

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,)	BRIEF ON BEHALF OF
Appellee)	APPELLEE
)	
v.)	
)	
Staff Sergeant (E-6))	Crim. App. Dkt. No. 20230303
ZACKERY J. ASKINS,)	
United States Army,)	USCA Dkt. No. 26-0002/AR
Appellant)	

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

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?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10

U.S.C. § 866.¹ This Honorable Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

On May 23, 2023, a military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of forgery, two specifications of false official statement, two specifications of sale of military property of the United States, and four specifications of larceny and wrongful appropriation, in violation of Articles 105, 107–08, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 905, 907–08, and 921 [UCMJ], as well as one specification of transport of explosive materials, in violation of Article 134, UCMJ, 10 U.S.C. § 934 incorporating 18 U.S.C. § 842. (JA 25–29, 32–33). On May 24, 2023, the military judge convicted Appellant, contrary to his pleas, of three specifications of domestic violence, in violation of Article 128b, UCMJ, 10 U.S.C. § 928b.² (JA 26–27, 71).

On May 25, 2023, the military judge sentenced Appellant to reduction to the grade of E-1, confinement for 102 months, forfeiture of all pay and allowances, a fine of \$35,000 and to serve an additional confinement of twelve months if the fine

¹ Unless otherwise indicated, all references to the UCMJ are to the versions in the *Manual for Courts-Martial*, United States (2019 ed.) with the 2020 and 2021 National Defense Authorization Act Amendments.

² The military judge acquitted Appellant of one specification of domestic violence. (JA 27, 71).

is not paid, and a dishonorable discharge. (JA 24, 30–31, 72–75). The military judge credited Appellant with 521 days of pretrial confinement credit. (JA 24, 75). The convening authority waived automatic forfeitures and disapproved the adjudged forfeitures. (JA 23). On June 27, 2023, the military judge entered judgment. (JA 22).

On August 28, 2025, the Army court sua sponte merged the findings of guilty to Specifications 1 and 2 of Charge V into a consolidated specification numbered as Specification 1 of Charge V, dismissed and set aside the original Specification 2 of Charge V, reassessed and affirmed the segmented sentence to confinement for Specification 1 of Charge V, affirmed the remaining findings of guilty, and affirmed the sentence to a dishonorable discharge, 102 months of confinement, a fine of \$35,000, and reduction to the grade of E-1. (JA 14).

On October 3, 2025, this Court docketed the case pursuant to Appellant’s petition for grant of review.³ On February 5, 2026, this Court granted review. (JA 01).

Statement of Facts

Appellant was stationed at Joint Base Elmendorf-Richardson (JBER), Alaska as an active explosive ordnance disposal (EOD) technician from 2014–18.

³ On October 22, 2025, this Court docketed Appellee’s cross-appeal pursuant to The Judge Advocate General, U.S. Army certificate for review of the decision of the Army court relating to contested convictions. (USCA Dkt. No. 26-0014/AR)

(JA 74, 82, 97). With over fifteen years of experience, the Army entrusted him to lead teams of Soldiers on emergency and EOD incident responses to collect, dispose, and safeguard explosives. (JA 76).

But over the course of more than ten separate emergency and EOD incident responses from March 2014 to November 2017, Appellant stole eleven blocks of M1-12 C4 explosives for his own personal use and possession. (JA 74–75, 81–83). The government charged him with larceny and wrongful appropriation of explosive materials in March 2022. (JA 13–18). Appellant (i) negotiated to plead guilty to larceny of the C4 between on or about 25 August 2014 and on or about 14 August 2017 (JA 26, 122), (ii) stipulated to stealing eleven C4 blocks (JA 97), and (iii) testified about one instance between February and December 2016. (JA 74–77). Namely, he described moving a C4 block that he previously recovered and prepared for disposal from his unit into his personal storage and later shipping it when he moved to Fort Sill, Oklahoma. (JA 76–85).

Additional facts are incorporated below.

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.

Summary of Argument

The Army court did not err. The Article 43(f), UCMJ “time of war” exception applies when the United States is “at war” until three years after the termination of hostilities as proclaimed by the President. Combat and counterterrorism operations conducted in Afghanistan, Iraq, and Syria pursuant to the 2001 and 2002 Authorizations for the Use of Military Force (AUMF) triggered the exception. The United States remained engaged in these armed conflicts in 2014–17. The President and Congress acknowledged these hostilities through military appropriations, force deployments, executive orders, and casualty reporting. The President had not proclaimed the termination of hostilities when Appellant stole explosives belonging to the United States. Thus, the Army court was correct when it found the statute of limitations remained tolled at all relevant times.

Additional Facts

On appeal, the government filed a Motion for Judicial Notice of official reports and documents addressing the armed conflicts in Afghanistan, Iraq, and Syria. (JA 178–82). These reports and documents discussed the nature of the armed conflicts, the manner they were carried out, force deployment, casualties

involved, legislation enacted, executive orders promulgated, and total expenditures in each relevant operation. (JA 178–465).

The reports addressing Afghanistan showed that on September 18, 2001, the President signed 2001 AUMF into law. (JA 189). It authorized the President to use military force to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” (JA 189). Accordingly, from 2001 to 2021, U.S. troops were continuously deployed to Afghanistan in support of Operation ENDURING FREEDOM (OEF) and Operation FREEDOM’S SENTINEL (OFS). (JA 189–93). OEF began on October 7, 2001. (JA 189, 352, 453). On December 28, 2014, President Obama announced the end of OEF and beginning of OFS on January 1, 2015. (JA 187, 190). President Biden announced our final withdrawal from Afghanistan in coordination with our allies and partners would begin on May 1, 2021, and declared the end of the war in Afghanistan on August 31, 2021. (JA 7 at n. 6–7).

Similarly, the reports addressing Iraq and Syria showed that on October 16, 2002, the President signed the 2002 AUMF Against Iraq Resolution into law. (JA 193). It authorized the President to use military force to “defend the national security of the United States against the continuing threat posed by Iraq” and “to

enforce all relevant U.N. Security Council resolutions against Iraq.” (JA 189). Accordingly, Islamic State-Operation INHERENT RESOLVE (OIR) began on October 15, 2014. (JA 187, 195). At the time Appellant shipped the explosives to Fort Sill, OIR was ongoing, though the 2002 AUMF had been recommended for repeal and a draft AUMF limited to a three-year period was introduced. (JA 218).

Argument

Standard of Review

This Court reviews de novo a lower court’s interpretation of a statute and its application of that statute for an abuse of discretion. *See United States v. Csiti*, 85 M.J. 414, 420 (C.A.A.F. 2025) (citing *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024)).

Law and Discussion

A. The Time of War Exception.

Article 43(f)(2), UCMJ provides, in relevant part:

When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter . . . 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[.]

“Article 43(f) was taken directly from 18 U.S.C. § 3287, for the purpose of escaping the possibility that the latter suspension of limitations might be deemed inapplicable to trials by court martial.” *United States v. Taylor*, 4 U.S.C.M.A. 232,

235, 15 C.M.R. 232, 235 (C.M.A 1954) (citations omitted). This provision reflects Congress's intent to preserve the government's ability to prosecute offenses committed during wartime that directly implicate the security or readiness of the armed forces. *See United States v. Swain*, 10 U.S.C.M.A. 37, 40–41, 27 C.M.R. 111, 115 (1958) (“Congress meant what it said clearly in the statute.”). Article 43(f) has three components: (1) a triggering clause; (2) a suspension period, and (3) a termination clause.

1. Triggering Clause: The Meaning of “War.”

Article 43(f), UCMJ applies “[w]hen the United States is at war[.]” This phrase has not changed since its enactment. *See Manual for Courts-Martial (MCM)* (1951 ed.), App’x 2 (citing The Act of 5 May 1950, Pub. L. 506, 81st Congress, c. 169, § 1, 64 Stat. 108 (1951)). “Whether a time of war exists depends on the purpose of the specific article in which the phrase appears, and on the circumstances surrounding application of that article.” *MCM* (2016 ed.), App’x 21-4 (citations omitted). While Article 43 does not define war, case law has interpreted the meaning of “war” in subsection (f)’s phrase “at war” and subsection (a)’s phrase “time of war” to be the same. *See Taylor*, 4 U.S.C.M.A. at 237, 15

C.M.R. at 237 (citing *United States v. Ayers*, 4 C.M.A. 220, 15 C.M.R. 220 (C.M.A. 1954)).⁴

Military courts have also determined that “war” refers to both *de facto* and *de jure* war. *See, e.g., Taylor*, 4 U.S.C.M.A. at 237, 15 C.M.R. at 237; *United States v. Castillo*, 34 M.J. 1160, 1163 (N.M.C.M.R. 1992). When determining whether the country is engaged in a *de facto* war, courts have looked to factors such as:

[1] the nature of the conflict; [2] the manner in which it is carried on; [3] the movement to and presence of large numbers of personnel on the battlefield; [4] the casualties involved; [5] the sacrifices required; [6] the drafting of recruits to maintain a large number of personnel in the military service; [7] national emergency legislation enacted and being enacted; [8] executive orders promulgated; and [9] the expenditure of large sums to maintain armed forces in the theater of operations.

Castillo, 34 M.J. at 1162–64 (citing *United States v. Bancroft*, 3 C.M.A. 3, 11 C.M.R. 5 (C.M.A. 1953)).⁵ No one factor is dispositive; rather, this is a fact-

⁴ *See also* R.C.M. 103(21), *MCM* (2016 ed.):

“[T]ime of war” means a period of war declared by Congress, or the factual determination by the President that the existence of hostilities warrants a finding that a “time of war” exists for purposes of [Part IV] of this Manual.

⁵ *See also United States v. Anderson*, 17 C.M.A. 588, 38 C.M.R. 386, 387 (C.M.A. 1968) (Vietnam conflict under Article 43(a)); *United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1973) (Vietnam conflict on August 19, 1969); *United States v.*

specific, totality-of-the-circumstances evaluation of the time an Appellant commits the qualifying offense. *See United States v. Rivaschivas*, 74 M.J. 758, 761 (Army Ct. Crim. App. 2015) (analyzing the state of conflict in 2007); *United States v. Huftless*, No. 201700175, 2018 CCA LEXIS 352, at *18–19 (N-M. Ct. Crim. App. Jul. 12, 2018) (analyzing the state of conflict in 2004).

Congress . . . recognized that during periods of hostilities huge sums of money are spent for materials and equipment -- a circumstance which offers temptation to the unscrupulous. Moreover, in such instances there is an urgent need for haste -- with the result that opportunities for the use of safeguards, which might otherwise be followed in Government procurement, are diminished.

Taylor, 4 U.S.C.M.A. at 237, 15 C.M.R. at 237 (considering the Korean War as a “police action”); *see Ayers*, 4 U.S.C.M.A. at 226, 15 C.M.R. at 226 (“[T]he existence of hostilities increases not only the incentive for unauthorized absence, but also the ability to escape apprehension.”). “The existence of *de facto* war is ‘determined by the realities of the situation as distinguished from legalistic niceties,’ and the ‘existence of armed hostilities against an organized enemy’ is of

Reyes, 48 C.M.R. 832 (A.C.M.R. 1974) (Vietnam conflict on January 27, 1973); *Taylor*, 4 U.S.C.M.A. at 237, 15 C.M.R. at 237 (Korean conflict under Art. 43(f)); *Ayers*, 4 C.M.A. at 227, 15 C.M.R. at 227 (Korean conflict under Art. 43(a)); *Bancroft*, 3 C.M.A. 3, 11 C.M.R. 5 (Korean conflict); *Rivaschivas*, 74 M.J. at 761 (Operation IRAQI FREEDOM in 2007); *Castillo*, 34 M.J. at 1166–67 (Operation DESERT SHIELD/DESERT STORM); *Huftless*, No. 201700175, 2018 CCA LEXIS 352, at *20 (Operation IRAQI FREEDOM in 2004).

crucial importance.” *Castillo*, 34 M.J. 1160 at 1163 (quoting *United States v. Shell*, 7 U.S.C.M.A. 646, 23 C.M.R. 110, 114 (1957)).

2. Suspension Period: The Qualifying Period and Date of Commission.

While there is no military case addressing the suspension clause in Article 43(f), UCMJ, the United States Supreme Court has held that its civilian counterpart, 18 U.S.C. § 3287, only applies to crimes committed after the triggering of the suspension of limitation but before the termination of hostilities. *United States v. Smith*, 342 U.S. 225 (1952); *United States v. Grainger*, 346 U.S. 235, 246 (1953); *see also United States v. Pfluger*, 685 F.3d 481, 485 (5th Cir. 2012) (“We admit that it would seem suspect if the Government had tried to indict Pfluger solely based on the suspension of limitations triggered by that conflict[.]”). In other words, the statute of limitations would apply to crimes committed during the three-year suspension period after termination of hostilities.

3. Termination Clause: Termination of Hostilities as Proclaimed by the President.

Article 43(f) provides, in relevant part, that the statute of limitations “is suspended until three years after the termination of hostilities as proclaimed by the President[.]” *See Shell*, 7 U.S.C.M.A. 646, 651, 23 C.M.R. 110, 115 (holding that the Armistice in Korea on July 27, 1953 ended actual hostilities essential to a finding of “time of war” and thus, the state of war terminated on that date); *United States v. Busbin*, 7 U.S.C.M.A. 661, 23 C.M.R. 125 (C.M.A. 1957) (same); *see*

also *United States v. Frediani*, 790 F.3d 1196, 1200 (11th Cir. 2015) (interpreting 18 U.S.C. § 3287 to require the political branches, not the courts, to demarcate the end of hostilities). Consequently, the day of termination of hostilities is the day the statute of limitations begins to run. *Swain*, 10 U.S.C.M.A. at 40 (applying *Grainger*, 346 U.S. at 235).

B. The Army Court Relied on the Correct Principles of Law.

The Army court relied on its precedent in *Rivaschivas*, 74 M.J. 758, *rev. denied*, *United States v. Rivaschivas*, 2015 CAAF LEXIS 911 (C.A.A.F. Oct. 15, 2015), which in turn relied on *Bancroft*, 3 C.M.A. 3, 11 C.M.R. 5.

1. The Level of Intensity Need Not Equal Total War.

Appellant contends conditions on the ground from 2014–17 did not satisfy the “*Bancroft* standard” of a “true national exigency” as evidenced by the fewer number of casualties during this time, the government’s ability to prosecute other larcenies since the Korean War, and the lack of evidence that resources needed to be dedicated to the war effort similar to World War II levels. Appellant argues the exception should be narrowly construed to apply only out of necessity and notes civilian caselaw.⁶

⁶ *But see United States v. Choy Kum*, 91 F.Supp. 769 (N.D. Cal. 1950) (asserting 18 U.S.C. § 3287 is to be liberally construed in favor of the public unlike the general statute of limitations to which strict construction is accorded); *United States v. Shelton*, 816 F.Supp 1132, 315 (W.D. Tex. 1993) (“[A]rmed conflict to

But neither the statute nor military case law requires the armed conflict have an “extremely broad” or “intrusive effect on the entire country,” military, or branch of service.⁷ To the extent Appellant contends that only total war—where the country devotes its entire human, economic, and military resources—qualifies, this Court should disagree. The *Bancroft* case provided a non-exhaustive list of indicia

amount to a “war” for military purposes admittedly should be a lower standard than to constitute a war for civilian purposes.”); *United States v. Prospero*, 573 F.Supp. 2d 436, 445 (Mass. Dist. Ct. 2008) (“The government should not be penalized for invoking a criminal statute sparingly (or judiciously).

⁷ Amici asks this Court to interpret “war” as requiring a conflict be “massive” and “pervasive” based on Congress’s decision to amend 18 U.S.C. § 3287 in 2008, but not Article 43(f), UCMJ. (Brief for Colonel (Ret.) James Young et al. as Amicus Curiae, pp. 7–8). But post-hoc legislation should not be used to determine Congressional intent in passing 18 U.S.C. § 3287 in 1948. Instead, legislative changes are driven by need; whereas civilian court splits produced a need to clarify the civilian statute, there was no similar need for Article 43(f) because military courts consistently determined the United States was engaged in war. *Compare Shelton*, 816 F.Supp. at 1135 (holding the 1991 Persian Gulf conflict did not amount to war under 18 U.S.C. § 3287), *and Prospero*, 573 F.Supp. 2d at 445–46 (rejecting *Shelton*’s requirement for a formal declaration of war and holding the war in Afghanistan ended on December 22, 2001 with the formal recognition of Hamid Karzai’s government and in Iraq on May 1, 2003 when President Bush declared the end of major combat operations), *and Pfluger*, 685 F.3d at 483 (rejecting *Prospero*’s functional approach to the termination clause and holding the U.S. was in a time of war in May 2004), *with Rivaschivas*, 74 M.J. at 761 (finding the U.S. war in a time of war during Operation IRAQI FREEDOM in 2007), *and Castillo*, 34 M.J. at 1166–67 (finding the U.S. was in a time of war during the 1991 Persian Gulf conflict under the aegis of Operation DESERT SHIELD/DESERT STORM), *and United States v. Huftless*, No. 201700175, 2018 CCA LEXIS 352, at *20 (finding the U.S. was in a time of war during Operation IRAQI FREEDOM in 2004).

that a state of war existed. It did not create a minimum threshold that death, devotion, and destruction must reach.

The Army court was correct when it determined the United States as at *de facto* war, not by comparing the level of sacrifice between military engagements, but by considering the context leading to those sacrifices. This lens embraces the reality that since *Bancroft*, the character of modern warfare has changed in large part due to the adversary as well as advances in technology. Thus, it is sufficient that the United States be engaged in a military operation whose intensity (e.g., the scale, duration, and weaponry involved) is clearly distinguishable from what war is not: riots, banditry, isolated acts of terrorism, civilian law enforcement actions, and similar situations. This is not an argument of convenience; it is an individualized, realistic assessment of conditions on the ground.

Notably, the Army court appeared to equate *de facto* war with an “armed conflict,” which is consistent with modern legal terminology.⁸ This Court should find that when the United States is engaged in an armed conflict, the United States

⁸ See, e.g., 32 C.F.R. § 47.3 “Active Duty Service for Civilian or Contractual Groups” (defining armed conflict as a “prolonged period of sustained combat involving members of the U.S. Armed Forces against a foreign belligerent, [connoting] more than a military engagement of limited duration or for limited objectives, and involves a significant use of military and civilian forces” for purposes of determining Veterans Affairs benefits); *Hamdan v. Rumsfeld*, 548 U.S. 557 631–32 (2006) (Common Article 3 of the Geneva Conventions is incorporated into the Uniform Code of Military Justice by its reference to the “laws of war.”).

is engaged in *de facto* war for purposes of suspending the statute of limitations.⁹ (JA 6–7).

The analysis then becomes straightforward: (i) was the United States at *de facto* war/in an armed conflict—meaning hostilities had met a minimum threshold of intensity against an organized non-state actor—and (ii) if so, when, if ever, did the President proclaim the end of hostilities? *See Shell*, 7 U.S.C.M.A. at 646. Once the minimum threshold has been met, decreased operational tempo, a ceasefire, or other temporary operational pauses at the time Appellant commits his larceny is not dispositive.¹⁰

⁹ This interpretation would be consistent with Supreme Court decisions that invoked the legal presumption that the United States was at war in the context of detention of enemy combatants. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (“[I]f measured from September 11, 2001, to the present, is already among the longest wars in American history.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“[D]etention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”).

¹⁰ Appellant also raises equity concerns in arguing for a narrow reading of the exception. But Appellant is not without relief. This Court has recognized that while the statute of limitations is the primary protection against pre-accusation delays, its protections may be insufficient. *See United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995), *cert. denied*, 516 U.S. 820, 116 (1995). In that case, Appellant could raise a Fifth Amendment Due Process claim for egregious pre-accusation delay. *Id.* (requiring Appellant to show egregious or intentional tactical delay and actual prejudice).

2. In 2014–17, the United States was Engaged in Armed Conflicts in Afghanistan, Iraq, and Syria.

While the Army court did not specifically cite to the reports (JA 7), they nonetheless support the Army court’s factual finding that the United States remained engaged in multiple armed conflicts, including combat and counterterrorism operations in Afghanistan, Iraq, and Syria, under the 2001 and 2002 AUMF. (JA 178–465). Those reports referenced three military operations—Operation ENDURING FREEDOM (OEF), Operation FREEDOM’S SENTINEL (OFS), and Operation INHERENT RESOLVE (OIR)—whose combined estimated taxpayer cost between Fiscal Year 2014–17 was over \$155 billion. (JA 204–05).

The reports support the Army court’s trigger determination consistent with its precedent in *Rivaschivas*. The 2001 and 2002 AUMF authorized the President to conduct combat and counterterrorism operations and were in effect at all relevant times.¹¹ Notably, Section 2(b) of both AUMFs state that they are “intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” These authorizations clearly indicate Congress recognized and declared the terrorist attacks on September 11, 2001 as precipitating a state of armed conflict between the United States and the entities named therein. *See Anderson*, 17 C.M.A. at 590, 38 C.M.R. at 387 (analyzing the

¹¹ *See* Section 1219, the National Defense Authorization Act for Fiscal Year 2026, (enacted December 18, 2025) (repealing the 2002 AUMF).

language of the Gulf of Tonkin Resolution as legislative declaration of a state of armed conflict between the United States and North Vietnam).

Operation ENDURING FREEDOM began on October 7, 2001, when the United States launched military operations in Afghanistan, including airstrikes against Kabul and Kandahar. (JA 185–96). In sustaining military operations for over a decade, American troops fought a widespread insurgency and endeavored to establish a viable government. By the end, the U.S. military sustained 2,350 deaths and 20,149 wounded. (JA 198–202). On December 28, 2014, President Obama announced the end of U.S. combat operations in Afghanistan and transition to OFS. (JA 185–96, 319–39, 447–65).

As a part of OFS, U.S. forces remained in Afghanistan with a dual mission: (i) to participate in a coalition mission to train, advise, and assist Afghan National Defense and Security Forces and (ii) to conduct counterterrorism operations against the remnants of al Qaeda.¹² *See Razak v. Obama*, 174 F. Supp. 3d 300, 302–03 (D.C. Dist. Ct. 2016). Airstrikes continued, targeting insurgent networks. (JA 340–76). By the end, the U.S. military sustained 109 deaths and 620 wounded. (JA

¹² On February 29, 2020, the Trump Administration signed an agreement with the Taliban committing to a reduction in forces by July 2020 and withdrawal of all military forces and other personnel by the end of April 2021. (JA 185–96). On April 14, 2021, President Biden announced the final withdrawal of U.S. troops would begin May 1, 2021 and end by September 11, 2021. (JA 185–96). During this time, U.S. targeted air support continued. (JA 378–465).

198–202). The United States withdrew its troops on August 31, 2021, and President Biden declared the end of the war in Afghanistan that same day. (JA 7, 447–65). Thus, OEF and OFS suspended the statute of limitations until August 31, 2024.

Operation INHERENT RESOLVE kinetic operations began on August 8, 2014, and continued as Appellant stole the eleven C4 blocks. Combined Joint Task Force - Operation Inherent Resolve (CJTF-OIR), comprised of U.S. military and coalition forces, united to build the military coalition to support Iraqi Security Force operations against the Islamic State of Iraq and the Levant (ISIL). (JA 206–88). Between October and December 2016, U.S. and Coalition aircraft carried out more than 650 airstrikes on ISIL targets. (JA 235–88). As of June 16, 2025, the U.S. military sustained 120 deaths and 496 wounded. (JA 290–318).

Ultimately, the nature of these conflicts, their duration, manner in which they were carried out, the sacrifices required, and expenditure of large sums to maintain troops in theater demonstrate that the United States was engaged in a *de facto* war/armed conflict. After these operations triggered the exception, but before the President proclaimed the termination of hostilities in OEF, OFS, and OIR, Appellant stole eleven C4 blocks. Thus, the Army court was correct in finding the qualifying period did not terminate before Appellant stole the C-4 blocks and so the statute of limitations did not apply to his crimes.

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?

Summary of Argument

Appellant personally waived the statute of limitations bar to his larceny convictions in Specification 1 of Charge I when he agreed to waive all waivable motions. Even if he merely forfeited, the error was not plain or obvious because the charged conduct included his acts of larceny committed within a period that the statute of limitations did not bar; namely, when he participated in an emergency or EOD incident response on or about August 14, 2017. If this Court disagrees, this Court should remand to the Army court to order a rehearing so that the Convening Authority may decide whether to withdraw from the plea agreement pursuant to paragraph 4d.

Additional Facts

On March 7, 2022, the Summary Court-Martial Convening Authority (SCMCA) received Specification 1 of Charge I against Appellant for larceny of various M1-12 block C4 committed between on or about August 25, 2014, and 14 August 2017. (Charge Sheet). The military judge issued two Pretrial Orders, addressing the way parties should raise certain issues, including the statute of

limitations pursuant to Rule for Courts-Martial [R.C.M.] 907(b)(2)(B). (JA 106, 110).

Trial defense counsel did not raise the statute of limitations issue but moved to dismiss this specification for failure to state an offense, in part, due to its three-year range and the possibility of future Federal civilian prosecution. (JA 37–62, 113). In this motion, defense wrote:

SSG Askins is at real risk of future prosecution for the same conduct because of the Government’s inability to distinguish between blocks of C-4, ongoing federal investigation and pursuit of explosives, and SSG Askins’ continuing exposure for criminal liability for any future allegations of larceny committed as early as 2011 (the year that lot number MA-07L035 was dispersed). ([*See*] UCMJ, Art. 43) (placing a toll on statutes of limitation during a time of war); (*United States v. Rivaschivas*, 74 M.J. 758 (A.C.C.A. 2015))[] (finding the Iraq and Afghanistan conflicts constitute a “time of war” under Article 43 of the UCMJ).

(JA 113). The military judge denied defense’s motion, stating in relevant part:

[T]he charge encapsulates the Accused’s five specific draws of C-4 while he was stationed at JBER. These are the only draws of C-4 that are associated with the Accused within the Army’s system of records; the first one beginning on 25 August 2014 and the last one beginning on 14 August 2017. These are the beginning and end dates of the charge. Tellingly, the Government did not charge the entire five-year period during which the Accused was stationed at JBER . . . Rather, the Government narrowed the scope to track with the dates reflected by the evidence.

(JA 116).

On April 13, 2023, Appellant entered into a pretrial agreement with the Convening Authority and negotiated to plead guilty to Specification 1 of Charge I, excepting the words “blasting caps,” elected to have the Military Justice Act of 2016 sentencing rules apply, and agreed to waive all waivable motions. (JA 122–23).

On April 14, 2023, the parties executed a Stipulation of Fact. (JA 96–102). Paragraph 1 of the Stipulation of Fact states, “All parties agree . . . that [Appellant] had no lawful justification, excuse, or defense for his conduct.” (JA 96). The Stipulation of Fact further provides:

Between on or about 25 August 2014 and [on] or about 14 August 2017, [Appellant] participated in more than 10 separate EOD incident responses in and around JBER with his unit. . . . One specific mission in 2015 required multiple trips by [Appellant][.] During the course of the various incident responses that he participated in during that period, [Appellant] . . . [stole] 11 blocks/sticks of C-4 explosives (Charge Demolition M112) for his own personal use and possession.

(JA 97). And in the “Disclaimer of Defenses” paragraph: “[Appellant] expressly disclaims the existence of any defense to the charges and specifications to which he has pled guilty. Defense counsel and [appellant] have discussed possible defenses and agree that none apply.” (JA 100).

Before Appellant entered a plea of guilty, the parties discussed the “waive all waivable motions” clause in a R.C.M. 802 conference. (JA 63–65). During the

providence inquiry, the military judge discussed the same clause with Appellant and counsel. (JA 92–93). Neither the military judge nor the parties specifically raised the issue of whether the statute of limitations barred prosecution of Specification 1 of Charge I in open court. At trial, the parties agreed the “waive all waivable motions” clause applies to “any future motions that have not yet been filed by the defense.” (JA 93). Thereafter, the military judge accepted his plea of guilty. (JA 95).

Argument

Standard of Review

The applicable statute of limitations is a question of law, which this Court reviews de novo. *United States v. Adams*, 81 M.J. 475, 479 (C.A.A.F. 2020) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)). When the statute of limitations issue is not raised at trial, this Court reviews for plain error. *Id.* To establish plain error, appellant must demonstrate (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights. *Id.* at 479 (citation omitted). However, this Court reviews de novo whether an accused has waived an issue. *United States v. Malone*, No. 25-0140/AR, slip op. at 6 (C.A.A.F. 2026) (quotations omitted).

Law

An accused is subject to the statute of limitations in force at the time of the

offense. *Toussie v. United States*, 397 U.S. 112, 115 (1970). “[A] statute of limitations does not establish a defense to the merits of a charge; rather, it is a limitation on the power of a prosecutor to bring charges and on the power of a court to try a case.” *Willenbring v. Neurauter*, 48 M.J. 152, 176 (C.A.A.F. 1998). Nevertheless, the right to raise the statute of limitations bar may be waived. *See* R.C.M. 907(b)(2)(B).

Waiver extinguishes an issue, and as a result, that issue cannot be reviewed on appeal. *United States v. Harborth*, 85 M.J. 469, 475 (C.A.A.F. 2025) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). “Waiver can occur either by a party’s intentional relinquishment or abandonment of a known right or by operation of law.” *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) (citing *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)). No magic words are required to establish a waiver. *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014) (quotation omitted). Instead, the determination of whether there has been an intelligent waiver must depend, in each case, upon the particular facts and circumstances surrounding that case. *Id.* (quotation omitted).

A guilty plea does not constitute a waiver of the statute of limitations procedural right. *United States v. Tunnell*, 23 M.J. 110, 111 (C.M.A. 1986) (citation omitted); *see also United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018) (noting that statute of limitations defects are an exception to the general

principle that an unconditional guilty plea waives all non-jurisdictional defects).

“For there to be such a waiver, the record must disclose that – by reason of advice from the military judge *or otherwise* – the accused was aware of his right to assert the statute of limitations and nonetheless chose to plead guilty.” *Tunnell*, 23 M.J. at 111 (emphasis added).

Absent an affirmative waiver, a party’s failure to raise defenses, motions, or objections before pleas or before adjournment forfeits these claims. *See* Rule for Courts-Martial 905(e)(1)–(2) (2019 ed.). An “express” waiver (i) occurs when there is the intentional relinquishment or abandonment of a known right and (ii) is accomplished via affirmative action by the accused or the accused’s counsel.

Malone, slip op. at 7 (finding Constitutional multiplicity waived); *see, e.g., United States v. Swift*, 76 M.J. 210, 217 (C.A.A.F. 2017) (trial defense counsel states “no objection” to a proposed course of legal action); *United States v. Ahern*, 76 M.J. 194, 198 (C.A.A.F. 2017) (same); *Gladue*, 67 M.J. at 314 (plea agreement with a waive all waivable motions clause); *United States v. Davis*, 79 M.J. 329, 330–32 (C.A.A.F. 2020) (“[n]o changes” to a military judge’s instructions).

Discussion

A. Appellant Waived the Statute of Limitations Bar to Prosecution.

1. Appellant and his trial defense counsel took affirmative actions.

The record demonstrates trial defense counsel and Appellant personally

waived this right. Appellant agreed to waive all waivable motions in his Plea Agreement.¹³ (JA 92–93, 123). And pursuant to R.C.M. 907(b)(2)(B), the statute of limitations claim is a waivable motion. Additionally, after the military judge advised Appellant that any motions to dismiss should be made before entry of pleas, his counsel asserted, “[T]he defense has no additional pretrial motions.” (JA 65–66). Both these assertions constitute affirmative waivers.

The parties discussed the waive all waivable clause in a R.C.M. 802 conference and during the providence inquiry. (JA 63–65, 92–93). Although the parties did not specifically discuss the statute of limitations claim, the parties agreed the “waive all waivable motions” clause applies to “any future motions that have not yet been filed by the defense.” (JA 93). *Cf. United States v. Thompson*, 59 M.J. 432, 439 (C.A.A.F. 2004)) (declining to presume awareness based on defense counsel raising the defect during post-trial matters given that the record lacks any discussion or evidence regarding Appellant’s alleged waiver).

2. The waiver was knowing.

The record demonstrates Appellant was personally aware of his right by reason of advice from his counsel. *Tunnell*, 23 M.J. at 111. His trial defense counsel cited to *United States v. Rivaschivas* and the statute of limitations in their

¹³ It is further reasonable to infer that this clause was intentional, as a prior Plea Agreement, dated October 11, 2022, contained the same clause. (JA 120).

Motion to Dismiss for Failure to State an Offense as basis for his risk of future prosecution. (JA 113). This clearly establishes knowledge of this right.

Moreover, Appellant affirmed that his counsel advised him of the meaning and effect of his guilty plea, including its material terms, and understood it in all respects. (JA 91, 94). He expressed satisfaction with his counsel's advice. (JA 94). There is nothing in the record to suggest his counsel's advice was premised on an erroneous understanding of the law. *Cf. United States v. Brown*, 30 M.J. 907, 909 (A.C.M.R. 1990) (finding defense counsel's erroneous assertion that the statute of limitations was tolled demonstrated Appellant did not knowingly waive the right).

While the Stipulation of Fact includes a "Disclaimer of Defenses," the statute of limitations is not an enumerated defense under R.C.M. 916 or other special defense that rebuts an element of an offense; the statute of limitations is a prosecutorial bar. *Neurauter*, 48 M.J. at 176. Appellant has never alleged his counsel incorrectly advised him or failed to advise him of the associated risk his attorney specifically identified in the Motion to Dismiss.

3. There was no additional duty for the military judge to advise Appellant of this right because Appellant did not appear to be "unaware" of the right.

Rule for Courts-Martial 907(b)(2)(B) requires the military judge to inform the accused of the right to assert the statute of limitations in bar of trial "if it appears Appellant is unaware of that right." Based on defense counsel's knowledge of the right, the parties' mutual understanding of the waive all waivable motions

clause, and the above colloquy, the military judge’s duty under this rule was not triggered; nothing indicated Appellant was unaware of the right.

This Court and its predecessors’ have held in contested trial contexts that the military judge has an “affirmative obligation to advise” an accused of the right and “determine that any waiver of the statute is both knowing and voluntary.”¹⁴

Thompson, 59 M.J. at 439 (involving prosecution of a time-barred lesser-included offense); see *United States v. Salter*, 20 M.J. 116 (C.M.A. 1985) (explaining the military judge’s sua sponte duty to determine if the waiver was knowing and voluntary was a principle of open-court advisement recognized in the 1951 and 1969 Manuals for Courts-Martial); see also *United States v. Moore*, 32 M.J. 170, 173 (C.M.A. 1991) (finding no waiver where the accused “vigorously contested the charges clearly affected by the statute of limitations”). In unpublished opinions, the service courts have uniformly applied *Thompson*’s affirmative obligation to guilty plea cases. See *United States v. Jesko*, No. 20160439, 2018 CCA LEXIS 328, *7 (A. Ct. Crim. App. Jun. 29, 2018) ([mem op.](#)); *United States v. Sayers*, No. 40142, 2023 CCA LEXIS 199, *11–12 (A.F. Ct. Crim. App. Mar. 27, 2023) ([mem](#)

¹⁴ See also *Rivaschivas*, 74 M.J. 758 (holding in a guilty plea context that the appellant must be personally aware of that right and must knowingly and affirmatively waive it on the record.”); *United States v. Colley*, 29 M.J. 519 (A.C.M.R. 1989) (“[T]he right to plead the statute of limitations in bar of trial will not be imposed when the record . . . does not disclose that the Appellant was aware of that right).

[op.](#)); *United States v. Miller*, No. 202200230, 2023 CCA LEXIS 445, *12 (N-M. Ct. Crim. App. Oct. 23, 2023) ([mem op.](#)).

But this Court should clarify that the reasoning in *Tunnell*, not *Thompson*, applies in a guilty plea case. In *Tunnell* and other guilty plea cases, the military judge’s duty to advise was not automatic or irrespective of defense counsel’s role, but rather conditioned on an appearance of a lack of awareness. *See, e.g., Brown*, 30 M.J. 907 (considering whether the military judge advised Appellant after determining his counsel incorrectly advised him); *United States v. Troxell*, 30 C.M.R. 6 (C.M.A. 1960) (finding a knowing waiver where he agreed not to raise the statute of limitations bar and both his counsel and the law officer advised him of the consequences). This reasoning properly considers the role of counsel in a non-contested case.

The government respectfully brings to this Court’s attention that the language of “unaware” had already appeared in R.C.M. 907(b)(2)(B) in the 1984 edition of the *MCM*—before the Court of Military Appeals decided *Tunnell* and this Court decided *Thompson*. *Compare* R.C.M. 907(b)(2)(B), *MCM* (1984 ed.), *with MCM* (1969 ed.), ¶¶ 53h, 68c (considering whether Appellant was aware).¹⁵

¹⁵ R.C.M. 907(b)(2)(B), *MCM* (1984 ed.) was based, in part, on the first two paragraphs of subparagraph 68c, *MCM* (1969 ed.), while its discussion was based, in part, on subparagraphs 68c and 215d, *MCM* (1969 ed.). *See MCM* (1984 ed.), App’x 21, R.C.M. 907(b)(2)(B). Notably, whereas the military judge’s duty to

While *Tunnell* considered counsel's role, *Thompson* relied on cases that analyzed the 1969 version of the SOL, which did not include the language of "unaware." *See* 59 M.J. at 439 (citing *Salter*, 20 M.J. at 117; *Moore*, 32 M.J. at 173).

In applying the reasoning in *Tunnell*, the military judge's responsibility to advise would not be triggered because the record clearly demonstrated Appellant's counsel was aware of the right, while there was no evidence Appellant was unaware of this right or did not knowingly and voluntarily waive the statute of limitations as part of his plea agreement. *See* R.C.M. 907(b)(2)(B). Instead, Appellant agreed to stipulate to conduct committed well before March 7, 2017, namely, to conduct committed between August 25, 2014 and August 14, 2017 as well as in 2015 generally. (JA 97). Given the express language in his plea agreement, stipulation of fact, and colloquy during his providence inquiry, Appellant not only took actions indicating to the military judge that he was aware of his right, but also personally participated in the waiver. Thus, there was nothing in the record that should have reasonably alerted the military judge.

advise was generally conditioned upon an "[affirmative appearance] that the accused is aware," the 1969 *MCM* separately provided a duty to advise about a statute of limitations that has run with respect to included offenses irrespective of an accused's awareness. *See MCM* (1969 ed.), ¶ 68c.

4. The waive all waivable clause is adequate to waive a statute of limitations right even without specific reference to the right.

As this Court stated in a case involving Constitutional multiplicity:

This text of the [Plea Agreement] unambiguously agrees to waive any waivable motions and after the military judge conducted a detailed, careful, and searching examination of Appellant to ensure he understood the effect of [this] provision, Appellant explicitly indicated his understanding that he was giving up the right to make any motion which by law is given up when you plead guilty.

Gladue, 67 M.J. at 314. Furthermore, the waiver’s validity was not affected by the fact that none of the parties discussed multiplicity on the record. *Id.*

Tradition alone is inadequate to justify imposing a requirement that the statute of limitations—a procedural right granted by the grace of Congress—be specifically referenced, while multiplicity—a right grounded in the Constitution—does not. *See generally Toussie*, 397 U.S. at 121. As the Supreme Court noted in *Chase Sec. Corp. v. Donaldson*, the bases in law for statutes of limitation are “necessity and convenience[.]” . . . [It] has never been regarded as . . . a ‘fundamental’ right or . . . ‘natural’ right of the individual.” 325 U.S. 304, 314 (1945).

Moreover, Appellant has never claimed his counsel failed to advise him nor does the record suggest his counsel sought to invite error.¹⁶ *See generally United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (citations omitted) (invited error doctrine “prevents a party from creating error and then taking advantage of a situation of his own making on appeal.”). Where an Appellant does not allege ineffective assistance of counsel or similar objections and the record does not disclose otherwise, the court may presume (1) competence and (2) good faith by trial defense counsel. *See, e.g., Malone*, slip op. at 11; *United States v. Williams*, 85 M.J. 121, 125 (C.A.A.F. 2024) (noting Appellant did not challenge the providence of his guilty plea or raise similar objections).

Ultimately, this Court should not presume that when Appellant waived “any future motions,” then told the military judge his counsel advised him of the meaning of this clause and he understood it “in all respects,” that his counsel failed to advise him of the right to raise a statute of limitations bar. Instead, (i) the presumption of competent counsel in this non-contested case, (ii) the unambiguous text of this clause, (iii) evidence that his counsel was aware of the right, and (iv) no contrary evidence suggesting Appellant was unaware clearly establish his

¹⁶ There was a strategic reason for trial defense counsel to waive this right on behalf of his client. That reason was to receive the benefit of the plea deal with the knowledge there was Federal civilian prosecution interest in this case. (JA 54–55, 113).

intentional relinquishment or abandonment of a known right. Accordingly, this Court should find Appellant was personally aware of this right and nevertheless, affirmatively waived it thereby extinguishing his right to raise this issue on appeal.

B. If this Court finds mere forfeiture, the error was not plain.

The government charged Appellant with larceny between on or about August 25, 2014 and August 14, 2017. Appellant's providence inquiry addressed only one block of C4 (JA 75–76), though he stipulated to stealing eleven blocks of C4, including on or about August 14, 2017, which would not have violated Article 43(b), UCMJ, even if applicable. (JA 97). Thus, even if prosecution was barred with respect to his acts beginning on or about August 25, 2014, including the one C4 block for which he formed the requisite intent no later than December 2016, the provident portions of his guilty pleas encompassing acts of misconduct within the statute limit (i.e., C4 stolen on or about August 14, 2017) were not barred and therefore, remain unaffected. *See United States v. Lee*, 29 M.J. 516 (A.C.M.R. 1989).

C. Remedy.

If this Court does not affirm, the Court should remand to the Army Court to order a rehearing so the Convening Authority may decide whether to withdraw pursuant to paragraph 4d of the Plea Agreement.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court vacate the Army court's order and affirm the findings and sentence as originally adjudged.



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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 7,831 words.
2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins on all four sides.

A handwritten signature in black ink, appearing to read 'VYT. NGUYEN', with a long horizontal flourish extending to the right.

VYT. NGUYEN
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Attorney for Appellee
March 16, 2026