No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD D. COLLINS

UNITED STATES OF AMERICA, PETITIONER

v.

HUMPHREY DANIELS III

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.

RELATED PROCEEDINGS

General Court-Martial (Hurlburt Field and Eglin Air Force Base, Fla.):

United States v. *MSgt. Richard D. Collins* (Feb. 26, 2017) (no docket number assigned)

General Court-Martial (Joint Base Andrews Naval Air Facility Washington):

United States v. *Lt. Col. Humphrey Daniels, III* (June 14, 2017) (no docket number assigned)

United States Air Force Court of Criminal Appeals:

United States v. *Richard D. Collins, MSgt. (E-7), U.S. Air Force*, No. ACM 39296 (July 23, 2018)

United States v. *Humphrey Daniels, III, Lt. Col. (O-5), U.S. Air Force*, No. ACM 39407 (June 18, 2019)

United States Court of Appeals for the Armed Forces:

United States v. *Richard D. Collins*, No. 19-52 (Mar. 12, 2019)

United States v. *Humphrey Daniels III*, No. 19-345 (July 22, 2019)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Armed Forces in these cases. Pursuant to this Court's Rule 12.4, the United States is filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions."

OPINIONS BELOW

The order of the Court of Appeals for the Armed Forces in *United States* v. *Collins* (App., *infra*, 1a) is reported at 78 M.J. 415. The opinion of the Air Force

Court of Criminal Appeals (App., *infra*, 2a-18a) is reported at 78 M.J. 530.

The order of the Court of Appeals for the Armed Forces in *United States* v. *Daniels* (App., *infra*, 19a-20a) is not yet published in the Military Justice Reporter but is available at 2019 WL 3026956. The opinion of the Air Force Court of Criminal Appeals (App., *infra*, 21a-41a) is not published in the Military Justice Reporter but is available at 2019 WL 2560041.

JURISDICTION

The judgment of the court of appeals in *Collins* was entered on March 12, 2019. On June 6, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 10, 2019. On July 3, 2019, the Chief Justice further extended the time to and including August 9, 2019. The judgment of the court of appeals in *Daniels* was entered on July 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

At the times of respondents' offenses in 1998 and 2000, Article 43(a) of the Uniform Code of Military Justice (UCMJ) provided that a "person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (1994). Article 120(a) of the UCMJ provided that any "person subject to [the UCMJ] who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 920(a) (1994).

The current version of Article 43(a) of the UCMJ provides that a "person charged with absence without leave or missing movement in time of war, with murder, rape or sexual assault, or rape or sexual assault of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2012 & Supp. V 2017). The current version of Article 120(a) of the UCMJ provides in relevant part that any "person subject to [the UCMJ] who commits a sexual act upon another person by * * * using unlawful force against that other person * * * is guilty of rape and shall be punished as a court-martial may direct." 10 U.S.C. 920(a)(1).

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

Other pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 42a-45a.

STATEMENT

Following a general court-martial by the United States Air Force, respondent Collins was convicted of rape, in violation of 10 U.S.C. 920(a) (1994). App., *infra*, 2a. The Air Force Court of Criminal Appeals (AFCCA) reversed. *Id.* at 2a-18a. The Judge Advocate General (JAG) of the Air Force certified the case to the Court of Appeals for the Armed Forces (CAAF), which summarily affirmed. *Id.* at 1a.

Following a general court-martial by the United States Air Force, respondent Daniels was convicted of rape, in violation of 10 U.S.C. 920(a) (1994), and other offenses. App., *infra*, 21a-22a. The AFCCA reversed the rape conviction. *Id.* at 21a-41a. The Air Force JAG

certified the AFCCA's decision on the rape count for review, and the CAAF summarily affirmed. *Id.* at 19a-20a.

A. Military Prosecution and Punishment of Rape

1. Sexual assault is "one of the most destructive factors in building a mission-focused military." *Memorandum from James N. Mattis, Secretary of Defense, to All Members of the Department of Defense: Sexual Assault Prevention and Awareness* (Apr. 18, 2018), https://dod.defense.gov/portals/1/features/2018/0418_sapr/saapos d004331-18-res.pdf. In addition to their "devastating impact on victims," sexual assaults by one military service member against another "negatively affect morale, good order and discipline and the unit cohesion and combat effectiveness of military personnel and units." United States Dep't of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Service Comm. on Military Justice* 2-3 (2005), http://jpp.whs.mil/public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ. pdf.

Compounding the problem, military victims "chronically underreport" sexual assaults for a number of "unique" reasons, including the "hierarchical structure of military service and its focus on obedience, order, and mission before self." United States Dep't of Defense, *Report of the Response Systems to Adult Sexual Assault Crimes Panel* 59-60 (June 2014), http://responsesystems panel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf. Some victims fear "reprisal or retaliation" and believe that "'nothing will happen to the[] perpetrator.'" *Id.* at 60 (citation omitted). Such concerns "erode trust" in military organizations, "violate[] fundamental military values," and "undermine[] a

commander's ability to maintain good order and discipline." United States Dep't of Defense, *Judicial Proceedings Panel: Report on Retaliation Related to Sexual Assault Offenses* 17 (Feb. 2016), http://jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf. Investigating and prosecuting sexual assault is accordingly a top priority for the United States military.

2. From November 1986 to January 2006, Article 43 of the UCMJ provided a default five-year statute of limitations for most criminal offenses, 10 U.S.C. 843(b) (1994), along with an exception under which "any offense punishable by death[] may be tried and punished at any time without limitation," 10 U.S.C. 843(a) (1994). Article 120 provided that the offense of "rape * * * shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 920(a) (1994). Indeed, "the military death penalty for rape ha[d] been the rule for more than a century." *Kennedy* v. *Louisiana*, 554 U.S. 945, 946 (2008) (statement of Kennedy, J., respecting the denial of rehearing).

In *Willenbring* v. *Neurauter*, 48 M.J. 152 (1998), the CAAF addressed whether rape was "punishable by death" for purposes of Article 43, notwithstanding this Court's holding in *Coker* v. *Georgia*, 433 U.S. 584 (1977), that the Eighth Amendment prohibits imposition of the death penalty on a civilian defendant convicted of raping an adult woman. The CAAF determined that rape was "punishable by death" under Article 43—and therefore not subject to a limitations period—because the UCMJ expressly authorized the death penalty for rape. *Willenbring*, 48 M.J. at 178 (quoting 10 U.S.C. 843(a) (1994)); see 10 U.S.C. 920(a) (1994). The CAAF addi-

tionally observed that federal courts of appeals had uniformly interpreted a parallel provision of the federal criminal code, which provides that offenses "punishable by death" may be prosecuted without a limitations period, 18 U.S.C. 3281, to likewise apply to any crime for which the death penalty is authorized by statute. *Willenbring*, 48 M.J. at 180.

In *United States* v. *Stebbins*, 61 M.J. 366 (2005), the CAAF reiterated its holding that rape was "punishable by death" for purposes of Article 43— and therefore not subject to a limitations period—because the UCMJ specifically authorized the death penalty for rape. *Id.* at 369. And in 2006, Congress amended Article 43 to provide expressly that "rape * * * may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2012 & Supp. V 2017); see National Defense Authorization Act for Fiscal Year 2006 (2006 NDAA), Pub. L. No. 109-163, § 553(a), 119 Stat. 3264. The accompanying Conference Report explained that the amended limitations provision would "clarify" the continuing vitality of the CAAF's longstanding position that "rape is * * * an offense with an unlimited statute of limitations." H.R. Conf. Rep. No. 360, 109th Cong., 1st Sess. 703 (2005); see H.R. Rep. No. 89, 109th Cong., 1st Sess. 332 (2005) (similar).

B. *United States* v. *Collins*

1. In August 2000, respondent Collins was a course instructor at Sheppard Air Force Base (AFB) in Texas. App., *infra*, 4a. One student in the course was a fellow Air Force service member, HA. *Ibid.* One evening, HA encountered Collins while she was "eating dinner alone at a club on base." *Ibid.* Collins "appeared to be intoxicated." *Ibid.* HA suggested that he "take a taxi or shuttle home," but he "declined." *Ibid.* HA then drove

Collins "to his on-base residence," and helped him "out of the vehicle and to his front door due to his apparently impaired condition." *Ibid.* "[O]nce inside," Collins "suddenly pushed HA against the wall and then threw her onto the floor." *Ibid.* "HA initially resisted," but Collins "struck her in the face." *Ibid.* Collins "then raped HA." *Ibid.* HA suffered multiple injuries, including "a black eye," *ibid.*, "scratches on her face and knuckles," *ibid.*, and "trauma" to her vaginal area, C.A. App. 626-627.

Three days after the assault, HA "reluctantly admitted to a female instructor that she had been raped." App., *infra*, 4a. "As a result, HA was transported to a hospital where she underwent a sexual assault forensic exam," and both the Air Force and civilian police initiated investigations. *Ibid.* At the time, HA feared that Collins would "flunk [her] * * * or * * * kill [her]" if she told anyone about the attack. C.A. App. 440. She accordingly told investigators that "she was assaulted by an unknown" man "in an off-base store parking lot." App., *infra*, 4a. When security-camera footage failed to corroborate her account, HA admitted that she had "made it up because she did not want to identify the attacker." *Ibid.* She added that she "knew who the assailant was," but she "refused to identify" him. *Id.* at 5a.

2. In April 2011, more than a decade after she was raped, "HA made a restricted sexual assault report to an Air Force mental health provider, stating that she had previously been physically and sexually assaulted by an instructor but 'did not want to be involved.'" App., *infra*, 5a. The provider "referred HA to a Sexual Assault Response Coordinator, to whom HA also made a restricted report that she had been sexually assaulted

by an active duty Air Force member at Sheppard AFB, but she did not identify the assailant." *Ibid.*

In March 2014, "HA made an unrestricted report to the Chief of Military Justice at Sheppard AFB, this time identifying [Collins] as having raped her at Sheppard AFB in 2000." App., *infra*, 5a. The Air Force then reopened its investigation. *Ibid.* Among other details of the attack, HA told investigators that, during the rape, she was "fixated" on a family portrait hanging on the wall above the couch in the front room of Collins's home. C.A. App. 380; see *id.* at 437-439. HA described in detail the individuals in the portrait: a biracial couple, a daughter, and a younger son. *Id.* at 541-542, 677-678. She recalled where each member of the family was sitting in the portrait and the respective hairstyles of the mother and daughter. *Ibid.* She also provided Air Force investigators with sketches of the portrait and the room. *Id.* at 868-869.

Based on that information, Air Force investigators obtained authorization to search Collins's home at Eglin AFB in Florida. C.A. App. 700-701, 865-867. There, in a storage closet, they found a family portrait that matched HA's description. *Id.* at 701-706, 836, 887. When investigators showed the portrait to HA, "she placed her hands over her mouth," "wip[ed] tears away from her eyes," and "stated [that] this photo was in [the] house" the night she was raped. *Id.* at 706. During the search, Air Force investigators also discovered a separate photograph taken in the front room of the house at Sheppard AFB where Collins lived in 2000. *Id.* at 837, 888. That photograph showed the same family portrait, hanging on the wall above the couch, just as HA had described. *Id.* at 888-891. Air Force authorities charged

Collins with raping HA in 2000, in violation of 10 U.S.C. 920(a) (1994). See App., *infra*, 5a.

3. At his 2016 court-martial, Collins "pleaded not guilty" and "vigorously contested" the rape charge. App., *infra*, 5a-6a. He did not, however, "object or move to dismiss the charge and specification on the grounds that they were barred by the statute of limitations in effect at the time of the alleged offense." *Id.* at 6a. Collins was found guilty of the rape charge and sentenced to "a dishonorable discharge, confinement for 198 months, forfeiture of all pay and allowances, and [a] reduction" in grade. *Id.* at 3a.

Collins appealed to the AFCCA on various grounds. While the appeal was pending, the CAAF decided *United States* v. *Mangahas*, 77 M.J. 220 (2018), which involved a 2015 prosecution for a rape committed in 1997. *Id.* at 221. Without holding argument on the issue, the CAAF overruled its prior decisions in *Willenbring* and *Stebbins*, *supra*, "to the extent that they hold that rape was punishable by death" and therefore not subject to a limitations period under the UCMJ. *Mangahas*, 77 M.J. at 222. The CAAF took the view that *Coker* was controlling in the military context, *id.* at 223; stated that "where the death penalty could *never* be imposed for the offense charged, the offense is *not* punishable by death for purposes of" Article 43(a), *id.* at 224-225; and thus concluded that the UCMJ's default five-year statute of limitations applied to the 1997 rape at issue in that case, see *id.* at 225.

The AFCCA applied *Mangahas* to Collins's case and reversed his conviction. App., *infra*, 2a-18a. The court reasoned that, under *Mangahas*, the 2000 rape for which Collins was convicted was subject to a five-year limitations period, which expired before the Air Force

charged him in 2016. *Id.* at 6a-9a. The court added that the limitations period had also expired before Congress expressly provided in 2006 that rape can be prosecuted without a limitations period, and that the 2006 NDAA accordingly could not render the prosecution timely. *Id.* at 16a-18a; see *Stogner* v. *California*, 539 U.S. 607, 616-617 (2003) (holding that the Ex Post Facto Clause barred the extension of an expired limitations period). Although Collins had not raised a limitations objection at trial, the AFCCA concluded he was entitled to relief under the plain-error doctrine. App., *infra*, 9a-14a. The court did not address any of Collins's other challenges to his conviction. See *id.* at 3a.

4. The Air Force JAG certified the limitations issue to the CAAF for appellate review. See App., *infra*, 1a. In its briefing, the Air Force expressly stated that "[t]o preserve the possibility of further appellate litigation, the United States does not concede that *Mangahas* was correctly decided." Gov't C.A. Reply Br. 15 n.6.

While the appeal in Collins's case was pending at the CAAF, the CAAF decided *United States* v. *Briggs*, 78 M.J. 289 (2019), petition for cert. pending, No. 19-108 (filed July 22, 2019), in which the CAAF reiterated its holding in *Mangahas* and concluded that the 2006 NDAA provision stating expressly that rape may be prosecuted without a limitations period does not apply to rapes committed before enactment of the statute, *id.* at 292-295. The CAAF then summarily affirmed the AFCCA's decision in Collins's case. App., *infra*, 1a.

C. *United States* v. *Daniels*

1. In July 1998, respondent Daniels was stationed at Minot AFB in North Dakota. He met TS, a civilian, at the gym, and they exchanged phone numbers. R. 840-843. Late in the evening of July 14, 1998, Daniels called

TS at her home, where she lived with her two-year-old son. R. 843-844. Daniels asked if he could come over to TS's home, and TS reluctantly agreed. *Ibid.* After the two talked for some time, Daniels repeatedly asked to stay the night. R. 847. TS told him that he could not, because her son slept in her bed and she had nowhere else for Daniels to sleep. *Ibid.* Daniels, however, "wouldn't take 'no' as an answer," and TS eventually "got tired of fighting the issue." R. 847-848. The two then went to TS's bed, where her son was sleeping. R. 849. Daniels kept "trying to touch" TS, and she "kept pushing him off." R. 850. Eventually, Daniels "pushed [TS's] shorts aside" and "entered [her] with his penis" without consent. R. 852. Daniels left the next morning and called TS later in the day as if "nothing happened." R. 854.

TS told a friend about the rape, who reported it to the local police. R. 854-855. The Air Force also opened an investigation. App., *infra*, 25a. TS ultimately "declined to participate in the investigation," *ibid.*, in part because the police told her the crime "would be very hard to prove," R. 855. TS subsequently "ran away" from Minot because she "wanted this to go away." R. 856.

2. Seventeen years later, in 2015, a police detective in Fairfax County, Virginia, contacted TS about Daniels. App., *infra*, 24a-25a. The detective was investigating Daniels for stalking a woman with whom he had previously had a romantic relationship. *Id.* at 24a. In the course of that investigation, the detective discovered classified information at Daniels's home, which led the detective to contact Air Force investigators. *Id.* at 25a. Air Force investigators told the detective that Daniels had been investigated for raping TS in 1998. *Ibid.*

When the detective contacted TS, she "agreed to go forward with the * * * rape allegation." App., *infra*, 24a. Daniels was then charged with rape, in violation of 10 U.S.C. 920(a) (1994), and other violations of military law, App., *infra*, 21a-26a. He was convicted by a court-martial in 2017 and sentenced to "a dismissal, confinement for three years, and a reprimand." *Id.* at 22a. The convening authority approved the sentence with the period of confinement reduced to two years and 252 days. *Ibid.*

Daniels appealed to the AFCCA. App., *infra*, 22-23a. As in Collins's case, the AFCCA reversed the conviction in light of the CAAF's recently issued decision in *Mangahas*, which abrogated prior decisions under which military rapes could be prosecuted at any time. See 77 M.J. at 222-225. The AFCCA stated that the Air Force's 2017 prosecution of Daniels for a 1998 rape was barred by the five-year statute of limitations in 10 U.S.C. 843(b) (1994), as interpreted by the CAAF in *Mangahas* and *Collins*. App., *infra*, 26a-28a. The AFCCA set aside an additional conviction and remanded for resentencing. *Id.* at 40a-41a.

3. The Air Force JAG certified to the CAAF the AFCCA's holding that Daniels's rape charge was barred by the statute of limitations. App., *infra*, 19a. While maintaining that *Mangahas* and the CAAF's subsequent decision in *Briggs* were "incorrectly decided," the government acknowledged that the AFCCA's decision reversing Daniels's rape conviction should be summarily affirmed if the CAAF were not willing to reconsider those recent precedents. Gov't Mot. for Summ. Disposition 1-2. The CAAF summarily affirmed the AFCCA's decision. App., *infra*, 19a-20a.

REASONS FOR GRANTING THE PETITION

This petition for a writ of certiorari presents the same question of exceptional importance to military justice as the government's recent petition in *United States* v. *Briggs*, No. 19-108 (filed July 22, 2019). For reasons explained below, the Court should grant this petition and the petition in *Briggs*, and then consolidate the cases for briefing, argument, and decision.

1. In *Briggs*, the Air Force brought a 2014 prosecution for a 2005 rape. *United States* v. *Briggs*, 78 M.J. 289, 290 (C.A.A.F. 2019). Relying on its recent decision in *United States* v. *Mangahas*, 77 M.J. 220 (2018), which overruled longstanding precedent that had allowed for the prosecution of rape offenses at any time, the CAAF concluded that the Air Force's prosecution of Briggs was barred by the statute of limitations in force at the time of his 2005 offense, which (as relevant here) provided a five-year limitations period for all offenses except those "punishable by death," 10 U.S.C. 843(a) (2000). In the CAAF's revised view, rape was not "punishable by death" for purposes of that statute, *ibid.*, because this Court had held in *Coker* v. *Georgia*, 433 U.S. 584 (1977), that the Eighth Amendment prohibits imposition of the death penalty on a civilian defendant convicted of raping an adult woman, see *Briggs*, 78 M.J. at 292; accord *Mangahas*, 77 M.J. at 222-225. The CAAF in *Briggs* further concluded that Congress's 2006 amendment to the UCMJ, which expressly provided that rape could be punished without a time limitation, see 10 U.S.C. 843(a) (2012 & Supp. V 2017), could not be applied to pre-2006 rapes, because doing so would constitute an impermissible retroactive application of the law. 78 M.J. at 292-295.

As the government explained in its petition for a writ of certiorari in *Briggs*, both of the CAAF's conclusions in that case are incorrect. See Pet. at 11-22, *Briggs*, *supra* (No. 19-108) (*Briggs* Pet.). First, rape was "punishable by death" for purposes of the statute of limitations in force from 1986 to 2006, 10 U.S.C. 843(a) (2000), because the UCMJ at that time provided that rape could be "punished by death," 10 U.S.C. 920(a) (2000), and that legislative determination controls the statute-of-limitations question. See *Briggs* Pet. 12-16. Moreover, even if "punishable by death" in the statute of limitations meant *constitutionally* "punishable by death," 10 U.S.C. 843(a) (2000), Congress has authority to determine that capital punishment should be available for military rape, because crimes in the military context are not subject to the same constitutional constraints as punishments for assertedly analogous crimes in the civilian context, see *Briggs* Pet. 16-20.

Second, the Air Force's prosecution of Briggs for a 2005 rape was permissible under Congress's 2006 amendment to the statute of limitations, which provided that "rape * * * may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2012 & Supp. V 2017). Because the 2006 amendment codified the CAAF's then-longstanding interpretation that rape could be prosecuted without a time limitation, see *United States* v. *Stebbins*, 61 M.J. 366, 369 (2005); *Willenbring* v. *Neurauter*, 48 M.J. 152, 178 (1998), Briggs had fair notice in 2005 that he could be prosecuted for rape without a time limitation, and the presumption against retroactivity does not render it inapplicable. See *Briggs* Pet. 20-22. Nor does application of the 2006 amendment to a 2005 rape create an Ex Post Facto Clause difficulty, because that Clause does not bar a

legislature from extending an *unexpired* limitations period (*i.e.*, the default five-year limitations period that would otherwise apply). *Ibid.*; see *Stogner* v. *California*, 539 U.S. 607, 616-617 (2003).

2. The first of the government's arguments in *Briggs* applies with full force here. The rapes committed by respondent Collins in 2000 and respondent Daniels in 1998 were "punishable by death" and therefore not subject to a time limitation under the statute of limitations then in effect. 10 U.S.C. 843(a) (1994). That is true both because (1) the term "punishable by death" refers only to the *statutorily* authorized punishment, which for rape in 1998 and 2000 was death, see 10 U.S.C. 920(a) (1994), and (2) even if "punishable by death" meant *constitutionally* punishable by death," *ibid.*, rape was constitutionally punishable by death in the military at the time of respondents' offenses in 1998 and 2000, see *Briggs* Pet. 11-20.

The government's second argument in *Briggs*—that, even if the CAAF were correct that the pre-2006 limitations period was only five years, a 2014 prosecution for a 2005 rape was permissible under Congress's 2006 amendment of the statute of limitations—would not in itself be dispositive of respondents' cases here. Unlike in *Briggs*, respondents' 1998 and 2000 rapes occurred more than five years before the 2006 amendment, so a five-year limitations period would have expired prior to its enactment. As a result, a decision in *Briggs* premised solely on the second argument would implicate a further issue of whether applying the 2006 amendment to respondents' cases should be viewed as an attempt to extend an already-expired limitations period, which this Court has held to be barred by the Ex Post Facto Clause. See *Stogner*, 539 U.S. at 616-617.

3. This Court should grant both the petition in *Briggs* and this petition. If the Court were to resolve *Briggs* based on the government's first argument—that rape was "punishable by death" for purposes of the statute of limitations in force between 1986 and 2006—the prosecutions of respondents here would be permissible on the same grounds. But if the Court were to resolve *Briggs* based on the government's second argument (regarding the effect of the 2006 amendment on a prosecution for a 2005 rape), further questions would remain about the validity of the prosecutions of respondents Collins and Daniels. Granting both petitions (rather than holding this petition for a decision in *Briggs*) therefore ensures that the Court will be able to efficiently resolve all the issues presented by these cases.

As discussed in the government's petition in *Briggs*, the question presented warrants this Court's review. See *Briggs* Pet. 22-26. Although the CAAF interpretation at issue involves only military rapes committed between 1986 and 2006, the military continues to receive reports of such rapes, and Congress would not have wanted the perpetrators to escape justice. As explained above, rape is not only devastating to military discipline and effectiveness, but is also difficult to uncover and often reported only years after the fact. See pp. 4-5, *supra*. These cases illustrate that dynamic. Respondent Collins violently raped a junior Air Force service member who was a student in his course, but she did not name her assailant for many years, in part out of fear that he would retaliate. See p. 7, *supra*. Respondent Daniels raped a victim living in a military community who declined to pursue the case because she feared that she would not be believed. See p. 11, *supra*. The military continues to investigate reports of similar crimes.

See *Briggs* Pet. 23. Even if the number of cases affected by the CAAF's decisions is not especially high, they are exceptionally important to the victims, the military, and Congress.

Reviewing the CAAF decisions underlying this petition in conjunction with *Briggs* would allow the Court to consider the full range of cases—both those in which the rape occurred more than five years before 2006 and those in which it did not—that are affected by the CAAF's errors. At a minimum, however, the Court should hold this petition pending its resolution of the petition in *Briggs* and then dispose of this petition as appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted, along with the petition for a writ of certiorari in *United States* v. *Briggs*, No. 19-108 (filed July 22, 2019), and consolidated for briefing and argument. In the alternative, this petition should be held pending the Court's resolution of the petition in *Briggs* and then disposed of as appropriate.

Respectfully submitted.

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AUGUST 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
DAILY JOURNAL
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* * * * *

Appeals—Summary Disposition

No. 19-0052/AF. U.S. v. Richard D. Collins. CCA 39296. On consideration of the three issues certified by the Judge Advocate General of the Air Force, 78 M.J. 190 (C.A.A.F. 2018), the briefs of the parties, and Appellee's motion to summarily affirm filed on February 26, 2019, and in light *United States v. Briggs*, ___ M.J. ___ (C.A.A.F. Feb. 22, 2019), it is ordered that the three certified issues are answered in the negative, and the decision of the United States Air Force Court of Criminal Appeals is therefore affirmed. Appellee's motion is denied as moot.

* * * * *

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39296

UNITED STATES, APPELLEE

v.

RICHARD D. COLLINS
MASTER SERGEANT (E-7), U.S. AIR FORCE,
APPELLANT

Appeal from the United States Air Force Trial Judiciary

Decided: 23 July 2018[1]

PUBLISHED OPINION OF THE COURT

Military Judge: TIFFANY M. WAGNER.

Before: JOHNSON, MINK, and DENNIS, *Appellate Military Judges*.

Senior Judge JOHNSON delivered the opinion of the court, in which Judge MINK and Judge DENNIS joined.

JOHNSON, Senior Judge:

Appellant was found guilty, contrary to his pleas, of one specification of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.

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[1] We heard oral argument in this case on 28 June 2018.

A general court-martial composed of officer and enlisted members sentenced Appellant to a dishonorable discharge, confinement for 198 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant raises seven issues on appeal: (1) whether the statute of limitations had run on the alleged offense of rape; (2) whether the evidence is factually insufficient to support the conviction; (3) whether Appellant was denied effective assistance of counsel guaranteed by the Sixth Amendment[2] where his trial defense counsel failed to present evidence of an alternative suspect; (4) whether Appellant was subjected to unreasonable search and seizure in violation of the Fourth Amendment;[3] (5) whether Appellant was denied his Sixth Amendment right to confrontation where the military judge permitted a prosecution witness to testify by remote means; (6) whether Appellant's Fifth Amendment[4] due process rights were violated by the loss of exculpatory evidence in the 15 years between the alleged offense and the court-martial; and (7) whether the convening authority committed unlawful command influence.[5] Because, as to the first issue, our superior court's holding in *United States v. Mangahas*, 77 M.J. 220, 225 (C.A.A.F. 2018), compels us to set aside the findings and sentence and to dismiss the charge and specification, we do not address the remaining issues.

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[2] U.S. CONST. amend. VI.

[3] U.S. CONST. amend. IV.

[4] U.S. CONST. amend. V.

[5] Appellant personally asserts issues (6) and (7) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

I. BACKGROUND

In August 2000, HA was a young Airman attending her initial training as a radiology technician at Sheppard Air Force Base (AFB), Texas. Appellant was one of her course instructors. At trial, HA testified that on Friday, 25 August 2000, she encountered Appellant when she was eating dinner alone at a club on base. Appellant appeared to be intoxicated. After Appellant declined HA's suggestion that he take a taxi or shuttle home, HA drove Appellant to his on-base residence. HA helped Appellant out of the vehicle and to his front door due to his apparently impaired condition. However, once inside the door, Appellant suddenly pushed HA against the wall and then threw her onto the floor. HA initially resisted until Appellant struck her in the face. Appellant then raped HA.

On the morning of Monday, 28 August 2000, HA arrived for class with a black eye and scratches on her face and knuckles. HA reluctantly admitted to a female instructor that she had been raped. As a result, HA was transported to a hospital where she underwent a sexual assault forensic exam (SAFE), and the Air Force Office of Special Investigations (AFOSI) and civilian police initiated investigations.

Initially, HA told AFOSI she was assaulted by an unknown male who digitally penetrated her in an off-base store parking lot the preceding weekend. When security camera video from the store HA identified failed to corroborate HA's statements, AFOSI agents confronted her. HA admitted her account of the assault was not true. She told the agents she made it up because she did not want to identify the attacker, but she had been pressured at the hospital to say what had

happened. HA admitted she knew who the assailant was, but she said she did not want to "ruin a family." She denied that it had been one of her course instructors. Because HA refused to identify the perpetrator, AFOSI and the civilian police eventually dropped their investigations. Civilian authorities destroyed the SAFE kit in 2002.

HA separated from the military in 2003 and then later returned to active duty in 2007. In April 2011, HA made a restricted sexual assault report to an Air Force mental health provider, stating that she had previously been physically and sexually assaulted by an instructor but "did not want to be involved." The provider referred HA to a Sexual Assault Response Coordinator, to whom HA also made a restricted report that she had been sexually assaulted by an active duty Air Force member at Sheppard AFB, but she did not identify the assailant. These restricted reports were not referred to law enforcement or investigated. HA separated from the Air Force again in 2011.

In March 2014, HA made an unrestricted report to the Chief of Military Justice at Sheppard AFB, this time identifying Appellant as having raped her at Sheppard AFB in 2000. This report led AFOSI to reinitiate the investigation. A single charge and specification of rape were preferred against Appellant and received by the summary court-martial convening authority on 17 March 2016. On 6 September 2016, the charge and specification were referred for trial by a general court-martial. Appellant's court-martial took place at Hurlburt Field, Florida, on 17 November 2016, and at Eglin AFB, Florida, on 21-26 February 2017. At trial, Appellant pleaded not guilty and the Defense vigorously contested the

charge and specification. However, the Defense did not object or move to dismiss the charge and specification on the grounds that they were barred by the statute of limitations in effect at the time of the alleged offense.

II. DISCUSSION

A. Law

The applicable statute of limitations is a question of law that we review de novo. *Mangahas*, 77 M.J. at 222 (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)). "An accused is subject to the statute of limitations in force at the time of the offense." *Id.* (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)). However, "failure to make the timely assertion of a right" constitutes forfeiture, whereas the "intentional relinquishment or abandonment of a known right" constitutes waiver. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). Where an appellant forfeits a right by failing to make a timely assertion at trial, appellate courts will review the forfeited issue for plain error. *Id.* (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). In a plain error analysis the appellant "has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). Waiver, by contrast, "leaves no error to correct on appeal." *Ahern*, 76 M.J. at 197 (citing *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)).

Article 43, UCMJ, 10 U.S.C. § 843, provides the statute of limitations for offenses under the Code. The version of Article 43 in effect in August 2000 stated, *inter*

alia, "A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. § 843(a) (2000). Otherwise, the general rule was that "a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges" by a summary court-martial convening authority. 10 U.S.C. § 843(b)(1) (2000).

In *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the United States Supreme Court held that the Eighth Amendment[6] forbids imposing the death penalty for the crime of rape of an adult woman. *Coker* is binding precedent for Air Force courts-martial. *United States v. McReynolds*, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (per curiam); *see Mangahas*, 77 M.J. at 223; *see also United States v. Hickson*, 22 M.J. 146, 154 n.10 (C.M.A. 1986) (stating that in light of *Coker*, the death penalty for rape may not be constitutionally inflicted in absence of aggravating circumstances). However, in August 2000, the Manual for Courts-Martial continued to provide that death was an authorized punishment for the crime of rape under Article 120, UCMJ. *Manual for Court-Martial, United States* (2000 ed.), pt. IV, ¶ 45.e.(1).

In *Willenbring v. Neurauter*, 48 M.J. 152, 180 (C.A.A.F. 1998), the United States Court of Appeals for the Armed Forces (CAAF) unanimously held that, *Coker* notwithstanding, as a matter of statutory interpretation "rape is an 'offense punishable by death' for purposes of exempting it from the 5-year statute of limitations of Article 43(b)(1)." *See also United States v. Stebbins*,

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[6] U.S. CONST. amend. VIII.

61 M.J. 366, 369 (C.A.A.F. 2005) (quoting *Willenbring*, 48 M.J. at 178) ("[T]he question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue.")

In 2006, Congress amended Article 43, UCMJ, to provide that "[a] person charged with . . . rape or rape of a child . . . may be tried or punished at any time without limitation." 10 U.S.C. § 843(a) (2006).[7]

However, the CAAF's recent decision in *Mangahas* explicitly overruled its holding in *Willenbring* that under the pre-2006 version of Article 43, UCMJ, the offense of rape was exempt from the general five-year statute of limitations. 77 M.J. at 223-25. Finding that *Willenbring* was "badly-reasoned" and risked "'undermining public confidence in the law,'" the CAAF unanimously held "where the death penalty could *never* be imposed for the offense charged, the offense is *not* punishable by death for purposes of Article 43, UCMJ." *Id.* at 224-25 (quoting *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015)). Therefore, because the alleged rape of an adult woman in *Mangahas* occurred in 1997, 18 years before the charge and specification were received by the summary court-martial convening authority, the CAAF dismissed the charge and specification. *Id.* at 225.

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[7] In 2013, Congress again amended Article 43, UCMJ, to additionally exclude the offenses of sexual assault and sexual assault of a child from the five-year statute of limitations. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1703, 127 Stat. 672, 958 (2013) (codified as 10 U.S.C. § 843(a)).

Rule for Courts-Martial (R.C.M.) 907 provides that the running of the statute of limitations under Article 43, UCMJ, is waivable grounds for a motion to dismiss a charge and specification without trial. R.C.M. 907(b)(2)(B) further provides "that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right." "'[W]henever it appears that the statute of limitations has run against an offense,' that fact will be brought to the attention of the accused by the court." *United States v. Salter*, 20 M.J. 116, 117 (C.M.A. 1985) (quoting *United States v. Rodgers*, 24 C.M.R. 36, 38 (C.M.A. 1957)).

"[O]n direct review, we apply the clear law at the time of appeal, not the time of trial." *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) (citing *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008)).

B. Analysis

Appellant contends that in light of *Mangahas*, the military judge committed plain error which requires this court to set aside the findings and sentence and to dismiss the charge and specification. We agree.

Under *Mullins* and *Harcrow*, we must apply the clear law at the time of appeal to cases that, like Appellant's, are pending direct review. *Mullins*, 69 M.J. at 116. In light of *Mangahas*, the statute of limitations applicable to the charged offense of rape in violation of Article 120, UCMJ, committed on or about 25 August 2000 was five years. *See Mangahas*, 77 M.J. at 225. Therefore, the statute of limitations in Appellant's case expired in August 2005, more than ten years before the charge and specification were preferred and delivered

to the summary court-martial convening authority in March 2016. Accordingly, we must evaluate the events at trial in this light.

R.C.M. 907(b)(2)(B) required the military judge to inform Appellant at trial of Appellant's apparent right to assert the statute of limitations defense to bar the only charge and specification against him. *See Salter*, 20 M.J. at 117. The military judge's failure to do so, like trial defense counsel's failure to assert the defense, was understandable in light of the CAAF's holding in *Willenbring*. Nevertheless, applying the CAAF's clear holding in *Mangahas* that the five-year statute of limitations had long since run, the military judge's failure to comply with R.C.M. 907(b)(2)(B) was an error that was plain and obvious.[8] *See Girouard*, 70 M.J. at 11. Moreover, the error was plainly materially prejudicial to Appellant's substantial rights because the statute of limitations was a complete defense to the only charge and specification in the case. *Id.* Although the statute of

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[8] Appellant contends the applicable standard of review is plain error. This is the standard the CAAF applied in both *Mullins*, 69 M.J. at 116, and *Harcrow*, 66 M.J. at 159. Each of those cases dealt with changes to applicable precedent arising after trial but during the course of direct appellate review, where the appellants had failed to make evidentiary objections at trial. *Mullins*, 69 M.J. at 116-17 (applying *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007)); *Harcrow*, 66 M.J. at 159 (applying *Crawford v. Washington*, 541 U.S. 36 (2004)). Appellant's case, in contrast, involves the military judge's failure to perform an affirmative duty imposed by R.C.M. 907(b)(2)(B), regardless of Appellant's failure to raise the issue. It might be argued that the plain error standard applicable to forfeited issues is inapposite, and that de novo is the appropriate standard of review. However, we need not resolve this question because we agree with Appellant that the military judge committed plain error in light of *Mangahas*.

limitations is waivable, at oral argument the Government conceded it could articulate no plausible reason why Appellant would have knowingly waived the defense had he understood it was available in this contested trial. Nor can we discern any such reason.

The Government attempts to distinguish *Mangahas* on the basis that, in that case, the accused moved to dismiss the charge and specification of rape based on the statute of limitations in spite of *Willenbring*, whereas in the instant case Appellant did not. The Government relies heavily on the United States Supreme Court's decision in *Musacchio v. United States*, 136 S. Ct. 709 (2016). In *Musacchio*, the petitioner failed to invoke the statute of limitations bar in 18 U.S.C. § 3282(a)[9] at trial but attempted to do so on appeal. *Id.* at 713. The Court first found the statute "provides a nonjurisdictional defense, not a jurisdictional limit" on prosecution. *Id.* at 718. The Court then held:

> Because § 3282(a) does not impose a jurisdictional limit, the failure to raise it at or before trial means that it is reviewable on appeal—if at all—only for plain error. . . . We conclude, however, that a district court's failure to enforce an unraised limitations defense under § 3282(a) cannot be a plain error.
>
> . . .
>
> When a defendant fails to press a limitations defense, the defense does not become part of the case and the

[9] 18 U.S.C. § 3282(a) provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

> Government does not otherwise have the burden of proving that it filed a timely indictment. When a defendant does not press the defense, then, there is no error for an appellate court to correct—and certainly no plain error.
>
> A defendant thus cannot successfully raise the statute-of-limitations defense in § 3282(a) for the first time on appeal.

Id. The Government contends the statute of limitations in Article 43, UCMJ, like that in 18 U.S.C. § 3282, is a nonjurisdictional, available defense that an accused must assert in order to make it part of the case. The Government argues that, where an accused fails to assert the defense for any reason—including, as in Appellant's case, the apparent unavailability of the defense in light of clear existing precedent—under *Musacchio* a plain error analysis is unnecessary because the defense is simply not "part of the case."

The Government appears to essentially argue that *Musacchio* created a new standard of review, or rather a standard of non-review, apparently unique to statute of limitations jurisprudence. The Government does not argue Appellant waived the statute of limitation bar, which involves the "intentional relinquishment or abandonment of a known right." *Ahern*, 76 M.J. at 197. Indeed, it is apparent that Appellant, like the military judge and other trial participants, was understandably unaware such a defense was available. *See United States v. Hoffmann*, ___ M.J. ___, No. 18-0002/AR, 2018 CAAF LEXIS 226 (C.A.A.F. 7 May 2018) (mem.) ("[W]e do not construe the failure to object to what was the settled law at the time as an intentional relinquishment of a known right. . . . ") Similarly, the Government cannot

prevail under the plain error standard of review applicable to forfeited issues because the combination of *Mangahas*, *Mullins/Harcrow*, R.C.M. 907(b)(2)(B), and *Salter* make it apparent the military judge plainly erred by failing to inform Appellant at trial that the statute had run on the charge of rape. However, the Government seizes on the strong language in *Musacchio* that an unraised statute of limitations defense does not become part of the case and cannot be successfully raised on appeal to mean some principle other than waiver or forfeiture is at work. We are not persuaded.

To begin with, *Musacchio* may be distinguished from the instant case on multiple grounds. *Musacchio* did not interpret Article 43, UCMJ, which governs trials by courts-martial; rather, it addressed the operation of 18 U.S.C. § 3282, applicable to civilian prosecutions. By design, the civilian and military justice systems employ different rules of procedure. In particular, our superior court has recognized "that Congress, in drafting Article 43, did not intend to create, in sections (b) and (c), a mirror image of the rule then and now extant in federal [civilian] law." *United States v. Tunnell*, 23 M.J. 110, 113 (C.M.A. 1986). In addition, *Musacchio* did not address a situation where the statute of limitations defense was apparently unavailable at the time of trial based on clear existing precedent that was subsequently overruled during the pendency of the appeal. It is not clear to us that the Court's analysis would be the same in such a situation. Furthermore, *Musacchio* did not address the affirmative duty to bring the statutory bar to the attention of the accused imposed on the trial judge by R.C.M. 907(b)(2)(B), which has no civilian equivalent.

Even setting these distinctions aside, the Government misconstrues the Court's approach to the applicable standard of review in *Musacchio*. It is true that, as the Government states, the Court expressly did not decide whether Musacchio's failure to raise the statute of limitations constituted waiver or forfeiture. *Musacchio*, 136 S. Ct. at 718 n.3. However, this was not because it found neither applied; it was because, even assuming a plain error standard of review, the trial judge's failure to raise 18 U.S.C. § 3282 *sua sponte* in a civilian trial would never meet the criteria for relief under the plain error standard of review. The Court found a defendant "cannot successfully raise the statute-of-limitations defense in § 3282(a) for the first time on appeal" not because plain error was not the applicable standard of review, but by evaluating the alleged error in light of the plain error standard and finding it could never be met. *Id*. at 718.

In light of the military judge's affirmative obligation under R.C.M. 907(b)(2)(B) to raise the statute of limitations issue, Appellant's situation is clearly different. Again, there is no indication Appellant "intentionally relinquished" an available statute of limitations defense, and therefore waiver is inapplicable. *Ahern*, 76 M.J. at 197. Under *Mangahas*, *Mullins*, R.C.M. 907(b)(2)(B), and *Salter*, the military judge was required to inform Appellant the statutory bar was available, and she plainly erred to the material prejudice of Appellant's substantial rights by failing to do so. *See Girouard*, 70 M.J. at 11. Therefore, we cannot affirm the conviction.

The Government advances a second argument, inspired by the CAAF's recent decision in *United States v. Williams*, ___ M.J. ___, No. 17-0285, 2018 CAAF

LEXIS 365 (C.A.A.F. 27 Jun. 2018), to the effect that the 2006 amendment to Article 43, UCMJ, retroactively applied to the August 2000 rape charge, and therefore the statute of limitations never actually expired, *Mangahas* notwithstanding. In *Williams*, the CAAF set aside findings of guilty with respect to four specifications of sexual offenses based upon an erroneous propensity instruction that was not harmless beyond a reasonable doubt. *Williams*, 2018 CAAF LEXIS 365, at *7-14; *see United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016). Apparently, one set-aside specification alleged rape on divers occasions between late 2000 and early 2003. *Williams*, 2018 CAAF LEXIS 365, at *3-4. In its decretal paragraph, the CAAF stated, *inter alia*:

> The record is returned to the Judge Advocate General of the Army with a rehearing as to the Specification of Charge I authorized to the extent that the charge and specification are not barred by the statute of limitations. *See United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018); *United States v. Grimes*, 142 F.3d 1342, 1351 (11th Cir. 1998) (recognizing that the federal circuits are in agreement "that extending a limitations period before the prosecution is barred does not violate the Ex Post Facto Clause"). *But see United States v. Lopez de Victoria*, 66 M.J. 67, 73-74 (C.A.A.F. 2008) (holding that the 2003 amendment to Article 43, UCMJ, 10 U.S.C. § 843,[10] did not retroactively extend the statute of limitations due to statutory construction).

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[10] This change to Article 43, UCMJ, modified the statute of limitations with respect to certain offenses against children and did not

Williams, 2018 CAAF LEXIS 365, at *15 (footnote inserted). In a footnote, the CAAF commented "[t]he parties may address any potential retroactivity issues concerning the statute of limitations on remand or at the rehearing." *Id.* at *15 n.5.

Taking its cue from *Williams*, the Government cites *Grimes* and a series of other federal circuit decisions for the principle that extending the applicable statute of limitations before the existing statute of limitations has expired on a particular offense does not violate the Ex Post Facto Clause.[11] *Grimes*, 142 F.3d at 1351; *see United States v. Taliaferro*, 979 F.2d 1399, 1402 (10th Cir. 1992); *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992); *United States v. Madia*, 955 F.2d 538, 540 (8th Cir. 1992); *United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975); *Clements v. United States*, 266 F.2d 397, 398-99 (9th Cir. 1959). The Government goes on to distinguish the 2003 amendment to Article 43 addressed in *Lopez de Victoria* from the 2006 amendment as a matter of statutory construction, and concludes the latter unlike the former was intended to apply to earlier offenses for which the statutory period had not yet run.

We acknowledge there is an unresolved question of whether and to what extent the 2006 amendment to Article 43 extended the statute of limitations period for rapes occurring within the five years preceding the amendment's effective date. One day this court may be called upon to address that question. But today is not

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affect the statute of limitations applicable to Appellant's case. *See Lopez de Victoria*, 66 M.J. at 71.

[11] U.S. CONST. art. I, § 9, cl. 3.

that day. It is unnecessary for us to reach those aspects of the Government's argument because the five-year statute of limitations on the August 2000 rape charged in Appellant's case *did run* before the 2006 amendment.

The Government attempts to address this manifest flaw in its position by arguing that at the time of both the alleged offense in August 2000 and the 2006 amendment to Article 43, there was no statute of limitations for rape under the existing precedent of *Willenbring*. The Government argues *Mangahas* did "not reach the question of retroactivity," and that "[e]ven if *Mangahas* means that *Willenbring* is no longer good law in 2018, *Willenbring was* good law at the time of the 2006 amendment." However, the Government fundamentally misconceives the import of the CAAF's decision in *Mangahas*. The meaning of *Mangahas* is that under Article 43, UCMJ, the statute of limitations for rape in 1997, as well as in August 2000, was and always has been five years. Any pronouncements to the contrary in *Willenbring* or elsewhere were simply wrong. *See Mangahas*, 77 M.J. at 223-25. As discussed above, there remains an open question as to whether rapes committed prior to but within five years of the 2006 amendment were taken out of the statute of limitations. However, the offense Appellant was charged with, unlike the specification at issue in *Williams*, is entirely outside that window. *See Williams*, 2018 CAAF LEXIS 365, at *3-4.

If we were to accept the Government's argument, the outcome of *Mangahas* would appear nonsensical. There, the CAAF interpreted identical language in Article 43, UCMJ, as applied in Appellant's case. Finding *Willenbring* was "badly-reasoned" and explicitly overruling its

interpretation of Article 43, the CAAF held the applicable statute of limitations for an alleged rape in 1997 was five years, and dismissed the charge and specification. *Mangahas*, 77 M.J. at 223-25. The same reasoning applies to an alleged rape that occurred in August 2000. We are compelled to follow our superior court's precedent and take similar action.

III. CONCLUSION

The findings of guilt and the sentence are **SET ASIDE**. The Charge and its Specification are **DISMISSED**. Article 66(c), (d), UCMJ, 10 U.S.C. § 866(c), (d).

FOR THE COURT

/s/ CAROL K. JOYCE
CAROL K. JOYCE
Clerk of the Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

USCA Dkt. No. 19-0345/AF
Crim. App. No. 39407

UNITED STATES, APPELLANT

v.

HUMPHREY DANIELS III, APPELLEE

ORDER

On consideration of the issue certified by the Judge Advocate General of the Air Force, ___ M.J. ___ (C.A.A.F. Jun. 19, 2019), Appellant's brief, and Appellant's motion for a summary disposition, motion to suspend this Court's rules, and motion to dispense with the requirement to file a joint appendix all filed June 19, 2019, and in light of *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), it is, this 22nd day of July, 2019,

ORDERED:

That the motions are hereby granted; and

That the certified issue is answered in the affirmative, and the decision of the United States Air Force Court of Criminal Appeals is therefore affirmed.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Schwartz)
Appellate Government Counsel (Payne)

APPENDIX D

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39407

UNITED STATES, APPELLEE

v.

HUMPHREY DANIELS, III
LIEUTENANT COLONEL (O-5), U.S. AIR FORCE,
APPELLANT

Appeal from the United States Air Force Trial Judiciary

Decided: 18 June 2019

THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4

Before: HUYGEN, MINK, and LEWIS, *Appellate Military Judges*.

Senior Judge HUYGEN delivered the opinion of the court, in which Judge MINK and Judge LEWIS joined.

HUYGEN, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of negligent dereliction of duty, one specifica-

tion of rape, and four specifications of conduct unbecoming an officer and gentleman in violation of Articles 92, 120, and 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 920, 933[1, 2] The members adjudged a sentence of a dismissal, confinement for three years, and a reprimand. The convening authority approved 2 years and 252 days of confinement but otherwise approved the sentence as adjudged. The convening authority also deferred the mandatory forfeiture of pay and allowances from the effective date of the forfeiture until the date of action.

Appellant raises through counsel seven assignments of error (AOE): (1) Appellant's conviction for rape (Charge II) must be set aside under *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018); (2) his convictions for negligent dereliction of duty (Charge I) and conduct unbecoming an officer and gentleman (Charge III) are factually and legally insufficient; (3) Charge III and its specifications fail to state an offense; (4) the military judge erred in admitting a transcript of Appellant's testimony from his criminal trial in civilian court; (5) the trial counsel engaged in prosecutorial misconduct during closing and rebuttal argument; (6) the court-martial panel members failed to comply with the military judge's instructions; and (7) Appellant is entitled to relief under *United States v. Moreno*, 63 M.J. 129

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[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), unless indicated otherwise. The version of Article 120, UCMJ, at issue in Appellant's case is found in the 1998 *MCM*.

[2] The members found Appellant not guilty of one specification of conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ (Specification 4 of Charge III).

(C.A.A.F. 2006), for the delay from the date his trial concluded until the date the convening authority took action. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant raises an additional seven AOE: (8) his conviction for rape is factually and legally insufficient; (9) his trial defense counsel were ineffective for failing to move to dismiss Charge III and its specifications for failure to state an offense; (10) the Government failed to disclose evidence as required under *Brady v. Maryland*, 373 U.S. 83 (1963); (11) the military judge erred in admitting a "911 phone call" into evidence; (12) the cumulative effect of errors substantially impaired the fairness of Appellant's trial; (13) the reference in the court-martial transcript to Appellant being arraigned by a special court-martial means that the general court-martial that tried him lacked jurisdiction or his sentence to confinement and a dismissal is unlawful; and (14) the staff judge advocate (SJA) misadvised the convening authority that the maximum punishment in Appellant's case was death.

We address below AOE (1), (2), (3), and (7). AOE (8) is rendered moot by our resolution of AOE (1). We have considered AOE (4)-(6) and (9)-(14); they warrant no further discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We find prejudicial error with regard to AOE (1) and set aside Appellant's conviction for rape and the sentence. We also set aside the finding of guilty for Specification 2 of Charge III (conduct unbecoming an officer and gentleman).

I. BACKGROUND

In November 2014, Appellant and Major (Maj) DU ended their romantic relationship. On or about 5 December 2014, Maj DU contacted the Fairfax County (Virginia) Police Department (FCPD) and reported that Appellant was "stalking" her.[3] FCPD Detective EM, the lead investigator of Maj DU's allegation against Appellant, had cameras set up outside Maj DU's house. On the night of 9 December 2014, the cameras photographed Appellant in the house's fenced-in backyard.

On the morning of 16 December 2014, Maj DU was driving in her neighborhood and called "911" from her car to report that Appellant was following her in his car. Detective EM had a warrant issued for Appellant's arrest and contacted Appellant's chain of command at Joint Base Andrews Naval Air Facility Washington, Maryland. When Appellant arrived at the base's main gate, security forces detained him. After Appellant's first sergeant came to the gate and talked with him, Appellant agreed to have the first sergeant drive him to an FCPD station in Alexandria, Virginia.

Appellant arrived at the FCPD station around 1400 hours, and Detective EM placed him under arrest. After escorting Appellant to an interview room, Detective EM advised him of his rights, which he acknowledged before he agreed to answer questions. Detective EM and another FCPD detective interviewed Appellant for the next couple of hours. Appellant's answers to their questions formed the basis of four of the five specifications of conduct unbecoming an officer and gentleman

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[3] In 2015, Appellant was convicted in Fairfax County circuit court of misdemeanor stalking.

with which Appellant was charged and tried at court-martial.

On 17 December 2014, Detective EM and other FCPD personnel conducted a search of Appellant's off-base residence. During the search, FCPD personnel found documents indicating they contained classified information and contacted the Air Force Office of Special Investigations (AFOSI). Several days after the search, AFOSI agents went to Appellant's apartment and seized the documents, which became the subject of the single specification of negligent dereliction of duty with which Appellant was charged and tried at court-martial.

On 18 December 2014, Appellant called his friend, SM, from the Fairfax County Detention Center and asked her to call his supervisor, Colonel (Col) KB, and request 10 days of emergency leave so that Appellant could take care of a "personal" and "medical" situation. SM wanted to include Appellant in a three-way call but was unable to do so. She was able to contact Appellant's office and submit his leave request, which Col KB denied. Appellant's request for SM to contact Col KB formed the basis of the fifth specification of conduct unbecoming an officer and gentleman with which Appellant was charged and tried at court-martial.

During Detective EM's investigation of the stalking allegation, AFOSI provided a 1998 report of an investigation by AFOSI and Minot (North Dakota) police into an allegation by TS that Appellant raped her on or about 14 July 1998. In September 1998, TS declined to participate in the investigation, which was then closed with no action. In 2015, Detective EM contacted TS, who agreed to go forward with the original rape allegation,

which became the single specification of rape with which Appellant was charged and tried at court-martial.

II. DISCUSSION

A. Statute of Limitations

Appellant asserts that, because the statute of limitations had run, his conviction for a rape in 1998 must be set aside under *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). We agree.

Prior to the findings portion of Appellant's trial, the Defense moved for the dismissal of the rape charge on two bases: that the Government had violated Appellant's right to a speedy trial and that the five-year statute of limitations set by Article 43, UCMJ, 10 U.S.C. § 843,[4] had tolled. The Government opposed the motion and, with regard to the statute of limitations, cited precedent, including *Willenbring v. Neurater*, 48 M.J. 152 (C.A.A.F. 1998).[5]

"The applicable statute of limitations is a question of law, which we review de novo. An accused is subject to

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[4] The version of Article 43, UCMJ, at issue in Appellant's case is found in the 1998 *MCM*.

[5] The military judge who presided during motions practice on 1 December 2016 heard oral argument on the Defense motion to dismiss and then indicated he would make a written ruling. There is no written or oral ruling on the motion in the record of trial, but there is also no mention of a "missing" ruling by either party at trial or on appeal. In addition, all the appellate exhibits offered and admitted at trial are in the record. The application of *Mangahas* resolves the issue of the statute of limitations in Appellant's case and requires us to set aside his rape conviction. As a result, we need not address the absence of a ruling on the motion.

the statute of limitations in force at the time of the offense." *Mangahas*, 77 M.J. at 222 (citations omitted). At the time of the charged rape that allegedly occurred in 1998, the UCMJ's statute of limitations stated, "A person charged . . . with any offense punishable by death, may be tried and punished at any time without limitation." Article 43(a), UCMJ, 10 U.S.C. § 843(a). Otherwise, the statute of limitations for trial by court-martial was generally five years before the receipt of sworn charges. Article 43(b)(1), UCMJ, 10 U.S.C. § 834(b)(1). The 1998 *Manual for Courts-Martial* set death as the maximum punishment for rape. *Manual for Courts-Martial, United States* (1998 ed.), pt. IV, ¶ 45.e.(1).

As the court clearly and concisely explained in *United States v. Collins*, 78 M.J. 530, 532-33 (A.F. Ct. Crim. App. 2018), *aff'd*, ___ M.J. ___, No. 19-0052, 2019 CAAF LEXIS 231, at *1 (C.A.A.F. 12 Mar. 2019), *Mangahas* overruled *Willenbring* and operates to apply a five-year statute of limitations to a rape that is charged as occurring before 2006, when the limitation was lifted. *See* Article 43(a), UCMJ, 10 U.S.C. § 843(a).[6] The result in Appellant's case is that time expired on the 1998 rape charge in 2003, 13 years before Appellant was charged and three years before Article 43, UCMJ, was amended. Because we apply the law at the time of appeal, not at the time of trial, *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) (citation omitted), we find that the military judge erred by denying the Defense's motion to dismiss Charge II and its Specifica-

[6] The version of Article 43, UCMJ, as changed in 2006 is found in the 2008 *MCM*.

tion. The statute of limitations had run by the time Appellant was charged in 2016 with committing rape in 1998.[7] Therefore, we set aside Appellant's conviction for rape and the sentence.

Because we set aside the findings of guilty of rape and the sentence and dismiss with prejudice Charge II and its Specification, we consider whether to reassess a sentence or order a rehearing. *See United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). We are setting aside the most serious charge of which Appellant was convicted. As a result, the penalty landscape has changed dramatically, particularly regarding the maximum possible confinement that was confinement for life and is now 15 months,[8] and the remaining offenses—negligent dereliction of duty and conduct unbecoming an officer and gentleman—do not capture the gravamen of criminal conduct of the original charges. *See id.* at 15-16 (citations omitted). We thus exercise our broad discretion and authorize a rehearing on sentence. *See id.* at 12.

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[7] As the court did in *Collins*, we acknowledge the "unresolved question" of whether the 2006 amendment of Article 43, UCMJ, extended the statute of limitations for rape occurring between 2001 and 2006. 78 M.J. at 536. But, as in Collins' case, it is unnecessary for us to answer the question in Appellant's case because the five-year statute of limitations on the 1998 rape had run before the 2006 amendment. *See id.*

[8] The military judge merged Specifications 1, 2, 3, and 5 of Charge III, of which Appellant was found guilty, and the members were instructed to consider them as one offense for sentencing purposes.

B. Legal and Factual Sufficiency

Appellant next contends that his convictions of negligent dereliction of duty (Charge I and its Specification) and conduct unbecoming an officer and gentleman (Charge III and its Specifications 1, 2, 3, and 5) are factually and legally insufficient. We disagree except for, in part, the Specification of Charge I and, in toto, Specification 2 of Charge III.

1. Law

We review issues of legal and factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Id.* at 325. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence

constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

In order for Appellant to be found guilty as charged of negligent dereliction of duty under Article 92, UCMJ, the Government was required to prove beyond a reasonable doubt that (1) Appellant had a duty to protect classified information; (2) he reasonably should have known of the duty; and (3) at or near Camp Springs, Maryland, on or about 17 December 2014, he was, through neglect, derelict in the performance of the duty by taking classified materials to his residence and leaving them unattended. *See Manual for Courts-Martial*, *United States*, pt. IV, ¶ 16.b.(3) (2016 ed.) (*MCM*). A duty may be imposed by, *inter alia*, regulation. *Id.* ¶ 16.c.(3)(a). "Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by[, *inter alia*,] regulations [or] training. . . . " *Id.* ¶ 16.c.(3)(b). "'Negligently' means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." *Id.* ¶ 16.c.(3)(c).

In order for Appellant to be found guilty as charged of conduct unbecoming an officer and gentleman under Article 133, UCMJ, the Government was required to prove beyond a reasonable doubt that (1) Appellant did a certain act and (2) under the circumstances, the act

constituted conduct unbecoming an officer and gentleman. *See MCM*, pt. IV, ¶ 59.b.

The "certain act" charged in Specification 1 of Charge III (and instructed by the military judge) was that (a) at or near Alexandria, Virginia, on or about 16 December 2014, Appellant misled FCPD detectives by falsely claiming he did not go into the backyard of Maj DU's residence, on or about 9 December 2014; (b) he "did so in the case of himself against whom [he] had reason to believe there were or would be criminal proceedings pending;" and (c) he did so with the intent to impede the due administration of justice. The "certain act" charged in Specification 2 was that, at or near Alexandria, Virginia, on or about 16 December 2014, Appellant misled FCPD detectives by falsely claiming he could not provide his official email address to the detectives under the same circumstances charged in Specification 1. The "certain act" charged in Specification 3 was that, at or near Alexandria, Virginia, on or about 16 December 2014, Appellant misled FCPD detectives by falsely claiming he was not in Maj DU's neighborhood on 16 December 2014 under the same circumstances charged in Specification 1. The "certain act" charged in Specification 5 was that, at or near Alexandria, Virginia, on or about 18 December 2014, Appellant asked SM to misrepresent to Col KB the basis of Appellant's request that he be placed in an emergency leave status. Conduct in violation of Article 133, UCMJ, is, *inter alia*, action "in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of[, *inter alia*,] dishonesty. . . . " *Id.* ¶ 59.c.(2).

2. Analysis

At the outset, we declare legally and factually sufficient Specifications 1, 3, and 5 of Charge III. For Specifications 1 and 3, the Government proved beyond a reasonable doubt the falsity of Appellant's claims that he was not in Maj DU's backyard on 9 December 2014 and not in her neighborhood on 16 December 2014. Moreover, Appellant made these false claims after being detained on his way in to work by Air Force personnel at the request of Fairfax County authorities and then placed under arrest and advised of his rights by FCPD detectives. While wearing his Air Force uniform, he agreed to answer questions from FCPD detectives who knew that he was an Air Force officer and that his claims were false when he made them with the obvious intent to impede the investigation of the stalking allegation against him. For Specification 5, the Government proved beyond a reasonable doubt that Appellant asked SM to "misrepresent" to Col KB the basis for Appellant's emergency leave request and hide the fact that Appellant was in jail. Considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements of Specifications 1, 3, and 5 of Charge III beyond a reasonable doubt and been convinced that Appellant committed the charged acts, that his conduct was unbecoming an officer and gentleman, and that he was guilty beyond a reasonable doubt. After weighing the evidence in the record and making allowances for not having personally observed the witnesses, we are so convinced.

Conversely, we determine legally and factually insufficient particular language of the Specification of Charge I, which alleged that Appellant was negligently derelict

in his duty to protect classified information by "taking classified materials to his residence and leaving said materials unattended" on or about 17 December 2014. The Government presented no evidence that Appellant took the classified materials found *at* his residence on 17 December 2014 *to* his residence on or about that date. However, the Government did prove beyond a reasonable doubt that, on or about 17 December 2014, Appellant left the classified materials unattended at his residence when he left his residence on the morning of 16 December 2014. We therefore except from the Specification of Charge I the language (1) "taking classified materials to," (2) the "and" before "leaving," and (3) "said" and set aside the finding of guilty of the excepted language. We substitute "at" for "to" and "classified" for "said" and find legally and factually sufficient the finding of guilty of the substituted language.[9]

We also determine factually insufficient Specification 2 of Charge III. Taking a fresh, impartial look at the evidence, we are convinced of the falsity of Appellant's claim that he could not provide his official email address to the FCPD detectives interviewing him. However, we are not convinced that he made the false claim endeavoring to impede the investigation of the stalking allegation against him. Instead, we find it clear from the evidence (and the briefs of both parties on appeal) that Appellant's intent was to hide from his chain of command and supervision the fact that he was under criminal

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[9] With excepted and substituted language, the specification reads, in relevant part, that Appellant was, through neglect, derelict in the performance of his duty by "at his residence leaving classified materials unattended."

investigation and under arrest. As a result, we set aside the finding of guilty of Specification 2 of Charge III.

C. Failure to State an Offense

Appellant also challenges Charge III and its specifications, of which Specifications 1, 3, and 5 remain, for failure to state an offense. We are not persuaded.

1. Law

Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). We also consider Appellant's failure to object at trial and review for plain error. *United States v. Tunstall*, 72 M.J. 191, 196 (C.A.A.F. 2013). To establish plain error, an appellant has the burden to demonstrate (1) error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced a substantial right of the appellant. *Id.* (citation omitted).

There are only two elements for the offense of conduct unbecoming an officer and gentleman under Article 133, UCMJ: (1) an act of the accused and (2) that, under the circumstances, the act constituted conduct unbecoming an officer and gentleman. *MCM*, pt. IV, ¶ 59.b. "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman." *Id.* ¶ 59.c.(2). Using an example of stealing property in violation of Articles 121 and 133, UCMJ, the *MCM* explains:

> Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional

> requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

Id.

2. Analysis

At trial, the Defense did not move for dismissal of any charge or specification for failure to state an offense pursuant to Rule for Courts-Martial 907(b)(2)(E) or object to the military judge's instructions to the court members on the elements of the Charge III offenses.

a. Specifications 1 and 3 of Charge III

Appellant argues on appeal that it was plain or obvious error for Specifications 1 and 3 of Charge III to fail to allege Appellant's conduct was prejudicial to good order and discipline or service-discrediting. The argument is based on a reading of Specifications 1 and 3 as charges for obstructing justice. Obstructing justice is a specified offense under Article 134, UCMJ. Conduct constitutes obstructing justice if the conduct at issue satisfies all four elements of the offense, including the "terminal element" of conduct prejudicial to good order and discipline or service-discrediting. *MCM,* pt. *IV,* ¶ 96.b.(4). Appellant's argument is understandable not least because of the military judge's instructions on the elements of Specifications 1 and 3 of Charge III for conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. As the military judge instructed, the elements were that Appellant wrongfully misled FCPD detectives by making false claims; he "did so in the case of himself against whom [he] had reason to believe there were or would be criminal proceedings pending;" he did so "with the intent to impede the due administration of justice;" and his conduct was unbecoming an

officer and gentleman. Except for the fourth and final element—"conduct unbecoming" instead of the terminal element—the elements as instructed were identical to the elements for obstructing justice.

Nonetheless, Appellant's argument fails. Not only did the Defense at trial not object to the elements of Specifications 1 and 3, but it employed a deliberate strategy to treat Specifications 1 and 3 (and 2 and 4) as "general Article 133 violation[s]" and not charges of obstructing justice in order to limit Appellant's confinement risk.[10] The strategy ultimately operated to Appellant's distinct benefit when the military judge merged all four of the Article 133, UCMJ, specifications of which Appellant was found guilty and instructed the members to consider them as one offense for sentencing purposes. Even if we were to assume *arguendo* that the omission of the terminal element from Specifications 1 and 3 was error, the error was not plain or obvious, and, even if it was, it did not materially prejudice a substantial right of Appellant. *See Tunstall*, 72 M.J. at 196.

b. Specification 5 of Charge III

Appellant also argues on appeal that Specification 5 of Charge III fails to state an offense "because it is vague, lacks words of criminality," and did not put Appellant on notice "that it was a crime to ask his civilian

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[10] Obstructing justice in violation of Article 134, UCMJ, has a maximum punishment including confinement for five years. *MCM*, pt. IV, ¶ 96.e. Conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ, has a maximum punishment including confinement "for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year." *Id.* ¶ 59.e.

friend to call his supervisor to inform his supervisor Appellant was requesting emergency leave." We are unpersuaded and instead find that Specification 5 did state an offense.

> An officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133, UCMJ. The gravamen of the offense is that the officer's conduct disgraces him personally. . . . Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out—this notwithstanding whether or not the act otherwise amounts to a crime.

United States v. Lofton, 69 M.J. 386, 388-89 (C.A.A.F. 2011) (quoting *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009)). Applying *Schweitzer*, we determine that Specification 5 put Appellant on notice that his conduct was criminal. But the crime at issue was not, as Appellant now contends, to "ask a civilian friend to call his supervisor to request 'emergency leave'" on Appellant's behalf. Instead, Appellant was charged with and convicted of conduct unbecoming an officer and gentleman because he asked SM to *misrepresent* to Col KB the basis for his emergency-leave request as a "personal" and "medical" situation instead of what it actually was: arrest and detention by civilian authorities for a criminal charge. Correspondingly, the specification was not vague and did not lack words of criminality. As with Specifications 1 and 3, we review Specification 5 for plain error and find none.

D. Post-Trial Processing Delay

Appellant claims that he is entitled to relief for the delay from the date his trial concluded until the date the convening authority took action. While we find that the delay in the post-trial processing of his court-martial was unreasonable, we grant no further relief than Appellant has already received.

We review de novo whether an appellant has been denied the due process right to a speedy post-trial review. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). A presumption of unreasonable delay arises when the convening authority does not take action within 120 days of the end of trial. *Id.* at 142. A presumptively unreasonable delay triggers an analysis of the four factors laid out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (citations omitted).

Appellant's trial ended on 14 June 2017. The convening authority took action on 2 February 2018, 233 days after the end of trial and 113 days beyond the 120-day standard.

Appellant's trial took place on 20 September 2016, 1 December 2016, 5-9 June 2017, and 12-14 June 2017 and required a 1,123-page trial transcript and 12 volumes, including a classified volume. Except for the classified volume, Appellant received a copy of the record of trial on 10 October 2017. The staff judge advocate's recommendation (SJAR) is dated 25 September 2017; the SJAR addendum with the victim's statement is dated 12 October 2017. Appellant requested and was

granted delays to submit clemency matters until 6 November 2017, 6 December 2017, and 11 December 2017. His seven-volume, 1,400-page clemency matters are dated 7 December 2017. However, they were not all submitted by that date, and, at some point after 9 December 2017, Appellant's original military defense counsel was replaced by a new military defense counsel. On 5 January 2018, Appellant indicated his clemency submission was complete. The second addendum to the SJAR with Appellant's clemency submission is dated 11 January 2018. The SJAR and both addenda recommended that the convening authority approve the sentence as adjudged.

Appellant cited the post-trial processing delay in his clemency submission dated 7 December 2017 and asserted his right to speedy post-trial processing on 17 January 2018.[11]

Appellant claims to have suffered prejudice in the form of oppressive incarceration and excessive anxiety related to his purportedly wrongful convictions for rape, conduct unbecoming an officer and gentleman, and negligent dereliction of duty. *See Moreno*, 63 M.J. at 138 (citations omitted). But we note, as the Government points out, that *Mangahas* is the basis of Appellant's

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[11] Appellant has twice moved the court for an expedited review of his case, and the court has treated both motions as demands for speedy appellate review. This opinion is being issued two months before the 18-month standard for a presumptively unreasonable delay in appellate review set in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Appellant also petitioned the United States Court of Appeals for the Armed Forces for a writ of habeas corpus, which petition was denied, but did not file any such petition with us. *See Daniels v. Brobst*, ___ M.J. ___, No. 19-0223, 2019 CAAF LEXIS 215 (C.A.A.F. 2 Apr. 2019) (mem.).

most significant relief—the set-aside of his rape conviction and sentence—and the case was not decided until 6 February 2018, or four days after the convening authority took action in his case.

We weigh the *Barker* factors and conclude that Appellant is entitled to relief for the presumptively unreasonable 113-day delay in the post-trial processing of his case. The sentence adjudged by the court members included three years of confinement. The convening authority approved a sentence including two years and 252 days of confinement. While there is no explanation in the record for the difference in confinement between the adjudged and approved sentences, we do not chalk up to mere coincidence the fact that the convening authority reduced the confinement by exactly 113 days. But, even if the precise measure of relief was purely coincidental, we find that it satisfies Appellant's entitlement. We decline to grant further relief pursuant to *Moreno* or any other discretionary authority we may exercise. *See United States v. Tardif*, 57 M.J. 219, 223-24 (C.A.A.F. 2002); *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

III. CONCLUSION

The findings of guilt of Charge II and its Specification and of Specification 2 of Charge III are **SET ASIDE** and Charge II and its Specification and Specification 2 of Charge III are **DISMISSED WITH PREJUDICE**. The sentence is **SET ASIDE**. The finding of guilt of the excepted language of the Specification of Charge I is also **SET ASIDE**. The case is returned to The Judge Advocate General for further processing consistent

with this opinion.[12] A rehearing on sentence is authorized. Article 66(e), UCMJ, 10 U.S.C. § 866(e).

FOR THE COURT

/s/ CAROL K. JOYCE
CAROL K. JOYCE
Clerk of the Court

[12] We direct a corrected court-martial order to remedy the following errors: (1) none of the specifications include "United States Air Force" after Appellant's name; (2) the Specification of Charge II lists the wrong date of the charged offense; (3) Specification 1 of Charge III is missing the word "falsely" before "claiming"; and (4) Specification 5 of Charge III lists the wrong date of the charged offense and does not reflect the minor change to the spelling of SM's last name that the military judge allowed the Government to make. Yet again, we are dismayed at the lack of attention to detail in court-martial processing and compelled to remind Air Force personnel to exercise care in the execution of their duties.

APPENDIX E

1. 10 U.S.C. 843(a) and (b) (1994) provides:

Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

2. 10 U.S.C. 843(a) and (b) (2012 & Supp. V 2017) provides:

Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, rape or sexual assault, or rape or sexual assault of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges

and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2)(A) A person charged with having committed a child abuse offense against a child is liable to be tried by court-martial if the sworn charges and specifications are received during the life of the child or within ten years after the date on which the offense was committed, whichever provides a longer period, by an officer exercising summary court-martial jurisdiction with respect to that person.

(B) In subparagraph (A), the term "child abuse offense" means an act that involves abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:

(i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).

(ii) Maiming in violation of section 928a of this title (article 128a).

(iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).

(iv) Kidnapping in violation of section 925 of this title (article 125).

(C) In subparagraph (A), the term "child abuse offense" includes an act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense under chapter 110 or 117 of title 18 or under section 1591 of that title.

(3) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

3. 10 U.S.C. 920(a) (1994) provides:

Art. 120. Rape and carnal knowledge

(a) Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

4. 10 U.S.C. 920(a) provides:

Art. 120. Rape and sexual assault generally

(a) RAPE.—Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;

(2) using force causing or likely to cause death or grievous bodily harm to any person;

(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(4) first rendering that other person unconscious; or

(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing

the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

5. 18 U.S.C. 3281 provides:

Capital offenses

An indictment for any offense punishable by death may be found at any time without limitation.