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 RICHARD D. COLLINS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1259.

2. Whether, at the time of the offenses for which Respondents were convicted, rape was an "offense punishable by death" for purposes of Article 43 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843.

RELATED PROCEEDINGS

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

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INTRODUCTION

The Petition in these consolidated cases presents the same narrow question as the Petition in *United States* v. *Briggs*, No. 19-108: Whether the Court of Appeals for the Armed Forces (CAAF) erred in a pair of decisions holding that, for offenses committed prior to June 6, 2006, the military statute of limitations for rape of an adult is five years.

As in *Briggs*, the heart of the government's case for certiorari here is that, at the relevant times, rape of an adult was an offense "punishable by death" for purposes of Article 43 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843, such that it had no statute of limitations. Pet. 15. And as in *Briggs*, there are three independent reasons why that claim does not justify this Court's intervention.

First, and most importantly, CAAF's conclusion to the contrary was correct on the merits. Even if the Eighth Amendment does not itself bar the military from imposing the death penalty for rape of an adult, Article 55 of the UCMJ, 10 U.S.C. § 855—which incorporates into courts-martial this Court's interpretations of the Eighth Amendment, including *Coker* v. *Georgia*, 433 U.S. 584 (1977)—does.

Second, certiorari is unwarranted in any event because any error by CAAF would amount to nothing more than a misinterpretation of the UCMJ—and one that affects only "a closed set of crimes committed before 2006." Petition for a Writ of Certiorari at 23, *United States* v. *Briggs*, No. 19-108 [hereinafter "*Briggs* Pet."].

Third, reviewing CAAF's decisions in Respondent Collins's case would require this Court to also resolve a difficult question as to its statutory jurisdiction—

which the government has consistently argued (until now) is limited to the four corners of CAAF's decisions in the cases from which certiorari is sought.

If this Court is inclined to deny the petition in *Briggs*, it should therefore deny the Petition here. But even if this Court is inclined to grant certiorari in *Briggs*, this case is sufficiently distinct from that one that the proper disposition would be to hold it pending *Briggs*—if not to deny certiorari outright.

DECISIONS BELOW

CAAF's dispositive order in Respondent Collins's case is reported at 78 M.J. 415 (C.A.A.F. 2019) (mem.), and is reprinted in the Petition Appendix at 1a. The opinion of the Air Force Court of Criminal Appeals in Respondent Collins's case is reported at 78 M.J. 530 (A.F. Ct. Crim. App. 2018), and is reprinted in the Petition Appendix at 2a–18a.

JURISDICTION

The government invokes this Court's jurisdiction under 28 U.S.C. § 1259(3). As noted below, however, there is a serious question as to whether that statute (or 28 U.S.C. § 1259(4)) provides this Court with jurisdiction over CAAF's decision in Respondent Collins's case. *See post* at 8–10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions identified in the Petition, Pet. 2–3, Pet. App. 42a–45a, this case also involves Article 55 of the 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 of the UCMJ, 10 U.S.C. § 843, which is reprinted as part of CAAF's opinion in *Briggs* at *Briggs* Pet. App. 7a–8a.

REASONS FOR DENYING THE PETITION

1. As in *Briggs*, the government's central objection here is to *United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). In that case, CAAF unanimously held that rape of an adult is not an "offense punishable by death" for purposes of Article 43 of the UCMJ because, thanks to this Court's decision in *Coker*, courts-martial could not constitutionally impose such a punishment. As a result, instead of carrying no statute of limitations, the alleged 1997 rape for which Lt. Col. Mangahas was charged had a statute of limitations of five years. *See id*. at 223.

And although Congress amended Article 43 in 2006 to eliminate a statute of limitations for rape, CAAF did not consider the effect of that amendment in *Mangahas* because the five-year statute of limitations had expired before the 2006 amendment was enacted. *See id*. at 222; *see also Stogner* v. *California*, 539 U.S. 607, 610–21 (2003) (holding that a retroactive extension of an expired statute of limitations is unconstitutional). The government did not seek further review of *Mangahas*.

In *United States* v. *Briggs*, 78 M.J. 289 (C.A.A.F. 2019), CAAF resolved a question *Mangahas* had left open, unanimously holding that the 2006 amendment to Article 43 did *not* apply retroactively to those rape cases for which the statute of limitations had not yet expired. Whereas *Mangahas* foreclosed military prosecutions of any rape committed on or before

January 6, 2001 that was not prosecuted within five years, *Briggs* foreclosed new courts-martial for rapes committed between January 7, 2001 and January 5, 2006. Thus, although the government's Petition in *Briggs* is focused on *Mangahas*, it at least nominally seeks reversal of CAAF's decision in *Briggs*, as well.

The Petition in Respondent Collins's case, in contrast, only implicates the question CAAF decided in *Mangahas*. Respondent Collins was charged in March 2016 (and subsequently convicted) for a rape that took place in August 2000. Thus, the 2006 amendment to Article 43 *could not* have retroactively extended the statute of limitations in Respondent Collins's case—because it had already expired. *See Stogner*, 539 U.S. at 610–21. Respondent Collins's case instead rises and falls on whether *Mangahas* was rightly decided—regardless of whether *Briggs* was.

2. The Brief in Opposition in *Briggs* [hereinafter "*Briggs* BIO"] sets out three reasons why certiorari should be denied in that case, each of which applies with equal—if not greater—force here.

A. First, and most importantly, *Mangahas* was rightly decided. As the *Briggs* BIO explains, *Mangahas* held that rape of an adult is not an "offense punishable by death" because, in CAAF's view, this Court's decision in *Coker* "unequivocally held that the death penalty was a constitutionally impermissible penalty in violation of the cruel and unusual punishment clause of the Eighth Amendment for the crime of rape of an adult woman." *Mangahas*, 77 M.J. at 223. Rape of an adult therefore was not "punishable by death" for purposes of Article 43 because the death penalty was categorically unavailable as a potential punishment in such cases. *See Briggs* BIO at 11–15.

This Court has never held *Coker* inapplicable to courts-martial—and five Justices expressly declined an invitation to do so in *Kennedy* v. *Louisiana*, 554 U.S. 945, 948 (2008) (statement of Kennedy, J.). As in *Briggs*, then, the government's central objection is that CAAF elected to apply *Coker* to courts-martial—rather than distinguish it. As CAAF's predecessor has explained, however, there is little reason to apply the Eighth Amendment differently to courts-martial for offenses—like the offense at issue here—that "have no characteristics which, for purposes of applying the prohibition against 'cruel and unusual punishments,' distinguish them from similar crimes tried regularly in State and Federal courts." *United States* v. *Matthews*, 16 M.J. 354, 368 (C.M.A. 1983).

But even if *Coker* does not apply to courts-martial of its own force, as the *Briggs* BIO explains, Article 55 of the UCMJ would compel the same result. CAAF and its predecessor have long interpreted that provision to incorporate into courts-martial this Court's Eighth Amendment jurisprudence as a matter of statute. *See, e.g.*, *United States* v. *Wappler*, 9 C.M.R. 23, 26 (C.M.A. 1953); *see also Briggs* BIO at 13–14 & n.8.

And as in *Briggs*, the Petition here does not even cite Article 55, let alone attempt to explain why it doesn't incorporate *Coker*. Belatedly, in its reply brief in *Briggs*, the government casts that provision as irrelevant because it was enacted at the same time as Article 120—which expressly authorized the death penalty for rape. *See Briggs* Reply Br. 8–9. The government thus suggests that the more specific language of Article 120 should prevail over the general text of Article 55. *See id*. at 9.

This argument is a non sequitur. When Articles 55 and 120 were enacted in 1950, this Court had not yet held that the Eighth Amendment bars the death penalty for rape of an adult in *civilian* courts, let alone courts-martial. It is only because of *Coker*, which post-dates the enactment of *both* provisions, that Article 55 bans courts-martial from imposing the death penalty for rape of an adult.

The logic of the government's reading of Article 55 would mean that Congress only incorporated into courts-martial the Eighth Amendment as it was understood at the moment Article 55 was enacted. Unsurprisingly, the government offers no support for this counterintuitive proposition. And CAAF and its predecessor have long rejected it—reading Article 55 to incorporate this Court's Eighth Amendment jurisprudence as of the time relevant to each case, not as of 1950. *See, e.g.*, *Matthews*, 16 M.J. at 368.

Ultimately, unless CAAF and its predecessor have erred (for six decades) by interpreting Article 55 to incorporate this Court's Eighth Amendment jurisprudence, then Article 55 incorporates *Coker* into courts-martial. Rape of an adult is therefore *not* "punishable by death" for purposes of Article 43—and hasn't been since 1977—because Article 55 prohibits capital punishment for such an offense. Put another way, as the *Briggs* BIO concluded, "even if the Eighth Amendment itself does not forbid the imposition of the death penalty for adult rape by a servicemember, Article 55 does. Either way, *Mangahas* was rightly decided." *Briggs* BIO at 14.

B. Properly accounting for Article 55, neither *Briggs* nor this Petition raises "an important question of federal law that has not been, but should be, settled

by this Court." S. Ct. R. 10(c). Because *Coker* applies to courts-martial by statute, the Eighth Amendment question is not actually presented here. And it is also irrelevant going forward; as the government itself conceded in *Briggs*, the maximum available sentence from a court-martial today for rape of an adult is life without the possibility of parole. *Briggs* Pet. 8 n.*.

The *Briggs* petition also claimed that this Court's review is needed to resolve tension between CAAF's reading of Article 43 and civilian courts' readings of analogous text in 18 U.S.C. § 3281. *See id.* at 24–25. But Congress did not intend for Article 43 to be read *in pari materia* with civilian statutes of limitations. *See, e.g.*, *United States* v. *Lopez de Victoria*, 66 M.J. 67, 72 (C.A.A.F. 2008); *United States* v. *McElhaney*, 54 M.J. 120, 124–26 (C.A.A.F. 2000); *see also Briggs* BIO at 20–21. Thus, *Mangahas* is not "in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a).[1]

Ultimately, the government's only real argument in favor of certiorari here, as in *Briggs*, reduces to a claim that CAAF misinterpreted the UCMJ in a manner that affects "a closed set of crimes committed before 2006." *Briggs* Pet. 23; *see also* Pet. 17 ("[T]he number of cases affected by the CAAF's decisions is not especially high . . . ."). Even if CAAF erred (and it didn't), that's not exactly compelling.

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1. The government's reply in *Briggs* concedes that this "inconsistency does not strictly amount to a conflict." *Briggs* Reply at 11. The government nevertheless claims that "it is the kind of inconsistency that this Court has cited in granting review of CAAF cases." *Id*. As the *Briggs* BIO documented, however, the questions presented in those cases, unlike here, went well beyond CAAF's interpretation of the UCMJ. *See Briggs* BIO at 18–20.

C. All of this goes to why there is no need for this Court to grant the Petition. But there is also a significant question as to whether this Court *could* grant certiorari even if it wanted to. As the *Briggs* BIO noted, the government has long argued that this Court's jurisdiction in cases appealed from CAAF is limited to the four corners of the "decisions" at issue. *Briggs* BIO at 6–11. Whereas at least *part* of the Petition in *Briggs* seeks this Court's review of CAAF's decision in that case, the Petition here does not seek review of *anything* CAAF decided in Respondent Collins's case (which is barely even mentioned). Instead, it is directed at *Mangahas*.[2]

As in *Briggs*, the government could have avoided this jurisdictional issue here by certifying to CAAF the

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2. The Air Force Judge Advocate General certified three questions to CAAF in Respondent Collins's case:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT DETERMINED THAT THE 2006 AMENDMENT TO ARTICLE 43, UCMJ, CLARIFYING THAT RAPE IS AN OFFENSE WITH NO STATUTE OF LIMITATIONS, DID NOT APPLY TO APPELLEE'S 2000 RAPE OFFENSE.

II. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT FOUND THAT APPELLEE COULD SUCCESSFULLY RAISE THE STATUTE OF LIMITATIONS DEFENSE FOR THE FIRST TIME ON APPEAL.

III. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT FOUND THAT THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INFORM APPELLEE HE COULD RAISE THE STATUTE OF LIMITATIONS AS A BAR TO TRIAL.

United States v. *Collins*, 78 M.J. 190, 190 (C.A.A.F. 2018) (mem.). CAAF's "decision" in *Collins* summarily answered each of these three questions in the negative. *See* Pet. App. 1a.

question whether *Mangahas* was rightly decided in Respondent Collins's case—which CAAF would have had to answer, and which would have eliminated any doubt as to this Court's jurisdiction. But it didn't. Thus, if the government's longstanding view of this Court's jurisdiction is correct, this Court lacks the ability in Respondent Collins's case to even reach the question that the Petition presents.[3]

In its *Briggs* reply, the government offers three defenses of this Court's jurisdiction—none of which are persuasive. First, it argues that this Court must have jurisdiction in that case because it *already* exercised jurisdiction over it—by initially granting Briggs's petition for certiorari, vacating CAAF's decision below, and remanding in light of *Mangahas*. *See Briggs* Reply at 2. But "drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). And this Court in *Ortiz* v. *United States*, 138 S. Ct. 2165 (2018), hardly took its jurisdiction over CAAF as settled merely because it had previously exercised it. *See id*. at 2173 & n.3.

Second, the government suggests that whether *Mangahas* is rightly decided is "predicate to an intelligent resolution" of the issues CAAF decided in *Briggs* (and, by implication, Respondent Collins's case). *Briggs* Reply Br. at 4. But the government imports that analysis from inapposite cases analyzing the scope of questions presented before this Court—not cases analyzing the scope of § 1259. *See id*.

3. As the party invoking this Court's jurisdiction, the burden is on the government to establish that jurisdiction exists, not on Respondent Collins to establish that it doesn't. *See, e.g.*, *Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019).

(quoting *United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2009)).[4] And the government offers no explanation for why it passed up the opportunity to remove any doubt as to this Court's jurisdiction by certifying the question whether *Mangahas* was rightly decided to CAAF.

Third, the government for the first time asserts that this Court could also exercise jurisdiction under 28 U.S.C. § 1259(4), because these cases are ones "in which the Court of Appeals for the Armed Forces granted relief." That argument might make sense if that's all that § 1259(4) said. But the full text of that provision—which the government tellingly omits from the *Briggs* reply—paints a different picture. This Court has jurisdiction under § 1259(4) over CAAF's decisions in "[c]ases, *other than* those described in paragraphs (1), (2), and (3) of this subsection, in which [CAAF] granted relief." 28 U.S.C. § 1259(4) (emphasis added).

Neither *Briggs* nor this case is a "case[] *other than* those described" in § 1259(1)–(3). In *Briggs*, CAAF "granted a petition for review under section 867(a)(3) of title 10." *Id.* § 1259(3). And Respondent Collins's case was "certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10." *Id.* § 1259(2).[5] Because

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4. The weakness of the government's argument on this point is only reinforced by its insistence that whether the court-martial had *subject-matter jurisdiction* was somehow *not* "predicate to the intelligent resolution" of the issues CAAF decided in *Larrabee* v. *United States*, 78 M.J. 107 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 1164 (2019). *See Briggs* Reply Br. 4.

5. As this Court made clear in *United States* v. *Denedo*, 556 U.S. 904 (2009), the purpose of § 1259(4) is to allow this Court to review cases in which CAAF grants some form of extraordinary

this Court could review CAAF's decisions in these cases through those other provisions, it cannot review them through § 1259(4).

3. The government's Petition in this case therefore presents no stronger an argument for granting certiorari than the Petition in *Briggs*. And in at least two respects, it is meaningfully weaker.

First, whereas the constraints on this Court's jurisdiction over CAAF would significantly *narrow* the scope of review in *Briggs*, here, it would foreclose jurisdiction entirely. The government in Respondent Collins's case did not certify to CAAF, and CAAF did not decide, whether *Mangahas* was rightly decided. If this Court can only review the four corners of CAAF's decision in Respondent Collins's case, then it cannot decide the question presented in the Petition.

Second, there is no scenario in which this Court's review could reach *more* of the question presented in these cases than in *Briggs*—and, even apart from the jurisdictional issue, one scenario in which it would reach far less. As the Petition notes, if this Court in *Briggs* reverses CAAF's decision in *Mangahas*, "the prosecutions of respondents here would be permissible on the same grounds." Pet. 16. But if this Court grants *Briggs* and only reverses CAAF's decision in *Briggs*, such a ruling would have no bearing whatsoever on Respondent Collins's case—which arises out of an offense committed in 2000, and in which the five-year statute of limitations had expired before the 2006 amendment was enacted.

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relief—in which CAAF's jurisdiction is based on something other than Article 67(a) of the UCMJ, 10 U.S.C. § 867(a).

The government cryptically suggests otherwise, arguing that such a result "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." *Id*. at 15. It would be one thing if the Petition offered argument for why, contra *Mangahas* and *Stogner*, retroactive extension of an expired statute of limitations would *not* be unconstitutional in this context, but it doesn't. *See Munaf* v. *Geren*, 533 U.S. 674, 703 (2008) ("Under such circumstances we will not consider the question."). So long as *Mangahas* stays on the books, then, there would be nothing more for this Court to do here.

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In its reply in *Briggs*, the government attempted to portray the jurisdictional issue as Briggs's "principal argument for denying certiorari." *Briggs* Reply at 2. As in that case, however, the difficult jurisdictional question this Court would have to resolve is just the final nail in the cert.-worthiness coffin. Even if this Court ultimately concluded that it has jurisdiction here to revisit CAAF's decision in *Mangahas*, there is no error to correct. And even if CAAF erred in *Mangahas*, its error runs only to the scope of the UCMJ as applied to a small set of cases that closed nearly two decades ago. That's why, as in *Briggs*, the Petition here should be denied outright. But even if this Court is otherwise inclined in *Briggs*, the government offers no convincing reason why certiorari must also be granted in Respondent Collins's case at this stage—versus holding this Petition pending the ultimate disposition in *Briggs*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied as to Respondent Collins—or held pending this Court's disposition in *Briggs*.

Respectfully submitted,

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