**UNITED STATES DISTRICT COURT**
**District of Kansas**
(Topeka Docket)

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.** **CASE NO. 5:22-cr-40055-TC-RES**

**ROGER GOLUBSKI,**

**Defendant.**

GOVERNMENT'S RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS INDICTMENT AS BARRED BY THE STATUTE OF LIMITATIONS

The United States of America, by and through undersigned counsel, respectfully submits this response to the defendant's Motion to Dismiss Indictment as Barred by the Statute of Limitations (Doc. 71). For the reasons below, the defendant's motion should be denied.

## I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

On September 14, 2022, a federal grand jury returned an indictment under seal charging the defendant with six counts of violating 18 U.S.C. § 242 between May 1998 and December 2002 by sexually assaulting two victims while acting under color of law. (Doc. 1). On April 24, 2024, a federal grand jury returned a superseding indictment that made no substantive changes but modified the date ranges of the charged conduct to September 1997 through December 2002. (Doc. 73.) All six counts charge that the

defendant's criminal conduct included aggravated sexual abuse and an attempt to commit aggravated sexual abuse; all counts except Count Four charge that the defendant's criminal conduct included kidnapping and an attempt to commit kidnapping. Counts One-Three relate to the defendant's sexual abuse of victim S.K., who was 13 or 14 years old in 1997, when the defendant began abusing her.

On April 12, 2024, the defendant filed the motion currently before the Court (Doc. 71), as well as a Motion to Dismiss the Indictment for Lack of Notice and Failure to State an Offense (Doc. 72).[1] This case has not yet been set for trial.

The government hereby incorporates the "summary of crimes charged in the indictment" in the government's motion for an order permitting admission of evidence pursuant to Federal Rules of Evidence 413 and 404(b), which sets forth details of the facts underlying the charges in this case. (Doc. 50.)

## II. ARGUMENT

Under 18 U.S.C. § 3281, "[a]n indictment for any offense punishable by death may be found at any time without limitation." The caselaw is clear that 18 U.S.C. § 3281 applies to all counts in the superseding indictment and, thus, prosecution can commence at any time without limitation. Additionally, 18 U.S.C. § 3283 provides that "[n]o statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is

[1] The government responds separately to the Motion to Dismiss the Indictment for Lack of Notice and Failure to State an Offense. (Doc. 72.)

longer." The caselaw also is clear that 18 U.S.C. § 3283 applies to Counts One-Three, and, thus, prosecution for those charges can commence, as relevant here, at any time "during the life of the child." 18 U.S.C. § 3283. Because all charges in the superseding indictment fall within the limitations periods provided by §§ 3281 and 3283, the Court should deny the defendant's motion to dismiss the charges as untimely.

**A. Section 3281 Applies to All Charges in the Indictment**

All counts charged in the superseding indictment may be brought "at any time without limitation." 18 U.S.C. § 3281. This is because the grand jury has charged that each offense involved kidnapping and/or aggravated sexual abuse (and their attempts), which § 242 makes punishable by imprisonment for any term of years or life or, critically to resolution of this motion, by death. 18 U.S.C. § 242. Because each offense is, accordingly, a capital offense and "punishable by death", § 3281 with its unlimited limitations period applies. 18 U.S.C. § 3281. The defendant's contrary argument has been rejected by every appellate court to consider it.

**1. Section 3281 Applies to All Death-Eligible Offenses, Whether or Not the Death-Penalty May Be Imposed Constitutionally**

Chapter 213 of Title 18 of the United States Code establishes the statutes of limitations for federal crimes. For most crimes, "no person shall be prosecuted, tried, or punished . . . unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a). This five-year limitations period does not apply, however, where a different limitations period is "otherwise expressly provided by law." *Id.* One such law is § 3281, which expressly

provides that "[a]n indictment for any offense punishable by death may be found at any time without limitation." 18 U.S.C. § 3281.

In determining which statute of limitations is applicable to a particular criminal offense, the starting point is the plain language of the criminal statute itself, which is also the end point "[i]f the language is clear and unambiguous." *United States v. Husted*, 545 F.3d 1240, 1242 (10th Cir. 2008). That is, where the text of the statute is clear, "the plain meaning of the statute controls." *Id.*

In this case, the defendant's argument centers on "the statutory context, structure, history, and purpose," while ignoring the plain language of the statute. (Doc. 71 at 13.) Section 242 provides that a defendant "may be sentenced to death" if he deprives an individual of constitutional or federal rights under color of law through conduct that "include[s] kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse." 18 U.S.C. § 242. As the defendant concedes, each of the six counts in the indictment charges a § 242 violation with two or more statutory enhancements for kidnapping, attempted kidnapping, aggravated sexual abuse, and attempted aggravated sexual abuse. As a result, each and every count in the superseding indictment charges an offense that the plain language of § 242 makes death-eligible. As such, those counts are "offense[s] punishable by death" under § 3281. 18 U.S.C. § 3281. All counts are thus subject to § 3281 rather than § 3282(a) and the unlimited limitations period applies.

Multiple federal appeals courts have addressed the applicability of § 3281 to a crime that a statute makes death-eligible but that cannot actually be punished by death, and *every*

federal appeals court that has done so has adopted the government's position, as discussed further below.[2] That is, the Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48, 60-61 (2010)—which held that capital punishment may be imposed only in § 242 cases where death results from a defendant's conduct—does not alter the statutory scheme for determining which offenses are covered by § 3281's statute of limitations provisions. Where the criminal statute provides that an offense is death-eligible, § 3281 applies even where the death penalty cannot be imposed or where the government chooses not to seek the death penalty.

The Supreme Court has applied the same principle in interpreting the military analogue to § 3281. In *United States v. Briggs*, 141 S. Ct. 467 (2020), the Court considered whether the Uniform Code of Military Justice's ("UCMJ's") provision that a military offense "punishable by death, may be tried and punished at any time without limitation" applied to a rape that the UCMJ provided could be "punished by death," notwithstanding the Court's holding in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), that the Constitution forbids actually imposing the death penalty for rape that does not result in death. *Id.* at 468-70 (citations omitted). The Court held that the rape had no statute of limitations, reasoning that the term "punishable" in the UCMJ is a "term of art that is defined by the specification of the punishments set out in the penalty provisions of the UCMJ." *Id.* at 470. The Tenth Circuit, citing *Briggs*, reached the same conclusion in another UCMJ case,

[2] The defendant does not cite to or distinguish any of these directly-on-point cases in his motion. (Doc. 71.)

finding no limitations period for rape under the UCMJ equivalent of § 3281. *See Nixon v. Hilton*, 842 F. App'x 269 (10th Cir. 2021).

Another example is *United States v. Ealy*, 363 F.3d 292, 296 (4th Cir. 2004), in which the defendant advanced the exact argument that the defendant makes here: that offenses for which a federal statute expressly allows a death sentence but for which the death penalty could not constitutionally be imposed are not "punishable by death" under § 3281. The Fourth Circuit rejected this argument, holding that § 3281's applicability depends on whether the death penalty may be imposed for the crime under the enabling statute, "*not* on whether the death penalty is in fact available for defendants in a particular case." *Id.* at 295-97 (emphasis added) (internal quotation marks omitted).

Similarly, in *United States v. Gallaher*, 624 F.3d 934 (9th Cir. 2010), the defendant, a member of an American Indian tribe, argued that § 3282's five-year statute of limitations applied to his first-degree murder indictment because his tribe had elected not to allow capital punishment for first-degree murder committed on tribal land. *Id.* at 937, 939-940; *see* 18 U.S.C. § 3598 (permitting American Indian tribes to elect whether to permit the death penalty for crimes committed within their jurisdiction). The Ninth Circuit rejected this argument, concluding that the district court correctly found no limitations period applied under § 3281 because, even though the court could not actually impose death on the defendant, "[i]n a very literal sense, the offense defined [in § 1111(b)] is still a 'capital crime'; the statute still authorizes the imposition of the death penalty and Congress has not repealed it. . . . The plain text of § 111(b) mandates that we continue to categorize first

degree murder as a crime punishable by death." *Id.* at 941 (internal quotation marks omitted).

In *United States v. Edwards*, 159 F.3d 1117, 1128 (8th Cir. 1998), the defendants advanced a similar argument, asserting that their federal arson prosecutions were time-barred because the death penalty procedures applicable when they committed their crimes were unconstitutional. The Eighth Circuit rejected the defendants' argument, reasoning that § 3281 "derive[s its] justification from the serious nature of the crime rather than from a concern about, for example, what procedural protections those who face a penalty as grave as death are to receive." *Id.* (quotation and citation omitted).

In *United States v. Payne*, 591 F.3d 46 (2d Cir. 2010), the Second Circuit likewise clearly held: "An offense 'punishable by death,' within the meaning of § 3281, is one for which the statute authorizes death as a punishment, regardless of whether the death penalty is sought by the prosecution or ultimately found appropriate by the factfinder or the court." *Id.* at 59, *cert. denied*, 562 U.S. 950 (2010).

The Tenth Circuit has cited this holding of *Payne* with approval, albeit in dicta. *United States v. Garcia*, 74 F.4th 1073, 1100 & n. 14 (10th Cir.), *cert. denied sub nom. Troup v. United States*, 144 S. Ct. 400, 217 L. Ed. 2d 216 (2023), and *cert. denied sub nom. Gallegos v. United States*, 144 S. Ct. 608, 217 L. Ed. 2d 324 (2024). In addition, district courts in the Tenth Circuit have reached the same conclusion, determining that "offenses 'punishable by death' are still considered 'capital crimes' for statute-of-limitations purposes, even if the death penalty is unenforceable." *United States v. Magnan*, No. 13-cr-069, 2014 U.S. Dist. LEXIS 54929, at *3 (E.D. Okla. April 12, 2014); *see also United*

*States v. Murphy*, No. 20-cr-78, 2021 U.S. Dist. LEXIS 31570, at *4-5 (E.D. Okla. Feb. 18, 2021) ("The death penalty's unavailability due to a jurisdictional quirk does not, and cannot, affect the statute of limitations for charging the offense. To hold otherwise risks a grave injustice[.]"); *United States v. Martinez*, 505 F. Supp. 2d 1024 (D.N.M. 2007) (finding § 3281 applied where defendant could not be punished by death due to tribal decision under § 3598, noting that "§ 1111 still authorizes the imposition of the death penalty and . . . Congress has not made any changes to it").

Accordingly, because all charges in the superseding indictment are "punishable by death" for statute-of-limitations purposes, § 3281 eliminates any statute of limitations and the charges are not time-barred.

**2. Section 3281 Applies Because the Superseding Indictment Appropriately Charges the Enhancements of Kidnapping, an Attempt to Kidnap, Aggravated Sexual Abuse, or an Attempt to Commit Aggravated Sexual Abuse**

Both the plain language of § 242 and the applicable caselaw demonstrate that § 242 does not incorporate the jurisdictional elements of the federal kidnapping and aggravated sexual abuse statutes. Accordingly, the superseding indictment appropriately charges those § 242 enhancements and, as a result, § 3281 applies to all charges.

The defendant argues that, although the plain language of the indictment appropriately charges the enhancements of kidnapping, an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, the charges "do not (and cannot) actually include" those offenses. (Doc. 71 at 15.) Specifically, the defendant claims that § 242 fully incorporates all elements of the federal statute prohibiting

aggravated sexual abuse (18 U.S.C. § 2241) and the federal statute prohibiting kidnapping (18 U.S.C. § 1201), including the jurisdictional elements. (Doc. 71 at 16.) Because, the defendant argues, the indictment does not include facts that would satisfy the jurisdictional elements of § 1201 or § 2241, the indictment does not satisfactorily plead those enhancements and, accordingly, the five-year statute of limitations in § 3282 applies.

The defendant has failed to cite a single opinion suggesting, much less holding, that the government must prove the jurisdictional elements of the penalty enhancements of § 242, and the government has found no authority supporting the defendant's argument. In fact, as explained below, the authority refutes the defendant's claim: to convict the defendant of a § 242 offense involving kidnapping or aggravated sexual abuse, the government need not prove the jurisdictional elements of those federal statutes.

**i. The Plain Language of § 242 Does Not Incorporate the Jurisdictional Elements of § 2241 or § 1201**

The plain language of § 242 undermines the defendant's argument. The plain language of § 242 nowhere expressly requires proof of the jurisdictional elements of § 2241 or § 1201, nor does it mention, much less cross-reference, either of these statutes. Indeed, there is no indication that Congress, in crafting the penalty enhancements in § 242, intended to add the jurisdictional requirements of the federal aggravated sexual abuse statute or the federal kidnapping statute. The fact that Congress used the terms "aggravated sexual abuse" and "kidnapping" as enhancements in § 242 does not by itself support an inference that Congress intended the government to prove the jurisdictional elements of § 2241 or § 1201.

Congress's authority to enact § 242, which governs federal and state actors, derives from the Necessary and Proper Clause of Article I, Sec. 8, and the Fourteenth Amendment of the Constitution.[3] *See* U.S. Const. art. I, § 8, cl. 18; U.S. Const. amend. XIV, § 5; *see also Screws v. United States*, 325 U.S. 91, 98-99 (1945) (Section 242 "was enacted to enforce the Fourteenth Amendment" and "its purpose was to protect all persons in the United States in their civil rights, and furnish the means of their vindication") (internal quotation marks omitted). As a result, Congress did not need to add any federal jurisdictional element to § 242, unlike §§ 2241 and 1201, which would be state crimes without the additional jurisdictional element. And nowhere in the language or legislative history of § 242 is there any indication that Congress intended to add these additional and unnecessary elements to the aggravated sexual abuse and kidnapping penalty enhancements.

Because Congress did not define the terms aggravated sexual abuse or kidnapping, either expressly or through cross reference, a court must presume it intended the terms to carry their ordinary, contemporary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). The ordinary definition of aggravated sexual abuse does not carry with it an expectation that the abuse

[3] Congress did not derive its authority to pass § 242 from the Commerce Clause, as the defendant has implied. (Doc 71.)

will occur in the special maritime or territorial jurisdiction of the United States or in a federal prison, just as the ordinary definition of kidnapping does not include an expectation that a victim will be transported across state lines, that the kidnapper will use of channels or instrumentalities of commerce, or that any other jurisdictional element be met.[4]

To be sure, both §§ 2241 and 1201 require proof of a jurisdictional element—such elements are precisely what conferred upon Congress the ability to enact that legislation. But the defendant here was not charged with violating § 2241 or § 1201; he was charged with violating the victim's constitutional rights under § 242. The United States has jurisdiction to enforce § 242 anywhere in the United States against anyone whose conduct meets the elements of that statute. *See Screws*, 325 U.S. at 98-99; *United States v. Guidry*, 456 F.3d 493, 510 (5th Cir. 2006) ("Federal jurisdiction exists [for the kidnapping enhancement in § 242] without interstate abduction because his action constituted a violation of [the victim's] constitutional rights."). Accordingly, the plain language of § 242 indicates that Congress did not import the unnecessary jurisdictional elements found in § 2241 or § 1201.

**ii. The Caselaw Shows that § 242 Does Not Incorporate the Jurisdictional Elements of § 2241 or § 1201**

[4] The definition of rape in Black's Law Dictionary, for example, contains no requirement that the offense occur in a particular location. *See* Black's Law Dictionary 1288 (11th ed. 2019) (defining rape, in part, as "[u]nlawful sexual activity (esp. intercourse) with a person . . . without consent and usu. by force or threat of injury"). Similarly, the definition of kidnapping in the Black's Law Dictionary contains no requirement that the kidnapping a victim be transported across state lines or that the defendant use a facility or instrumentality of commerce in connection with the crime. *See* Black's Law Dictionary 886 (11th ed. 2019) (defining kidnapping as "[t]he crime of seizing and taking away a person by force or fraud").

Section 242 itself does not define "kidnapping" or "aggravated sexual abuse." As a result, federal courts have defined those terms by looking to the substantive provisions of § 2241, § 1201, and the ordinary, contemporary meaning of those terms. Contrary to the defendant's argument, the government has not found—and the defendant does not cite—a single case in which a federal court incorporated the jurisdictional requirements of § 2241 or § 1201 into § 242.[5]

Federal courts have defined "aggravated sexual abuse" under the § 242 enhancement by reference to the definition of the offense *conduct* set forth in the federal aggravated sexual abuse statute, 18 U.S.C. § 2241, expressly excluding its jurisdictional requirements. *United States v. Shaw*, 891 F.3d 441, 447 (3d Cir. 2018) ("a number of our sister Circuits have defined the term [aggravated sexual abuse] by reference to the federal aggravated sexual abuse statute, 18 U.S.C. § 2241, *excluding* its jurisdictional requirements") (emphasis added). In *United States v. Lanham*, the Sixth Circuit held directly that § 2241's jurisdictional component is not an element in a § 242 prosecution, finding that the "jurisdictional requirements of 18 U.S.C. § 2241 did not apply because [defendants] were not prosecuted under this statute"; rather, "the district court was merely giving content to the term 'aggravated sexual assault' by using the definition in 18 U.S.C. § 2241." 617 F.3d 873, 888 (6th Cir. 2010); *see also United States v. Holly*, 488 F.3d 1298 (10th Cir. 2007) (defining the elements of aggravated sexual abuse in the context of the § 242 enhancement as "the substantive provisions of § 2241" and setting forth those

[5] In addition, the defendant failed to distinguish or explain any of the following cases, which explicitly reject his argument. (Doc. 71.)

provisions); *United States v. Morris*, 494 F. App'x 574 (6th Cir. 2012) (same); *Cates v. United States*, 882 F.3d 731, 736 (7th Cir. 2018) (using the substantive provisions of § 2241 to define the elements of aggravated sexual abuse, in the context of the § 242 enhancement); *United States v. Giordano*, 442 F.3d 30, 47 (2d Cir. 2006) (finding "baseless" defendant's argument that the victims "had no federally protected right to be free from aggravated sexual abuse [in the § 242 context] when such abuse did not satisfy the jurisdictional requirements of federal statutory sexual abuse crimes").

Similarly, federal courts have defined "kidnapping" under the § 242 enhancement by reference to the substantive terms of the federal kidnapping statute, 18 U.S.C. § 1201, excluding its jurisdictional requirements. In *United States v. Guidry*, 456 F.3d 493 (5th Cir. 2006), the defendant argued that the term "kidnapping" in § 242 should be defined either by its common law definition or by both substantive and jurisdictional provisions of § 1201. The Fifth Circuit rejected both arguments. Particularly, the court rejected defendant's argument that the government had to prove an interstate abduction under § 1201 to prove the § 242 kidnapping enhancement, stating that:

> If [defendant] were charged with violating the federal kidnapping statute when he took [the victim] to an isolated spot in order to sexually assault her, for the purpose of federal jurisdiction he indeed would have had to transport [the victim] out of the state. But here, [defendant] was charged with violating [the victim's] civil rights by kidnapping her. Federal jurisdiction exists without interstate abduction because his action constituted a violation of [the victim's] constitutional rights. In the absence of § 242 requiring "kidnapping" to comport with the elements of the federal kidnapping statute, the generic, contemporary meaning of [the] kidnapping statute suffices.

*Id.* at 510.

Multiple other federal courts have upheld convictions under § 242 that include the kidnapping or aggravated sexual assault enhancement where the jurisdictional element of § 2241 or § 1201 was not an issue at trial. *See, e.g.*, *United States v. Kindley*, No. 21-3484, 2022 WL 17245115 (8th Cir. Nov. 28, 2022) (affirming convictions for violations of § 242 with enhancements for kidnapping and aggravated sexual assault); *United States v. Simmons*, 470 F.3d 1115 (5th Cir. 2006) (affirming conviction for violation of § 242 with enhancement for aggravated sexual abuse).[6] Indeed, the government has been unable to find a single conviction under § 242 that was overturned for failure to prove the jurisdictional element of § 2241 or § 1201 as part of the enhancement. The defendant's argument that § 242 incorporates the jurisdictional elements of §§ 2241 and 1201 as part of its enhancements is incorrect.

**B. Section 3283 Applies to Counts One-Three in the Superseding Indictment**

Section 3283, like § 3281, provides an alternative to the five-year statute of limitations applicable to most federal crimes under § 3282. Section 3283 provides that

[6] Section 242 is one among multiple federal criminal statutes that include enhancements for kidnapping, aggravated sexual abuse, or attempted kidnapping or aggravated sexual abuse. *See, e.g.*, 18 U.S.C. §§ 245, 247, 249, 1589; 42 U.S.C. § 3631. Multiple federal courts have affirmed convictions for violations of these statutes, including the kidnapping or aggravated sexual abuse enhancements, where the additional jurisdictional elements were not addressed at trial. *See, e.g.*, *United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010) (affirming forced labor conviction under § 1589 with enhancement for aggravated sexual assault); *United States v. Callahan*, 801 F.3d 606 (6th Cir. 2015) (affirming forced labor conviction under § 1589 with enhancement for kidnapping or attempted kidnapping); *United States v. Norris*, 358 F. App'x 60 (11th Cir. 2009) (summarily affirming convictions for forced labor under § 1589 with enhancements for aggravated sexual abuse or attempted aggravated sexual abuse). As with § 242, the government has been unable to find a single conviction under one of these other statutes that was overturned for failure to prove the jurisdictional element of § 2241 or § 1201 as part of the enhancement.

"[n]o statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer." 18 U.S.C. § 3283. Here, the superseding indictment was brought during the life of the child victim and, thus, falls squarely within the limitation set by § 3283.

The defendant, again failing to cite to a single case interpreting the statute, argues that § 3283 does not apply to the charges in this case because it applies only to offenses in which the sexual or physical abuse, or kidnapping, of a child is "an essential ingredient" of the offense charged. (Doc. 71 at 25.) The defendant's proposed categorical approach to § 3283 does not withstand scrutiny.

Although the Tenth Circuit has not yet addressed this issue, other courts have held that sexual or physical abuse or kidnapping of a child need not be an "essential ingredient" of the offense charged for § 3283 to apply. Rather, courts have engaged in a fact-specific approach to applying § 3283. For example, in *United States v. Schneider*, a case involving a violation of 18 U.S.C. § 2423(b) (Transportation of Minors with Intent to Engage in Criminal Sexual Activity), the Third Circuit rejected the argument—identical to that raised by the defendant here—that sexual abuse of a child must be an "essential ingredient" of the offense for § 3283 to apply. 801 F.3d 186, 196-97 (3d Cir. 2015). The Third Circuit emphasized that § 3283 "has no . . . restrictive language or legislative history suggesting congressional intent to limit its application to a specific subset of circumstances. Congress, rather, has evinced a general intention to 'cast a wide net to ensnare as many offenses

against children as possible.'" *Id.* at 196 (quoting *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010)). After engaging in a fact-specific analysis of the conduct underlying defendant's conviction, the court concluded that the defendant's conduct "'involves sexual abuse' as contemplated by § 3283" and, accordingly, that the extended statute of limitations under § 3283 applied. *Id.* at 196.

Similarly, in *Weingarten v. United States*, the Second Circuit rejected the defendant's argument that "§ 2423 offenses do not qualify categorically as 'offense[s] involving the sexual . . . abuse . . . of a child' because they are crimes of intent, which do not require proof of actual sexual abuse to sustain a conviction" and that, therefore, the offenses were not subject to the extended § 3283 limitations period. 865 F.3d 48, 58 (2d Cir. 2017). The Second Circuit stressed that "[t]he language of § 3283 . . . reaches beyond the offense and its legal elements to the conduct 'involv[ed]' in the offense. That linguistic expansion indicates Congress intended courts to look beyond the bare legal charges in deciding whether § 3283 applied." *Id.* at 59. Adopting *Schneider*, the Second Circuit held that "[i]t would undermine [Congress's intention to ensnare as many offenses against children as possible] to apply the narrow categorical approach." *Id.* The court thus affirmed that the limitations period was governed by § 3283. *Id.* at 60; *see also United States v. Maxwell*, 534 F.Supp.3d 299, 314 (S.D.N.Y. 2021) (rejecting the categorical approach to applying § 3283 and holding that "[t]he appropriate inquiry is whether the charged offenses involved the abuse of a minor on the facts alleged in this case"); *United States v. Majeed*, No. 21-cr-20060, 2023 WL 4826849, at *12 (D. Kan. July 27, 2023) (citing *Maxwell* and *Weingarten* in rejecting defendants' argument that a categorical

approach applies to determining whether an offense "involves" abuse or kidnapping of a child for purposes of § 3283); *United States v. Tso*, No. 1:22-cr-01858, 2023 WL 3885332 at *1-3 (D.N.M. June 8, 2023) (same).

Moreover, the plain language of § 3283 undercuts the defendant's argument. The statute applies to offenses "involving" physical or sexual abuse or kidnapping of a child. If Congress wished to adopt the narrow construction urged by the defendant, it could have done so expediently, by requiring that § 3283 apply whenever the offense "has as an element" the physical or sexual abuse or kidnapping of a child. Congress has used this exact language in other federal criminal statutes. *See, e.g.*, 18 U.S.C. §§ 16, 373, 521, and 924(c)(3)(A). Congress was thus aware that it could limit § 3283 in this manner; it chose not to do so. *See Maxwell*, 534 F. Supp. 3d at 313 (canvassing caselaw and stressing that the "linguistic expansion" incorporated by the word "involved" indicates that "Congress intended courts to look beyond the bare legal charges in deciding whether § 3283 applied").

Because the Court should apply a fact-based approach to determine whether § 3283 extends the statute of limitations for Counts One-Three, those Counts are not categorically time-barred for this reason, as well, and the Court should not dismiss them.

**C. Dismissal Based on Statute of Limitations Grounds Is Premature**

A statute of limitations "merely creates an affirmative defense for the accused." *United States v. Titterington*, 374 F.3d 453, 457 (6th Cir. 2004) (holding that the statute of limitations merely creates an affirmative defense and allegations negating the elements of an affirmative defense need not be alleged in the indictment) (citing *United States v. Cook*, 84 U.S. 168 (1872)); *see also Musacchio v. United States*, 577 U.S. 237, 247 (2016)

("[C]omission of [a federal] crime within the statute-of-limitations period is not an element of the . . . offense, and it is up to the defendant to raise the limitations defense.") (internal quotation marks omitted). "When a defendant introduces the limitations defense into the case, the Government then has the right to reply or give evidence on the limitations claim." *Musacchio*, 577 U.S. at 247.

Any pretrial motion to dismiss is governed by Federal Rule of Criminal Procedure 12(b)(1), which authorizes a district court to resolve before trial only those motions "that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). The Supreme Court has instructed that Rule 12 allows for pretrial resolution of a motion to dismiss the indictment only when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969). "Where, however, the questions of fact relating to the motion to dismiss are intertwined with considerations of issues going to the merits of the case, the questions must be deferred until presented at trial." *United States v. Knox*, 396 U.S. 77, 83 (1969).

The only facts properly before this Court are those contained in the superseding indictment, which are sufficient to establish violations of § 242 with kidnapping and aggravated sexual assault enhancements. Because any defense claim that the charges are time-barred based on the facts of this case would require the government to present its evidence, any such claim is premature.

## III. CONCLUSION

For the foregoing reasons, the extended statute of limitations in § 3281 applies to all charges in the superseding indictment and the extended statute of limitations in § 3283 also applies to Counts One-Three. Accordingly, none of the charges in the superseding indictment are time-barred, and the United States respectfully requests that this Court deny the defendant's motion to dismiss.

Respectfully submitted,

KATE E. BRUBACHER
UNITED STATES ATTORNEY

By: /s/ *Stephen A. Hunting*
Stephen A. Hunting
Assistant United States Attorney
District of Kansas
444 Quincy St., Suite 290
Topeka, Kansas 66683
Ph: (785) 295-2850
Fax: (785) 295-2853
Email: stephen.hunting@usdoj.gov
Ks. S. Ct. No. 21648

KRISTEN M. CLARKE
Assistant Attorney General
Civil Rights Division

By: /s/ *Tara Allison*
Tara Allison
Trial Attorney
Crim. Section, Civil Rights Div.
U.S. Department of Justice
150 M St. NE
Washington, DC 20002
Ph: (202) 598-7882
Email: tara.allison@usdoj.gov
NY Bar No. 5666029

**CERTIFICATE OF SERVICE**

I hereby certify that on April 26, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

/s/ *Tara Allison*
Tara Allison
Trial Attorney