

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

UNITED STATES  
Appellee

v.

Sergeant (E-5)  
**JACOB L. BRUBAKER-ESCOBAR**  
United States Army  
Appellant

JOINT MOTION TO WITHDRAW  
THE MANDATE

Crim. App. Dkt. No. 20190618

USCA Dkt. No. 20-0345/AR

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

COME NOW the undersigned appellate counsel pursuant to Rules 19, 30, 33, and 43A of this Court's Rules of Practice and Procedure and jointly move for this Court to withdraw the mandate in the above-captioned case.

On June 4, 2021, this Court issued the decision and judgment in appellant's case. The time for reconsideration expired on June 14, 2021. Rule of Practice and Procedure 31(a). On June 22, 2021, this Court issued the mandate pursuant to Rule 43A. On June 29, 2021, the Army Court issued the Certificate of Completion of Appellate Review. The conviction is not yet final because the time for filing a petition for a writ of certiorari has not yet expired, and the discharge has not yet been executed. *See* Article 76, UCMJ; Rule for Court-Martial 1209(a)(1)(B)(iii) (2018).

Although there are “profound interests in repose attaching to the mandate of a court of appeals,” a court may nevertheless recall its mandate “in extraordinary circumstances” as a last resort against “grave, unforeseen contingencies.” *United States v. Dearing*, 64 M.J. 364, 364 (C.A.A.F. 2006) (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)). See also *United States v. Kreutzer*, 62 M.J. 215, 2005 CAAF LEXIS 1022 (C.A.A.F. 2005) (vacating the mandate due to noncompliance with Rule 43A); *United States v. Gomez*, 48 M.J. 39, 1997 CAAF LEXIS 457 (C.A.A.F. 1997) (ordering mandate set aside and ordering a petition for reconsideration be filed within 10 days).

In this case, such “extraordinary circumstances” exist. For the reasons set forth in the contemporaneously-filed Petitions for Reconsideration, the Court’s opinion did not consider Section 531(n)(1) of the National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA),<sup>1</sup> which amended Section 5542 of the Military Justice Act of 2016 (MJA)<sup>2</sup> to allow the President to determine which provisions of the MJA would go into effect if “a specification alleges the commission, before the effective date of such amendments, of one or more offenses.” Importantly, the enactment date of the 2018 NDAA is December 12, 2017, which is before the issuance date of EO 13825, March 1, 2018. The parties should have but

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<sup>1</sup> Pub. L. No. 115-91, 131 Stat. 1283 (2017).

<sup>2</sup> Pub. L. No. 114-328, 130 Stat. 2000 (2016).

did not cite the 2018 NDAA in response to this Court’s order for briefing on the specified issue. In light of the 2018 NDAA’s amendment, however, Section 6b of Executive Order (EO) 13,825, 83 Fed. Reg. 9889 (Mar. 1, 2018) is a valid exercise of the President’s authority.

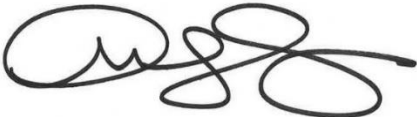
Withdrawing the mandate in order to grant reconsideration in this case will prevent the “grave, unforeseen consequence” of erroneously invalidating a provision of EO 13,825 based on an incomplete reading of MJA §5542(c)(1). The opinion in this case has potential far-reaching consequences—several other provisions of EO 13,825 similarly base the entry into force of MJA amendments on when the offense was committed, rather than when the government first took action to initiate prosecution. *See* EO 13,825 §10 (“[A]ny change to sentencing procedures made by [certain enumerated articles] applies only to cases in which all specifications allege offenses committed on or after January 1, 2019.”).

## Conclusion

Wherefore, appellant respectfully requests this Court withdraw the mandate in order to grant reconsideration of its opinion.



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**Certificate of Filing and Service**

I hereby certify that a copy of the foregoing in the case of *United States v. Brubaker-Escobar*, Crim. App. Dkt. No. 20190618, USCA Dkt No. 20-0345/AR, was electronically served on the Clerk of Court and Government Appellate Division on June 29, 2021.

A handwritten signature in black ink, appearing to read "Alexander Hess", with a long horizontal stroke extending to the right.

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