IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	REPLY BREIF ON BEHALF OF APPELLANT
v.	
Staff Sergeant (E-6) **DANNY L. MCPHERSON,** United States Army, Appellee	Crim. App. No. ARMY 20180214 USCA Dkt. No. 21-0042/AR

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0773
wayne.h.williams.mil@mail.mil
U.S.C.A.A.F. Bar. No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar. No. 31651

Index of Brief

Table of Authorities ii

Issue Presented 1

Statement of the Case 1

Argument 1

A. Appellee Ignores the Context of the Legislation as a Whole and Inappropriately focuses on an Isolated Provision 1

B. The ACCA's and Appellee's Interpretation Eliminates Predictability and is Therefore Untenable 8

C. Any Construction That Results in the Premature Termination of the Statute of Limitations Should be Found Absurd. 10

Conclusion 14

Table of Authorities

Cases

Crooks v. Harrelson, 282 U.S. 55 (1930) 15
Cyan, Inc. v. Beaver Cty Emp. Ret. Fund, 138 S. Ct. 1061 (2018) 7, 9
Deal v. United States, 508 U.S. 129 (1993) 5
FDA v. Brown & Williamson Tobacco, Corp., 529 U.S. 120 (2000) 5
John R. Sand and Gravel Co. v. United States, 552 U.S. 130, 133 (2008) 15
King v. Burwell, 576 U.S. 473 (2015) 5, 6, 8
Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342 (1944) 15
Toussie v. United States, 397 U.S. 112 (1970) 11, 15
Tyler v. Cain, 533 U.S. 656 (2001) 5
United States v. Briggs, No. 19-108, slip op., 2020 U.S. LEXIS 5989 (U.S. Dec. 10, 2020) 5, 10, 11
United States v. Lovasco, 431 U.S. 783 (1977) 10

Statutes

Article 43, UCMJ 6, 7, 10
Article 124, UCMJ 6
Article 125, UCMJ 6, 8
Article 134, UCMJ ..... passim
NDAA FY 2004, Pub. L. No. 108-136 (24 Nov. 24, 2003) 13
NDAA FY 2006, Pub. L. No. 109-163 (Jan. 6, 2006) 14
NDAA FY 17, Pub. L. No. 114-328 (Dec. 23, 2016) ..... passim
NDAA FY 18, Pub. L. 115-91 (Dec. 12, 2017) 10

Treatises

A. Scalia & B. Garner, Reading Law 167 (2012) 5, 13

Legislative History

162 Cong. Rec. S6871 (daily ed. 8 Dec. 2016) 4, 7

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

Certified 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?

Statement of the Case

On November 3, 2020, the United States filed a certificate for review. It filed its supporting brief with this Court on November 27, 2020. Appellee responded on December 21, 2020. The United States's reply follows.

Argument

Appellant briefly responds to certain arguments presented in Appellee's brief to this Court. For the reasons stated in Appellant's opening pleading and the arguments made in this reply, the decision of Army Court of Criminal Appeals [ACCA] should be overturned.

A. Appellee Ignores the Context of the Legislation as a Whole and Inappropriately focuses on an Isolated Provision.

Appellee's brief focuses nearly exclusively on one provision of the National Defense Authorization Act [NDAA] Fiscal Year [FY] 2017: § 5225(f). Pub. L. No. 114-328 § 5225(f) (Dec. 23, 2016). However, his laser focus on a single provision—isolated from the context of the statute as a whole—to find that

Congress eliminated Indecent Acts with a Child, Article 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 934 (2000), from the lexicon of child abuse offenses for all time, fails to address the context of the changes made to Article 43, UCMJ, as a consequence of the Military Justice Act 2016 [MJA 2016]. Read in their appropriate and respective context to the statute as a whole, it is plainly evident that the amendments directed by NDAA FY 17, § 5225(d)(i)–(iv) do not have retroactive effect, especially not so for historical, subsumed, and since re-labeled "child abuse offenses." Consequently, they did not curtail the limitation period applicable to Appellee's sexual assaults of K.R. Accordingly, his argument should fail and the opinion of the Army Court of Criminal Appeals [ACCA] should be overturned.

The government does not expect nor ask this court to ignore what is plainly said. Rather, it asks this court to avoid reading too much into what is not said. More succinctly, the statute of limitations for a child abuse offense committed 16 years ago, and thus only chargeable under the then Article 134 that later migrated to and was subsumed by Article 120b, is not contemplated, governed, or amended (whether to enlarge or to shorten) by the Military Justice Act of 2016.

The Supreme Court recently stressed "the meaning of a statement often turns on the context in which it is made, and that is no less true of statutory language." *United States v. Briggs*, No. 19-108, slip op., 2020 U.S. LEXIS 5989 at *6 (U.S.

Dec. 10, 2020) (citing *Tyler v. Cain*, 533 U.S. 656, 662 (2001); *Deal v. United States*, 508 U.S. 129, 132 (1993); A. Scalia & B. Garner, Reading Law 167 (2012)). To be sure, "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)). That is because a court's "duty after all is to construe statutes, not isolated provisions." *King*, 576 U.S. at 486.

Read in context of the legislation as a whole, it is overwhelmingly clear that Congress did not intend to curtail the viable prosecution of child abuse offenses. Appellee focuses on whether changes to the statute of limitations for child abuse offenses were intended to be retroactive without any analysis of which provisions were intended to be so applied. Appellee avoids any discussion of the clearly expressed intent of Congress that the amendments found in § 5225(d) were made merely to conform the list of child abuse offense as necessitated by changes made elsewhere in the legislation. NDAA FY 17, Pub. L. No. 114-328 § 5225(d) (observing that the amendments are conforming amendments).

Rather than recognize the inherent limitation expected of a conforming amendment, Appellee proposes that this Court should conclude that Congress redefined the term "child abuse offense" and then directed that every prior iteration

of Article 43, UCMJ, incorporate and apply that definition. (*See* Appellee Br. at 14–15). His proposed interpretation would in effect remove entirely from the definition of a child abuse offense not only Article 134 Indecent Acts with a Child, but Forcible Sodomy of a Child, charged under Article 125; Kidnapping charged under Article 134; Maiming, charged under Article 124; and Article 134 Assaults with intent to commit specified offenses, committed prior to December 23, 2016. A conforming amendment should not be interpreted and applied to effectuate such a radical result. *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."). Accordingly, it cannot be plain, from the statutory text, that Congress intended this result or that the language of the statute it drafted plainly states as much.

Lost in Appellee's analysis is how § 5225(d)(i)–(iv) fits into the overall statutory scheme of MJA 2016. The context of the legislation as a whole dictates that the amendments made there should not be interpreted to actually shorten the elongated statute of limitation for child abuse crimes committed under earlier versions of the Code. It should not be overlooked that the MJA 2016 was the single most comprehensive change to the UCMJ in a generation. 162 Cong. Rec. S6871 (daily ed. 8 Dec. 2016). Because of revisions made elsewhere to the numbering of the punitive articles, Congress needed to conform Article 43, UCMJ,

to the structure of the Code moving forward. And as noted in Appellant's opening brief, Congress expressly articulated how it intended the amendment to apply and unequivocally 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. NDAA FY 17, Pub. L. No. 114-328 § 5225(d). This context alone demonstrates the limitation period for crimes prosecuted under Article 134, UCMJ, Indecent Acts with a Child, was not reduced to the default period. *See King*, 576 U.S. at 486 (observing that a court's "duty after all is to construe statutes, not isolated provisions.").

Further context of congressional intent is found in Congress's enlargement of the statute of limitation for child abuse offenses in the same legislation. *See* NDAA FY 17, Pub. L. No. 114-328 § 5225(a) (increasing the limitation period for crimes committed against children). It is difficult to surmise that Congress decreased the limitation period for child abuse offenses while simultaneously increasing the limitation period for the very same offenses perpetrated against children. The incongruity caused by Appellee's proposed interpretation is made clear when one considers the treatment of maiming, kidnapping, and assaults with intent to commit specific offenses. His interpretive approach would result in a conclusion that kidnappings charged under Article 134, UCMJ, are not child abuse offenses but kidnappings charged under the new Article 125, UCMJ, are. This

illogical result is avoided if the provisions are read and placed into appropriate context of the legislation as a whole.

Contrary to Appellee's assertion, (Appellee Br. at 15), the government's interpretation gives meaning to all of the words and provisions in the statute with due consideration of their context and role in the statutory scheme implemented by Congress. Rather than avoid "discussing the most relevant—indeed, the *only* relevant—question: what the text of the statute contains," (Appellee Br. at 15) (emphasis in original), the government's position respects all provisions, words, and expressions of Congressional intent included in the legislation. By contrast, Appellee, seeks to define the statute through isolation and aims to divorce each provision from its contextual role in the legislation. For instance, Appellee does not even acknowledge—much less harmonize—the fact that Congress deliberately included "Conforming Amendments" in § 5225(d). Nor does Appellee address that Congress has never decreased, but has only increased, the limitation period for child abuse offenses—to include the very legislation at issue. Indeed, placing a legislative enlargement on one end of the analytical conveyor belt and having it bizarrely pop out the other end as a legislative reduction seems wrong at best and more likely – interpretive folly. Moreover, Appellee accuses the government's interpretation of running afoul of the canon of surplusage. (Appellee Br. at 17). To be sure, Appellee asks the Court to simply ignore the express language

Congress included in the statute that observed that the amendments to § 5225(d)(i)–(iv) were conforming in nature. This expression of intent should be ascribed meaning.[1] *See Cyan, Inc.*, 138 S. Ct. at 1071–72 ("Congress does not hide elephants in mouseholes.") (internal marks omitted) (citation omitted).

Appellee seems most frustrated by the word "before." (Appellee Br. at 10, 15–19, 23). Appellant does not dispense with this word. To the extent that § 5225(f) may have once applied to the prosecution of crimes committed before December 23, 2016,[2] it does not require that the definition of what amounts to a child abuse crime—as described in a conforming amendment—be retroactively applied. If anything, the conforming of Article 43, UCMJ, to the structure of the Code post-MJA 2016 refers only to the definition of what amounts to a child abuse crime, *after* implementation of the comprehensive changes. Appellant does not shy away from "before," but rather espouses a position that recognizes the entire

[1] Interestingly, taken to its logical extreme, Appellee's proposed interpretation likely violates the cannon of surplusage the most. Considered to its natural conclusion, by Appellee's account, *every* version of Article 43 that has existed since adoption of the Uniform Code of Military Justice would define child abuse offenses exclusively by the list included in § 5225(d)(i)–(iv). This result would certainly cause surplusage because it is difficult for "every word and every provision be given effect," (Appellee's Br. at 17) (citation omitted), when those words and phrases describe provisions that will not exist for a decade or more.

[2] In the NDAA FY 18 Congress provided that Article 43, UCMJ, as it existed on December 22, 2016 applied to offenses committed before the date of implementation of MJA 2016. Pub. L. 115-91, 131 Stat. 1386, § 531(n) (Dec. 12, 2017).

context of the legislation and all the phrases and legislative signals used by Congress should be given their appropriate meaning.

B. The ACCA's and Appellee's Interpretation Eliminates Predictability and is Therefore Untenable.

A "principal benefit of statutes of limitation is that they provide clarity." *Briggs*, 2020 U.S. LEXIS 5989 at *8 (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977)). Accordingly, "it is reasonable to presume that clarity is an objective for which lawmakers strive when enacting such provisions." *Briggs*, 2020 U.S. LEXIS 5989 at *8. Contrary to Appellee's suggestion, clarity is not limited to a criminal accused. (*See* Appellee Br. at 26) (claiming "[w]ho more than criminal defendants, should be able to rely on the law as written") (internal quotation marks omitted). As recently articulated by the Supreme Court, clarity in statutes of limitation are important to both prosecutors who try cases and importantly to "rape victims, who often wrestle with the painful decision whether to identify their attackers and press charges." *Briggs*, 2020 U.S. LEXIS 5989 at *9. Any interpretation that would take a profoundly weird turn and unwind Congress's methodical and unyielding efforts to extend the period of limitation for child abuse offenses would turn predictability on its head.

The government's interpretation of the statutory scheme, constructed here, establishes the most consistent and predictable outcome: use the statute of limitation in effect when a child abuser committed his historically defined crime.

This unremarkable approach affords predictability for all individuals involved: the accused, his victim, and the prosecutor who brings the charges to court. Further, this rule is firmly supported by the law. *See e.g.*, *Toussie v. United States*, 397 U.S. 112, 115 (1970). The need for predictability is inherent in this case. K.R. reported in 2016 that Appellee sexually abused her; notably before the enactment of MJA 2016. The government—ostensibly relying on the statute of limitation that it had until K.R.'s 25th birthday to bring charges—began its investigation and shortly thereafter brought charges on March 27, 2017, when K.R. was only 23 years old. The retroactive application of § 5225(d)(i)–(iv) that Appellee proposes would pull the proverbial rug out from under both a victim and prosecutor. That Appellee did not object at his court-martial further underscores that all of the participants in the court-martial believed that charges were brought within the limitation period. An interpretation of the statute that would eviscerate this stability, logic, and rightful expectation should be avoided.

The government does not dispute that Congress initially intended for some retroactive effect. Section 5225(f) states as much. NDAA FY 17, Pub. L. No. 114-328 § 5225(f). But it is not plain that § 5225(f) applied a new definition of child abuse offenses retroactively or otherwise eliminated the previously enhanced limitation period already applicable to them. This drastic application is simply not found in either the language of the provision nor can it be derived from context in

the statutory scheme. It is not plain the provision curtailed otherwise viable prosecutions, and it strains reason that Congress required the abrupt termination of a limitation period—one it had painstakingly secured to protect child victims—by first requiring a finding that the limitation period had not expired. NDAA FY 17, Pub. L. No. 114-328 § 5225(f). To the contrary, it is clear that Congress did not intend such a sweeping effect.

C. Any Construction That Results in the Premature Termination of the Statute of Limitations Should be Found Absurd.

The government will not belabor the arguments advanced in its opening pleading to this Court. (Appellant's Br. at 20–28). The arguments included there directly refute Appellee's position. It is important to note that Appellee accepts that a "provision may be either disregarded or judicially corrected . . . if failing to do so would result in a disposition that no reasonable person could" approve. (Appellee's Br. at 24) (quotation marks and citation omitted). He merely argues that the absurdity doctrine is inapplicable to the case at issue. (Appellee Br. at 24–26). Appellant steadfastly disagrees; fewer things are more shocking than undercutting the protection of the most vulnerable.

It is hard to say that the absurdity that would result here is not "so gross as to shock the general moral or common sense." (Appellee's Br. at 25) (marks and citation omitted). Indeed, it is not difficult to surmise that "all mankind would, without hesitation, unite[] [to] reject[]" the application of a statute, A. Scalia & B.

Garner, Reading Law, 237 (citation omitted), that would punish K.R. for not having the wherewithal and courage as a 10 year-old child to speak up about being sexually molested by her father. Congress, if not society as a whole, has recognized the acute need to increase protections for this vulnerable population and has methodically acted to put required protections in place. NDAA FY 2004, Pub. L. No. 108-136 § 551 (Nov. 24, 2003) (increasing limitation period for child abuse offenses to child's age of 25 years); NDAA FY 2006, Pub. L. No. 109-163, § 553(b)(1) (Jan. 6, 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). It is repugnant to common sense and morals that an inadvertent stroke of a pen—in all consideration with the singular act to protect children—could result in the overnight evaporation of those protections.

Appellee attempts to escape this absurdity by claiming that Congress actually may have intended this result in an effort to achieve uniformity. (Appellee's Br. at 26). Irrespective of the compelling evidence that Congress did not intend § 5225(d)(i)–(iv) to be applied retroactively (as described in Appellant's initial pleading and this reply), the proposed interpretation would not achieve uniformity. To be sure, the interpretation advocated by Appellee—and adopted by the ACCA—would result in a deeply fractured system where the same crime may

be subject to three or more possible periods of limitation (e.g. kidnappings charged under Article 134, UCMJ, would be subject to a different limitation periods based on when they were committed, and such offenses would also be treated different than a kidnapping charged under Article 125, UCMJ). Put simply, an interpretation that would cause premature expiration of the statute of limitations would be entirely incongruent with Congress's long-standing approach to child abuse crimes, and would be, "so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

D. The Notion of Repose is Inapplicable.

Appellee alludes multiple times to the principle of repose should this Court find that the language is ambiguous. (Appellee Br. at 11, 21 n.5, 25). Put simply, the application of repose in this case is particularly inappropriate. While it is true, generally speaking, statutes of limitation are to be liberally interpreted in favor of repose, *Toussie*, 397 U.S. at 115, it is important to understand why. When considering why repose is favored, one must first understand the rationale behind the contention.

Three basic reasons underlie why statutes of limitation exist. *Id.*; *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Those reasons are: (1) basic facts may become obscured over time; (2) a need to minimize the risk of punishment for acts committed long ago; and (3) to encourage diligent and

prompt prosecutions. *Toussie*, 397 U.S. at 115; *John R. Sand and Gravel Co.*, 552 U.S. at 133. "[T]he theory is that . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). Congress dispensed with these concerns, as they relate to the prosecution of child abuse offenses, in the same legislation where it increased the limitation period for such crimes. NDAA FY 17, Pub. L. No. 114-328 § 5225(a). None of the conditions that rationalize application of repose to statutes of limitation appear to be important to Congress when it comes to the protection of children from adults who abuse them. Indeed, Congress repudiated these concerns when it, for the third time, increased the limitation period for these crimes. NDAA FY 17, Pub. L. No. 114-328 § 5225(a). Consequently, the principle of repose should not be leveraged to secure a windfall for Appellee and aid his evasion from being held responsible for his sexual abuse of his daughter.

CONCLUSION

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

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Attorney for Appellant
December 30, 2020

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 December _30_, 2020.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate General, United States Army
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822