the inherent need for elongated statutes of limitation for child abuse crimes; especially when those crimes are committed by parents. He highlighted the vulnerabilities of children when it comes to crimes committed upon them by their parents. (R. at 484). He noted that children will "hold secrets, to accept the shame of it for themselves" in order to "preserve family relationships." (JA 75–76). Dr. M.S. also testified that when children are touched inappropriately "they may or may not completely understand and appreciate how wrong or what is wrong with it." (JA 78). Put simply, children have "younger minds, younger understanding, in terms of their ability to understand the world." (JA 77). Increased time periods for children to report the crimes committed upon them are essential because of these considerations and the time children need to mature enough to understand what occurred. To distinguish Appellee's acts from a child abuse offense would eviscerate the purpose (not just the intent) for which the extended period was adopted in the first instance and should be avoided.

Finally, Appellee's argument would result in the absurd result that the Court first find that the statute of limitations had not expired so that the legislation could then curtail it. This result is illogical.[4] A conclusion that Congress increased the

[4] The only logical reading of this language suggests that Congress was addressing an issue identified in *United States v. Lopez de Victoria*, and intended to retroactively extend *unexpired* limitation periods. In *Lopez de Victoria*, the Court

period of limitations for child abuse offenses, while simultaneously and drastically shortening the limitations period for the same malfeasance, would be absurd. *See United States v. X-Citement Video*, 513 U.S. 64, 69 (1994) (refusing to adopt position that "would produce results that were not merely odd, but positively absurd") *but see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1446 n.13 (2010) (noting that the "possible existence of a few outlier instances does not prove" absurdity because Congress may have accepted such anomalies for uniformity). Despite its limited application, the absurdity doctrine is still applicable to this case because it cannot be said that a reasonable person could have intended a disposition that a prosecution determined to be within the stated statute of limitations was now extinguished only because it was otherwise timely.

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observed that Congress was permitted "to apply legislation retroactively, subject to the limits of the Ex Post Facto Clause" of the Constitution but must be explicit in its language to do so. 66 M.J. at 72. The Court caveated this observation by noting that Congress "cannot revive an otherwise barred offense without violating the Ex Post Facto Clause." *Id*. at 73 (citing *Stogner v. California*, 539 U.S. 607, 609 (2003)). By applying the legislation to those offenses for which, "the applicable limitation period ha[d] not yet expired," it is evident that, at most, Congress attempted to retroactively extend the limitation period. That Congress subsequently stuck the language in the NDAA FY 18 merely evidences that it did not want to contend with the as yet undecided constitutional question whether a retroactive extension of a statute of limitation might violate the Ex Post Facto Clause of the Constitution. *See id*. at 73 (noting the Supreme Court had not decided that an unexpired limitation period can be extended without offending Ex Post Facto).

Certainly, courts do not avail themselves of the absurdity doctrine lightly. Use of the doctrine is justified where the "absurdity [is] so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). And, "[l]ooking beyond the naked text is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress's intention . . . ." *Public Citizen*, 491 U.S. at 455. Determining whether the statute of limitations for child abuse offenses was curtailed because of MJA 2016 warrants application of the doctrine. Furthermore, this ACCA panel's impression that it could not consider legislative history and policy, even when analyzing an admittedly "unfortunate and likely unintended consequence," contradicts precedent that "plain language" and "absurdity" are not mutually exclusive. *See United States v Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (quoting *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) ("the plain language of a statute will control *unless* it leads to an absurd result) (emphasis added)); *see also United States v. Herrmann*, 76 M.J. 304, 308 (C.A.A.F. 2017) (observing that courts enforce statutes according to their terms, "at least where the disposition required by the text is not absurd") (citation omitted).

As previously described, the premature expiration of the statute of limitations appears entirely incongruent with Congress's long-standing approach to child abuse crimes. Indeed, the conclusion that Congress would foreclose

prosecution of one class of child abusers, after it painstakingly had increased the limitation period, on three occasions, to include the very same legislation, "is so gross as to shock the general moral or common sense." *Crooks*, 282 U.S. at 60. Moreover, while *Crooks* cautioned against application of the doctrine, it observed, "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Id*. (citing *Treat v. White*, 181 U.S. 264, 268 (1901)). The legislation and statutory scheme is replete with evidence that Congress's plain intent was not to dramatically shorten the statute of limitations for child abuse crimes committed under prior versions of the Code.

The Army Court's opinion defeats the very purpose of the legislation. Further, it inexplicably unwinds years of Congressional action focused on bringing those who molest children to justice. To the extent the legislation can be read to plainly subject Appellee's crime to a mere five-year limitation period, that result is bizarre and shocking to morals and common sense and should be avoided. *See*, *Crooks*, 282 U.S. at 60. Finally, this court is not operating in a vacuum because both the statute and legislative history contain sufficient evidence to "make plain the intent of Congress that the letter of the statute is not to prevail," *Id*. (citing *Treat*, 181 U.S. at 268), and accordingly the decision of the Army Court's should be reversed.

E. Even if the Statute of Limitations had Expired, Appellee Forfeited the Defense and is not Entitled to Relief Under the Plain Error Standard of Review.

The military judge shall inform an accused of the right to have a pending charge dismissed if the applicable statute of limitations has run. *See* R.C.M. 907(b)(2)(B). Because the military judge has a sua sponte duty, an accused cannot knowingly waive his right to allege bar to prosecution for statute of limitations, if it appears that the accused is unaware of his right to assert the claim. *United States v. Salter*, 20 M.J. 117, 117 (U.S.C.M.A. 1985); *Briggs*, 78 M.J. at 295. Consequently, an accused's failure to raise a statute of limitations claim will be reviewed for plain error. *Briggs*, 78 M.J. at 295.

Assuming arguendo that the statute of limitations for Appellee's crimes was curtailed by a retroactive application of the NDAA FY 17, P.L. 114-328 § 5225, the error was not clear or obvious and Appellee is not entitled to relief. Rule for Courts-Martial 907(b)(2)(B) requires the military judge to inform an accused of the right to have a pending charge dismissed if the applicable statute of limitations is expired.

As an initial matter, absent consideration of NDAA FY 17, Section 5225, it was clear that the limitation period had not expired when Charge I and its Specifications were received by the summary court-martial convening authority on 27 March 2017. Specifications 1–6 of Charge I charged multiple instances of

indecent acts with a child under the age of 16 years that occurred between May 1, 2004 and December 31, 2004. In 2004, Article 43, UCMJ, established that "[a] person charged with having committed a child abuse offense" can "be tried by court-martial if the sworn charges and specifications are received before the child attains the age of 25 years by an officer exercising summary court-martial jurisdiction." Article 43, UCMJ (2002) (as amended by NDAA FY 2004, Pub. L. No. 108-136 § 551 (effective 24 November 2003)). The statute of limitations is tolled upon receipt of the sworn charges by the summary court-martial convening authority. Article 43, UCMJ. Because the summary court-martial convening authority received the sworn charges on March 27, 2017, when K.R. was 23 years old (JA 37, 47), the statute of limitations for Specifications 1–6 of Charge I had not expired under the statute of limitations in effect at the time of Appellee's crimes. Generally speaking, the statute of limitations applicable is that in effect at the time the accused committed his crimes. *Briggs*, 78 M.J. at 293 (citing *Toussie*, 397 U.S. at 115 (internal citation omitted)). Working within the plain error framework, the error now averred was not clear or obvious.

If this Court finds the applicable statute of limitations had reverted to what it was before 2003, any such error was not clear or obvious when Appellee was convicted on March 13, 2018. Without belaboring the arguments from above, multiple canons of statutory construction support the government's interpretation

that the statute of limitations had not expired. Consequently, because multiple canons of construction can be read to support the government's proposed construction of the statute; a contrary interpretation was neither plain nor obvious to the parties or military judge at trial. In summation, to reach the Army Court's conclusion the military judge had to have: 1) given substantive effect to a conforming amendment; 2) find plain meaning in the subsequent omission of Article 134, UCMJ, from the list of offenses; 3) conclude that Congress intended "constitutes" in ¶(b)(2)(B) to mean "charged;" 4) adopt an interpretation that defeats a stated purpose of the statute; and 5) and accept that the statute of limitations was shortened because it had not yet expired. Even if the Army Court is correct, this result certainly was not plainly so. Accordingly, Appellee is not entitled to relief.

Any alternative meaning would not have been clear or obvious to the military judge on 13 March 2018. *United States v. Gonzales*, 78 M.J. 480, 486 (C.A.A.F. 2019) ("While the terms clear or obvious do not have any special definitions, the Supreme Court has distinguished clear and obvious errors from errors that are subject to reasonable dispute.") (internal marks and cites omitted). Appellee is therefore not entitled to relief because he cannot meet the second prong of the plain error standard.

CONCLUSION

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence as approved by the convening authority.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,948 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on November 27, 2020.

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