IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	Crim. App. Dkt. No. 20130693
Sergeant (E-5) **THOMAS M. ADAMS** United States Army, Appellant	)	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.

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Statement of Statutory Jurisdiction

The United States 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. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3).

Statement of the Case

On August 2, 2013, at Fort Riley, Kansas, a general court-martial panel with enlisted representation convicted Appellant, contrary to his pleas, of historical offenses including one specification of carnal knowledge, two specifications of sodomy with a child, and seven specifications of indecent liberties with a child, in violation of Articles 120, 125, and 134, UCMJ; 10 U.S.C. §§ 920, 925, 934 (2000). *United States v. Adams*, 2017 CCA LEXIS 6, at *1–2 (A. Ct. Crim. App. Jan. 6, 2017) (summ. disp.). The members also convicted Appellant, contrary to his pleas, of more recent offenses including two specifications of aggravated sexual assault of a child; one specification each of aggravated sexual abuse of a child, indecent liberties with a child, rape of a child, and indecent conduct with a child; two specifications each of aggravated sexual contact with a child, producing child pornography, possessing child pornography, and possessing child erotica, in violation of Articles 120 and 134, UCMJ; 10 U.S.C. §§ 920 and 934 (2006). *Adams*, 2017 CCA LEXIS 6, at *2. The panel sentenced Appellant to a dishonorable discharge, confinement for life with eligibility for parole, forfeiture of all pay and allowances, and reduction to the grade of E-1. *Adams*, 2017 CCA LEXIS 6, at *2. The convening authority approved the findings except for

Specification 3[1] of Charge V and approved the adjudged sentence. *Adams*, 2017 CCA LEXIS 6, at *2.

On January 6, 2017—in light of this Court's decision in *United States v. Hills*[2]—the Army Court set aside the findings of guilty and sentence and authorized a rehearing. *See Adams*, 2017 CCA LEXIS 6, at *8.

On May 11, 2017—following the Army Court's remand—the government preferred an amended charge sheet that alleged substantially the same offenses that the Army Court set aside and authorized for a rehearing.[3, 4] (JA 036–41). On August 3, 2017, based upon the recommendation of the Article 32 Preliminary Hearing Officer (PHO) at the Article 32 Preliminary Hearing, the government preferred an Additional Charge.[5] (JA 042, 051). On August 4, 2017, the convening authority referred the charges that were re-preferred on May 11, 2017 and the Additional Charge that was preferred on August 3, 2017 to a general court-

[1] Specification 3 of Charge V charged Appellant with possession of child erotica.
[2] 75 M.J. 350 (C.A.A.F. 2016)
[3] The Summary Court-Martial Convening Authority (SCMCA) received the sworn charges on the same date. (Charge Sheet, dated May 11, 2017).
[4] The government also possessed the original charge sheet that was preferred against Appellant in 2012 and received by the SCMCA on September 11, 2012. (*See* JA 029; 217–18).
[5] The Additional Charge preferred against Appellant on August 3, 2017, alleges offenses that are not the subject of this Court's granted assignment of error.

martial. (JA 218). At the same time, by order of the convening authority, the 2012 charges were dismissed without prejudice. (JA 217–18).

Following the authorized rehearing on November 5–6, 2018, a military judge sitting alone as a general court-martial convicted Appellant, contrary to his pleas, of six specifications of indecent liberties with a child, one specification of aggravated sexual assault of a child, one specification of indecent acts with a child, one specification of producing child pornography, one specification of sodomy with a child under the age of 12, one specification of aggravated sexual abuse of a child, and one specification of abusive sexual contact with a child, in violation of various iterations of Articles 120, 125, and 134, UCMJ. (JA 198–201). The military judge sentenced Appellant to a reduction to E-1, forfeiture of all pay and allowances, 43 years' confinement, and a dishonorable discharge. (JA 205). On April 29, 2019, the convening authority approved the adjudged sentence and credited Appellant with 2,086 days of credit against his sentence. (JA 049).

On July 13, 2020, the Army Court set aside and dismissed Appellant's conviction of producing child pornography and affirmed the remaining findings of guilty and the sentence. (JA 018). Subsequent to the Army Court's decision, the Appellant filed a petition for grant of review on September 11, 2020, in accordance with this Court's Rules of Practice and Procedure. On December 5, 2020, this

Court granted Appellant's petition for review and ordered Appellant to file a brief on the following 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.[6]

(JA 001).

Statement of Facts

1. The Preferral of Charges in 2017 Following the Army Court's Remand.

On May 11, 2017, charges for the same offenses tried during Appellant's 2013 court-martial were re-preferred against Appellant.[7] (JA 036–41). On July 12, 2017, an Article 32, UCMJ, preliminary hearing was held at Fort Leavenworth, Kansas, to investigate the charges. (JA 050). On July 19, 2017, the PHO filed his report of investigation (ROI). (JA 050). The PHO determined that probable cause existed for, among other offenses, each Specification listed in Charge II and Charge IV. (JA 050). The PHO also recommended that the government prefer

[6] Relevant to this Court's granted assignment of error, Appellant was convicted of Specifications 2, 3, 4, and 5 of Charge II (indecent liberties with a child); and, Specification 1 of Charge IV (sodomy with a child under the age of 12).
[7] The SCMCA received the sworn charges the same day. (JA 037).

additional charges against the Appellant. (JA 051). As a result, the government preferred The Additional Charge and its three specifications.[8] (JA 042–43).

On August 4, 2017, the convening authority approved his legal advisor's recommendation and dismissed the charge sheet that was preferred in 2012. As the convening authority dismissed the 2012 charge sheet, he referred substantially the same charges and specifications as detailed on the May 11, 2017 charge sheet[9] and The Additional Charge that was preferred on August 3, 2017[10] to a rehearing. (JA 215–16).

2. Underlying Bases for the Relevant Offenses Charged under Articles 134 and 125, UCMJ

H.P. was born on November 6, 1994. (JA 152). Appellant, who is H.P.'s stepfather, began to sexually abuse her when she was in the third grade and lived on Fort Riley, Kansas. (JA 156, 166, 172). On the first occasion, Appellant called H.P. upstairs to his room where he had pornography displayed on the computer and asked her if she had learned anything about sex in school. (JA 156–57). Appellant

[8] The offenses alleged in The Additional Charge are not relevant to this Court's granted assignment of error.
[9] The charges and specifications preferred against Appellant on May 11, 2017 (JA 036–43) are, but for modifications to the dates of the offenses, substantially the same as the charges and specifications preferred against Appellant on September 11, 2012. (JA 028–35).
[10] The Additional Charge and its three specifications preferred against Appellant on August 3, 2017 were not part of Appellant's 2013 court-martial.

then had H.P. lie on the bed with her pants off and told her to use her fingers and sex toys to penetrate her vagina. (JA 156–57, 165). H.P. did not understand at the time what the sex toys were because she was but in the third grade. (JA 158). She only knew that Appellant told her to use them. (JA 158). H.P. did not disclose this incident after it happened, because she was scared she would get in trouble. (JA 163). Appellant told H.P. not to tell anyone about the incident and that it would be their secret. (JA 163). If H.P. did not use the sex toys on herself as Appellant instructed, he threatened to tell her mother that she would not listen. H.P. feared she would be grounded or have her privileges taken away. (JA 174–75).

Appellant continued his sexual abuse of H.P. while she was in the third and fourth grade. (JA 164–65). On one occasion, in his purple Ford Ranger truck while at the horse stables on Fort Riley, Appellant instructed H.P. to pull down her pants and gave her a sex toy to put inside herself. (JA 167–68). On another occasion while Appellant and H.P. were inside the horse stables, Appellant invited H.P. take her shirt off so he could look at her breasts. (JA 168). H.P. recalled at the time Appellant made this request to see her breasts, she wore a pink training bra. (JA 169). On another occasion at the horse stall, Appellant exposed his penis to H.P. (JA 171). Once exposed, Appellant requested H.P. touch his penis, but she refused. (JA 171).

One evening while on Fort Riley, Appellant positioned H.P. on her knees while on his bed. (JA 181). H.P. recalled that while on the bed, she wore a full length, light blue nightgown. (JA 181). Appellant positioned H.P. so that the nightgown was over her head and secured it by placing one of his military berets on her head. (JA 181). Appellant then anally penetrated H.P. with a sex toy. (JA 181). H.P. observed that the sex toy was cold and felt like latex or silicone. (JA 181). After penetrating her anus with the sex toy, Appellant then penetrated her anus with his penis. (JA 181). H.P. testified that while Appellant penetrated her anus with his penis, she felt the tops of his thighs on the bottoms of her feet and the weight of his body moving. (JA 181–82). Appellant only stopped anally penetrating H.P. with his penis when he thought he heard a car pulling into the driveway. (JA 182).

Summary of Argument

The 2016 amendments to Article 43, UCMJ, *did not* revert the legislatively elongated statute of limitations for historical indecent liberties and sodomy offenses charged under Articles 134 and 125, UCMJ, to a mere five years. And the plain language of the statute does not compel a contrary conclusion. Congress has only increased the period of limitations in order to protect children. *See* NDAA 2004, § 551; NDAA 2006, § 553(b)(1); and, NDAA 2017, § 5225(a). Accordingly, the amendments made by the Military Justice Act 2016 (MJA 2016)

were certainly not intended to prematurely foreclose certain prosecutions for abuses against children necessarily charged under past versions of Articles 125 and 134, UCMJ. Appellant argues against both the clear language of the statute and the overall context of the statutory scheme to reach a result plainly counter to Congressional intent and logic.

Even if a strained reading of the statute could result in a conclusion that the statute prematurely foreclosed the prosecution of child abuse offenses charged under historical versions of the Code, this conclusion would shock the conscience to such a degree that it should be found absurd. To be sure, the Appellant's position is contrary to Congressional intent as evidenced by the totality of the 2017 NDAA's legislative history. In order to avoid this surprising and absurd result, this Court should apply the long-standing principal that the statute of limitations in effect at the time Appellant committed his crimes is the one that controls. *See Toussie v. United States*, 397 U.S. 112, 115 (1970). Such an interpretation both achieves the Congressional intent and "serves the interests of all concerned." *United States v. Briggs*, 141 St. Ct. 467, 471 (2020).

Assuming arguendo this Court determines that the 2016 amendment to Article 43, UCMJ caused the statute of limitations—for the child abuse offenses that Appellant now challenges—to revert to five years, Appellant is not entitled to relief after his case is reviewed under a plain error analysis.

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).

Law

I. Congress Increased the Statute of Limitations for Child Abuse Offenses on Three Occasions.

Congress has amended Article 43 and increased the limitation period to prosecute child abuse offenses three times between 2003 and 2017. In 2003, Congress expanded the statute of limitations, under Article 43, UCMJ, for child abuse offenses. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003). This amendment expanded the statute of limitations for child abuse offenses from five years to the victim's 25th birthday. NDAA 2004 § 551(b)(2)(A). It also defined the term "child abuse offense" as "an act that involves sexual . . . abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses." NDAA 2004 § 551(b)(2)(B). The amendment specifically enumerated "sodomy" as a "child

abuse offense." NDAA 2004, § 551(b)(2)(B)(iii). It also specifically enumerated "indecent acts or liberties with a child in violation of section 934 of this title (article 134)" as a "child abuse offense." NDAA 2004, § 551(b)(2)(B)(v).

Congress amended Article 43 yet again in 2006. National Defense Authorization Act for Fiscal Year 2006 (NDAA 2006), Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264 (2006). In this amendment, Congress further expanded 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).

The third amendment to Article 43 concerning the statute of limitations occurred with the enactment of the 2017 NDAA, which again further expanded the statute of limitations for child abuse offenses to "the life of the child or within ten years after the date on which the offense was committed, whichever provides a longer period . . . ." National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. 114-328, § 5225(a), 130 Stat. 2000, 2910 (2016).

II. The Military Justice Act of 2016

The change in the limitation period provided in Article 43, UCMJ, was a small part of the larger changes directed by 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. As part of the Code's revision, some Article 134 offenses were re-designated under different Articles—kidnapping (Article 125), assaults with intent to commit specified offenses (128), maiming (128a),—while sodomy under Article 125 was deleted.

III. The Statute of Limitations and Interpretation

The statute of limitations in effect when the crime is committed generally controls. *Toussie*, 397 U.S. at 115 *superseded by statute on other grounds*. As a general rule, there is a presumption against retroactive legislation. *Landsgraf v. Usi Film Prods.*, 511 U.S. 244, 277 (1994); *INS v. St. Cyr*, 533 U.S. 289, 315 (2011). This presumption exists because "it is contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent. The principal that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Kaiser Aluminum Corp. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

In its simplest form, "[s]tatutes of limitations . . . are designed to promote justice by preventing surprises." *Order of R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348 (1944). Indeed, "certainty in statutes of

limitations generally serves the interests of all concerned." *United States v. Briggs*, 141 St. Ct. 467, 471 (2020). Accordingly, "congressional enactments and administrative rules will not be construed to have a retroactive effect unless their language requires the result." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

When determining whether Congress intended a law to have retroactive effect, "[this Court applies] traditional canons of statutory construction." *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012). In analyzing statutory construction, "unless ambiguous, the plain language of the statute will control unless it leads to an absurd result." *Id.; Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). Underpinning this fundamental concept of avoiding absurd results, "the meaning of a statement often turns on the context in which it is made, and that is no less true of statutory language." *Briggs*, 141 St. Ct. at 470.

It is well settled that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982); *United States v. American Trucking Association*, 310 U.S. 534, 543 (1940); *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 55–56 (1942); *United States v. Wilson*, 503 U.S. 329, 334 (1992). In undertaking the process of interpretation, "there is a danger that the courts' conclusion as to

legislative purpose will be unconsciously influenced by a judge's own views or by factors not considered by the enacting body." *American Trucking Ass'n.*, 310 U.S at 544. Accordingly, "[a] lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a conclusion." *Id.*

Argument

Appellant's argument that the sexual abuse offenses he committed upon his minor stepdaughter are subject to a mere five year statute of limitations is nonsensical, contradicts more than a decade of expressed Congressional purpose and intent, and somehow equates inarguably child abuse offenses into not child abuse offenses. Stated simply, the amendments made by MJA 2016 were not intended to prematurely foreclose certain prosecutions for abuses against children under Articles 125 and 134, UCMJ. To adopt Appellant's argument would require this court to ignore the fact that Congress has only increased the period of limitations in order to protect children. *See* NDAA 2004, § 551; NDAA 2006, § 553(b)(1); and, NDAA 2017, § 5225(a).

Appellant's argument improperly requires the court to give substantive effect to a mere conforming amendment and conclude that the resulting omission of Article 125 and 134, UCMJ from the list of child abuse offenses in Article 43

following the 2016 redesign of the UCMJ somehow extinguished their presence from all prior versions of the Code. (Appellant's Br. at 16–19). To adopt this interpretive analysis runs afoul of the inherent limitations of conforming amendments. Moreoever, an interpretation that would conclude that Congress inexplicably curtailed the enhanced limitation period would defeat the very purpose of the statute and should be avoided.

To the extent that a plain reading of the statute could support Appellant's position, it would yield an absurd result that would defeat not only the intent, but also the very purpose of the legislation. Accordingly, it should be avoided.

Assuming arguendo this Court determines that the 2016 amendment to Article 43, UCMJ, caused the statute of limitations—for the historical child abuse offenses that Appellant now challenges—to revert to five years, Appellant is not entitled to relief after his case is reviewed under a plain error analysis.

A. Appellant's Prosecution Was Not Time-Barred Because the Specifications of Charges II and IV Were Timely Received, In Accordance With the Version of Article 43, UCMJ, in Effect When He Abused His Stepdaughter.

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*, 397 U.S. at 115).

From 2003 to 2005, when Appellant sexually abused H.P. on multiple occasions, 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)." NDAA 2004, § 551(2)(A)–(B). The statute further stated that any act involving sodomy of a child would constitute child abuse. NDAA 2004, § 551(B)(iii).

Appellant was charged with indecent liberties with a child under Article 134, UCMJ, and sodomy with a child under Article 125, UCMJ, for sexually abusing his stepdaughter from 2003 to 2005; 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. NDAA 2004, § 551(2)(A). The SCMCA received the sworn charges on September 11, 2012 and May 11, 2017 (JA 029, 037), when H.P. was 17 and 22 years old, respectively. (JA 152). In accordance with the Article 43, UCMJ, the limitation period that was in effect at

the time of Appellant's offenses, the sworn charges were timely received by the SCMCA before Appellant's trial, his resulting conviction, *and* his authorized rehearing. This is important to note because for the government to prevail on this issue, it does not require the benefit of the most recent expansion. Instead, this prosecution survives even if only the shorter statute of limitations, in effect at the time of the offense, applies.

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

The NDAA FY 17 did not prematurely expire the limitation period in effect for Appellant's sexual abuse of H.P. To conclude otherwise is contrary to the plain language of the statute irrespective of the fact that the conforming amendments to Article 43(b)(2)(B)(i)–(v) should not be given substantive effect. To accept Appellant's position would require the court to ignore the context of the changes made as a result of MJA 2016 and specific Congressional directions included in the legislation.

As an initial matter, 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]).[11] Holistically, Congress increased the limitation period for child abuse offenses through a substantive change to Article 43, UCMJ. NDAA

[11] An argument can be made that the NDAA FY 17 was not in effect during the pendency of Appellant'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.

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

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."). Appellant would have this Court ignore this expressed intent of Congress. Instead, Appellant focuses attention on the resulting omission of Articles 125 and 134 from the list of enumerated offenses located in Article 43(b)(2)(B), UCMJ, without lending any weight or credence to the fact Congress specified that the restructuring of the list of offenses was through a conforming amendment in the MJA 2016. A plain reading of the statute, with due consideration of the context of the legislation of a whole, compels a conclusion that Congress meant to continue its painstaking efforts to increase protections for children. *See Briggs*, 141 St. Ct. at 470; *King*, 576 U.S. at 492–93. An interpretation that Congress intended to strike sodomy and indecent liberties with a child from the historical lexicon of child abuse offenses is not similarly required.

The generational restructuring of the Code through MJA 2016 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

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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.

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.

Congress clearly stated its intent behind the 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 directly 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, § 5225(d). Similar language was not included when making a substantive change to increase the limitation period. *See*, NDAA FY 17, § 5225(a) (not including the phrase "Conforming Amendment").

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, § 5225(d), thus these were non-substantive amendments to bring

Article 43, UCMJ, in line with the UCMJ after the comprehensive changes took effect. *See Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund*, 138 S. Ct. 1061, 1071–72 (2018); 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)).

The omission of specific enumeration of Article 134 and Article 125, 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. Their resulting omission prospectively from the Code does not compel a finding that they were deleted from every prior iteration. Accordingly, the statute of limitations for Appellant's crimes was not retroactively shortened.

C. Appellant's Indecent Liberties with and Sodomization of H.P. 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).

Appellant's sodomization of and indecent liberties with H.P. clearly *constitute* child abuse offenses. As such, these offenses are certainly not subject to a curtailed statute of limitations and should be subject, at a minimum, to the statute of limitations in effect at the time Appellant committed his crimes, if not the even longer period now granted by Congress to these type offenses. Article 43, UCMJ (2019), defines a "child abuse offense" as: (1) an act that involves the abuse of a person who has not attained the age of 16 years; and (2) where the act *constitutes* any of the offenses described in Article 43 (b)(2)(B)(i)–(iv). Paragraph (i) proscribes, among other offenses, rape and sexual abuse of a child. Appellant was convicted of several sexual crimes committed against H.P. to include: directing her to penetrate herself with sex toys and her fingers; penetrating her anus with his penis; inviting her to touch his penis; and, directing her to remove her shirt so he could stare at her breasts. (JA 157–58, 164–71, 181–82). These crimes were

charged under Article 125, UCMJ, and Article 134, UCMJ, because they occurred on multiple occasions between 2003 and 2005. (JA 036–43).

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,[12] UCMJ; unnatural carnal copulation under Article 125,[13] UCMJ; or indecent liberties with a child under Article 134,[14] UCMJ. 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.

The omission of specific enumeration of Articles 125 (as historical Sodomy) and 134 from the statutory scheme of the MJA 2016 redesign merely occurred as the result of a reorganization. This is no more telling than if Appellant's actions occurred today. Had Appellant committed the 2003–2005 conduct with H.P. today, there is no question he would be charged with rape of a child and abusive sexual contact of a child under Article 120b, UCMJ. Thus, while his malfeasance

[12] *MCM*, 2005, pt. IV, ¶ 45.b.(2) (sexual intercourse with a child).
[13] *MCM*, 2005, pt. IV, ¶ 51.b.(1) (sodomy committed against a child).
[14] *MCM*, 2002, pt. IV, ¶ 87.b.

was charged under Articles 125 and 134, UCMJ, because the statute of limitations in effect at the time of the crimes controls, his crimes nevertheless *constitute* child abuse offenses under Article 120b. This is because they "involve[d] a child who has not attained the age of 12 years," and is clearly demonstrated by a simple elements analysis. *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 62.a.(1).

H.P. testified that she was born in November of 1994. (JA 152). Appellant abused her from 2003 to 2005, making her no older than 12 at the time of the relevant offenses. (JA 039–41). Rape of child occurs when "any person subject to this chapter . . . commits a sexual act upon a child who has not attained the age of 12 years." *MCM, 2019*, pt. IV, ¶ 62.a.(1). "The term 'sexual act' means the penetration, however, slight of the penis into the . . . anus." *MCM*, 2019, pt. IV, ¶ 60.g.(1)(A). Appellant positioned H.P. on the bed in his bedroom and penetrated her anus with his penis. (JA 181). Sexual abuse of a child occurs when "any person subject to this chapter . . . commits a lewd act upon a child." *MCM*, 2019, pt. IV, ¶ 60.c. A child is defined as "any person who has not attained the age of 16 years." *MCM*, 2019, pt. IV, ¶ 60.h.(4). A lewd act encompasses "intentionally exposing one's genitalia . . . to a child," and "any 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." *MCM*, 2019, pt. IV, ¶ 60.h.(5)(B)(D). On separate occasions, Appellant directed H.P. to penetrate her vagina with her fingers and multiple sex toys, told her to touch his penis, and ordered her remove her bra so he could stare at her breasts. (JA 157–58, 164–71, 171–72).

The plain meaning of the language controls. 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* offenses listed) (emphasis added). Accordingly, the *actus reus* of Appellant'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) (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 (1961).

Appellant's 2004 conduct certainly "make[s] up, form[s] or compose[s]" the offenses described in Article 43(b)(2)(B)(i) (2019), namely child rape and sexual abuse of a child under Article 120b, UCMJ (2019). With the context of the necessary re-organization of the UCMJ in mind, this natural reading of the text avoids the absurd finding that Appellant's acts of: ordering H.P. to penetrate her vagina with sex toys and her fingers; exposing his penis to her and requesting she touch it; ordering her to expose her breasts so he could stare at them; and, sodomizing H.P.'s anus with his penis are not covered by the extended limitation period in effect at the time of Appellant's crimes merely because the UCMJ Article number at the time the offense later changed and was subsumed into the ambit of another UCMJ Article. *See Wilson*, 503 U.S. at 334. ("[A]bsurd results are to be avoided."); (JA 157–58, 164–71, 171–72).

Certainly, Appellant's case uniquely proves the absurdity of his argument. He contends that because indecent liberties and sodomy under Articles 134 and 125, UCMJ, respectively, are no longer enumerated in the statute, the limitation period for the offenses reverted to 5 years. (Appellant's Br. at 17). Appellant's position is simply untenable. Appellant's anal sodomization of H.P. with his penis is no less a child abuse offense because he was charged with the criminal statute in effect when he subjected H.P. to his despicable acts. 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 sodomy charged under Article 125, UCMJ, is subject to only a 5-year limitation period but sodomy charged under Article 120b, UCMJ, is subject to the expansive period of life of the child or 10 years should be avoided. *See*, *King*, 576 U.S. at 486 (observing that a court's "duty after all is to construe statutes, not isolated provisions.").

When looking at "plain language" as to the changes to Article 43, UCMJ, the meaning most plain, overt, and simple interpretation 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 Appellant was charged with and convicted of child abuse offenses and thus subject to an elongated limitation period.

D. To Find that the 2016 Amendments to Article 43 Retroactively Reduced the Applicable Statute of Limitations Period to Five Years for the Offenses at Issue Would Lead to an Absurd Result, Contrary to Congress's Intent.

Appellant's position that Congress intended indecent liberties with a child and sodomy of a child to revert to a five-year statute of limitations yields an absurd result and should be rejected by this Court. Congress has only increased the statute of limitations for child abuse offenses. Accordingly, the most logical interpretation based upon the totality of the 2017 NDAA's legislative history, purpose and long-

standing legal precedent is that the applicable statute of limitations period is the one in effect at the time Appellant committed his crimes. *See Toussie*, 397 U.S. at 115. This interpretation "prevent[s] surprises," *Railway Express Agency, Inc.*, 321 U.S. at 342, and "generally serves the interests of all concerned." *Briggs*, 141 St. Ct. at 471.

It is well settled that "[w]here the plain meaning of the words used in a statute produces an unreasonable result, plainly at variance with the policy of the legislation as a whole, [the Court] may follow the purpose of the statute rather than the literal words." *N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. at 55–56 (internal marks and citation omitted). Courts are encouraged to avoid "interpretations of a statute which would produce absurd results . . . if alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575. This is because "certainty in statutes of limitations generally serves the interests of all concerned." *Briggs*, 141 St. Ct. at 471. In conducting the analysis, "[t]he canon in favor of strict construction of criminal statutes . . . does [not] demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." *United States v. Moore*, 423 U.S. 122, 145 (1972) (quoting *United States v. Brown*, 333 U.S. 18, 25-26 (1948)).

Indeed, Congress has always expanded, rather than shortened the statute of limitations period for child abuse cases. NDAA 2004, § 551(b)(2)(A) (prosecution permitted "before the child attains the age of 25 years"); Article 43, UCMJ (2008) (prosecution permitted "during the life of the child or within five years after the date on which the offense was committed, whichever provides the longer period"); Article 43, UCMJ (2019) (prosecution permitted "during the life of the child or within ten years after the date on which the offense was committed, whichever provides the longer period").

The Senate and the House Armed Services Committee Reports reveal that the 2016 amendment was intended to *expand* the limitations period for child sexual abuse and other offenses. S. REP. 114-255, at 601 (2016) (Comm. Rep.); H. REP. 114-537, at 606 (2016) (Comm. Rep.). It does not naturally or logically follow that Congress would prematurely foreclose victims from seeking justice while simultaneously enlarging the window to the 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.). Appellant brazenly asserts otherwise[15] and requests this Court interpret the legislation in a manner directly opposite from that

[15] *See* Appellant's Br. at 15–16.

legislation's stated purpose. H. REP. 114-537, at 606 (observing intent to extend statute of limitations for child abuse offenses).

"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 Appellant's crimes against H.P. 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 at all, but rather the omission of some numerical designators from a list found in 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.[16] This pervasive

[16] As noted by Senator Nelson in 2003:

> Child victims of sexual crimes sometimes struggle to come to terms with the crimes committed against them and

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.'")).

Appellant's proposed interpretation contradicts the 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)

> 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).

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).

Indeed, Appellant's crimes highlight the prescience of Senator Nelson's comments regarding the need for expanded statutes of limitations. Appellant began his sexual abuse on H.P. when she was only in the third grade. (JA 156, 166, 172). While he directed her in the use of her fingers and sex toys to penetrate her vagina, she was unaware of what sex toys were because she was only in the third grade. (JA 158). Further, she did not disclose the incident because she was scared she would get into trouble. (JA 158). Leveraging H.P.'s understandable immaturity and naiveté, Appellant threatened to have her grounded and other privileges taken away should she tell anyone of what he was doing to her. (JA 174–75). Appellant continued and progressed his assaults as H.P. moved into the

fourth grade. (JA 164–165). Appellant escalated his sexual deviance to the penetration of H.P.'s anus with his penis. (JA 181–182). It was not until H.P. received a sexual education class in school did she report Appellant's abuse. (JA 175–176). Only then did law enforcement become involved. (JA 177). Accordingly, Appellant's own malfeasance and victim selection proves valid Congressional concerns regarding the latency of child abuse reporting.

The amendment's general purpose was to *increase* the statute of limitations period for child abuse offenses, establish the statute of limitations for new offenses, and maintain the statute of limitations for all other historical offenses. No reasonable interpretation of the 2016 amendments to Article 43, UCMJ, supports the notion that Congress's intent and purpose was to shorten the statute of limitations period, especially for sexual offenses committed against children. Accordingly, to adopt Appellant's fanciful interpretation that the applicable statute of limitations for the offenses at issue would revert to a mere five years from the commission of the offense would lead to an absurd result. The only fair interpretation is that the longstanding principal of the statute of limitations in effect at the time of the controls. *Toussie*, 397 U.S. at 115.

E. Assuming the Statute of Limitations Reverted to Five Years, Appellant is Not Entitled to Relief Under the Plain Error Analysis.

An Appellant's failure to raise a statute of limitations claim at a court-martial is reviewed for plain error.[17] *Briggs*, 78 M.J. at 295 ("Accordingly, in a court martial, R.C.M. 907 (b)(2)(B) makes the statute of limitations 'part of a case' whenever the accused has a statute of limitations defense and does not appear to know it. We therefore review Appellant's failure to raise the statute of limitations for plain error."). For an Appellant to prevail under the plain error test "there must be an error, that was clear or obvious, and which prejudiced a substantial right of the accused." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). Working within the plain error framework, the error Appellant now raises was not clear or obvious.

1. Any error concerning the statute of limitations was not clear or obvious during Appellant's court-martial.

It takes a novel approach of statutory interpretation of NDAA 2017, Section 5225 to conclude that the applicable statute of limitations for Specifications 2–5 of Charge II and Specification 1 of Charge IV had expired. This novel interpretation certainly would not have been plain or obvious to the military judge at trial.

[17] Of note, Appellant concedes that he raised no objection at the court-martial regarding the statute of limitations. (Appellant's Br. at 25)

As an initial matter, absent consideration of Section 5225, multiple reasons explain why the limitation period for the relevant offenses listed in Charge II and Charge IV had not expired prior to Appellant's rehearing in 2018. First, the charges preferred against Appellant in 2012 tolled when the SCMCA initially received the sworn charges on September 11, 2012. (JA 029). Further, the Army Court's January 6, 2017 decision, which authorized a rehearing on the set aside and dismissed charges and specifications, evinced the lower court's understanding that the applicable statute of limitations had not expired. *See Adams*, 2017 CCA LEXIS 6, at *8 ("The findings of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority."). From a statute of limitations standpoint, that the initial 2012 offenses were dismissed at the same time the 2017 charges were referred is of no consequence. Indeed, "[t]he savings clause of Article 43(g), UCMJ, allows charges to be dismissed and referred within 180 days if the charges are 'defective or insufficient *for any cause*. . . . '" *United States v. Adams*, 2020 CCA LEXIS 232, at *10, n.14 (A. Ct. Crim. App. Jul. 13, 2020) (mem. op.) (emphasis in original); Article 43(g)(1), UCMJ (2012) (emphasis added). Accordingly, even the dismissal of the 2012 charges, which immediately preceded the referral of the 2017 charges, did not cause the applicable statute of limitations to run. *See Adams*, 2020 CCA LEXIS 232, at *10, n.14 ("Although Specification 1 of Charge IV is identical to the corresponding 2012 charge, we

note that Specifications 2, 3, and 4 of Charge II have slight differences in wording compared to the corresponding 2012 charges. In light of the CAAF's decision in *Stout*, 2019 CAAF LEXIS 648, at *4, holding pre-referral changes are permissible, we find appellant's argument regarding these offenses meritless.").

Simply stated, Charge II and Charge IV were received by the SCMCA on September 11, 2012 and May 11, 2017, respectively.[18] (JA 029, 037).[19] Charge II and Charge IV involved, among other crimes, multiple instances of indecent liberties with a child and sodomy committed against a child under the age of 12 years on various occasions between 2003 and 2005. (JA 039–41). 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, 117 Stat. 1392, 1481 (effective Nov. 24, 2003)). The statute of limitations is tolled upon receipt of the sworn charges by the summary court-martial convening authority. Article 43, UCMJ; *see also* R.C.M. 907 (b)(2)(B) discussion.

[18] H.P. had not reached the age of 25 at either receipt of the charges by the SCMCA. (JA 152).
[19] Of note, the only "new" charge added at the time of the 2017 trial was Charge II, Specification 5.

Appellant's contention that the military judge should have been on notice merely because it was an old case and NDAA 2017 had recently been enacted falls flat. (Appellant's Br. at 26). Put simply, neither his case's age nor the enactment of NDAA 2017 make the alleged error plain or obvious. Further, Appellant is mistaken when he suggests the Army Court noted there may be statute of limitations issue during his 2018 petition for extraordinary relief.[20] (*See* Appellant's Br. at 26).

Certainly, a "principal benefit of statutes of limitation is that they provide clarity." *Briggs*, 141 S. Ct. at 471 (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*, 141 S. Ct. at 471. Appellant's claim turns predictability on its head, thus, it cannot be plainly obvious as he now contends. 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." *Id*. Any interpretation that would take a profoundly weird turn and unwind Congress's methodical and unyielding

[20] "Appellant has not raised, and therefore we do not address, issues of speedy trial or statute of limitations." *Adams v. Cook*, 2018 CCA LEXIS 30, at *3 (A. Ct. Crim. App. Jan. 23, 2018).

efforts to extend the period of limitation for child abuse offenses would turn predictability on its head and thus could not be plain and obvious to any of the participants in Appellant's trial.

Because the SCMCA received the sworn charges on May 11, 2017, when H.P. was 22 years old (JA 152), the applicable statute of limitations for the offenses listed in Charge II and Charge IV had not expired. Generally speaking, the statute of limitations applicable is that in effect at the time the accused committed his crimes. *Toussie*, 397 U.S. at 115. This was certainly the understanding of not only the military judge, but also of the trial counsel, Appellant and his counsel, and importantly H.P.[21]

2. Any error concerning the statute of limitations was not clear or obvious during the Army Court's Article 66, UCMJ, appellate review in 2017.

That the error was not plain or obvious is no more evident than when Appellant's case came before the Army Court on appeal for the first time in 2017. *Adams*, 2017 CCA LEXIS 6, at * 8. At the time the Army Court set aside Appellant's 2013 court-martial findings and sentence on January 6, 2017, pursuant to this Court's decision in *Hills*, the 2016 amendments to Article 43, UCMJ, had presumably been enacted. *See supra* note 11. Yet no party to the appellate

[21] Appellant raised a statute of limitation claim for the first time on March 4, 2020. (Supplemental Brief on Behalf of the Appellant filed with the Army Court).

proceeding, including Appellant, made *any* mention of a potential statute of limitations issue.

Should this Court determine that the applicable statute of limitation—was not only reduced despite the legislation's purpose and intent, because sodomy charged under Article 125 and indecent acts with a child charged under Article 134 were erased from the criminal lexicon as child abuse offenses—any such error certainly was not clear or obvious to *any* party involved when Appellant was convicted on November 5, 2018. *See 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). It follows that since the error was not clear or obvious, Appellant cannot meet the second prong of the plain error standard.

F. Appellant's Position That the Savings Clause Under Article 43(g), UCMJ, is Inapplicable is Wrong Because the Sworn Charges and Specifications Were Timely Received by the SCMCA.

The Savings Clause pursuant to Article 43, UCMJ, tolls the statute of limitations for charges and specifications that "are dismissed as defective or insufficient *for any cause*," even if said charges and specifications "has expired" or "will expire within 180 days after the date of dismissal or the charges." The Savings Clause provision of Article 43, UCMJ, applies when:

> the new charges and specifications [are] received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications).

Article 43(g)(2)(A)–(B), UCMJ. Subsequent "trial and punishment under the new charges and specifications are not barred by the statute of limitations if the conditions specified in [Article 43(g)(1)–(2)] are met." Article 43(g)(1)(B). This Court has previously found that:

> when an accused is arraigned on charges and specifications that appear might be barred by the statute of limitations, the critical question posed by Article 43 is whether the "sworn charges and specifications" were timely received, not whether the same piece of paper that contains those charges at the court-martial was the same piece of paper that conveyed those charges to the summary court-martial authority.

United States v. Miller, 38 M.J. 121, 124 (C.A.A.F. 1993).

As noted earlier, Appellant's position on this matter is of no consequence to the issue before this Court because the "'sworn charges and specifications' were timely received." *Miller*, 38 M.J. at 124. The original charges were brought to trial in 2012 without running afoul of the statute of limitations. On rehearing, because the SCMCA received the re-preferred, sworn charges less than 180 days after Appellant's 2012 charges were dismissed, the Savings Clause protected the

continued prosecution of Appellant's malfeasance. *See* Article 43(g)(2)(A), UCMJ. The 2017 charges "allege the same acts . . . that were alleged in the dismissed charges or specification (or allege acts . . . that were included in the dismissed charges or specifications)." Article 43(g)(2)(B), UCMJ (2012). Thus, the original tolling of the charges and their specifications when received by the SCMCA on September 11, 2012, (JA 029) precludes a finding that the statute of limitations had expired. Further, it is indisputable that when the government originally tried Appellant in August 2013, the statute of limitations in effect at the time had not expired. Accordingly, Appellant's argument falls flat.

It should be noted that Appellant's case highlights both the absurdity of his argument and the fact that, if true, the retroactive curtailment of the statute of limitations for his offenses was not plain or obvious to any of the participants. Appellant was prosecuted to a conviction for his child abuse offenses of sodomy and indecent acts in 2013, well before Congress made any of the changes. Because of an instruction error, his convictions were set aside and authorized to be retried. Irrespective of this delay, the statute of limitations would not have foreclosed retrial because, assuming arguendo that H.P. had reached her 25th birthday, Appellant's charges would nevertheless be timely because of the savings clause. The savings clause would serve to put Appellant's trial—at least for purposes of the statute of limitations—in the same timeframe as his original trial. Appellant's

case demonstrates how dramatic his proposed interpretation of the statute is in expiring otherwise valid prosecutions. Accordingly, any error was not plain and obvious, and Appellant's failure to preserve his objection at trial means he is not entitled to relief.

Conclusion

Wherefore, the United States respectfully requests this Honorable Court affirm the findings and sentence.

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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 February 19, 2021.

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