

No. 17-243

IN THE
Supreme Court of the United States

LIBAN H. ABDIRAHMAN, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

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

SUPPLEMENTAL BRIEF OF THE PETITIONERS

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March 19, 2018

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioners file this brief to apprise the Court of additional developments relevant to one of the cases consolidated in the Petition.

1. Air Force Lieutenant Colonel Michael Briggs (Court of Appeals Docket # 16-711) was convicted of rape in 2014 for an offense that allegedly took place in July 2005. *See* 1 Pet. App. 130a.

2. At the time of both the charged offense and conviction, the Court of Appeals for the Armed Forces (CAAF) interpreted Article 43 of the Uniform Code of Military Justice, 10 U.S.C. § 843, to impose no statute of limitations for rape—because, in CAAF’s view, it was an “offense punishable by death.” *See Willenbring v. Neurater*, 48 M.J. 152, 178, 180 (C.A.A.F. 1998).

3. If rape was not an “offense punishable by death,” the statute of limitations in Lt. Col. Briggs’s case would have been five years, 10 U.S.C. § 843(b)(1) (2006), and would therefore have barred his 2014 prosecution and conviction.¹

1. In 2006, Congress amended Article 43 to provide that “[a] person charged with . . . rape . . . may be tried and punished at any time without limitation.” National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553(a), 119 Stat. 3136, 3264 (codified as amended at 10 U.S.C. § 843(a)).

Although this Court has not decided whether retroactive extensions of unexpired statutes of limitations raise ex post facto concerns, *see Stogner v. California*, 539 U.S. 607, 618 (2003), CAAF has specifically held that amendments to Article 43 extending unexpired statutes of limitations do not apply retroactively absent express language providing that they do. *See United States v. Lopez de Victoria*, 66 M.J. 67, 74 (C.A.A.F. 2008). The 2006 amendment to Article 43 includes no such language.

4. On February 6, 2018 (after the briefing on this Petition was complete), CAAF unanimously overruled *Willenbring* in *United States v. Mangahas*, holding that, at least for pre-2006 conduct, “the offense of rape is not exempt from the five-year statute of limitations.” No. 17-434, 2018 WL 770507, at *1 (C.A.A.F. Feb. 6, 2018); *see id.* at *2 & n.2; *cf. Kennedy v. Louisiana*, 554 U.S. 407, 428 (2008) (holding that the Eighth Amendment forbids a capital sentence for rape that does not result in the death of the victim).

5. On March 15, 2018, CAAF denied a motion for reconsideration filed by the government in *Mangahas*.

6. Because Lt. Col. Briggs’s direct appeal is still pending, he is entitled to benefit from CAAF’s decision in *Mangahas*. *See Griffith v. Kentucky*, 479 U.S. 314, 327–28 (1987).

7. If this Court’s disposition in *Dalmazzi v. United States*, No. 16-961 (argued Jan. 16, 2018), includes a reversal or vacatur of CAAF’s decision in *United States v. Ortiz*, 76 M.J. 189 (C.A.A.F. 2017), Petitioners have suggested that it should then grant this Petition, vacate the decisions below, and remand for further proceedings. Pet. 6; *see also* U.S. Br. Opp. 3. Lt. Col. Briggs would then be free to raise his entitlement to relief under *Mangahas* before CAAF (or the Air Force Court of Criminal Appeals) in the first instance.

8. If, however, this Court in *Dalmazzi* affirms CAAF’s decision in *Ortiz*, and is otherwise inclined to deny this Petition, it should, at the very least, grant the Petition with respect to Lt. Col. Briggs, vacate CAAF’s decision in his case, and remand for further proceedings in light of *Mangahas*.

Respectfully submitted,

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