

IN THE SUPREME COURT OF THE UNITED STATES

No. 18A-_____

UNITED STATES OF AMERICA, APPLICANT

v.

MICHAEL J.D. BRIGGS

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully requests a 30-day extension of time, to and including June 22, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces (CAAF) in this case. The opinion of the court of appeals (App., infra, 1a-12a) is reported at 78 M.J. 289. The court of appeals entered its judgment on February 22, 2019. Unless extended, the time within which to file a petition for a writ of certiorari will expire on May 23, 2019. The jurisdiction of this Court would be invoked under 28 U.S.C. 1259(3).

1. In May 2005, respondent was a captain and an F-16 instructor pilot in the United States Air Force. App., infra, 1a.

"Following an evening of heavy drinking," respondent "went to [the] room" of a fellow Air Force service member, DK, and "forced her to have sex with him even though she said 'no' and 'stop' and tried to roll away." Id. at 1a-2a. "DK did not immediately report the incident to law enforcement authorities, but she did tell others about it." Id. at 2a. In 2013, DK called respondent and, "[w]ithout [his] knowledge, * * * recorded their conversation," in which he admitted to the rape. Ibid. Respondent told DK, "I will always be sorry for raping you." Ibid.

From 1986 to 2006, the Uniform Code of Military Justice (UCMJ) provided that "any offense punishable by death * * * may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2000); see App., infra, 4a. During that time, the UCMJ stated that rape was punishable by death, 10 U.S.C. 920(a) (2000), and, in United States v. Stebbins, 61 M.J. 366 (2005), and Willenbring v. Neurauter, 48 M.J. 152 (1998), the CAAF determined that the UCMJ imposed no statute of limitations for rape, notwithstanding this Court's decision in Coker v. Georgia, 433 U.S. 584 (1977), that imposing the death penalty for rape of an adult woman in the criminal justice system violates the Eighth Amendment. In 2006, Congress amended the UCMJ to expressly provide that "rape * * * may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2012); see App., infra, 4a-5a.

2. In 2014, respondent was charged by court martial, found guilty of raping DK in 2005, and sentenced to "a dismissal, confinement for five months, and a reprimand." App., infra, 2a. On appeal to the United States Air Force Court of Criminal Appeals (AFCCA), respondent argued for the first time that the statute of limitations had run before he was charged. Id. at 2a-3a. The AFCCA declined to consider respondent's limitations argument because he had failed to raise it at trial, and it affirmed his conviction. Id. at 3a. Respondent sought review in the CAAF, alleging ineffective assistance of counsel based on his trial counsel's failure to raise the statute of limitations and also challenging the judicial composition of the AFCCA. Ibid. The CAAF denied review with respect to the limitations issue and affirmed the AFCCA's decision on its judicial composition. Ibid.

In July 2017, petitioner and 164 other service members filed a petition for a writ of certiorari seeking review of CAAF decisions on the composition of the AFCCA. Abdirahman v. United States, No. 17-243. While that petition was pending, the CAAF decided United States v. Mangahas, 77 M.J. 220 (2018), in which the court overruled its prior decisions in Stebbins and Willenbring and concluded that "the period of limitations for rape of an adult woman under the version of" the UCMJ "in force from 1986 until 2006 * * * was five years." App., infra, 4a (citing Mangahas, 77 M.J. at 222). Mangahas did not address the effect of the 2006

amendment to the UCMJ providing that rape can be tried without a limitations period. See id. at 5a.

Following the CAAF's decision in Mangahas, respondent filed a supplemental brief in this Court requesting that, if the Court denied his petition with respect to the AFCCA composition question, it nevertheless grant his petition, vacate the CAAF's judgment, and remand so that the CAAF could consider the effect of Mangahas on his limitations argument. The United States did not oppose that request. And, after upholding the composition of the AFCCA in Ortiz v. United States, 138 S. Ct. 2165 (2018), this Court ultimately granted respondent's request, 139 S. Ct. 38; see 138 S. Ct. 2702; App., infra, 3a.

3. On remand from this Court, the CAAF ordered the rape charge dismissed. App., infra, 1a-12a. The court stated that, under its decision in Mangahas, the UCMJ at the time of respondent's offense in 2005 "established a five-year period of limitations," id. at 5a, and the court concluded that the 2006 amendment to the UCMJ expressly eliminating any limitations period for rape charges did not apply, id. at 6a-10a. The court viewed its precedent to require treating the issue as a question of retroactivity; applied presumptions disfavoring the amendment's application; and refused to find those presumptions overcome. See ibid. The court rejected the government's contention that applying the 2006 amendment would not actually be a "'retroactive'

application of the law because the 2006 amendment did not attach any new legal obligations on" respondent, as well as its contention that Congress intended the 2006 amendment to apply to cases like respondent's because it was simply codifying the CAAF's then-extant decisions in Stebbins and Willenbring, id. at 8a-10a. The CAAF also rejected the government's contention that respondent had relinquished the limitations defense by failing to raise it at trial. Id. at 10a-12a.

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to continue consultation within the government and to assess the legal and practical effects of the court of appeals' ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MAY 2019