

**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

APPELLANT’S PETITION FOR
RECONSIDERATION

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:

Appellate defense counsel request this Court reconsider its opinion in this case because the National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA)¹ amendments to Section 5542(c)(1) of the Military Justice Act of 2016 (MJA)² were not considered when this Court determined Section 6b of Executive Order (EO) 13,825³ was invalid as applied to appellant’s case.

As the majority noted in the opinion, Congress authorized the President to designate the effective date of the MJA and to “prescribe in regulations whether, and to what extent, the amendments made by this [act] shall apply to a case in

¹ Pub. L. No. 115-91, 131 Stat. 1283 (2017).

² Pub. L. No. 114-328, 130 Stat. 2000 (2016).

³ 83 Fed. Reg. 9889 (Mar. 1, 2018).

which one or more actions under [the UCMJ] have been taken before the effective date of such amendments.” *United States v. Brubaker-Escobar*, __M.J.__, 2021 CAAF LEXIS 508, at *5 (C.A.A.F. June 4, 2021) (citing MJA §5542(c)(1)).

Section 6b of Executive Order 13,825, however, provided that the pre-MJA version of Article 60, UCMJ, applied to the extent it required convening authority action in cases where the earliest alleged misconduct pre-dated January 1, 2019—regardless of when the government took action to initiate criminal proceedings against the accused. This Court concluded that Section 6b was “inconsistent with the MJA to the extent it orders convening authorities to apply pre-MJA post-trial procedures to cases in which no UCMJ action was taken before . . . January 1, 2019.” *Brubaker-Escobar*, 2021 CAAF LEXIS 508, at *8. Because the government did not take action to initiate criminal proceedings against appellant until after January 1, 2019, this Court concluded the MJA amendments to Article 60 applied to appellant’s case, notwithstanding Section 6b of Executive Order 13,825. *Id.* at *10.

However, the “clarifying amendments” to Section 5542(c)(1) contained in the 2018 NDAA § 531(n)(1) authorized the President to prescribe which MJA amendments applied, as long as a specification alleged the commission of an offense occurring before January 1, 2019. MJA §5542(c)(1) presently reads as follows, with the amended language in italics:

Subject to the provisions of this division and the amendments made by this division, the President shall prescribe in regulations whether, and to what extent, the amendments made by this division shall apply to a case in which *a specification alleges the commission, before the effective date of such amendments, of one or more offenses or to a case in which*⁴ one or more actions under [the UCMJ] have been taken before the effective date of such amendments.

MJA § 5542(c)(1), *as amended by* 2018 NDAA, § 531(n)(1). The President promulgated Executive Order 13,825 several months after the 2018 NDAA’s enactment.

Considering the language added to Section 5542(c)(1), Section 6b of Executive Order 13,825 is a valid exercise of authority. The 2018 NDAA amendment allowed the President to mandate convening authorities take action to the extent required under the applicable pre-MJA version of Article 60, UCMJ, if government action was taken to initiate criminal proceedings against an accused before January 1, 2019, *but also* if at least one of the specifications alleged that an offense occurred prior to January 1, 2019.

Reconsideration is warranted in this case. Appellant was charged with, and pled guilty to, offenses that occurred before January 1, 2019. (Charge Sheet). In enacting 2018 NDAA §531(n)(1), Congress expressly authorized the President to

⁴ Specifically, 2018 NDAA § 531(n)(1) states: “Section 5542(c)(1) of the [MJA] is amended by inserting after ‘shall apply to a case in which’ the following: ‘a specification alleges the commission, before the effective date of such amendments, of one or more offenses or to a case in which.’”

determine the pre-MJA version of Article 60 apply, to the extent it required action by the convening authority. Thus, Executive Order 13, 825 was a valid exercise of Presidential authority, and action was required by the convening authority in this case.

Conclusion

Wherefore, appellant respectfully requests this Honorable Court grant the Petition for Reconsideration.



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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 30, 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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