IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	)	BRIEF OF *AMICI CURIAE*
Appellee,	)	JOSHUA DAVIS, AMY GORDON,
	)	AND RACHAEL JENSEN
v.	)	
	)	
Staff Sergeant (E-6)	)	
DANNY L. MCPHERSON,	)	
United States Army,	)	
Appellant.	)	Docket No. ARMY 20180214

ISSUE PRESENTED

I. WHETHER THE STATUTE OF LIMITATIONS EXPIRED FOR THE SPECIFICATIONS IN CHARGE I.

STATEMENT OF INTERST

Amici curiae are three students at the University of Texas School of Law with an interest in military justice. All three completed a seminar on "Military Justice and Jurisdiction" with Professor Stephen I. Vladeck during the Fall 2019 semester. Pursuant to Rules 22(a)(2), 22.1(3), and 22.3 of the Rules of Appellate Procedure of the United States Army Court of Criminal Appeals, *amici* submit this brief in support of Appellant as part of this Court's Project Outreach, and under the supervision of Professor Vladeck—whose admission as a member of the bar of this Court is scheduled for February 13, 2020.

STATEMENT OF CONSENT

Counsel for the Appellant have consented to the filing of this brief. Counsel for the Appellee have not objected to the filing of this brief. And this Court conditionally granted *amici*'s motion for leave to file this brief on January 21, 2020.

INTRODUCTION

On March 13, 2018, Appellant was convicted by a military judge sitting as a general court-martial of, among other things, "indecent acts with a child" in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 ("Charge I"), for conduct that occurred in 2004. Charge I was received by the summary court-martial convening authority on March 27, 2017—before the victim in this case turned 25.

The question in this case is whether the statute of limitations for Charge I expired before it was received. The parties agree that, at the time of Appellant's offenses in 2004, the statute of limitations for Charge I ran until the victim's twenty-fifth birthday. Under a 2003 amendment to Article 43 of the UCMJ, that is the statute of limitations for all "child abuse offenses," a term that Article 43 expressly defined as "an act that involves sexual or physical abuse of a person who has not attained the age of 16 years and **constitutes** [one of five enumerated

offenses, including] indecent acts or liberties with a child in violation of section 934 of this title (Article 134)." 10 U.S.C. § 843(b)(2)(B)(v) (emphasis added).

The parties thus also agree that, if that language had remained untouched, Appellant's prosecution on Charge I would have been timely. But Congress amended Article 43(b) in 2016—before Charge I was received—by removing "indecent acts . . . in violation of section 934" from the list of enumerated child abuse offenses in Article 43(b)(2)(B).

> Subsection (b)(2)(B) of such section (article) is amended **by striking clauses (i) through (v)** and inserting the following new clauses:
>
> (i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).
>
> (ii) Maiming in violation of section 928a of this title (article 128a).
>
> (iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).
>
> (iv) Kidnapping in violation of section 925 of this title (article 125).

Military Justice Act of 2016, Pub. L. No. 114-328, § 5225(d), 130 Stat. 2000, 2910 (2016) (the "2016 amendment") (emphasis added). In other words, the 2016 amendment redefined "child abuse offense" for purposes of Article 43(b) in a manner that expressly *removed* Charge I. And Congress also made the 2016 amendment expressly retroactive. *See id*. § 5225(f), 130 Stat. at 2910 ("The

amendments made by subsections (a), (b), (c), 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.").

One year later (and *after* Charge I was received by the summary court-martial convening authority), Congress clarified that, for "offenses committed before the date designated by the President under section 5542(a)" of the 2016 amendment, the 2016 amendment's changes to Article 43 would *not* apply retroactively. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 531(n)(2), 131 Stat. 1283, 1387 (2017) (the "2017 amendment") ("With respect to offenses committed before the date designated by the President under section 5542(a) of the Military Justice Act of 2016," Article 43(b)(2)(B) "shall be applied as in effect on December 22, 2016."). But "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution." *Stogner* v. *California*, 539 U.S. 607, 632–33 (2003). Thus, **if** Charge I no longer qualifies as a "child abuse offense" under Article 43(b)(2)(B) as amended in 2016, then it was time-barred regardless of the 2017 amendment—because more than five years elapsed between the offense and its receipt.

The question before this court, then, is whether Charge I was timely under Article 43(b)(2) as amended in 2016—not 2017. Appellant argues that the answer

is "no," because the 2016 amendment eliminated Appellant's underlying offense from Article 43(b)(2)(B)'s exhaustive list of "child abuse offenses," leaving Charge I to the (expired) five-year statute of limitations in Article 43(b)(1). The government argues that the answer is "yes," because the *conduct* for which Appellant was convicted in Charge I still "constitutes" one of the exemplar offenses enumerated under Article 43(b)(2)(B) as amended — to wit, child rape in violation of Article 120b, 10 U.S.C. § 920b.

As *amici* explain in the brief that follows, the plain text of the 2016 amendment is at best ambiguous as to which of these views is correct, and multiple canons of statutory interpretation dictate that such an ambiguity should be construed in favor of repose. And although this specific issue affects an incredibly limited (and closed) set of cases, the broader implications of adopting the government's reading weigh only further in favor of holding that Charge I was time-barred.

ARGUMENT

I. AS AMENDED IN 2016, ARTICLE 43(B)(2)(B) IS AMBIGUOUS AS TO WHETHER CHARGE I IS A "CHILD ABUSE OFFENSE"

As noted above, Article 43(b)(2)(B), as amended in 2016, defines a "child abuse offense" as one that both (1) "involves abuse of a person who has not attained the age of 16 years," and (2) "constitutes" any of the offenses specifically enumerated in the statute. The government argues that, although Appellant was

charged with indecent acts in violation of Article 134, his conduct nonetheless "constitutes" an offense in violation of Article 120b. Essentially, to the government, "the nature of appellant's misfeasance, not the article number under which he was charged, is the salient inquiry in determining Congress's intent here." Gov. Br. 8. The government's view, in other words, is that an offense qualifies for the longer statute of limitations under Article 43(b)(2) so long as the *conduct* aligns with one the offenses enumerated therein—even if the *offense* itself does not. The government's reading is not implausible, but it is also not the best—or only—reading of Article 43.

First, the government insists that Appellant's conduct "would have otherwise constituted" one of the enumerated offenses if the circumstances were different—*i.e.*, if he committed the same offense today and been susceptible to charges under Articles 120, 120b, and 120c. Gov. Br. at 8. But Article 43(b)(2)(B) does not define a "child abuse offense" as one that "would have **otherwise** constituted" a child abuse offense under different circumstances. Rather, it defines a child abuse offense as one that "constitutes" one of the listed offenses. In other words, the government has to insert words into the statute to produce the meaning it purportedly divines from the plain text.

Driving the point home is the very next subsection of Article 43—Article 43(b)(2)(C). That provision adds to the definition of "child abuse offense" "an act

that involves abuse of a person who has not attained the age of 18 years and **would** constitute an offense under chapter 110 or 117 of title 18 or under section 1591 of that title." 10 U.S.C. § 934(b)(2)(C) (emphasis added). The offenses listed in section (b)(2)(C) are all civilian offenses, so a servicemember would not be charged with those offenses directly. Therefore, although a servicemember's conduct "would constitute an offense" under those statutes had he been a civilian, his conduct does not "constitute" those offenses under the circumstances today. If "constituted" in Article 43(b)(2)(B) had the government's preferred meaning, then there would be no need for the word "would" in Article 43(b)(2)(C). In both circumstances, a "child abuse offense" is one that, in other circumstances, could have been charged under the specified provisions.

Thus, by using the phrase "would have constituted" in Article 43(b)(2)(C) and the term "constitutes" in Article 43(b)(2)(B), the plain language of Article 43 distinguishes between circumstances in which the court looks to the defendant's **actual** charges to determine the applicable statute of limitations, and circumstances in which the court matches the defendant's conduct to offenses with which he could **not** have been charged under the circumstances of his case. *See, e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (citation omitted)); *United*

States v. *Bowersox*, 72 M.J. 71, 74 (C.A.A.F. 2013) ("'[Where] Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion.'" (quoting *United States* v. *Wilson*, 66 M.J. 39, 45–46 (C.A.A.F. 2008)) (alteration in original)).

Second, the government's argument also ignores the significance of the current (and previous) child abuse offenses that contain overlapping conduct. As Appellant points out, Article 43(b)(2)(B)(iii) defines as separate child abuse offenses both aggravated assault and assault consummated by battery. *See* App. Br. 6. If the government were correct as to the meaning of "constitutes," Congress need not have included aggravated assault **at all**, because every aggravated assault necessarily includes conduct that would "constitute" assault consummated by battery. The same would also have been true of forcible sodomy in violation of Article 125, defined as a child abuse offense in Article 43(b)(2)(B)(iii), and forcible sodomy in violation of Article 134, which had been defined as a separate child abuse offense in Article 43(b)(2)(B)(v) until it was removed by the 2016 amendment. Indeed, on the government's reading, the pre-2016 reference to "indecent acts" in violation of Article 134 was **itself** redundant, at least once Article 43(b)(2)(B) also referred to Articles 120, 120b, and 120c.

Put another way, there are two possible ways to read the overlap in the list of enumerated offenses in Article 43(b)(2)(B): Either Congress intended for Article 43(b)(2) to contain an exhaustive list of enumerated child abuse offenses, in which case defendants charged with violating any of these offenses, but no others, were subject to the longer limitations period; or it simply failed to realize that a significant portion of Article 43(b)(2) was surplusage.

Even without the well-settled presumption against surplusage, *see Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 632 (2018), the latter conclusion is unlikely. The history of amendments to the list of child abuse offenses indicates that Congress routinely updated Article 43 to comport with other changes to the UCMJ. For example, in 2011, when Congress moved rape of a child and other sex offenses against children from Article 120 to Articles 120b and 120c, it also added those offenses to the list of child abuse offenses in Article 43(b)(2)(B)(i). *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541(d)(1), 125 Stat. 1298, 1410 (2011). That same amendment also updated Article 43(b)(2)(B)(v) to delete indecent assault and liberties with a child in violation of Article 134 from Article 43(b)(2)(B)(v). *See id*. If Congress intended for a defendant's **conduct**, and not the offense with which he was charged, to determine whether he was accused of committing a child abuse offense, this change would, again, have been unnecessary.

In light of the repeated changes to Article 43, and, indeed, to Article 43(b)(2)(B)(v) itself, it is not clear why Congress left indecent acts in violation of Article 134 as a standalone example of a child abuse offense until the 2016 amendment. What **is** clear, however, is that Congress never read the inclusion of Articles 120, 120b, and 120c in Article 43(b)(2)(B)(i) as incorporating, by implication, all of the offenses separately listed in Article 43(b)(2)(B)(v). And if Congress intended for indecent acts in violation of Article 134 to constitute a child abuse offense, removing it from the list of child abuse offenses was a singularly cryptic means of accomplishing that goal.

Amici do not suggest that the text of Article 43(b)(2)(B) as amended in 2016 is clear in the **other** direction. Rather, the best that can be said about whether Charge I was still a "child abuse offense" subject to the longer statute of limitations under Article 43(b)(1) once Congress deleted the underlying offense from Article 43(b)(2)(B)(v) is that the statute is . . . profoundly ambiguous.

II. BECAUSE THE 2016 AMENDMENT IS AMBIGUOUS AS TO WHETHER CHARGE I IS A "CHILD ABUSE OFFENSE," IT SHOULD BE INTERPRETED IN FAVOR OF REPOSE

That Article 43(b)(2)(B), as amended in 2016, is ambiguous as to whether Charge I is subject to a longer statute of limitations as a "child abuse offense" should decide this case. Although the government's brief repeatedly refers to what Congress must have intended, the Supreme Court and the Court of Appeals for the

Armed Forces have both been clear, over and over again, as to how such ambiguities should be resolved—in favor of repose. This is true both because of the Supreme Court's repeated "admonition that statutes of limitations are to be 'liberally interpreted in favor of repose,'" *United States* v. *Mangahas*, 77 M.J. 220, 224 (quoting *United States* v. *Marion*, 404 U.S. 307, 322 n.14 (1971)), and the rule of lenity.

A. Ambiguities in Statutes of Limitations Should Be Resolved in Favor of Repose

A criminal statute of limitations serves several purposes, including the vindication of both fairness and efficiency interests. It "limit[s] exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Toussie* v. *United States*, 397 U.S. 112, 114–15. With those considerations in mind, the Supreme Court has long held that statute of limitations are to be "liberally interpreted in favor of repose." *United States* v. *Scharton*, 285 U.S. 518, 521–22 (1932). As Justice Jackson wrote for the Court in 1944, "[t]he theory is that . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 349 (1944).

Writing for the majority in *Toussie*, Justice Black identified at least three reasons for this longstanding principle. First, statutes of limitations protect

individuals from having to defend themselves against charges when basic facts may have been obscured over the passage of time. 397 U.S. at 114. Second, a statute of limitation can minimize the danger of official punishment for acts conducted long ago. *Id*. Third, these time limits also encourage the government to be diligent and prompt in its prosecutorial endeavors. *See id*. at 115; *see also John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008) (noting that statutes of limitations often seek "to achieve a broader system-related goal, such as . . . promoting judicial efficiency").

For all of these reasons, the Supreme Court and CAAF have repeatedly insisted that, where a criminal statute of limitations is susceptible of multiple interpretations, courts should err on the side of repose—and resolve the ambiguity in favor of a shorter statute of limitations, rather than a longer one. *See, e.g.*, *United States* v. *Briggs*, 78 M.J. 289, 293 (C.A.A.F. 2019), *cert. granted on other grounds*, No 19-108, 2019 WL 6042319 (U.S. Nov. 15, 2019). That presumption here militates in only one direction: In favor of concluding that, under the 2016 amendment to Article 43(b)(2)(B), Charge I was subject to a five-year statute of limitations—and was therefore time-barred.

B. The Rule of Lenity Resolves Any Remaining Doubt as to Whether Charge I Qualifies as a "Child Abuse Offense" Under the 2016 Amendment to Article 43(b)(2)(B)

If, notwithstanding the above, this court finds "grievous ambiguity or uncertainty in the statute" after considering the text, as well as the structure, history, and purpose of the statute, the rule of lenity should be applied. *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010) (quoting *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998)); *see also United States* v. *Williams*, 75 M.J. 663, 666–67 (A. Ct. Crim. App. 2016) (applying the rule of lenity and recognizing it as a "rule of last resort").

The government's argument that this court should interpret, in its favor, the enumerated offenses that receive an extended statute of limitations as including an offense—the one Appellant was charged with—that was explicitly removed from the amended list, is inconsistent with the rule of lenity. That rule requires that ambiguities concerning the breadth of a criminal statute be resolved in the defendant's favor. *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019); *United States* v. *Santos*, 553 U.S. 507, 514 (2008); *see also United States* v. *Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007) ("We have long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused.").

Here, the court must decide whether to read Article 43's amended list of offenses that qualify for an extended statute of limitations to include offenses not explicitly listed, or to read it as being comprehensive as written. In choosing

between these two readings, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United* States v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952).

A clear understanding of these limits, encourages predictability, uniformity, and finality in the application of the law, which is crucial to advancing the fair administration of justice. *See United States* v. *Marion*, 404 U.S. 307, 322 (1971). In other words, clearly defined limits on the ability to prosecute make it easier for courts to objectively apply the law. Without them, there is more room for judicial discretion, allowing decision makers to recognize limitations based on personal preference or discriminatory factors.

The rule of lenity is also essential to the protection of the separation of powers. It is a cornerstone of criminal jurisprudence that the legislature, not the court has the power to define the limits of criminal punishment. *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Infringing on Congress's legislative role is particularly concerning in the criminal context, because of the serious consequences for individual liberty, and because criminal punishment "represents the moral condemnation of the community." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Congress **may** have meant for Charge I to remain a "child abuse offense" under the 2016 amendment, but the critical point for present purposes is

that the statute is far from clear on that point. And in the absence of clarity, lenity prevails.

III. THE GOVERNMENT'S PROPOSED READING OF ARTICLE 43(B)(2)(B) WOULD CREATE SIGNIFICANT AND BURDENSOME UNCERTAINTY IN FUTURE CASES

Finally, setting aside the principles of statutory interpretation that militate in favor of finding Charge I to be time-barred, this court should also decline to adopt the government's reading because of its potential implications. The government essentially asks this Court, based solely on the statute's use of the term "constitutes," to read Article 43(b)(2)(B) as incorporating the harrowingly complex categorical-like approach used in interpreting statutes like the Armed Career Criminal Act and the Immigration and Nationality Act to decide which offenses qualify as "child abuse offenses" under Article 43. That is to say, the government asks this court to treat the offenses enumerated in Article 43(b)(2)(B) as their own **categories**—and to conduct an element-by-element analysis of other criminal statutes to see if they satisfy the definition. There are two independent reasons, beyond those offered above for why this court should reject the government's invitation.

First, even if the word "constitutes," standing alone, could radically alter the meaning of Article 43, the statute doesn't require a categorical-like approach.[1] Article 43 contains a list of child abuse offenses—not a generic term (like "crime of violence," *see* 18 U.S.C. § 16), to match to other criminal offenses. When Congress intends to write a statute requiring a categorical or modified-categorical approach, it knows how to do so—and those statutes don't look anything like Article 43(b)(2)(B). *See, e.g.*, Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (defining a violent felony as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"); Immigration Nationality Act, 8 U.S.C. § 1101(a)(43) (defining an aggravated felony as, inter alia, "an offense described in" enumerated statutes). None of those statutes rely on the word "constitutes" to alone to carry the heavy load of requiring courts to cross-reference all of the elements in the enumerated offenses with the

1. When deploying the categorical approach, a court looks to the elements of a charged offense to determine whether those elements are broader or narrower than a cross-referenced offense. *See, e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). But if a cross-referenced offense is circumstance-specific, a court deploys a modified categorical approach to look to the "particular circumstances in which an offender committed the crime on a particular occasion." *Nijhawan* v. *Holder*, 557 U.S. 29, 38 (2009).

conduct for which the defendant faces distinct charges, and determine whether the defendant could have been charged with one of those offenses based on the facts alleged. Indeed, the government fails to identify a single case in which a court has conducted the statutory rewrite it seeks here. And for good reason. The analysis it proposes is not only unsupported by the language of the statute, it is unwieldy, complex, and inappropriate for purposes of determining the applicable statute of limitations.

Second, the government's reading would create potentially chaotic downstream consequences. Statutes that actually do require courts to apply the government's approach have led to considerable litigation and uncertainty in the civilian context. *See, e.g.*, *Nijhawan*, 557 U.S. 29; *Mathis*, 136 S. Ct. 2243. But in the context of determining the applicable statute of limitations for an offense, adopting this approach would be unworkable. It would require courts-martial to conduct this analysis on the front end—before conduct has been found beyond a reasonable doubt, and irrespective of which charges are actually brought—to determine whether a given set of **accusations** meet all of the elements of any of the enumerated offenses in Article 43. And it is not immediately clear what aspects of this approach would survive the Supreme Court's evolving scrutiny on the constitutional issues at play. *See Johnson* v. *United States*, 135 S. Ct. 2551, 2576 (2015). In case after case, courts would be asked to decide at the outset whether

other misconduct "constitutes" one of the offenses enumerated under Article 43(b)(2)(B)—in circumstances in which the conduct of the court-martial might compel a different conclusion.

If Congress intended all of these complexities, it picked an awfully strange way to say so. Instead, this Court should interpret the statute as Appellant argues: the longer limitations period for child abuse offenses as defined by Article 42(b)(2)(B) applies only to offenses enumerated therein.

CONCLUSION

Amici respectfully submit that this case be decided consistently with the views articulated herein.

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 30, 2020, a copy of the foregoing brief in the case of *United States v. McPherson*, Army Ct. Crim. App. Dkt. No. 20180214, was electronically filed with the Court and contemporaneously served on the Defense and Government Appellate Divisions.

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