No.

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS M. ADAMS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION APPENDIX

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April 21, 2025

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United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Thomas M. Adams,
Appellant

USCA Dkt. No. 24-0117/AR
Crim.App. No. 20130693

O R D E R

On consideration of Appellant's petition for reconsideration of this Court's order issued October 17, 2024, it is, by the Court, this 22nd day of November, 2024,

ORDERED:

That the petition for reconsideration is hereby denied.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Spinner)
Appellate Government Counsel (Talley)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Thomas M. Adams,
Appellant

USCA Dkt. No. 24-0117/AR
Crim.App. No. 20130693

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is by the Court, this 17th day of October, 2024,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Spinner)
Appellate Government Counsel (Talley)

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant THOMAS M. ADAMS
United States Army, Appellant

ARMY 20130693

Headquarters, 1st Infantry Division and Fort Riley (trial)
Headquarters, U.S. Army Combined Arms Center
and Fort Leavenworth (rehearing and sentence rehearing)
Jeffrey R. Nance, Military Judge (trial)
J. Harper Cook, Military Judge (rehearing)
Steven C. Henricks, Military Judge (sentence rehearing)
Lieutenant Colonel John A. Hammer, Staff Judge Advocate (trial)
Colonel Jarrett W. Dunlap, Jr., Staff Judge Advocate (rehearing)
Colonel Robert L. Manley III, Staff Judge Advocate (sentence rehearing)

For Appellant: Major Bryan A. Osterhage, JA; Frank J. Spinner, Esquire (on brief).

For Appellee: Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Captain Stewart A. Miller, JA (on brief).

22 January 2024

DECISION ON FURTHER REVIEW

Per Curiam:

On 6 January 2017, a panel of this Court set aside the findings and sentence and authorized a rehearing. *United States v. Adams*, ARMY 20130693, 2017 CCA LEXIS 6 (Army Ct. Crim. App. 6 Jan. 2017) (mem. op.). The government preferred new charges and held a rehearing in 2017. On 13 July 2020, this court set aside and dismissed Specification 1 of Charge III and affirmed the remaining findings of guilty and the sentence. *United States v. Adams*, ARMY 20130693, 2020 CCA LEXIS 232 (Army Ct. Crim. App. 13 Jul. 2020). On 9 September 2021, the Court of Appeals for the Armed Forces (CAAF) reversed this court's decision as to Specifications 2, 3, 4, and 5 of Charge II, and Specification 1 of Charge IV, and the

sentence. *United States v. Adams*, 81 M.J. 475 (C.A.A.F. 2021). CAAF affirmed the remaining findings and returned the record to the Judge Advocate General for remand to this court, authorizing a reassessment of the sentence or a sentence rehearing. *Id.*

On 13 May 2022, a military judge sitting as a general court-martial sentenced appellant to a dishonorable discharge, reduction to the grade of E-1, and confinement for 260 months. The record is now before us for further review.

On consideration of the entire record, we hold the sentence as approved by the convening authority correct in law and fact. Accordingly, the sentence is AFFIRMED.

FOR THE COURT:

JOSEPH P. TALBERT
Assistant Deputy Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Thomas M. ADAMS, Sergeant
United States Army, Appellant

No. 20-0366
Crim. App. No. 20130693

Argued April 21, 2021—Decided September 9, 2021

Military Judge: J. Harper Cook and Jeffery R. Nance

For Appellant: *Frank J. Spinner*, Esq. (argued); *Major Alexander N. Hess* (on brief); *Captain Lauren M. Teel*.

For Appellee: *Captain Thomas J. Darmofal* (argued); *Colonel Steven P. Haight, Lieutenant Colonel Wayne H. Williams*, and *Major Dustin B. Myrie* (on brief).

Judge HARDY delivered the opinion of the Court, in which Judge MAGGS and Senior Judge STUCKY joined. Chief Judge OHLSON filed a dissenting opinion in which Judge SPARKS joined.

Judge HARDY delivered the opinion of the Court.

This case, like *United States v. McPherson*, __ M.J. __ (C.A.A.F. 2021), requires us to decide whether Appellant's prosecution for certain offenses was time-barred by the statute of limitations provision in the 2016 version of Article 43(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843(b)(1) (2012 & Supp. IV 2013–2017). Pursuant to the Court's decision in *McPherson*, we hold that the statute of limitations had expired for Appellant's charged offenses under Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934 (2000).

This case differs slightly from *McPherson*, however, because the Government originally charged Appellant in 2012, years before Congress passed the 2016 amendments to Article 43(b), UCMJ, which retroactively shortened the relevant statute of limitations. But the 2012 charges, which

would normally be immune from reductions to the statute of limitations after charges were brought, are *not* the charges that Appellant faces today. Instead, in 2017, the Government dismissed the original 2012 charges against Appellant and re-preferred new charges for the same offenses. The Government argues that even though the statute of limitations has expired for the re-preferred 2017 charges, those charges are not time-barred because the savings clause in Article 43(g), UCMJ, 10 U.S.C. § 843(g) (2012 & Supp. IV 2013–2017), tolled the statute of limitations after the original charges were dismissed and re-preferred. We disagree.

The savings clause in Article 43(g), UCMJ, does not apply to this case. By its plain text, Article 43(g), UCMJ, only applies when the original charges or specifications were "dismissed as defective or insufficient for any cause." We find no evidence that the original charges were dismissed because of a defect or insufficiency, and therefore hold that the savings clause in Article 43(g), UCMJ, is inapplicable. Because we believe that the error in this case was clear and prejudiced Appellant's substantial rights, we reverse in part the decision of the United States Army Court of Criminal Appeals (ACCA).

I. Background

In 2013, a panel of officers with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of numerous sexual offenses against two minors.[1] *United States v. Adams*, No. ARMY 20130693, 2017

[1] At his original court-martial, Appellant was convicted of 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). Appellant was also convicted of offenses charged under the 2006 version of the UCMJ, 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, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934 (2006). *United States v. Adams*, No. ARMY

CCA LEXIS 6, at *1–2, 2017 WL 76915, at *1 (A. Ct. Crim. App. Jan 6, 2017) (summary disposition) (unpublished). The panel sentenced Appellant to confinement for life with the possibility of parole, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. *Id.* The convening authority approved all findings, except for Appellant's conviction for child erotica, and approved the sentence. *Id.*

On January 6, 2017, the ACCA set aside the findings of guilt and sentence and authorized a rehearing in light of this Court's decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).[2] *Adams*, 2017 CCA LEXIS 6, at *8, 2017 WL 76915, at *3. On May 11 and August 3, 2017, after the ACCA set aside the original findings and sentence, the Government preferred a new charge sheet. The new charge sheet included numerous charges that were identical, or nearly identical, to the charges originally filed against Appellant in 2012, plus some entirely new charges. As explained below, only five of the 2017 charges are relevant to this appeal.

On August 4, 2017, the convening authority dismissed the original 2012 charges and referred the 2017 charges to a general court-martial. Of the new 2017 charges, four are relevant to the Article 43(g) savings clause issue posed in this case: Specifications 2, 3, and 4 of Charge II for indecent liberties with a child under Article 134, UCMJ (2000); and Specification 1 of Charge IV for sodomy with a child under the age of twelve under Article 125, UCMJ (2000).[3] The fifth

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20130693, 2017 CCA LEXIS 6, at *1–2, 2017 WL 76915, at *1 (A. Ct. Crim. App. Jan. 6, 2017) (summary disposition) (unpublished).

[2] In *Hills*, we held that it is constitutional error for a military judge to use Military Rule of Evidence (M.R.E.) 413 to admit evidence of "charged conduct to which an accused has pleaded not guilty in order to show a propensity to commit the very same charged conduct." 75 M.J. at 354. Subsequently, in *United States v. Bonilla*, the ACCA extended the *Hills* ruling to include propensity evidence admitted under M.R.E. 414. No. ARMY 20131084, 2016 CCA LEXIS 590, at *22–23, 2016 WL 5682541, at *8 (A. Ct. Crim. App. Sept. 30, 2016) (unpublished), *aff'd* 76 M.J. 335 (C.A.A.F. 2017) (summary disposition).

[3] The full text of these four charges is included at the end of this opinion in Appendix 1. The differences between the 2017 charges

charge, Specification 5 of Charge II, is also implicated in this appeal. But, because that specification was preferred for the first time in 2017, it is relevant only to the statute of limitations question.

The 2017 charges were not based on any new conduct. The trial counsel explained to the military judge that the 2012 charges were dismissed because the "date ranges which were reflected on the 2017 charge sheet more accurately reflect the misconduct committed by the accused." However, none of the specifications at issue in this case changed in any material way, and the dates in all four specifications are exactly the same. As trial counsel clarified in a supplemental pleading, Specifications 2, 3, and 4 of Charge II were "the same as those which were preferred . . . in 2012 minus some minor crafting differences," and Specification 1 of Charge IV was a "verbatim recitation of Charge III, Specification 1 from [the] 2012 [charge sheet]."[4]

On various dates between September 8, 2017, and November 6, 2018, a military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of aggravated sexual assault of a child, six specifications of indecent liberties with a child, one specification of indecent acts with a child, one specification of production of child pornography, one specification of sodomy with a child, one specification of aggravated sexual abuse of a child, and one specification of abusive sexual contact with a child, in violation of Articles 120, 125, and 134, UCMJ. The military judge sentenced Appellant to confinement for forty-three years, reduction in grade to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence.

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and the corresponding 2012 charges are shown in bold, with the deleted text struck out and the new text underlined.

[4] Although trial counsel stated that Specification 1 of Charge IV was a verbatim recitation of the corresponding 2012 specification, the two specifications actually differ slightly. The 2017 specification includes Appellant's rank, and the words "on divers occasions" moved from the end to the beginning of the list of specified dates. *See* Appendix 1.

On appeal to the ACCA, Appellant argued that his court-martial for the specifications at issue in this appeal was timed-barred by statute of limitations. *United States v. Adams*, No. ARMY 20130693, 2020 CCA LEXIS 232, at *9, 2020 WL 4001871, at *5–6 (A. Ct. Crim. App. July 13, 2020) (unpublished). The ACCA disagreed. Although the ACCA noted that the relevant statutory text "does not appear ambiguous," the ACCA invoked "common sense" and declined to follow the text because to do so would lead "to an absurd and unintended result." *Id.* at *14, 2020 WL 4001871, at *8. The ACCA also held that, even if Congress did reduce the relevant statute of limitations in 2016, the savings clause in Article 43(g), UCMJ, applied because the Government made "slight changes" to the charge sheet prior to re-preferring charges against Appellant in 2017. *Id.* at *10 n.14, 2020 WL 4001871, at *6 n.14. The ACCA held that the "slight differences" fit within the statute's allowance for saving otherwise time-barred charges if they were dismissed as "defective or insufficient *for any cause*." *Id.*

We granted review to decide:

> 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.

United States v. Adams, 80 M.J. 461 (C.A.A.F. 2020) (order granting review).

II. Standard of Review

Deciding whether a statute of limitations has expired is a question of law that we review de novo. *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, we also review for plain error. *McPherson*, __ M.J. at __ (6) (citing *United States v. Briggs*, 78 M.J. 289, 295 (C.A.A.F. 2019), *rev'd on other grounds*, 141 S. Ct. 467 (2020)). 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." *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (internal quotation marks omitted) (citation omitted).

III. Discussion

Resolution of the issue presented in this case requires us to answer three questions. First, whether Congress's 2016 amendments to Article 43, UCMJ, reduced the statute of limitations for the offenses challenged by Appellant in this appeal—indecent liberties charged under Article 134, UCMJ, and sodomy charged under Article 125, UCMJ—to five years. Second, if so, whether the savings clause in Article 43(g), UCMJ, prevents those offenses from being time-barred by the reduced statute of limitations. And finally, if not, whether Appellant established plain error.

A. Statute of Limitations

In *McPherson*, which was argued the same day as this case, the Court thoroughly examined and decided the first question, and we adopt in whole the holding and reasoning of that decision. As the Court explained, we cannot ignore the plain text of the applicable version of Article 43(b), UCMJ, merely because the Government argues that to do so would go against Congress's apparent contrary intentions in enacting that provision or because doing so produces an undesirable result. __ M.J. at __ (1). Thus, consistent with the plain text of Article 43(b), UCMJ, as amended in 2016, the statute of limitations for Appellant's challenged charges under Articles 125 and 134, UCMJ, was five years. Pursuant to our holding in *McPherson*, we hold that Specification 5, Charge II, which was filed for the first time in 2017, not 2012, was time-barred by the plain text of the 2016 amended version of Article 43(b), UCMJ.

B. Savings Clause

The next question is whether the savings clause in Article 43(g), UCMJ, applies in this case and prevents the five-year statute of limitations from barring Appellant's challenged charges. Under Article 43(g), UCMJ:

> If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations . . . has expired, . . . trial and punishment under new charges and specifications are not barred by the statute of limitations . . . .

As noted above, for Appellant's challenged offenses under Articles 125 and 134, UCMJ, "the period prescribed by the applicable statute of limitations . . . has expired." Article 43(g), UCMJ. Thus, for Article 43(g), UCMJ, to permit trial and punishment under new charges and specifications, the original charges must have been "dismissed as defective or insufficient for any cause."

In its brief before this Court, the Government offered no explanation for how or why the original dismissed charges were "defective or insufficient." Apparently, the Government believed that because Article 43(g), UCMJ, requires that the original charges be "dismissed as defective or insufficient *for any cause*" (emphasis added), no explanation is required. The Government suggests it is simply enough that the charges were dismissed. We disagree.

The Government's approach would effectively strike the words "as defective or insufficient" from the statute. In the Government's view, Article 43(g)'s savings clause should apply whenever "charges or specifications are dismissed . . . for any cause," and the provision's other requirements are satisfied. It is a "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Thus, the Supreme Court has repeatedly held that courts are "obliged to give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632, (2018) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)); *see also*, *e.g.*, *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 105 (2010) (same); *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009) (same); *Connecticut Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 (1985) (same); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (same); *Inhabitants of Twp. of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (same); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (same). Because the Government's argument would render superfluous the words "as defective or insufficient" in Article 43(g), we cannot accept its suggested interpretation of that provision.

Instead, we believe that for the savings clause in Article 43(g) to apply, the original charges must have been dismissed because they were "defective or insufficient" in some manner.

When pushed at oral argument to explain how the dismissed charges were "defective or insufficient," the Government admitted that the changes made to the date ranges between the original 2012 charges and the 2017 charges were "minor," but maintained that the 2012 charges were defective or insufficient "to the extent that the date ranges were not correct." Oral Argument at 29:10, *United States v. Adams*, No. 20-0366 (C.A.A.F. April 21, 2021). We find no evidence that the dismissed charges suffered from any defect or insufficiency in their dates, or otherwise.

As noted above, the Government stated before the military judge that the original 2012 charges were dismissed because the "date ranges which were reflected on the 2017 charge sheet more accurately reflect[ed] the misconduct committed by the accused." As Appellant correctly points out, however, none of the date ranges of the specifications at issue in this appeal were edited. The Government's argument appears to be based on the fact that in each of the new 2017 specifications at issue in this appeal the date "3 May 2005" was initially replaced with "30 May 2005" in the list of occasions when the misconduct allegedly occurred. But that lone difference appears to have been a typo that the Government fixed when it amended the 2017 charge sheet to make the dates in the as-amended specifications identical to the corresponding 2012 specifications. Given that the dates in the 2012 specifications and the as-amended 2017 specifications are exactly the same, we cannot accept the Government's argument that the charges were dismissed and re-preferred to "more accurately reflect the misconduct committed by the accused."

We also note that although the date ranges of the relevant 2017 specifications are identical to the 2012 specifications, the Government did make other minor changes to the specifications, as shown in Appendix 1. However, the Government has never argued, or even suggested, either before the military judge or before this Court that those other changes were intended to address any defect or insufficiency in the original 2012 specifications. To the contrary, in its supplemental filing before the military judge, the Government described the changes as "minor crafting differences," and reassured the military judge "that these charges and specifications are *ex-*

actly the same" as the corresponding 2012 charges. Government Supplemental Pleading Relating Charges from 2012 and 2017 at 2, *United States v. Adams* (Third Judicial District, U.S. Army Sept. 13, 2017) (emphasis added).

In light of the Government's own statements about the 2017 specifications and the fact that no changes were made to the date ranges of the four specifications at issue here (the Government's purported reason for the dismissal of the original charges), we do not believe that the 2012 specifications were "dismissed as defective or insufficient for any cause." Accordingly, Article 43(g), UCMJ, does not apply to save the time-barred charges.

C. Plain Error

To establish plain error Appellant must show "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *Armstrong*, 77 M.J. at 469 (internal quotation marks omitted) (citation omitted). The Government argues that Appellant has not shown that any error was clear or obvious because neither party made "any mention of a potential statute of limitations issue" at either the court-martial or CCA stages. The Court rejected similar reasoning in *McPherson*, and we do the same here. *McPherson,* __ M.J. at __ (17). As we noted in *McPherson*, a plain reading of the 2016 version of Article 43(b), UCMJ, requires us to hold that the statute of limitations for the charges under Articles 125 and 134, UCMJ, was five years. We have no doubt that Appellant would have raised this issue as a defense at court-martial if he were properly advised of the issue by the military judge, as required by Rules for Courts-Martial (R.C.M.) 907(b)(2)(B). As such, the error in this case was clear and prejudiced Appellant's defense.

IV. Conclusion

The decision of the United States Army Court of Criminal Appeals is reversed as to Charge II and Specifications 2, 3, 4, and 5 thereunder, as to Charge IV and Specification 1 thereunder, and as to the sentence. The findings of guilty as to those charges and specifications are set aside, and those charges and specifications are dismissed. The remaining findings are affirmed. The record is returned to the Judge Advocate General of the Army for remand to the Army Court of

Criminal Appeals. That court may either reassess the sentence based on the affirmed findings, or it may order a rehearing on the sentence. *See United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Appendix 1

The full text of the four offenses at issue in this appeal appear below. These offenses were originally charged against Appellant on September 11, 2012, were re-preferred on August 11, 2017, and were amended on September 8, 2017. The differences between the original 2012 charges and the final 2017 as-amended charges are shown below in bold. Text deleted from the original 2012 specifications is struck-through, and new text added to the new 2017 specifications is underlined.

2017 Charge II, Specification 2 (formerly 2012 Charge II, Specification 3):

> In that Sergeant Thomas M. Adams~~,~~ **(E-5),** U.S. Army, did, at or near Fort Riley, Kansas, **on divers occasions** between on or about 1 December 2003 and on or about 15 December 2003~~,~~ **and** between on or about 27 March 2004 and on or about 1 February 2005~~,~~ and between on or about 18 April 2005 and on or about 3 May 2005, ~~**on divers occasions**~~ take indecent liberties with [the victim], a female under ~~**the age of**~~ 16 years **of age,** not the wife of the ~~**said Sergeant Adams**~~ **accused,** by ~~**directing**~~ **causing** her to touch her own genitalia and by causing her to penetrate her own genital opening with her own hand ~~**or**~~ **and** finger, with intent to arouse ~~**or**~~ **and** gratify ~~**the lust or**~~ **the** sexual desires of the ~~**said Sergeant Adams,**~~ **accused,** such conduct being ~~**prejudicial**~~ to the **prejudice of** good order and discipline in the armed forces and ~~**being**~~ of a nature to bring discredit upon the armed forces.

2017 Charge II, Specification 3 (formerly 2012 Charge II, Specification 4):

> In that Sergeant Thomas M. Adams~~,~~ **(E-5),** U.S. Army, did, at or near Fort Riley, Kansas, **on divers occasions** between on or about 1 December 2003 and on or about 15 December 2003~~,~~ **and** between on or about 27 March 2004 and on or about 1 February 2005~~,~~ and between on or about 18 April 2005 and on or about 3 May 2005, ~~**on divers occasions**~~ take indecent liberties with [the victim], a female **under** ~~**the age of**~~ 16 years~~,~~ **of age,** not the wife of the ~~**said Sergeant Adams,**~~ **accused,** by causing her to touch her own genital opening with instruments designed for sexual stimulation, with intent to arouse ~~**or**~~ **and** gratify the ~~**lust or**~~ sexual desires of the ~~**said Sergeant Adams**~~ **accused**, such

conduct being ~~**prejudicial**~~ **to the prejudice** of ~~**the**~~ good order and discipline in the armed forces and ~~**being**~~ of a nature to bring discredit upon the armed forces.

2017 Charge II, Specification 4 (formerly 2012 Charge II, Specification 6):

In that Sergeant Thomas M. Adams~~,~~ **(E-5),** U.S. Army, did, at or near Fort Riley, Kansas, between on or about 1 December 2003~~,~~ and on or about 15 December 2003~~,~~ **and** between on or about 27 March 2004 and on or about 1 February 2005~~, or~~ **and** between on or about 18 April 2005 and on or about 3 May 2005, take indecent liberties with [the victim], a female under ~~**the age of**~~ 16 **years, of age**, not the wife of the ~~**said Sergeant Adams,**~~ **accused,** by inviting [the victim] to touch his penis ~~**and stating "feel this", or words to that effect**~~, with intent to arouse ~~**or**~~ **and** gratify the ~~**lust or**~~ sexual desires of the ~~**said Sergeant Adams,**~~ **accused**, such conduct being ~~**prejudicial**~~ **to the prejudice of** ~~**the**~~ good order and discipline in the armed forces and ~~**being**~~ of a nature to bring discredit upon the armed forces.

2017 Charge IV, Specification 1 (formerly 2012 Charge III, Specification 1):

In that Sergeant Thomas M. Adams~~,~~ **(E-5),** U.S. Army, did, at or near Fort Riley, Kansas, **on divers occasions** between on or about 27 March 2004 and on or about 1 February 2005 and between on or about 18 April 2005 and on or about 3 May 2005, ~~**on divers occasions**~~ commit sodomy with [the victim], a child under the age of 12.

Chief Judge OHLSON, with whom Judge Sparks joins, dissenting.

Consistent with my analysis in *United States v. McPherson*, I would hold that the prosecution of Appellant for sexually abusing his young stepdaughter was timely. *See* __ M.J. __, __ – __ (1–16) (C.A.A.F. 2021) (Ohlson, C.J., with whom Sparks, J., joined, dissenting). I would therefore affirm Appellant's convictions on all specifications of indecent liberties with a child and sodomy with a child which are at issue here. Because the majority holds otherwise, I respectfully dissent.[1]

[1] I agree with the majority that the savings clause of Article 43(g), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843(g), is inapplicable in this case.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 20-0366/AR
Crim.App. No. 20130693

v.

ORDER GRANTING REVIEW

Thomas M.
Adams,
Appellant

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is, by the Court, this 3rd day of December, 2020,

ORDERED:

That said petition is hereby granted 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.

Briefs will be filed under Rule 25.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Spinner)
Appellate Government Counsel (Darmofal)

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KRIMBILL, BURTON, and RODRIGUEZ
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant THOMAS M. ADAMS
United States Army, Appellant

ARMY 20130693

Headquarters, 1st Infantry Division and Fort Riley
J. Harper Cook, Military Judge
Colonel Jerrett W. Dunlap, Jr., Staff Judge Advocate

For Appellant: Captain Alexander N. Hess, JA; Frank J. Spinner, Esquire (on brief, supplemental brief, and reply briefs).

For Appellee: Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Thomas J. Darmofal, JA (on brief); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA (on response to supplemental brief).

13 July 2020

MEMORANDUM OPINION ON FURTHER REVIEW

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BURTON, Senior Judge:

Appellant appeals his several convictions for sexually assaulting and abusing his minor step-daughter and niece. We write to discuss the following of appellant's asserted errors: (1) whether the court-martial lacked jurisdiction over the offenses; (2) whether double jeopardy barred the government from proceeding with the charges; (3) whether the statute of limitations expired for Specification 5 of Charge II; and (4) whether his conviction for production of child pornography is legally and factually insufficient.[1] We disagree with all assertions, with the exception of the

[1] A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of aggravated sexual assault of a child, six specifications of indecent liberties with a child, one specification of indecent acts

(continued . . .)

legal and factual sufficiency of appellant's conviction for production child pornography, which we set aside and dismiss.[2] We affirm the remaining findings and reassess the sentence.[3]

BACKGROUND

Appellant was originally tried and convicted for his misconduct in 2013.[4] *United States v. Adams*, ARMY 20130693, 2017 CCA LEXIS 6 (Army Ct. Crim.

(. . . continued)
with a child, one specification of production of child pornography, one specification of sodomy, one specification of aggravated sexual abuse of a child, and one specification of abusive sexual contact with a child, in violation of Articles 120, 125 and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920, 925 and 934. The military judge sentenced appellant to a dishonorable discharge, confinement for forty-three years, total forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence and credited appellant with 2,086 days against his sentence to confinement. Appellant was found not guilty of the following offenses alleging he sexually assaulted and sexually abused his step-daughter, niece, and three other children: one specification of aggravated sexual abuse of a child; two specifications of sodomy of a child; three specifications of aggravated sexual assault of a child; two specifications of abusive sexual contact of a child; two specifications of indecent act with a child; and one specification of possession of child pornography in violation of Articles 120, 125, and 134, UCMJ.

[2] Although appellant claims all of his convictions are legally and factually insufficient, we only address the legal and factual sufficiency of his conviction for production of child pornography (Specification 1 of Charge III), and find all other charges and specifications legally and factually sufficient.

[3] Appellant also raised as an assigned error that his convictions for taking indecent liberties with HR (Specification 6 of Charge I) and aggravated sexual abuse of HR (Specification 1 of the Additional Charge) constitute an unreasonable multiplication of charges (UMC). We have given full and fair consideration to appellant's claim of UMC and to the matters raised personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they merit neither discussion nor relief.

[4] In 2013, an enlisted panel convicted appellant, contrary to his pleas, of one specification of rape of a child, one specification of carnal knowledge, two specifications of aggravated sexual assault of a child, one specification of aggravated sexual abuse of a child, two specifications of aggravated sexual contact with a child, eight specifications of indecent liberties with a child, two

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App. 6 Jan. 2017) (mem. op.). This court set aside the findings and sentence due to a *Hills*[5] error and authorized a rehearing by the same or a different convening authority. *Adams*, 2017 CCA LEXIS 6, at *1, 8.

Upon remand to the convening authority, the government preferred a second charge sheet alleging substantively the same charges against appellant on 11 May 2017. On 3 August 2017, the government preferred an additional charge. We will refer to these charges collectively as the "2017 charges."

Thus, by August 2017, appellant was facing both the remanded 2012 charges and the newly preferred 2017 charges. A comparison of the two sets of charges revealed three categories of specifications. First, some specifications are substantially identical in both charge sheets.[6] Second, some specifications differ

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specifications of sodomy with a child, one specification of producing child pornography, one specification of possessing child pornography, and one specification of possessing child erotica, in violation of Articles 120, 125 and 134, UCMJ. The panel sentenced appellant to a dishonorable discharge, confinement for life with eligibility for parole, total forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority disapproved the finding of guilty for possession of child erotica, approved the remaining findings of guilty, and approved the sentence. *Adams*, 2017 CCA LEXIS 6 at *1-2.

[5] In *United States v. Hills*, 75 M.J. 350, 352 (C.A.A.F. 2016), our Superior Court held it is constitutional error for a military judge to give an instruction to a panel that permits Military Rule of Evidence [Mil. R. Evid.] 413 to be applied to evidence of charged sexual misconduct. Our Superior Court's ruling in *Hills* also applies to cases involving Mil. R. Evid. 414. *See United States v. Tanner*, 63 M.J. 445, 448-49 (C.A.A.F. 2006); *United States v. Bonilla*, ARMY 20131084, 2016 CCA LEXIS 590, at *22-23 (Army Ct. Crim. App. 30 Sep. 2016). During appellant's 2013 court-martial, the military judge's instruction to the panel allowed the consideration of charged misconduct, under Mil. R. Evid. 414, as evidence of appellant's propensity to commit the other charged offenses, "even if [the panel] is not convinced beyond a reasonable doubt that the accused is guilty of those offenses . . . ." *Adams*, 2017 CCA LEXIS 6, at *3-4.

[6] The first category of identical charges include: Specifications 2, 3, and 4 of Charge II (indecent liberties with a child in violation of Article 134), and Specification 1 of Charge IV (sodomy of a child in violation of Article 125). We note appellant claims Specification 2 of Charge II is a new offense and classifies it under category 3. Appellant explains that this specification "[c]orresponds to Specification 3 of Charge II [from the 2012 charge sheet], but the government

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only in that the 2017 charge sheet amended the time period when the offense was committed.[7] For all offenses in the second category, the time period when the offense was committed was amended from "between on or about 1 October 2007 and on or about 31 March 2008," in the 2012 charges to "between on or about 16 July 2008 and on or about 14 August 2008," in the 2017 charges. The third category consists of five new specifications preferred in 2017.[8]

A second Article 32, UCMJ, hearing was directed to consider all of the charges. Both the 2012 and 2017 charges were then forwarded to the convening authority, who dismissed "without prejudice" the 2012 charges and referred the 2017 charges to a general court-martial. At trial, appellant moved to dismiss the 2017 charges for lack of jurisdiction asserting the convening authority had exceeded the mandate of this court's remand. The military judge denied the motion and appellant petitioned this court to issue a writ of mandamus and a writ of habeas corpus. Appellant's writ asserted that further prosecution was barred by the Double Jeopardy Clause and the court-martial lacked jurisdiction over the charges. This court denied appellant's petition. *Adams v. Cook*, ARMY MISC 20170581, 2018 CCA LEXIS 30 (Army Ct. Crim. App. 23 Jan. 2018) (mem. op.).

At appellant's rehearing, appellant was convicted of sexually abusing HP, his step-daughter, when she was between the ages of nine and ten. On various

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changed the modality by alleging [appellant] 'cause[d]' HR to touch, instead of 'directing' HR to touch as alleged in the 2012 charges." After appellant submitted his brief to this court, the Court of Appeals for the Armed Forces (CAAF) issued its decision in *United States v. Moore*, 79 M.J. 483, 487-88 (C.A.A.F. 2020), which held that amending the modality of the offense prior to referral does not implicate the statute of limitations. Thus, we consider Specification 2 of Charge II as an identical charge under the first category.

[7] The offenses with a differing date range in the second category include: Specification 1 of Charge I (aggravated sexual assault of a child in violation of Article 120); Specification 3 of Charge I (indecent liberties with a child in violation of Article 120); and Specification 1 of Charge III (production of child pornography in violation of Article 134).

[8] The new offenses in the third category include: Specification 1 of Charge I (indecent acts with a child in violation of Article 120); Specification 6 of Charge I (indecent liberties with a child in violation of 120); Specification 5 of Charge II (indecent liberties with a child in violation of Article 134); Specification 1 of The Additional Charge (aggravated sexual abuse of a child in violation of 120); and Specification 3 of The Additional Charge (abusive sexual contact of a child in violation of 120).

occasions, appellant had HP penetrate her vagina with her fingers and a sex toy, requested she take her shirt off so he could see her breasts, requested she touch appellant's penis, and anally penetrated her with his penis.

Appellant was also convicted of sexually abusing his niece, HR, when she was thirteen years old. On various occasions, appellant had HR penetrate her vulva with a sex toy, requested she perform oral sex on him, requested she lift her shirt and fondled her breasts with both of his hands, requested she take photographs of her naked breasts, penetrated HR's vagina with his penis, and on one occasion, photographed his penis while penetrating HR's vagina.

LAW AND DISCUSSION

A. Whether the Court-Martial Lacked Jurisdiction

Appellant contends the convening authority exceeded the scope of this court's remand by dismissing the 2012 charges and referring the 2017 charges, thereby depriving the court-martial of jurisdiction. We disagree and find that upon remand a convening authority may take any lawful action regarding the offenses, including dismissal, amendment of charges, and referral of new charges.

Jurisdiction is a question of law that this court reviews de novo. *United States v. Nealy*, 71 M.J. 73, 75 (C.A.A.F. 2012). Article 66(d), UCMJ, permitted this court to to set aside the findings and sentence of appellant's first court-martial and authorize a rehearing by the same or a different convening authority. In cases where a rehearing is authorized, "[t]he convening authority may in the convening authority's discretion order a rehearing. A rehearing may be ordered as to some or all of the offenses . . . ." Rule for Courts-Martial [R.C.M.] 1107(e)(2).[9] Further, the convening authority is authorized to refer additional charges "together with charges as to which a rehearing has been directed." R.C.M. 1107(e)(2)(D).[10] We find this

[9] In *United States v. Carter*, 76 M.J. 293 (C.A.A.F. 2017), the Air Force Court of Criminal Appeals set aside the findings, but *did not* authorize a rehearing. *Id*. at 294. Nonetheless, the convening authority sent the case to be retried. The CAAF held the convening authority exceeded his authority and the scope of the remand. *Id*. at 295-96. In contrast, in appellant's case this court *did authorize* a rehearing. Thus, the convening authority had jurisdiction over the offenses when this court remanded the case.

[10] Rule for Courts-Martial 810(a)(3) also envisions new charges at a rehearing:

Combined Rehearings. When a rehearing on sentence is

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discretionary language inherently allows for the dismissal of some or all of the charges, for the referral of additional charges, and for the convening authority to amend the charges to conform to the evidence. *See Moore*, 79 M.J. at 486 (citing *United States v. Stout*, 2019 CAAF LEXIS 648, at *4 (C.A.A.F. 22 Aug. 19)). This court stated previously:

> When we authorize a rehearing we see our decision as returning the case to the convening authority who, subject to rules governing speedy trial, double jeopardy, unreasonable multiplication of charges, and other rules, may take any lawful action regarding the offenses. Dismissal and amendment of charges are among such lawful actions. While a rehearing is a continuation of the former proceeding, that does not make the charges immutable or cause us to construe them as having been carved into granite.

Adams, 2018 CCA LEXIS 30 at *11-12 (citing *United States v. Von Bergren*, 67 M.J. 290, 291 (C.A.A.F. 2009) (noting Von Bergren received a rehearing on an amended specification and the court did not view the issue as one of jurisdiction, but rather whether a new Article 32, UCMJ, hearing should have been granted) (internal quotation marks and citation omitted).

In sum, this court's remand "had the effect of vacating the proceedings and leaving the case as though no trial had been had," *Johnson v. United States*, 19 C.M.A. 407, 408, 42 C.M.R. 9, 10 (1970), and "no vestiges of the former court-martial linger[ed]." *Howell v. United States*, 75 M.J. 386, 392 (C.A.A.F. 2016). As such, the convening authority acted within his discretion when he referred new charges, amended charges, and dismissed charges. Accordingly, the court-martial had jurisdiction over the 2017 offenses.

B. Whether Double Jeopardy Barred the 2017 Charges

Appellant asserts the Double Jeopardy Clause barred the government from proceeding with the 2017 charges that were either identical or contained a date range shift from the 2012 charges (categories 1 and 2). We disagree and find the original

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> combined with a trial on the merits of one or more specifications referred to the court-martial *whether or not such specifications are being tried for the first time or reheard*, the trial will proceed on the merits. . . ."

(emphasis added).

jeopardy from the 2012 charges continued uninterrupted during the appellate process and the rehearing on the 2017 charges.

Whether a successive prosecution is barred by the Double Jeopardy Clause is a question of law we review de novo. *United States v. Campbell*, 71 M.J. 19, 26-27 (C.A.A.F. 2012). The Fifth Amendment to the United States Constitution commands that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V., cl. 2. The Double Jeopardy Clause consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause does not preclude the government from retrying an accused whose conviction was set aside due to an error in the proceedings. *Burks v. United States*, 437 U.S. 1, 14 (1978).

In the military justice system, protections against double jeopardy are provided through operation of Article 44, UCMJ ("former jeopardy"). *Burtt v. Schick*, 23 M.J. 140, 142 (C.M.A. 1986). Pursuant to Article 44, jeopardy attaches after the introduction of evidence.[11] Once jeopardy attaches, an accused "may not be retried for the same offenses without consent once jeopardy has terminated." *United States v. Easton*, 71 M.J. 168, 172 (C.A.A.F. 2012) (citing *Richardson v. United States*, 468 U.S. 317, 325 (1984)). A successful double jeopardy claim has two temporal components: first, that jeopardy attaches; and second, that it terminates. *Id*.

Jeopardy terminates, and therefore precludes a subsequent court-martial, if charges are dismissed in the absence of manifest necessity. *Easton*, 71 M.J. at 172 (C.A.A.F. 2012). The "manifest necessity" standard requires "a 'high' degree of necessity." *Id*. at 173 (citing *Arizona v. Washington*, 434 U.S. 497, 506 (1978)). "The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious cases." *Id*. (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)).

Appellant contends that the rehearing was a continuation of the first trial. *See United States v. Beatty*, 25 M.J. 311, 314 (C.M.A. 1987) (citation omitted). As such, appellant argues jeopardy attached to the 2012 charges when evidence was admitted during the first trial, and that jeopardy terminated when the convening authority dismissed those charges on 4 August 2017. Further, appellant argues the government lacked any manifest necessity to dismiss the 2012 charges.

[11] In contrast, in civilian trials, jeopardy attaches when the jury is empaneled. *See Crist v. Bretz*, 437 U.S. 28, 35 (1978).

We agree with appellant that jeopardy attached to appellant's convictions for the category 1 and 2 offenses at the first trial. We also agree that appellant's rehearing was a continuation of the first trial. However, under the principle of continuing jeopardy, jeopardy did not terminate when the convening authority dismissed the 2012 charges. The original jeopardy continued uninterrupted because the "successful appeal of a judgment of conviction, on any ground other than the sufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge." *United States v. Scott*, 437 U.S. 82, 90-91 (1978); *see also Burks v. United States*, 437 U.S. 1 (1978); *United States v. McMurrin*, 72 M.J. 697, 704-05 (N.M. Ct. Crim. App. 2013).[12]

In finding that the convening authority's dismissal did not terminate jeopardy in appellant's case, we also consider whether the three constitutional protections listed in *Pearce* are implicated.[13] We find they are not. First, appellant was not

[12] The convening authority's decision to dismiss and re-refer the same charges in appellant's case is similar to the Navy-Marine Corps Court of Criminal Appeals' (NMCCA) dismissal and the convening authority's re-referral of the same charge in *McMurrin*. In *McMurrin*, the NMCCA set aside and dismissed appellant's conviction for negligent homicide, affirmed the remaining findings of guilty, set aside the sentence, and authorized a rehearing on sentence only. 72 M.J. at 700. The convening authority referred additional charges to be combined with the rehearing on sentence, one of which was a charge and specification for negligent homicide based on the same underlying conduct prosecuted at the first trial. The NMCCA found that its decision setting aside McMurrin's negligent homicide conviction did not terminate jeopardy for that charge. *Id*. at 704. Instead, the court found the original jeopardy continued uninterrupted during the appellate process and the rehearing. *Id*. Further, the NMCCA noted that its dismissal of McMurrin's conviction did not implicate any of the double jeopardy concerns listed in *Pearce*, 395 U.S. at 717.

[13] Because we find jeopardy never terminated, we need not decide whether the government lacked manifest necessity to dismiss the 2012 charges. However, we will briefly address appellant's reliance on our Superior Court's decision in *Easton*, which we find readily distinguishable. In *Easton*, the convening authority withdrew and dismissed charges the day of trial because the government failed to procure sufficient evidence to convict, which the CAAF found did not constitute manifest necessity. 71 M.J. at 174. In contrast, in appellant's case, the government dismissed the 2012 charges because "[i]n reviewing the evidence, [the government] believed that the date ranges which [are] reflected on the 2017 charge sheet more accurately reflect the misconduct committed by [appellant]." Essentially, the government made changes to the charges and specifications to conform to the

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acquitted of any of the specifications in categories 1 and 2. Second, appellant's convictions were not final because this court's decision set aside those findings and authorized a rehearing. Third, appellant was not subject to multiple punishments because this court set aside the sentence from appellant's first trial and appellant has been credited the time he has served in confinement against his current sentence.

Accordingly, appellant's rehearing was not a double jeopardy violation within the intent of the Fifth Amendment. Appellant's successful appeal did not preclude the convening authority from dismissing the 2012 charges, referring those same charges and amended charges, and re-prosecuting appellant.

C. Whether the Statute of Limitations Expired

Next, we consider appellant's claim the statute of limitations [SOL] expired for Specification 5 of Charge II. Appellant claims that as a result of Congress' retroactive amendment to Article 43, UCMJ, in the National Defense Authorization Act for 2017 [NDAA 2017], the SOL for Specification 5 of Charge II (indecent liberties with a child in violation of Article 134, UCMJ) expired in 2010.[14] As we

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evidence expected to be presented at trial. As our Superior Court recently held in *United States v. Stout*, this is an entirely permissible action. 2019 CAAF LEXIS 648, at *4 (holding "[t]he words of Article 34 are clear and unambiguous: before referral, changes may be made to conform the specifications to the evidence contained in the report of the Article 32 investigating officer.").

[14] Appellant also claims the SOL expired for Specifications 2, 3, and 4 of Charge II (indecent liberties with HP, in violation of Article 134) and Specification 1 of Charge IV (sodomy of HP in violation of Article 125). Appellant argues the SOL expired when the convening authority dismissed the 2012 charges. We disagree. The savings clause of Article 43(g), UCMJ, allows charges to be dismissed and re-referred within 180 days if the charges are "defective or insufficient *for any cause* . . . ." (emphasis added). 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. *See also United States v. Moore*, 79 M.J. at 486 ("Nothing in Article 43, UCMJ, suggests that a charge or specification that was timely when received by the [Summary Court-Martial Convening Authority] might become untimely if the convening authority makes changes . . . [t]hat are authorized by Article 34(c),

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explain below, we do not find the SOL expired for this offense as it would lead to an absurd result contrary to Congress' intent.

The applicable SOL is a question of law, which we review 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). An accused is subject to the SOL in force at the time of the offense. *Toussie v. United States*, 397 U.S. 112, 115 (1970). Generally, subsequent amendments do not apply because there is both a presumption against retroactive legislation, *see INS v. St. Cyr*, 533 U.S. 289, 316 (2001), and a presumption in favor of repose, *United States v. Habig*, 390 U.S. 222, 227 (1968). "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires the result." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

Prior to 2003, the SOL for child abuse offenses was five years. UCMJ art. 43(b)(1) (2000 & Supp. II 2003). From 2003 to 2017, Congress amended the SOL for child abuse offenses three times. The first child abuse specific amendment occurred in 2003 when Congress amended Article 43(b)(1), UCMJ, to except from the general five-year SOL certain listed child abuse offenses, including indecent liberties with a child. NDAA 2004, Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003). The 2003 amendment provided that the SOL for these offenses would expire when the child reached the age of twenty-five years. *Id*. This was the SOL in effect at the time appellant committed the offense in Specification 5 of Charge II.

The second amendment occurred in 2006 when Congress increased the SOL for child abuse offenses to "the life of the child or within five years after the date on which the offense was committed, whichever provides a longer period . . . ." NDAA 2006, Pub. L. No. 109-163, §§ 552-53, 119 Stat. 3136, 3264-63 (2006).

Before we address the third amendment to Article 43, it is important to note that while Congress expanded the SOL for child abuse offenses, Congress also expanded Article 120, UCMJ. This expansion included a prohibition against "indecent liberties with a child" in Article 120(j), UCMJ.[15] The preface to the 2008 *Manual for Courts-Marital* [*MCM*] states the offense of indecent acts or liberties with a child "[w]as removed as it was subsumed into the new Article 120

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UCMJ."). Therefore, the government's decision to dismiss the 2012 charges and make slight changes pre-referral fits within the savings clause allowing for dismissal if the charges are "insufficient for any cause."

[15] *See* NDAA 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3258 (2006); *see also United States v. Avery*, 79 M.J. 363, 367 (C.A.A.F. 2020) (discussing expansion of Article 120).

provision."[16] Then, in 2011, Congress substantially revised Article 120, UCMJ, by creating Article 120b.[17] This new Article 120b included a prohibition against committing lewd acts upon children. UCMJ art. 120b(c).

The third amendment to Article 43 occurred with the enactment of the 2017 NDAA which expanded the SOL 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 . . . ." NDAA 2017, Pub. L. 114-328, § 5225(a), 130 Stat. 2000, 2910 (2016). Congress made this amendment retroactive. *Id*. at § 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 enactment of this subsection if the applicable limitation period has not yet expired.").[18]

The 2017 NDAA also struck indecent liberties from the list of child abuse offenses in Article 43, UCMJ and inserted "section 920, 920a, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130) . . . ."[19] Consequently, appellant claims his conviction for Specification 5 of Charge II (indecent liberties with a child under Article 134, UCMJ) now falls under Article 43(b), which carries a five-year SOL. We do not believe Congress intended this result.

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[16] We note the similarities between the definitions of "indecent" under Article 134 and "lewd act" under Article 120. Under Article 134, "indecent" was defined as that *form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations*." *MCM*, pt. IV, ¶90.c. (2002 ed.). (emphasis added). "Lewd act" includes "any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, 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*." UCMJ art. 120b(a)(h)(5)(D); *MCM*, pt. IV, ¶45.a.(h)(5)(D) (2012 ed.). (emphasis added).

[17] *See* NDAA 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1407-09 (2011).

[18] The 2018 NDAA clarified that the 2017 NDAA amendments to Article 43, UCMJ, "shall be applied as in effect on December 22, 2016." *See* NDAA 2018, Pub. L. No. 115-91, § 531(n)(2), 131 Stat. 1283, 1387 (2017). This clarification has little impact on appellant's case as Specification 5 of Charge II was preferred on 11 May 2017, after the effective date.

[19] *See* NDAA 2017, Pub. L. 114-328, § 5225(d), 130 Stat. 2000, 2910 (2016) (listing "conforming amendments").

As we discern whether Congress intended to reduce the SOL for indecent liberties with a child to five years and no longer treat the offense as a child abuse offense, we consider well-established principles of statutory construction. *United States v. McNutt*, 62 M.J. 16, 20 n.27 (C.A.A.F. 2005). Statutory construction begins with a look at the plain language of a rule. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989). The plain language will control, unless use of the plain language would lead to an absurd result. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (citation and quotation marks omitted).

On its face, the plain language of the 2017 NDAA amendment to Article 43 does not appear ambiguous. However, when considered in conjunction with the legislative history of the statute and the nature of the offense in Specification 5 of Charge II, we find excluding indecent liberties in violation of Article 134 from the list of child abuse offenses would lead to an absurd and unintended result.[20] In Specification 5 of Charge II, appellant was convicted of indecent liberties with a child by requesting his ten year-old step-daughter remove her shirt so he could look at her breasts. Not only does common sense dictate that appellant's conduct constitutes child abuse, we note this conduct would currently be punishable under Article 120b, UCMJ, as sexual abuse of a child by indecent conduct, which is included as an offense constituting child abuse in the 2017 NDAA.[21]

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[20] *See Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (applying the absurdity doctrine which permits courts to avoid an absurd application of an otherwise clear statute); *see also Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989). In *Public Citizen*, the Supreme Court considered the meaning of the word "utilize" in the Federal Advisory Committee Act (FACA). *Id.* at 443. The Court held the plain language of the statute would extend FACA's requirements in a manner that would be contrary to FACA's legislative intent and the Court was "[c]onvinced that Congress did not intend that result." *Id.* at 453. Similar to the FACA, the 2017 NDAA's legislative history, as well as Congress' previous amendments to Articles 43 and 120, compel us to find that the plain reading of the statute would limit its application in a manner that Congress did not intend.

[21] The Supreme Court relied on common sense in interpreting a provision of the Indian Regulatory Gaming Act in *Chicksaw Nation v. United States*, 534 U.S. 84 (2001). In *Chicksaw*, the Supreme Court considered a parenthetical in one of the provisions of the Act which explicitly cross-referenced another chapter exempting the Choctaw and Chicksaw Nations from paying certain taxes. *Id.* at 86-87. Despite the parenthetical's explicit reference to the exemption, the Court held that "[i]n context, *common sense* suggests that the cross-reference is simply a drafting

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The totality of the 2017 NDAA's legislative history makes Congress' intent abundantly clear: Congress intended to increase, not decrease, the SOL for child abuse offenses and sexual assault offenses. As a starting point, one of the main purposes of the 2017 NDAA was to implement "[t]he first comprehensive reform of the Uniform Code of Military Justice in decades." H. Rep. 114-537, at 5 (4 May 2016) (Comm. Rep.). The stated "rationale" for the bill was "[t]o enhance the rights of victims . . . ." *Id*. at 2-5. The Senate report on the bill explicitly states, "[t]he committee recommends a provision that would amend [Article 43, UCMJ] to extend the statute of limitations applicable to child abuse offense from the current [five] years or the life of the child, whichever is longer, to [ten] years or the life of the child, whichever is longer." S. Rep. 114-255, at 601 (18 May 2016) (Comm. Rep.); *see also* H. Rep. 114-537, at 606 (4 May 2016) (Comm. Rep.) (stating amendment would increase the SOL for child abuse offenses).

Notably, in our review of the legislative history, we found no discussion indicating an intent to no longer consider indecent liberties with a child as a child abuse offense or reduce the SOL for that offense. Nonetheless, appellant urges this court to interpret this silence as an affirmative indication of Congress' intent. Appellant's argument is unreasonable when considered in light of the migration of the child abuse offenses under Article 134 to Article 120b, in conjunction with the progressive increase in the statute of limitations for child abuse offenses over the past fifteen years.

Ultimately, we believe this is one of those rare and exceptional circumstances where the application of the statute as written would produce a result "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In drafting the 2017 NDAA, we do not believe Congress intended the absurd result of drastically reducing the SOL for indecent liberties with a child under Article 134, UCMJ, from the life of the child or within ten years after the date on which the offense was committed, whichever provides a longer period, to

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mistake, a failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law. *Id*. at 91. (emphasis added) (citing *Little Six, Inc. v. United States*, 229 F. 3d 1383, 1385 (CA Fed. 2000) (Dyk, J., dissenting from denial of rehearing en banc) ("The language of the provision has all the earmarks of a simple mistake in legislative drafting."). Similarly, we believe the omission of indecent liberties as a child abuse offense in the 2017 NDAA was a drafting mistake as a result of the migration of indecent liberties from Article 134 to lewd acts in Article 120b.

the pre-2003 period of merely five years.[22] Appellant's reading of the amendment would defeat the statutory purpose of the legislation and would lead to a result "so bizarre that Congress could not have intended it." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (quoting *Griffin*, 458 U.S. at 575). Accordingly, we find the statute of limitations for Specification 5 of Charge II has not expired.[23]

D. Legal and Factual Sufficiency

Lastly, we address appellant's claim that his conviction for producing child pornography (Specification 1 of Charge III) is legally and factually insufficient because HR only testified that she "saw a flash," and the photo was not introduced into evidence. Under the specific circumstances of this case, we agree.

We review questions of legal and factual sufficiency *de novo*. UCMJ art. 66(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173-74 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In applying this test, "we are bound to draw every reasonable inference from the

[22] The Supreme Court found the evolution of a statute crucial to its understanding of Congress' intent in *United States v. X-Citement Video*, 513 U.S. 64 (1994). *In X-Citement Video*, the Court considered whether the term "knowingly" in the Protection of Children Against Sexual Exploitation Act modified one of the subsections of the Act. *Id*. at 68. The Court acknowledged that the most "natural" reading of the statute suggests that the term "knowingly" modifies only the surrounding verbs and therefore would not apply to the subsections. *Id*. However, the Court noted the legislative history of the statute evolved over a period of years and "[c]an be summarized by saying that it persuasively indicates that Congress intended the term 'knowingly' apply to [the subsections]." *Id*. at 77. The Court held that interpreting the statute otherwise would produce "positively absurd" results. *Id*. at 69. Similarly, we cannot ignore Congress' firm focus on criminalizing and extending the SOL for child abuse and sexual assault crimes over the past two decades. The 2017 NDAA's obvious legislative history convinces us that Congress did not intend to exclude indecent liberties with a child from the list of child abuse offenses.

[23] We note that at the time appellant committed the offense in Specification 5 of Charge II, he was on notice that the SOL was until HP reached the age of twenty-five. HP was under the age of twenty-five when the 2017 charges were preferred. As such, there is no violation of the Ex Post Facto Clause of the Constitution. *See* Art. I, § 9, cl. 3; *Stogner v. California*, 539 U.S. 607, 610 (2003).

evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citation omitted). We take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (quoting *Washington*, 57 M.J. at 399).

As charged in this case, appellant's conviction for production of child pornography required the government to prove the following elements: (1) that the accused knowingly and wrongfully produced child pornography; and (2) that under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. UCMJ art. 134, *MCM*, pt. IV, ¶60.b. (2005 ed.).

At trial, HR testified appellant stated he wanted to take a picture "of his penis going inside [HR's] vagina." While in appellant's bedroom, appellant removed his pants, laid down on his bed, and told HR to remove her pants and underwear and to get on top of him. Appellant "proceeded to stick his penis inside of [HR], put his hands on [HR's] hips, pulled [HR] down, and then pushed [HR] up a few times." HR testified appellant took a picture while using one hand to hold onto her hip and the other hand to take the picture. When asked how she knew that the camera took the picture, HR responded, "[t]here was a flash." HR did not testify that she ever saw the photo and the photo was not entered into evidence. Law enforcement seized twenty-three digital devices from appellant's home, but never recovered the photo.

We are not convinced beyond a reasonable doubt appellant successfully took a photo depicting child pornography. To be clear, we are not holding the government is required to introduce into evidence an alleged photo containing child pornography to prove the offense. In fact, we find HR's detailed description of the sex act would satisfy the six factors developed in *United States v. Dost*, if captured in a photo. 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987) (listing factors for determining whether a photo contains a "lascivious exhibition" constituting child pornography for purposes of Article 134, UCMJ). Rather, what raises doubt is the lack of any evidence, testimony or otherwise, confirming the photo was successfully taken and what the photo actually depicted (not just what appellant intended to capture).

This case can be contrasted with the Air Force Court of Criminal Appeals' holding in *United States v. Simmons*, 2019 CCA LEXIS 156 (A.F. Ct. Crim. App. 9

Apr. 19). In *Simmons*, appellant was convicted of producing child pornography. *Id.* at *30-31. At trial, the government did not introduce the video. *Id.* However, the victim testified that she viewed the video and described the sexual act depicted in the video, which satisfied the *Dost* factors. *Id.* at *33.

In appellant's case, neither HR nor any other person testified they saw the photo. We are not convinced beyond a reasonable doubt the government proved the first element of the offense—that appellant successfully took the photo that HR described. Accordingly, we find the evidence introduced at trial legally and factually insufficient to support appellant's conviction for production of child pornography. We set aside and dismiss Specification 1 of Charge III in the decretal paragraph.

We are able to reassess appellant's sentence in accordance with principles set forth in *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). To reassess the sentence, we must be able to reliably conclude that, in the absence of error, the sentence "would have been at least of a certain magnitude." *Sales*, 22 M.J. at 307-98. First, we consider that the dismissal of appellant's conviction for production child pornography is not a drastic change in the penalty landscape. The maximum punishment for production of child pornography was thirty years.[24] Meanwhile appellant remains convicted of aggravated sexual assault of a child, six specifications of indecent liberties with a child, indecent acts with a child, sodomy of a child, aggravated sexual abuse of a child, and abusive sexual contact with a child. The maximum punishment for appellant's remaining convictions is Life plus 123 years of confinement. As such, dismissing appellant's conviction for production of child pornography is not a significant reduction in the maximum punishment.

[24] Appellant was charged to have committed the offense of production of child pornography between on or about 16 July 2008 and on or about 14 August 2008. In 2008, production of child pornography was not an offense listed under Article 134, UCMJ. The maximum punishment for an offense charged under Article 134, UCMJ, clauses 1 and 2, and not otherwise listed in the *MCM*, pt. IV, may be determined by reference to the maximum punishment for violation of a federal statute that proscribes and criminalizes the same criminal conduct and mental state included in the specification. *See United States v. Leonard*, 64 M.J. 381, 381-82 (C.A.A.F. 2007). In 2008, the federal statute criminalizing the production of child pornography provided a sentence of "not less than 15 years nor more than 30 years." 18 U.S.C. § 2251(e). Applying R.C.M. 1003(c)(1)(B)(ii) (2008 ed.), the maximum punishment would also include a dishonorable discharge and forfeiture of all pay and allowances.

Second, appellant's remaining convictions capture the gravamen of appellant's criminal conduct, namely that he routinely sexually abused his step-daughter and niece when they were children. Third, the same aggravating circumstances presented during sentencing proceedings at trial remain admissible and relevant during our reassessment. Fourth, appellant was sentenced by a military judge to a dishonorable discharge, confinement for forty-three years, total forfeiture of all pay and allowances, and reduction to E-1. Finally, the remaining offenses are the type that we, as appellate judges, have the experience and familiarity with to reliably determine what sentences would have been imposed at trial by the military judge.

Examining the entire record and applying the principles set out in *Winckelmann*, we are able to reliably determine to our satisfaction that absent the conviction for production of child pornography, appellant's sentence would have been at least a dishonorable discharge, confinement for forty-three years, total forfeiture of all pay and allowances, and reduction to E-1. *Winckelmann*, 73 M.J. at 13-16.

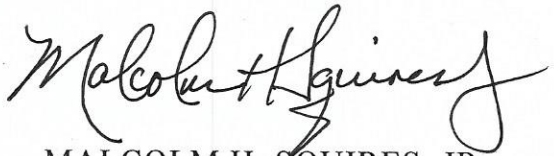
CONCLUSION

The finding of guilty for Specification 1 of Charge III is SET ASIDE and Specification 1 of Charge III is DISMISSED. The remaining findings of guilty and sentence are AFFIRMED.

All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored. *See* UCMJ arts. 58a(b), 58b(c), and 75(a).

Chief Judge KRIMBILL and Judge RODRIGUEZ concur.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HERRING, PENLAND, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant THOMAS M. ADAMS
United States Army, Appellant

ARMY 20130693

Headquarters, Fort Riley
Jeffery R. Nance, Military Judge
Lieutenant Colonel John A. Hamner, Staff Judge Advocate

For Appellant: Mr. Frank J. Spinner, Esquire (argued); Lieutenant Colonel Jonathan Potter, JA; Mr. Frank J. Spinner, Esquire (on brief and reply brief).

For Appellee: Captain Christopher A. Clausen, JA (argued); Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Christopher A. Clausen, JA (on brief).

6 January 2017

SUMMARY DISPOSITION

HERRING, Judge:

In appellant's court-martial for his sexual abuse of five minor victims over the course of seven years, the military judge's instruction to the panel allowed the consideration of charged misconduct under Military Rule of Evidence [hereinafter Mil. R. Evid.] 414 in a manner that now violates *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).[1]

A general court-martial composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of: carnal knowledge, two specifications of sodomy with a child, and seven specifications of

[1] While *Hills* dealt with Mil. R. Evid. 413 and this case involves Mil. R. Evid. 414, the analysis is the same. *See United States v. Tanner*, 63 M.J. 445, 448-49 (C.A.A.F. 2006); *United States v. Bonilla*, ARMY 20131084, 2016 CCA LEXIS 590, at *22-23 (Army Ct. Crim. App. 30 Sep. 2016).

indecent liberties with a child, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, 934 (2000) [hereinafter UCMJ]; and two specifications of aggravated sexual assault of a child, aggravated sexual abuse of a child, indecent liberties with a child, rape of a child, indecent conduct with a child, two specifications of aggravated sexual contact with a child, producing child pornography, possessing child pornography, and possessing child erotica, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934 (2006).[2] The panel sentenced appellant to a dishonorable discharge, confinement for life with eligibility for parole, forfeiture of all pay and allowance, and reduction to the grade of E-1. The convening authority approved the findings of guilty except for Specification 3 of Charge V (possessing child erotica) and approved the sentence as adjudged.

We review this case under Article 66, UCMJ. Appellant assigns five errors and personally asserted matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We do not discuss these assignments of error because of the relief we grant.

BACKGROUND

The military judge started instructing the panel using the standard spillover instruction. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 7-17 (10 Sept. 2014). He then gave an instruction about the panel's ability to use uncharged child molestation offenses, if proven by a preponderance of the evidence, "to show the accused's propensity or predisposition to engage in child molestation . . . ." Next, he addressed charged child molestation:

> Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense. Further, evidence that the accused committed the act of child molestation alleged in any specification and charge may have no bearing on your deliberations in relation to any other specification and charge unless you first determine by a preponderance of the evidence that it is more likely than not that the offenses alleged in that other charge and specification occurred. If you determine by a preponderance of the evidence the offenses alleged in that other charge and specification occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of those offenses, you may nonetheless then

[2] The panel acquitted appellant of one specification of indecent liberties with a child and one specification of indecent conduct with a child.

> consider the evidence of those offenses for its bearing on any matter to which it is relevant in relation to any other specification and charge to which it is relevant. You may also consider the evidence of such other acts of child molestation for its tendency, if any, to show the accused's propensity or predisposition to engage in child molestation.
>
> You may not, however, convict the accused solely because you believe he committed any other offense or solely because you believe the accused has a propensity or predisposition to engage in child molestation. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt.

Defense counsel had previously objected to these instructions, "particularly ones where you are using what's on the charge sheet to prove what's on the charge sheet."

The military judge supplemented the confusing instructions with this explanation to the panel, which was not included in the written instructions in App. Ex. CLXXIII:

> Now, members, I realize some of that might seem repetitive, but it relates to—I gave it to you in two different forms because one form relates to uncharged misconduct of child molestation and there was some reference to things that do not appear on the charge sheet during the course of the trial. And so that's why I gave you that instruction. And then the second time through, it relates to other charged offenses and how you may consider those other charged offenses in relation to each other, any offense of child molestation in relation to any other offense of child molestation.

The military judge asked if the panel had any questions, and they did not. He then reiterated using the same words our superior court noted as a problem in *Hills*, 75 M.J. at 357. He said:

> Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of

> any other offense. In other words, proof of one act of child molestation creates no inference that the accused is guilty of any other act of child molestation. However, it may demonstrate that the accused has a propensity to commit that type offense.

The military judge's attempt to clarify his instructions, while well-intentioned, only served to reinforce an impermissible use of propensity evidence under *Hills*.

Furthermore, during closing argument, trial counsel said, "Another important thing to highlight: When the judge talked about other acts of child molestation. I encourage you to re-read that . . . I feel it's very important . . . ." The military judge cut off trial counsel's attempt to read the instruction aloud to the panel. Shortly thereafter, trial counsel asserts, "The number of victims in this case does mean something. It means one of two things: One the accused is one of the unluckiest people you are going to meet; or two, this all happened." The military judge did not address this argument.

LAW AND ANALYSIS

Nearly three years after appellant's court-martial, our superior court held it is constitutional error for a military judge to give an instruction to a panel that permits Mil. R. Evid. 413 to be applied to evidence of charged sexual misconduct. *Hills*, 75 M.J. at 352. Our superior court reasoned:

> The instructions in this case provided the members with directly contradictory statements about the bearing that one charged offense could have on another, one of which required the members to discard the accused's presumption of innocence, and with two different burdens of proof—preponderance of the evidence and beyond a reasonable doubt. Evaluating the instructions in toto, we cannot say that Appellant's right to a presumption of innocence and to be convicted only by proof beyond a reasonable doubt was not seriously muddled and compromised by the instructions as a whole.

Id. at 357.

In appellant's court-martial the military judge's instructions were just as muddled and potentially confusing with respect to the burden of proof, and, therefore, created constitutional error. *United States v. Bonilla*, 2016 CCA LEXIS 590, at *23 (Army Ct. Crim. App. 30 Sep. 2016); *see also United States v.*

Guardado, 75 M.J. 889, 2016 CCA LEXIS 664, at *22 (Army Ct. Crim. App. 15 Nov. 2016) and *United States v. Santucci*, 2016 CCA LEXIS 594, at *7-8 (Army Ct. Crim. App. 30 Sep. 2016).

If instructional error is found when there are constitutional dimensions at play, this court tests for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006). The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence. *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). An error is not harmless beyond a reasonable doubt when there is a reasonable possibility the error complained of might have contributed to the conviction. *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007); *United States v. Chandler*, 74 M.J. 674, 685 (Army Ct. Crim. App. 2015).

Here, not only did the military judge give muddled and potentially confusing instructions, but the government's closing argument also drew the panel's attention to the propensity evidence. Additionally, the evidence as to some specifications was not particularly strong, but the panel convicted appellant of all but two of the twenty-three charged offenses. On the facts of this case, we are not convinced beyond a reasonable doubt the propensity instruction did not contribute to the findings of guilty or appellant's sentence, thus the findings and sentence cannot stand.

CONCLUSION

The findings of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority.

Judge PENLAND and Judge BURTON concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	PETITION FOR RECONSIDERATION
v.	
Sergeant (E-5) **THOMAS M. ADAMS** United States Army, Appellant	Crim. App. Dkt. No. 20130693 USCA Dkt. No. 24-0117/AR

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

COME now the undersigned under Rule 31 of this Court's Rules of Practice and Procedure [C.A.A.F.R.] and petition for reconsideration of the denial for grant of review.

For the reasons stated in Appellant's supplement, there is error that requires relief. Put simply, even if this Court's decision in *United States v. Guyton*, 82 M.J. 146 (C.A.A.F. 2022) remains good law, *presuming* "judicial delay" on a preserved violation of Rule for Courts-Martial 707 is contrary to the text of the rule, its history, and federal practice. *See United States v. Johnson*, 990 F.3d 661, 666-69 (8th Cir. 2021); *United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986); *United States v. Nance*, 666 F.2d 353, 359 (9th Cir. 1982). And the effect of this

error is a new trial. *Cf. United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017); *see also Zedner v. United States*, 547 U.S. 489, 507 (2006).

This error aside, one related issue is now ripe for review and appropriate for consideration given this Court's denial of Appellant's petition: Article 67(a)(3), Uniform Code of Military Justice [UCMJ], provides that this Court "shall review" the record in . . . all cases . . . in which, upon petition of the accused and on good cause shown, [this Court] has granted a review," but what constitutes "good cause"? To Appellant's knowledge, this question has never been directly addressed. This Court should do so now.

Article 67(a)(3) does not define the term "good cause" nor has a case or the rules of this Court. While C.A.A.F.R. 21 does require appellants to indicate if certain circumstances exist, to include, for example, whether the lower court decided a question of law that is novel or that conflicts with appliable decisions of this Court, *see* C.A.A.F.R. 21(b)(5), these are not requirements for review, "and 'good cause' may be shown without satisfying [the circumstances in C.A.A.F.R. 21]." Eugene R. Fidell & Dwight H. Sullivan, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* § 21.02, 197 (2020). Indeed, this Court has granted review for "good cause" to correct purely administrative matters. *See e.g.*, *United States v. Livingstone*, 79 M.J. 41, 41 n. * (C.A.A.F. 2019).

While "good cause" has not been defined, precedent from this Court suggests it enjoys near unfettered discretion with respect to its review for "good cause" under Article 67(a)(3). In *United States v. Rorie*, a fractured decision likened this Court's petition jurisdiction to the Supreme Court's discretionary certiorari practice. 58 M.J. 399, 405 (C.A.A.F. 2003). Overturning decades of precedent that had previously distinguished this Court's statutory review from the Supreme Court's discretionary review, *id* at 408-09 (Effron, J., Barker, J., dissenting), *Rorie* implies this Court may deny review even if an appellant shows error and material prejudice or other "good cause." *Id*. at 405; *see also United States v. McGriff*, 78 M.J. 487 (C.A.A.F. 2019) (per curiam) (citing *Teague v. Lane*, 489 U.S. 288, 296 (1989)) (remarking that the denial of review does not speak to the merits of the case).

"Good cause," however, cannot be completely discretionary. Otherwise, "shall review" is rendered superfluous. *See United States v. Mendoza*, __ M.J. __, slip. op. at 12 (C.A.A.F. Oct. 7, 2024) ("The Supreme Court, however, has repeatedly instructed that courts must give effect, if possible, to every word of a statute.") (citations and internal quotations omitted). That is, the interpretation of Article 67(a)(3) would amount to nothing more than saying this Court "shall review" cases in which it decides to review. That is certainly no "mandate." *See*

United States v. Rodriquez, 67 M.J. 110, 114-15 (C.A.A.F. 2010) (referring to "good cause" as a "congressional mandate").

If "good cause" means anything, it is a demonstration of error that warrants relief. It would be difficult to imagine that Congress intended this Court to deny review where this Court believed there may be prejudicial error, especially since the denial of review stands as a bar to Supreme Court review.

Because this Court *shall* review the record where there is good cause, this Court is, therefore, required to grant a petition where an appellant sufficiently demonstrates an error that warrants relief. Here, because there is error that warrants relief, this Court should grant review.

Consequently, this Court should grant the reconsideration, decide the scope of its review, and ultimately review this case.

Conclusion

WHEREFORE, the undersigned appellate defense counsel respectfully request that this Honorable Court reconsider its decision and grant this petition.

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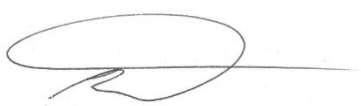

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Adams*, Crim. App. Dkt. No. 20130693, USCA Dkt. No. 24-0117/AR, was electronically filed with the Court and Government Appellate Division on October 31, 2024.

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