IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Appellee **v.** Staff Sergeant **Zackery J. ASKINS** United States. Army Appellant	*Amici Curiae* Brief Crim. App. Dkt. No. 20230303 **USCA Dkt. No. 26-002/AR**

Brief in Partial Support of Appellant

James A. Young
Colonel, USAF (Ret.)
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

Ann Ching
Clinical Professor of Law
Sandra Day O'Connor
College of Law
Arizona State University
Phoenix, AZ 85004
(480) 727-6424
ann.ching@asu.edu
USCAAF Bar No. 38264

March 11, 2026

To the Honorable Judges of the United States Court of Appeals for the Armed Forces

Interest of *Amici*

James A. Young is a retired judge advocate whose 30-year career focused on military justice. Thereafter, he served as the senior legal advisor to the Honorable Scott Stucky, a senior judge of this Court.

Ann Ching is a Clinical Professor of Law and a veteran of the Army Judge Advocate General's Corps. As a military lawyer, she served as a trial counsel, defense counsel, and as Chief of Military Justice.

Granted Issues

I. Whether the Army Court erred when it held that the United States was in a "time of war" from 2014–2017 and the Statute of Limitations was tolled.

II. Whether Appellant waived or forfeited application of the Statute of Limitations to his larceny conviction in Specification 1 of Charge I. If forfeited, does Appellant meet his burden of proof under plain error review.

Relevance of the Brief

Without access to the record, *Amici* are unable to determine whether Appellant waived or forfeited his statute of limitations claim; the United States was not "at war" from 2014 through December 2016; and the Government failed to prove beyond a reasonable doubt that the five-year statute of limitations was suspended on his larceny conviction.

Facts

Amici have no access to the record of trial and, therefore, accept the facts as set forth in the Government's brief at the Army Court of Criminal Appeals and that court's decision. *United States v. Askins*, No. ARMY 20230303, 2025 WL 2505763 (A. Ct. Crim. App. Aug. 28, 2025). Pursuant to a plea agreement, Appellant pled guilty to and was convicted, *inter alia*, of larceny of Army explosive materials between 2014 and December 2016. Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 921. *Askins*, 2025 WL 2505763 at *2. The summary court-martial convening authority received the charges on March 7, 2022. *Id.*

The Army Court held that Appellant's offenses occurred "in time of war," the five-year statute of limitations was "tolled until three years after the termination of hostilities, and Appellant's prosecution was not time-barred." *Askins*, 2025 WL 2505763, at *3–*4.

Argument

1. *Amici* are unable to determine whether Appellant waived or forfeited the statute of limitations issue.

1.1. Standard of Review

"Whereas forfeiture is the failure to make a timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation marks and citations omitted); *see United States v. Thompson*, 59 M.J. 432, 440 (C.A.A.F. 2004). This Court reviews forfeited issues for plain er-

ror, but "cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020) (citations omitted).

1.2. The military judge is required to inform Appellant of his right to assert the statute of limitations in bar of trial if it appears the accused is unaware of that right.

A military judge "*shall* inform the accused of [his] right" to assert the statute of limitations as a bar to trial "if it appears that the accused is unaware of the right." R.C.M. 907(b)(2)(B) (emphasis added). Unless expressly provided otherwise, the rules of construction in 10 U.S.C. § 101 apply to the Rules for Courts-Martial. R.C.M. 103(21) (2012 ed.); R.C.M. 103(21) (2016 ed.).[1] Therefore, within the Rules for Courts-Martial, the term "'shall' is used in an imperative sense." 10 U.S.C. § 101(g)(1); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) ("*shall* is mandatory" and "ought to be replaceable by either *has a duty to* or *is required to*"). (Emphasis in the original).

R.C.M. 907(b)(2)(B) does not specify the standard appellate courts must use to determine "if it appears that the accused was unaware of the right to assert the statute of limitations in bar of trial." The Court should apply a "reasonable judge" standard: whether it would appear to a reasonable judge, knowing all the circumstances, that the accused was unaware of

---

[1] The time period during which Appellant admitted committing the larceny offense coincided with the transition from the 2012 to 2016 *Manual for Courts-Martial* (*MCM*). *See MCM* Preface (2016 ed.).

that right. *See United States v. Jefferson*, 44 M.J. 312, 323 (C.A.A.F. 1996) (regarding judicial challenges for cause); *United States v. Mitchell,* 39 M.J. 131, 141–42 (C.A.A.F. 1994) ("a Constitutional appearance-of-fairness question is to be decided from the perspective of 'a reasonable judge'"). However, without access to the record or the plea agreement, *Amici* are unable to opine on whether the military judge in this case met the reasonable judge standard.

1.3. *Amici* are unable to opine on whether Appellant waived or forfeited the statute of limitations issue.

This Court's precedent provides that when the military judge does not inform an apparently unaware accused of a potential statute of limitations defense, an accused's failure to raise the issue does not constitute a waiver. *United States v. Tunnell*, 23 M.J. 110, 111 (C.A.A.F. 1986). If the Court were to decide Appellant forfeited the issue, it would apply the plain error test: whether the military judge committed obvious error in failing to inform Appellant of the right to assert the statute of limitations in bar of trial and that error materially prejudiced a substantial right *See United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (plain error test). Without access to the record, *Amici* is unable to opine on whether Appellant waived or forfeited the issue.

2. The statute of limitations was not suspended.

2.1. The standard of review.

Whether the applicable statute of limitations has run is a legal question that this Court reviews *de novo*. *United States v. McPherson*, 81 M.J. 372 (C.A.A.F. 2021).

2.2. The statute of limitations under Article 43(f)(2), UCMJ, may only be suspended when the United States is "at war."

Generally, "a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." Article 43(a), UCMJ. However, when the United States is "at war," the limitations period for an offense "committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States ... is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress." Article 43(f)(2), UCMJ. Article 43(f) was derived directly from 18 U.S.C. § 3287. S. Rep. No. 486 (1949).

In 2008, Congress amended § 3287 by broadening the circumstances under which the statute of limitations could be suspended—from "at war" to "at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b))." 122 Stat. 3647 (2008). Congress did not make

a similar change to Article 43(f). In 2016, however, it revised Article 43 but only to add "subsection headings ... for stylistic consistency." 130 Stat. 2910 (2016). Article 43(f)'s subheading reads: "Extension for other offenses in time of war." *Id.*

2.3. For Article 43(f) purposes, "at war" requires a congressional declaration of war.

The term "at war" appears in Article 43 only in subsection (f), which adopted its language directly from 18 U.S.C. § 3287. Two other subsections of Article 43, UCMJ, use the phrase "in time of war." Article 43(a), (e), UCMJ. Neither Congress nor the President defined the phrase "at war." In *United States v. Taylor,* this Court acknowledged that it had not found any case interpreting "at war" for purposes of § 3287. 15 C.M.R. 232, 236 (C.M.A. 1954). However, it did "not feel that these words compel an acceptance of the defense argument that Article 43(f) was intended to apply only in the event of a formally declared war." *Id.* at 237.

The two most recent cases interpreting "at war" in § 3287 were decided before the 2008 amendment and reached different outcomes. *See United States v. Prosperi*, 573 F. Supp. 2d 436, 438 (D. Mass. 2008) (holding that a declaration of war was not necessary to trigger suspension of the statute of limitations under § 3287); *United States v. Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993) ("The Congressional intent underlying the Sus-

pension Act appears to have been more directly concerned with such massive and pervasive conflicts as World War II").

Much has changed since 2008. Most importantly, the 2008 amendment to § 3287 clarifies that "at war" and the use of force under congressional authorization are separate concepts. Ignoring the distinction would violate the canon of statutory interpretation that no part of a legal text should be redundant or meaningless. Scalia & Garner, at 174. But establishing that "at war" and a congressional authorization for the use of military force are different is not sufficient. The question is, what does "at war" actually mean?

Although the two federal district court cases are contradictory, they can be reconciled by considering the 2008 amendment to § 3287. The law recognizes two types of congressional authorizations for the President to use military force. First, the term "at war" would be used to describe "such massive and pervasive conflicts as World War II." *Shelton*, 816 F. Supp. at 1135. In these cases, Congress would need to declare war. Second, Congress could authorize a limited use of military force as outlined in the amendment to § 3287—something less than a "massive and pervasive conflict[ ]."

As originally enacted Article 43(f) was basically a clone of § 3287. Although Congress amended Article 43(f) in 2016 to add subsection headings, it still has not added the words from the 2008 amendment to § 3287.

The Court should infer that this omission was deliberate and conclude that the term "at war" limits the application of Article 43(f) to massive and pervasive conflicts requiring a declaration of war.

This Court should decline to apply Article 46(f)'s "subsection heading" in defining the term "at war" because such headings or captions "are not part of a statute. They cannot vary its plain meaning and are available for interpretive purposes only if they can shed light on some ambiguity in the text." *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). Article 43(f)'s subheading does not shed such light.

2.4. The Government failed to establish that the statute of limitations had been suspended.

The Government must prove beyond a reasonable doubt that the accused committed the offense within the statute of limitations. *United States v. Moore*, 32 M.J. 170, 173 n.3 (C.A.A.F. 1991); *see* R.C.M. 907(b)(2)(B) Discussion ("The prosecution bears the burden of proving that the statute of limitations has been tolled, extended, or suspended if it appears that it has run."). The Government concedes that the military judge "did not provide a factual or legal determination as to whether the United States was in a time of war." Government's brief at the Army Court at 6. Thus, there is no reason to believe that the Government satisfied its burden.

Conclusion

Without access to the record of trial, *Amici* are unable to determine whether Appellant either waived or forfeited application of the statute of limitations;. The United States was not "at war" during the period of the offenses for which Appellant pled guilty, and the Government failed to prove beyond a reasonable doubt that the United States was "at war" under Article 43(f), UCMJ, such that the statute of limitations was suspended. This Court should set aside Appellant's larceny conviction and remand for reassessment of the sentence.

Respectfully submitted

/s/
James A. Young
Colonel, USAF (Ret.)
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

/s/
Ann Ching
Clinical Professor of Law
Sandra Day O'Connor
College of Law
Arizona State University
Phoenix, AZ 85004
(480) 727-6424
ann.ching@asu.edu
USCAAF Bar No. 38264

Certificate of Compliance

I certify that this amicus brief complies with the maximum length authorized by Rule 26(d) as it contains fewer than 6,500 words, not including front matter, the certificate of compliance, and the certificate of filing and service. This brief complies with the typeface and typestyle requirements of Rule 37. It was prepared using the 14-point EB Garamond font.

/s/
James A. Young
Colonel, USAF (Ret.)

Certificate of Filing and Service

I certify that a copy of the foregoing was transmitted by electronic means on March 11, 2026, to the Clerk of the Court; Appellate Government counsel—vy.t.nguyen14.mil@army.mil; Government Appellate Division—usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@army.mil; Appellate Defense counsel—eli.m.creighton.mil@army.mil; and Defense Appellate Division—usarmy.pentagon.hqda-otjag.mbx.usalsa-dadservice@army.mil.

/s/
James A. Young
Colonel, USAF (Ret.)