IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230303
Staff Sergeant (E-6) **ZACKERY J. ASKINS,** United States Army, Appellant	Tried at Fort Sill, Oklahoma, on 11 April 2022, 3 August 2022, 25 October 2022, 28 November 2022, and 23-25 May 2023, before a general court-martial appointed by the Commander, Headquarters, Fires Center of Excellence and Fort Sill, Lieutenant Colonel Tiffany D. Pond, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

I. WHETHER APPELLANT'S PLEA TO SPECIFICATION 1 OF CHARGE I WAS IMPROVIDENT WHEN THE MILITARY JUDGE FAILED TO SECURE AN AFFIRMATIVE WAIVER OF THE STATUTE OF LIMITATIONS.

Argument

This court reviews a military judge's failure to conduct a statute of limitations inquiry for plain error. *United States v. McPherson*, 81 M.J. 372, 377 (C.A.A.F. 2021). 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." *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (internal

quotation marks omitted) (citation omitted). "Unless it affirmatively appears in the record that the accused is aware of his/her right to plead the statute of limitations when it is obviously applicable, the MJ has a duty to advise the accused of the right to assert the statute in bar of trial." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-7-12 (29 Feb. 2020) "Affirmative" can be defined as "[s]upporting the existence of certain facts." *Black's Law Dictionary* 64 (8th ed. 2019).

A "waive all waivable motions" provision is not affirmative evidence of an accused's awareness of a statute of limitations bar. As this court's sister courts have recently held, there is no "authority supporting the proposition that a generic waiver clause in a plea agreement trumps a longstanding procedural requirement like the one found in R.C.M. 907(b)(2)(B)." *United States v. Miller*, 2023 CCA LEXIS 445, at *14 (N.M. Ct. Crim. App. 23 Oct. 2023) (disagreeing with the government's contention that "nothing in the record support[ed] that appellant 'appeared' to not understand his right," by pointing out the defense counsel had stated he had not intended on filing any motion); *see also United States v. Sayers*, 2023 CCA LEXIS 199, at *12-13 (A.F. Ct. Crim. App. 27 March 2023) (finding that even though appellant had agreed to "waive all waivable motions," there was nothing in the record to support an intentional waiver of the statute of

limitations, and that when asked by the military judge "about pretrial motions which were being waived, the defense made no mention of the statute of limitations").

In this case, when asked by the military judge whether there were other motions besides the previously ruled-on Mil. R. Evid. 404(b) motion that defense was "not making pursuant to this provision," the defense responded with "an Article 13 credit motion." (R. at 440). Nothing about this exchange presented any affirmative evidence that appellant was aware of the statute of limitations defense, in fact this conversation presents the very opposite, evidence that appellant was unaware of the statute of limitations defense, just as in *Miller* and *Sayers*.

Moreover, as the government attempts to minimize in a footnote, the stipulation of fact points to appellant being unaware of the statute of limitations defense: "[Appellant] expressly disclaims the existence of any defense to the charges and specifications to which he has pled guilty. Defense counsel and [appellant] have discussed possible defenses and agree that none apply." (Gov. Br. 10 n.3; Pros. Ex. 31, p. 24). Not only is there a lack of evidence that appellant was aware of the statute of limitations, but

there is also affirmative evidence that appellant was not aware. Under these facts, the military judge committed clear error.[1]

It must be "clear in the record of trial that an accused knows he has the right to raise the statute of limitations as a bar to prosecution and that he voluntarily gives up that bar." *United States v. Moore*, 32 M.J. 170, 173 (C.A.A.F. 1991). Here, as in *Moore*, there "is no explanation in the record as to why [the subject charge] went unchallenged." *Id*. Contrary to the government's assertion that appellant intentionally waived the statute of limitations to avoid federal prosecution, there was no strategic reason why defense would not have raised the statute of limitations when they moved to dismiss the very same specification for failure to state an offense. (App. Exs. XXXIX, LIII, LVI; R. at 157–82). With this in mind, it is clear that had appellant been informed of the statute of limitations defense, he would not have pleaded guilty to the offense, therefore, he was materially prejudiced.[2]

---

[1] See *McPherson*, 81 M.J. at 383 (rejecting the government's assertions that the C.A.A.F. could not find that the running of the statute of limitations is clear and obvious given all the steps required to reach the ACCA's judgment).

[2] *See United States v. Briggs*, 78 M.J. 289, 296 (C.A.A.F. 2019) ("If the military judge had informed Appellant of a possible statute of limitations defense, it requires no speculation to believe that Appellant would have sought dismissal") (rev'd on other grounds in *United States v. Briggs*, 592 U.S. 69 (2020)); *see also McPherson*, 81 M.J. at n. 2 ("because the Supreme Court's decision did not concern the standard of review, we continue to believe that this Court's reasoning in *Briggs* concerning the standard of review was correct").

"Whenever it appears that prosecution for an offense is barred by the statute of limitations, the court must bring that fact to the attention of the accused." *United States v. Colley*, 29 M.J. 519, 522 (A.C.M.R. 1989); *United States v. Brown*, 30 M.J. 907, 909 (A.C.M.R 1990). The government suggests that this court require a showing of ineffective assistance of counsel. (Gov't Br. 12). But R.C.M. 907(b)(2)(B) and case law make clear the military judge has an affirmative duty to inform the accused. *E.g., Miller*, 2023 CCA LEXIS 445, at *8. The government has provided no authority supporting the proposition that this court must inquire into attorney-client communications to find whether an accused was aware of a statute of limitations defense. In fact, the case law supports the opposite conclusion.[3]

[3] *See e.g., United States v. Moore*, 32 M.J. 170, 173 (C.A.A.F. 1991) ("our review of the *record* leads us to conclude"); *United States v. Tunnell*, 23 M.J. 110, 111 (C.M.R. 1986) ("the *record* must disclose that"); *Colley*, 29 M.J. at 522 ("a waiver . . . will not be imposed when the *record*"); *United States v. Lee*, 29 M.J. 516, 517 (A.C.M.R. 1989) ("lacking evidence of *record* that the appellant was aware of his right to assert the statute"); *United States v. Ditto*, 2009 CCA LEXIS 175, at *4 (Army Ct. Crim. App. 30 Jan. 2009) ("Where, as here, the *record* is silent on waiver"); *Sayers*, 2023 CCA LEXIS 199, at *11 (in analyzing a claim of ineffective assistance of counsel for failure to investigate, the court examined affidavits from defense counsel and the appellant which notably did not include subject matter relevant to the statute of limitations; instead the court held that the military judge should have inquired into appellant's knowledge of the statute of limitations where "the *record* [did] not disclose that [the accused] was aware of that right") (emphasis added throughout).

Appellant's trial defense counsel had an obligation to inform him of possible defenses to the charges referred against him; the military judge had a separate duty to "make a record of a knowing and voluntary waiver of the statute of limitations defense." *Miller*, 2023 CCA LEXIS 445, at *14. It is this duty of the military judge that is at issue here. The government's attempt to salvage the military judge's error by pinning it on appellant's trial defense counsel should not be heeded.

II. WHETHER APPELLANT COULD BE FOUND GUILTY UNDER 18 U.S.C. SECTION 842 IN THE FACE OF THE SECTION 845 EXCEPTION THAT APPLY TO ASPECTS OF TRANSPORTATION OF EXPLOSIVE MATERIAL REGULATED BY DEPARTMENT OF TRANSPORTATION.

Argument

The government requests this court not follow the clear rationale of the relevant federal precedent, arguing that it is not binding on this court. (Gov. Br. 18). However, as appellant was charged with violating a federal statute, one that is potentially a matter of first impression for this court, it is appropriate to grant more than mere persuasive authority to those courts' reasoning, more akin to how this court defers to state court interpretation of state statutes. *See Whole Woman's Health v. Jackson*, 23 F.4th 380, 386 (5th Cir. 2022) ("federal courts are bound by an authoritative determination of state law by the state's highest court") (citing *R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 499-500 (1941)).

The government asserts that the *Illingworth* and *Petrykievicz* courts "found that the 18 U.S.C. § 845 exclusion applied based on the explosive materials being regulated by the Department of Transportation (DoT), not the 'aspects of transportation.'" (Gov. Br. 18). However, the government ignores the *Petrykievicz* court's citation to *Scharstein*, in which the court, in defining the "key word" of "aspects" for purposes of 18 U.S.C. § 845, found that "Department of Transportation Regulations . . . prescribe certain requirements dealing with labeling, packaging, mode of transportation, placarding and shipping papers." *United States v. Scharstein*, 531 F. Supp. 460, 466 (E.D. Ky. 1982); *United States v. Petrykievicz,* 809 F. Supp. 794, 797 (W.D. Wash. 1992). Meanwhile, "[t]he requirement of a license is a separate aspect of transporting explosive materials, which is committed to the Secretary of the Treasury. *Id* (citing 18 U.S.C. § 843).

Here, the bases for the military judge's acceptance of his plea was primarily the placarding and paperwork he completed in order to ship the materials contained in his two CONEXs, not his or anyone else's licensing, or lack thereof, to transport the materials. (R. at 368-73). Therefore, applying the reasoning of *Petrykievicz* and *Scharstein*, this court should find that appellant's actions were an aspect regulated by the Department of Transportation, and thus excluded from prosecution under 18 U.S.C. § 845(a). Therefore, there is a substantial bases in law and fact to question the judge's acceptance of appellant's plea of guilt.

Conclusion

Wherefore, appellant respectfully asks this honorable court to set aside the findings and sentence of Specification 1 of Charge I, Specification 1 of Charge I, and Specification 3 of Charge V,[4] and affirm only such much of the remaining sentence that is reduction to E-1, confinement for 65 months, and a dishonorable discharge.

[redacted]

ROBERT W. DUFFIE
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

[redacted]

ROBERT W. RODRIGUEZ
Major, Judge Advocate
Branch Chief
Defense Appellate Division

[redacted]

AUTUMN R. PORTER
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

[redacted]

PHILIP M. STATEN
Colonel, Judge Advocate
Chief
Defense Appellate Division

[4] Appellant rests on the arguments in his initial brief for AE III and reaffirms that his Charge V, Specification 3 conviction is factually and legally insufficient.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on 13 December 2024.

ROBERT W. DUFFIE
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division