No. 19-184

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,
v.
RICHARD D. COLLINS, *Respondent*.

UNITED STATES, *Petitioner*,

v.

HUMPHREY DANIELS III, *Respondent*.

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

BRIEF FOR RESPONDENT HUMPHREY DANIELS III IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Armed Forces erred in *United States* v. *Mangahas*, 77 M.J. 220, *pet. recon. denied*, 77 M.J. 323 (C.A.A.F. 2018), in ruling that Art. 43(a), Uniform Code of Military Justice (UCMJ), which until 2006, provided that crimes "punishable by death" may be tried and punished at any time without limitation, did not apply to the crime of rape.

2. Whether this Court has jurisdiction to review the question presented in the Petition, given that Question 1 above was, by the Government's own suggestion, not addressed or decided by the Court of Appeals for the Armed Forces in Respondent Daniels's case.

Related Proceedings

Respondent is unaware of any related proceedings other than those identified in the Petition. *See* Pet. II.

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INTRODUCTION

This case presents no issue worthy of this Court's discretionary review. The Government's primary argument is that the Court of Appeals for the Armed Forces (CAAF) "misinterpreted" the applicable statute of limitations—not in this case, but in a case CAAF decided in 2018. *United States* v. *Mangahas*, 77 M.J. 220, *pet. recon. denied*, 77 M.J. 323 (C.A.A.F. 2018). The Government, however, did not challenge *Mangahas* before this Court within the jurisdictional time limits under Supreme Court Rule 13.1. And in this case, the Government did not even ask CAAF to reconsider *Mangahas.* Instead, it asked CAAF to summarily affirm Respondent's case on the basis of *Mangahas,* in a naked attempt to then use this case as a vehicle to get around its failure to seek certiorari in that case. Therefore, as a threshold matter, Respondent posits that this Court lacks jurisdiction to consider the question the Government poses in the Petition.

Even if the Court does have jurisdiction, there are multiple compelling reasons why certiorari should be denied. The Government exaggerates the effect *Mangahas* and *United States v. Briggs*, 78 M.J. 289 (C.A.A.F. 2019) would have on the military's efforts to deal with sexual abuse within its ranks; manufactures nonexistent tension between CAAF's rulings and those of the civilian courts; and disregards the deference due CAAF to interpret the Uniform Code of Military Justice (UCMJ). CAAF's interpretation of the UCMJ's statute of limitations was entirely reasonable and correct, given the plain language of Article 43, UCMJ and this Court's binding jurisprudence on the inapplicability of the death

penalty to crimes not resulting in death. The Petition should therefore be denied.

DECISIONS BELOW

CAAF's decision in Respondent's case is reported at 2019 WL 3026956 (C.A.A.F. Jul. 22, 2019), and is reprinted in the Petition Appendix C at 19a–20a. The Air Force Court of Criminal Appeals' decision in Respondent's case is not published, but is available at 2019 WL 2560041 (A.F. Ct. Crim. App. Jun. 18, 2019), and reprinted in the Petition Appendix D at 21a–41a.

JURISDICTION

The government invokes this Court's jurisdiction under 28 U.S.C. § 1259(2). As noted in Section III below, Respondent challenges Petitioner's invocation of this Court's jurisdiction over the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions identified in the Petition, Pet. App. 42a–45a, this case involves Article 55, UCMJ, which provides in relevant part that "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter." 10 U.S.C. § 855. Also of relevance is the full text of the 2006 amendment to Article 43, UCMJ, 10 U.S.C. § 843.[1]

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[1] The 2006 amendment was enacted as section 553 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L.

STATEMENT OF FACTS

The only witness against Respondent at trial on the rape charge was TS,[2] who at the time of the alleged offense was a 29-year-old civilian college student in Minot, North Dakota, with no connection to the military. Although TS testified she did not consent to sexual intercourse with Respondent, she admitted that she *did*: consent to him coming to her house at a late hour, R. 844, 861; give him directions to her house, R. 860; flirt with him after he arrived, R. 846, 867; ask him whether he, an African-American man, had ever dated a white woman before, R. 866; tell him she was "on the pill," R. 870; tell him she was looking for a father for her son, R. 867; and put her head on his lap as a "hint that I was tired." R. 894-95. She also admitted she told Respondent, "You're welcome to come up and sleep in my bed," R. 868, where they "spooned" together. R. 869. She acknowledged she had an opportunity to leave her bedroom when Respondent went to the bathroom to undress and put on a condom. R. 892.

TS described Respondent as being on top of her "holding her down" at the time of the penetration, R. 851, but she acknowledged she never told investigators in 1998 that Respondent did anything to physically restrain her, R. 874-75. TS admitted Respondent did not threaten her or her son. R. 874. When asked directly on cross-examination whether

No. 109-163, § 553, 119 Stat. 3136, 3264. That statute entered into force on January 6, 2006.

[2] Although TS identifies herself by her full name in her *amicus* brief in support of the Petition, Respondent will continue referring to her by her initials.

he did anything to overpower her, TS said "I can't recall."[3] R. 874. She described herself as a "pleaser," R. 861, and a "nurturer," R. 878, and admitted it was easier for her to say "yes" than "no." R. 861. She acknowledged that she did not want to report the incident to police after it happened, R. 854, that it was a friend who brought the authorities into the picture, R. 855, and that she wanted the authorities to drop the charges against Respondent, which they did at her request, because "I wanted things to go away." R. 896.

Throughout her testimony, TS could not recall what she told investigators in 1998, and in fact was confronted with multiple inconsistencies between what she said at trial versus what she told investigators in 1998. *See* R. at 863-70, 872-75. Her inability to recall her prior statements was understandable given the time that had passed. In fact, repeatedly she said "Again, 19 years ago. I'm trying to remember the best I can," R. 863, or some variation thereof. *E.g.,* R. 854, 859, 892, 868, 870, 872, 879.

Seventeen years after TS had adamantly declined to press a rape charge against Respondent, she was contacted by a Fairfax County, Virginia police detective who was investigating a complaint against Respondent in connection with an unrelated domestic dispute. When pressed on whether she was now willing to pursue a rape charge against Respondent, who had by this time risen in rank from a newly-minted Second

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[3] This testimony was important because in 1998, Art. 120, UCMJ, defined rape as "sexual intercourse *by force and* without consent" (emphasis added).

Lieutenant to a Lieutenant Colonel, TS reversed course and agreed to do so. This court-martial proceeding ensued.

The passage of time not only affected TS's memory but also impacted the defense's ability to investigate. Respondent's civilian and military defense counsel attempted to find the "friend" who reported TS's allegation of rape to the military, as well as the local police detectives and the Office of Special Investigations (OSI) agent who interviewed TS and Respondent, and who potentially could offer the inconsistent statements TS made in 1998 and refute her belated claim that the "real" reason she dropped the case was because they were "hostile" to her.[4] None of these people could be located. R. 27, 30. One witness was dead. R. 27. The defense moved to compel investigative assistance in tracking down witnesses who were still alive. R. 27-31; App. Ex. V. That motion was denied. The defense also moved to dismiss the rape charge for

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[4] Counsel discovered during the appeal to the Air Force Court of Criminal Appeals that the Government failed to disclose to the defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), evidence that TS was convicted in Minot, ND on February 8, 1991 of a misdemeanor that bore on her credibility. Criminal Filings for TS, LexisNexis Advance Public Records Smartlinx® Comprehensive Person Report (last accessed Oct. 1, 2019). Pet. App. D, at 23a. Had this information been available at the time of Respondent's 2017 trial, it still might not have been admissible to impeach her because Military Rule of Evidence 609(b) prohibits the entry of a criminal conviction to impeach if the conviction is more than 10 years old, absent exceptional circumstances. Had the trial occurred before February 8, 2001, however, this evidence would have been admissible. This is raised simply to demonstrate another way the passage of time damaged Respondent's ability to defend himself against a stale charge.

violating Respondent's Fifth Amendment due process rights and the statute of limitations. R. 32-57; App. Ex. VIII. In the hearing on that motion, Respondent called an expert on memory loss, Dr. Reneau Kennedy, who testified that after such a long passage of time, "the event itself is not necessarily encapsulated in the way that it originally occurred." R. 56. Dr. Kennedy also testified it was possible that not only had TS's memory degraded, her memory may also be contaminated. *Id.* Nevertheless, the motion to dismiss was also denied.

REASONS FOR DENYING THE PETITION

I. There Are No "Compelling Reasons" for the Court to Review This Case.

Supreme Court Rule 10 provides that petitions for certiorari will be granted only for "compelling reasons." Of the factors that Rule 10 says the Court will consider in making that determination, the Petition attempts to implicate at most only two: (a) the case presents an important federal question that has not been, but should be, settled by this Court (*see* Rule 10(c)), and (b) the case is in conflict with the decisions of other federal courts of appeals (*see* Rule 10(a)).[5] For the reasons discussed below, neither is present in this case.

A. The Government Overstates the Importance of These Cases to Its Efforts to Curb Sexual Assault in the Military.

The Government rightly points out that sexual

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[5] Notably, the Government does not contend CAAF's decision in this case conflicts with any decisions of this Court (*see* Rule 10(c)).

assault is an especially important and vexing problem in the armed forces, Pet. at 4-5, and concludes that investigating and prosecuting such cases is a "top priority" for the armed forces. *Id.* at 5.[6] Respondent fully agrees sexual abuse in the military is an important problem that requires an aggressive response. But the issue here is not whether the problem is important in general, but how important these few cases are, if at all, to the military's efforts to address the problem. Respondent respectfully submits that the Court's denial of certiorari in this case would have little or no adverse effect on the government's commendable efforts to crack down on sexual abuse in the military.

The Government concedes that the universe of cases that would be affected by CAAF's decision in *Mangahas* "is not especially high." Pet. at 17. In fact, in the Petition for Certiorari the Government filed on July 22, 2019 in *United States v. Briggs,* No. 19-108 (*Briggs* Pet.), it acknowledges that the decision in *Mangahas* affects only a "closed set of crimes committed before 2006," *id.* at 23, and that the number of still-pending cases in which the issue is presented is "very small." *Id.* at 26. Indeed, it identifies only three such cases—the three pending here on certiorari. *Id.* at 23. It also identifies a fourth case in which the Army Court of Criminal Appeals applied *Mangahas* to overturn a rape conviction, *see*

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[6] The reports from which the Government quotes to make the case that rape in the military is particularly serious because it adversely affects "morale," "good order" and "unit cohesion" all focus on rapes in which both perpetrator and victim are service personnel. *See* Pet. at 4-5. But not all military rape cases involve victims who are themselves in the military, as this case demonstrates.

id. (citing *United States v. Thompson,* No. 20140974, 2018 WL 1092097 (A. Ct. Crim. App., Feb. 26, 2018) (unpub. op.)). Like in *Mangahas,* however, the Government allowed *Thompson* to become final, not even seeking review by CAAF. Thus, even if this Court were to grant certiorari in these cases and reverse CAAF, its ruling would apply to only three of the five recent cases in which the pre-2006 statute of limitations for rape is, or has been, at issue, and in the process, would leave this small handful of cases with inconsistent results.[7] Additionally, even when final rape convictions are being collaterally attacked through writs of *habeas corpus*, the federal and military courts have not applied *Mangahas* retroactively, as *Mangahas* does not meet the criteria of *Teague v. Lane*, 489 U.S. 288 (1989) for retroactive application. *See Hilton v. Nixon*, No. 18-3139-JWL, 2018 WL 5295894 (D. Kan. Oct. 25, 2018) (unpub. op.); *Hill v. Rivera*, No. 2:17CV00003-JLH, 2018 WL 6182637 (E.D. Ark. Nov. 27, 2018) (unpub. op.); *In re Best*, __ M.J. __, 2019 WL 2481956 (N-M. Ct. Crim. App. Jun. 14, 2019).

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[7] Indeed, as Respondents Briggs and Collins point out in their Briefs in Opposition, when the Judge Advocate General certified those cases to CAAF, he did not certify the question decided in *Mangahas,* but only the questions of whether the 2006 amendments to Art. 43, UCMJ apply retroactively, and whether those Respondents could raise the statute of limitations defense for the first time on appeal. Additionally, those were the only questions decided by CAAF in those cases. *See Briggs* Brief in Opposition, at 8-9; Brief in Opposition, *United States v. Collins,* No. 19-184 (filed Sept. 9, 2919) (*Collins* Brief). If, as those Respondents argue, the *Mangahas* ruling was not before CAAF, and therefore not before this Court in their cases, then there are at most only three cases—*Thompson, Mangahas* itself, and this one—to which the *Mangahas* ruling has been applied, and only this one remains pending.

To be sure, CAAF's ruling in *Mangahas* affects not only pending cases but cases that might otherwise be brought. The Government says the military continues to receive reports of rapes occurring before 2006, *Briggs* Pet. at 16, and contends that as a result of *Mangahas*, the military has dismissed or declined to prosecute "at least ten" cases it otherwise would have pursued. *See id.* at 23. The Government provides no information about these cases by which its assertion can be evaluated, but it seems likely that, because of the staleness of the now decades-old evidence, a number of them would not have resulted in a conviction—or even a trial, if the military judge were to find the accused was so prejudiced by the government's delay in bringing the case that his Due Process rights were violated, as originally occurred in *Mangahas*. Misc. Dkt. No. 2016-10, 2017 CCA Lexis 236 (A.F. Ct. Crim. App. Apr. 4, 2017) (unpub. op.). The interests of the military in curbing sexual abuse in its ranks has likely been better served because the investigators and prosecutors assigned to the few ancient cases dropped because of *Mangahas* have been able to turn their attention to more recent cases in which the evidence is fresher and the likelihood of conviction is greater.[8]

Finally, in evaluating the Government's claimed interests, the Court also should consider the interests served by statutes of limitations. There are sound reasons why the courts have a long history of favoring

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[8] As discussed more fully in Section IV *infra,* one option for the Court is to grant certiorari only in *Briggs* to review the retroactivity issue. If the Court were to take that route, then those cases in which the crime occurred between January 6, 2001 and January 5, 2006, likely a large percentage of the "at least ten" in total, still would be prosecutable.

repose. "[T]he . . . statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." *United States v. Marion*, 404 U.S. 307, 322 (1971) (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)). A statute of limitations "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Marion*, 404 U.S. at 323 (quoting *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)); *see also Marion,* 404 U.S. at 322 n.14 ("criminal statutes of limitations are to be liberally construed in favor of repose"). To paraphrase *Stogner v. California,* 539 U.S. 607 (2003)*,* in which this Court held the Ex Post Facto clause prohibits the retroactive application of a statute eliminating a limitations period for child abuse to cases in which the prior statute of limitations had expired:

> Memories fade, and witnesses can die or disappear. Such problems can plague [rape] cases, where recollection after so many years may be uncertain, and "recovered" memories faulty, but may nonetheless lead to prosecutions that destroy [service members].

Id. at 631.

This is a classic example of such a case, where the evidence against Respondent was based solely on a faulty, conflicting memory of nuanced actions that occurred, and words that were uttered, almost 20 years earlier; where key witnesses disappeared or died, and relevant evidence became inadmissible. Assuring that service members who rape are

convicted and punished is important. But that objective must be balanced against the need to assure that service members are not wrongly convicted and punished, and their careers wrongly ruined, on the basis of stale and unreliable evidence. After all, "a 'primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions.'" *Cheney v. United States Dist. Court*, 542 U.S. 367, 384 (2004) (quotation omitted). "Doing justice" in sexual assault cases requires doing justice for an accused just as much as for an alleged victim.

B. There Is Neither "Conflict" Nor "Inconsistency" with the Decisions of Other Courts of Appeals.

Tellingly, the Government avoids using the word "conflict," but argues that there is "inconsistency" between the CAAF's interpretation of the phrase "punishable by death" in Art. 43, UCMJ and the interpretation by civilian courts of appeals of identical language in 18 U.S.C. § 3281, the statute of limitations for non-military prosecutions. *Briggs* Pet. at 24. In fact, there is neither conflict nor inconsistency.

There is no conflict because the CAAF and the other federal courts of appeals operate in entirely separate spheres. The CAAF's jurisdiction is limited to cases arising under the UCMJ. Art. 67, UCMJ, 10 U.S.C. § 867. But, over those cases, its jurisdiction is exclusive. Thus, there is no possibility a civilian court of appeals will be called upon to interpret and apply the UCMJ's statute of limitations to a case before it, just as there is no possibility that the CAAF will ever have before it a case in which it has to interpret and apply 18 U.S.C. § 3281. To be sure, cases may arise on one side of this divide in which the statute of

limitations on the other side has some bearing, but surely the CAAF will defer to how the civilian courts interpret § 3281, just as the civilian courts will defer to the CAAF for interpretation of Art. 43, UCMJ.

Nor is there any "inconsistency." The Government cites six civilian courts of appeals decisions with which it claims *Mangahas* is inconsistent. *See Briggs* Pet. at 23-24. But, as CAAF noted, all of those cases involved murder, not rape, and none involved the issue decided in *Mangahas*—whether a statute removing any period of limitations for crimes "punishable by death" applies to a crime that constitutionally could *never* be punished by death. *Mangahas*, 77 M.J. at 224.

The manner in which the Government employs *United States v. Payne,* 591 F.3d 46 (2d Cir.), *cert. denied,* 562 U.S. 950 (2010)—the first in its list of supposedly "inconsistent" civilian courts of appeals decisions—illustrates the distinction well. The Government describes the holding in *Payne,* and its supposed inconsistency with the CAAF's holdings in *Mangahas*, with this sentence: "[C]ivilian courts of appeals have agreed for 50 years that an offense is 'punishable by death' under Section 3281 if 'the statute authorizes the death penalty as a punishment, regardless of whether the death penalty' can be constitutionally imposed." *Briggs* Pet. at 24 (citing, and attributing the second internal quote to *Payne,* 591 F.3d at 59). The second internal quote is indeed directly from *Payne*, but the crucial last four words of the sentence are the Government's, not the court's. What the *Payne* court actually said in the "regardless" clause is, "regardless of whether the death penalty *is sought by the prosecution or ultimately found appropriate by the factfinder or the court*." *Id.* (emphasis added). *Payne* did not involve a crime for

which the death penalty could not be constitutionally imposed. Rather, Payne argued *not* that death could not be imposed for the murders he committed, but that it was not sought or imposed against *him*. Thus, *Payne* involved only the preposterous and easily-disposed-of argument that the federal limitations period varies from case to case, depending upon whether the prosecution seeks the death penalty or even whether the jury imposes it when it is sought. *Payne* did not even remotely involve the question presented here, and the Government's attempt to ascribe to the court words it did not say only underscores the lack of any inconsistency between *Mangahas* and *Payne*.

United States v. Ealy, 363 F.3d 292 (4th Cir.), *cert. denied*, 543 U.S. 862 (2004), is also inapposite. Ealy, like the defendant in *Payne*, was convicted of murders for which death was an available sentence but was not imposed in his case. In addition to making the argument rejected in *Payne* that § 3281 did not apply because *he* was not punished by death, Ealy also argued that it did not apply because the death penalty was unconstitutional generally under *Furman v. Georgia,* 408 U.S. 238 (1972). *See Ealy,* 363 F.3d at 296. The Fourth Circuit rejected both arguments. As to the second, it wrote that "even if imposition of the death penalty would be unconstitutional, all of the violations alleged in this case are still 'capital crimes' for limitations purposes under §§ 3281-3282." 363 F.3d at 297. But *Furman v. Georgia* was not like *Coker v. Georgia,* 433 U.S. 584 (1977). As this Court made clear four years later in *Gregg v. Georgia,* 428 U.S. 153 (1976), *Furman* held only that the death penalty *as then applied* was unconstitutional, not that it could never be constitutionally imposed for the

crime of murder. *See Gregg,* 428 U.S. at 169-87 (plurality opinion). *Coker,* on the other hand, was categorical that under the Eighth Amendment, death can never be imposed for non-fatal rape of an adult. *Coker,* 433 U.S. at 592 ("We have concluded that a sentence of death is a grossly disproportionate and excessive punishment for the crime of rape, and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.") That important distinction was never at issue and was therefore never addressed in *Ealy.*

The other cases the Government cites as "inconsistent" with CAAF's reading of Art. 43, *see Briggs* Pet. at 24-25, are all distinguishable for the same reason: like *Payne* and *Ealy,* they did not involve a crime that could not, under *any* circumstances, be punished by the death penalty. As CAAF said in *Mangahas* in response to the same "inconsistency" argument, "[h]ere . . . the death penalty is simply unavailable for the charged offense on constitutional grounds. We need not and do not decide today what potentiality or procedural posture equates to *punishable by death.* We simply hold 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, UCMJ." *Mangahas,* 77 M.J. at 224-25 (emphasis in original). No civilian court of appeals has ever held otherwise under § 3281.

II. CAAF's Reasonable Interpretation of Art. 43(a), UCMJ is Entitled to Deference.

CAAF plays a unique role in the federal justice system. Although an Article I court, Congress, in recognition of the special needs of the military, has long given CAAF (or its predecessors) exclusive

jurisdiction over cases arising under the UCMJ. Congress enacted the Military Justice Act of 1983 to, among other things, provide clearer avenues for this Court's review of military justice decisions. But Congress emphasized that "it does not intend to displace [CAAF[9]] as the primary interpreter of military law." S. Rep. No. 98-53 at 10 (1983); *see also id.* at 11 (CAAF will "continue to be the principal source of authoritative interpretations of the UCMJ"). Thus, while this Court does have jurisdiction to review CAAF's interpretations of the UCMJ, it is clear that Congress intended for deference to be afforded to the court that best understands the unique needs of the military—CAAF. Indeed, the Government consistently takes this position when the shoe is on the other foot and it is *opposing* petitions for certiorari to CAAF. *See, e.g.,* Brief for the United States in Opposition, *Larrabee v. United States,* 139 S. Ct. 1164 (2019) (mem.), at 11-12 (citing S. Rep. No. 98-53); Brief for the United States in Opposition, *Sullivan v. United States,* 137 S. Ct. 31 (2016) (mem.), at 16 (same).

CAAF's interpretation of Art. 43(a), UCMJ in *Mangahas* and its application in the instant cases is entirely reasonable, and therefore entitled to deference. In 1998, when the alleged crime in this case occurred, Art. 43(a), UCMJ provided for no limitations on crimes "punishable by death," and Art. 43(b), UCMJ provided a five-year limitations period for all other crimes. *See* Pet. App. E, at 42a. The plain language of the statute fully supports CAAF's interpretation: the word "punishable" is framed in the present tense, and the law of this land was in 1998, and remains today, that the crime of which

[9] CAAF was then known as the Court of Military Appeals (CMA).

Respondent was accused, rape, is not punishable by death. *Coker* was categorical. There is nothing in that decision that suggests in any way that this Court would make exceptions. To the contrary, the Court held death for non-fatal rape of an adult to be not only disproportionate and excessive, but "grossly" so. *Coker,* 433 U.S. at 592.

Indeed, this Court subsequently held that even non-fatal sexual abuse of a *child,* a most heinous crime, cannot be punished with death under the Eighth Amendment. *She v. Louisiana,* 554 U.S. 955 (2008). Given this precedent and the plain language of Art. 43, UCMJ, CAAF's ruling that death could never be imposed in a rape case, and therefore was not subject to Art. 43(a), UCMJ, was entirely reasonable.[10]

The Government has argued that Congress must have intended for there to be no limitations period for rape because, when it enacted the 1998 version of Art. 43, UCMJ in 1986, it also provided for death as the maximum penalty for rape, and that provision remained in the UCMJ, despite *Coker,* through 1998

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[10] In an apparent effort to build up the importance of this case, the Government ominously suggests that these cases could involve the weighty constitutional issue of whether *Coker,* despite its categorical holding, is fully applicable to rape cases in the military. *See* Pet. at 14; *Briggs* Pet. at 16-20. The Court should decline the Government's invitation to go down that path. Congress made it clear in Art. 55, UCMJ, that this Court's Eighth Amendment jurisprudence is, by that statute, fully applicable to the military, so there is no constitutional issue to be decided. In any event, that issue, if it ever needs to be addressed, should be addressed in a case in which the death penalty has actually been imposed for rape. *See Briggs* Brief in Opposition at 21-22; *Collins* Brief in Opposition at 5-7. That is not this case.

and beyond. But that is ascribing to Congress an intent that is contrary to the plain language it used to express itself, and that is not found anywhere in the legislative history. Indeed, by using the "punishable by death" language rather than listing specific crimes that would not be subject to a limitations period, Congress could very well have intended the category of cases not subject to a statute of limitations to be dynamic, changing as the law on appropriateness of applying the death penalty evolved, as it surely was at that time. That it evolved by Court decision rather than legislative enactment is of no consequence; Congress surely knew it could evolve either way. Congress also must be presumed to have known that *Coker* had already decided that rape was not so serious of a crime that it warranted punishment by death, and that Congress itself had made this Court's Eighth Amendment jurisprudence applicable to the military by Art. 55, UCMJ. "Congress is presumed to know the law, and knows how to change the law if it so desires." *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018) (citation omitted) (referencing unlawful influence under Art. 37, UCMJ); *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018) (referencing a service court of criminal appeals' authority to set aside mandatory punishments under Art. 66, UCMJ) (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) burton). Yet, knowing all of this, Congress did not expressly include rape as a crime for which there was to be no limitations period, but instead employed the open-ended "punishable by death" formulation.

Thus, CAAF's interpretation of Art. 43, UCMJ not only meets the standard of reasonableness, it is also correct. Whether a standard of reasonableness or

correctness applies, either way, there is no compelling reason for this Court's intervention.

III. The Court's Jurisdiction Is Questionable.

Both Briggs and Collins raise serious issues regarding whether this Court has jurisdiction to review the issue decided in *Mangahas* in their cases, considering that particular issue was never certified to, nor addressed by, CAAF in those cases. *See Briggs* Brief in Opposition at 8-9; *Collins* Brief in Opposition at 8-9. In this case, the question certified by the Judge Advocate General to CAAF was arguably broad enough to encompass the *Mangahas* issue,[11] but, by the Government's own reasoning, there are still questions regarding this Court's jurisdiction in this case. Pursuant to 28 U.S.C. § 1259(2), this Court may review "[d]ecisions" of CAAF in "cases" certified to it by the Judge Advocate General under 10 U.S.C. § 867(a)(2). For nearly three decades (and as recently as this January), the government has consistently maintained that this Court lacks jurisdiction under § 1259 to review any questions "not resolved by CAAF's decision in *this* case." Brief for the United States in Opposition at 10, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (mem.) (emphasis added).

The government's petition for this Court to review CAAF's decision in *this* Respondent's case is, in

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[11] The issue certified here was:

> WHETHER THE AIR FORCE'S PROSECUTION OF APPELLEE FOR RAPE IS BARRED BY THE APPLICABLE LIMITATIONS PROVISION OF THE UNIFORM CODE OF MILITARY JUSTICE.

Certificate for Review in *United States v. Daniels*, Crim. App. Dkt. 39407 (A.F. Ct. Crim. App., filed June 19, 2019), at 2.

reality, an untimely attack on *Mangahas*. The Government sought reconsideration of the *Mangahas* ruling at CAAF, but when that was denied, 77 M.J. 323, it did not seek certiorari here. In *this* case, the Judge Advocate General conceded *Mangahas* controlled, and asked CAAF to summarily dispose of the certified issue in Respondent's case "in accordance with *Mangahas* and *Briggs*."[12] Motion for Summary Disposition in *United States v. Daniels,* Crim. App. Dkt. 39407 (A.F. Ct. Crim. App. Jun. 18, 2019, filed June 19, 2019), at 1-2. In a one-sentence order, CAAF agreed *Mangahas* controlled and granted the Government's motion. Pet. App. C, at 19a.

Thus, the only "decision" that this Court has jurisdiction to review here is whether *Mangahas* applies to Respondent's case; the answer to that question is obviously yes. And, even if the Court were to find that it had no jurisdiction in *Briggs* and *Collins* but did in this case, it would make little sense to grant certiorari just to review the result in the one and only still-pending case affected by the *Mangahas* decision. As the Respondent pointed out in *Briggs,* this Court

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[12] The Government suggests a request for reconsideration of *Mangahas* was in fact made. Pet. at 12 (". . . 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*.") (emphasis added). However, the italicized language does not refer to the Government's Motion for Summary Disposition, *United States v. Daniels,* Crim. App. Dkt. 39407 (A.F. Ct. Crim. App. Jun. 18, 2019, filed June 19, 2019), at 1. The Government did not place any conditions on CAAF summarily affirming the Air Force Court of Criminal Appeals' decision. Instead, the italicized language refers to the lack of necessity for briefs and a joint appendix if CAAF was not willing to reconsider *Mangahas* and *Briggs*. *Id.* at 2.

"'[is] not, and for well over a century has not been, a court of error correction.'" *Briggs* Brief in Opposition at 6 (quoting *San Francisco v. Sheehan,* 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part); s*ee also* note 7 *supra.*

IV. The Government's Request to Consolidate *Briggs, Collins,* and *Daniels* Should Be Denied.

The Government requests that the two cases covered by the instant certiorari petition, *Collins* and *Daniels,* be consolidated with *Briggs* so that "the Court [could] 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." Pet. at 17. In the alternative, the Government says, "the Court should hold this petition [*Collins* and *Daniels*] pending its resolution of the petition in *Briggs* and then dispose of this petition as appropriate." *Id.*

Respondent Daniels believes the Court should deny certiorari in all three cases. But, if certiorari is to be granted at all, it should only be in *Briggs.* The distinguishing factor is that *Briggs* involves the issue of whether the 2006 amendments to Art. 43, UCMJ apply retroactively to cases in which the five-year statute of limitations had not yet expired. In contrast, *Collins* and *Daniels* do not involve that issue.[13] If the

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[13] The Government hints that if this Court rules the 2006 amendment does apply retroactively, it might try to argue that it should apply all the way back to cases, like *Collins* and *Daniels,* where the five-year statute of limitations had expired. *See, e.g.,* Pet. at 16 (if *Briggs* were to be decided only on the ground that the 2006 amendment applies retroactively, "further issues would remain about the validity of the prosecutions of respondents Collins and Daniels"). Any such argument would be specious, however, as it is clearly foreclosed by *Stogner.*

Court were to grant certiorari only in *Briggs,* and just on the retroactivity issue, it would be dealing only with a simple matter of statutory interpretation that has no constitutional overtones. *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("Constitutional questions should not be decided unless absolutely necessary to a decision of the case") (quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905)). In the process, it would expand the universe of cases that might be affected by a reversal, *see* note 8 *supra,* but without unduly expanding that universe back into the last century. Respondent Daniels is not suggesting this Court take this route; he is merely proposing this as an alternative to granting certiorari in all three cases.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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