No. 19-108

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL J.D. BRIGGS

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

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARY ELLEN PAYNE
Associate Chief
BRIAN C. MASON
Lt. Col., USAF
Deputy Chief
Government Trial and Appellate Counsel Division
Department of the Air Force
Joint Base Andrews-NAF, MD 20762

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 (Joint Base Andrews Naval Air Facility Washington):

United States v. *Lt. Col. Michael J.D. Briggs* (Aug. 7, 2014) (no docket number assigned)

United States Air Force Court of Criminal Appeals:

United States v. *Lt. Col. Michael J.D. Briggs*, No. ACM 38730 (June 23, 2016)

United States Court of Appeals for the Armed Forces:

United States v. *Michael J.D. Briggs*, No. 16-711 (May 3, 2017)

United States v. *Michael J.D. Briggs*, No. 16-711 (Feb. 22, 2019)

Supreme Court of the United States:

Liban H. Abdirahman v. *United States*, No. 17-243 (Sept. 7, 2018)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes: Page

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 19-108

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL J.D. BRIGGS

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

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 judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (App., *infra*, 1a-15a) is reported at 78 M.J. 289. The opinion of the Air Force Court of Criminal Appeals (App., *infra*, 16a-40a) is not published in the Military Justice Reporter but is available at 2016 WL 3682568.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2019. On May 14, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 22, 2019. On June 12, 2019, the Chief Justice further extended the

time to and including July 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In 2005, 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) (2000). 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) (2000).

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*, 41a-44a.

STATEMENT

Following a general court-martial by the United States Air Force, respondent was convicted of rape, in violation of 10 U.S.C. 920(a) (2000). The Air Force Court of Criminal Appeals (AFCCA) affirmed. App., *infra*, 16a-40a. The Court of Appeals for the Armed Forces (CAAF) summarily affirmed in part and denied review in part. 76 M.J. 36; 76 M.J. 338. This Court granted a petition for a writ of certiorari, vacated the CAAF's judgment, and remanded. 139 S. Ct. 38. On remand, the CAAF reversed the AFCCA and dismissed the charge against respondent. App., *infra*, 1a-15a.

1. In May 2005, respondent was a captain and F-16 instructor pilot in the Air Force. App., *infra*, 2a. "Following an evening of heavy drinking," respondent "went to [the] room" of a member of his squadron (DK) and "forced her to have sex with him even though she said 'no' and 'stop' and tried to roll away." *Ibid.* "DK did not immediately report the incident to law enforcement authorities, but she did tell others about it." *Ibid.*

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/saap-osd004331-18-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) (UCMJ Sex Crimes Report),

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) (RSP Report), http://responsesystemspanel.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. When respondent raped DK in 2005, the CAAF's binding precedent in *Willenbring* v. *Neurauter*, 48 M.J. 152 (1998), made clear that the UCMJ allowed prosecution for rape at any time, without limitation. See *id.* at 178; see also *United States* v. *Stebbins*, 61 M.J. 366, 369 (C.A.A.F. 2005) (reaffirming *Willenbring* shortly after respondent's crime occurred).

Willenbring interpreted Article 43 of the UCMJ. From November 1986 to January 2006, Article 43 included a default five-year criminal statute of limitations for most offenses, 10 U.S.C. 843(b) (2000), along with an

exception under which a "person charged * * * with any offense punishable by death, may be tried and punished at any time without limitation," 10 U.S.C. 843(a) (2000).

For "more than a century," Congress had expressly authorized the death penalty for rape under military law. *Kennedy* v. *Louisiana*, 554 U.S. 945, 946 (2008) (statement of Kennedy, J., respecting the denial of rehearing). Since at least 1863, Congress had authorized the military to impose the death penalty for rapes committed during wartime. See *ibid.* (citing Act of Mar. 3, 1863, § 30, 12 Stat. 736). And since 1950, the UCMJ had authorized the death penalty for military rapes committed during peacetime. See *ibid.* (citing Art. 120, 64 Stat. 140). In particular, from 1986 to 2006, 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) (2000).

In *Willenbring*, 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)). The CAAF additionally 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, regardless of whether the death penalty could be constitutionally imposed. *Willenbring*, 48 M.J. at 180.

3. Although DK did not report respondent's rape to law enforcement at the time, she obtained proof of the rape, sufficient to enable prosecution, eight years later. In July 2013, DK called respondent and, "[w]ithout [his] knowledge, * * * recorded their conversation." App., *infra*, 2a. In that conversation, respondent "acknowledged his misconduct." *Ibid.* Specifically, respondent told DK, "I will always be sorry for raping you." *Ibid.*; see *id.* at 18a-22a (reproducing partial transcript of the recording). In 2014, respondent was charged on one count of raping DK, in violation of 10 U.S.C. 920(a) (2000). See App., *infra*, 3a.

At the time of respondent's court-martial, the UCMJ provided (as it does today) that a "person charged 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 explicit reference to rape had been added to the UCMJ statute-of-limitations exception by the National Defense Authorization Act for Fiscal Year 2006 (2006 NDAA), Pub. L. No. 109-163, § 553(a), 119 Stat. 3264. The Conference Report accompanying the 2006 NDAA had 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) (Conference Report); see H.R. Rep. No. 89, 109th Cong., 1st

Sess. 332 (2005) (House Report) (similar); *Willenbring*, 48 M.J. at 178-180.

The 2006 NDAA was enacted after Congress received a report that it had commissioned from the Department of Defense, which had reviewed military law "with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault and to conform" military law "more closely to other Federal laws and regulations that address such issues." Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Tit. V, § 571(a), 118 Stat. 1920. The Defense Department's report had recommended (among other things) that the UCMJ expressly codify the CAAF's determination that no statute of limitations applies to rape. UCMJ Sex Crimes Report 285. The report approvingly cited the CAAF's determination in *Willenbring* that rape is "punishable by death," 48 M.J. at 178, and therefore not subject to a limitations period under Article 43 "[n]otwithstanding [*Coker*'s] prohibition against the death penalty for rape," UCMJ Sex Crimes Report 285. The report stated that the "military statute of limitations for rape of an adult female should continue to be unlimited" and that "[a]dding 'rape' * * * to [Article 43] clarifies that the holding of [*Willenbring*] is still good law and that there is an unlimited statute of limitations for all offenses that list death as a statutorily potential sentence—even if death is not a Constitutionally permitted punishment." *Ibid.*

In addition to adding "rape" to Article 43, the 2006 NDAA also revised Article 120's prohibition of rape and removed the express directive that capital punishment be available for that offense. § 552(a), 119 Stat. 3256-

3257. The revised provision instead states that rape "shall be punished as a court-martial may direct." § 552(a), 119 Stat. 3257. The 2006 NDAA specified, however, that "[u]ntil the President otherwise provides * * * , the punishment which a court-martial may direct for" rape includes "death." § 552(b), 119 Stat. 3263. In 2007, President George W. Bush issued an Executive Order providing that the death penalty would remain available for rape. Exec. Order No. 13,447, 72 Fed. Reg. 56,214 (Oct. 2, 2007); see *Kennedy*, 554 U.S. at 947 (statement of Kennedy, J.).[*]

4. At his court-martial, respondent was found guilty of raping DK, and sentenced to "a dismissal, confinement for five months, and a reprimand." App., *infra*, 3a. On appeal to the AFCCA, respondent argued that his 2005 rape was subject to the UCMJ's default five-year statute of limitations, which had expired before he was charged in 2014. *Ibid.* The AFCCA declined to consider that argument because respondent had failed to raise it at trial. *Ibid.* And the court affirmed his conviction, emphasizing that respondent's "own words to * * * DK are highly persuasive in convincing us that he committed the offense." *Id.* at 39a.

Respondent sought review in the CAAF. He alleged ineffective assistance of counsel based on his trial counsel's failure to assert a statute-of-limitations defense,

---

[*] Congress amended portions of Article 120 again in the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Pub. L. No. 112-81, § 541, 125 Stat. 1405-1407. Unlike the 2006 NDAA, the 2012 NDAA did not expressly address whether the death penalty remains available for rape. The current version of the *Manual for Courts-Martial* states that the maximum punishment for rape committed after June 28, 2012, is "confinement for life without eligibility for parole." Pt. IV ¶ 60.d(1) (2019).

and he also challenged the judicial composition of the AFCCA. App., *infra*, 3a-4a. The CAAF denied review with respect to the limitations issue and summarily affirmed as to the AFCCA's judicial composition. *Id.* at 4a; see 76 M.J. 36; 76 M.J. 338. In July 2017, petitioner and 164 other service members filed a petition for a writ of certiorari seeking review of CAAF decisions upholding the composition of the AFCCA. *Abdirahman* v. *United States*, 138 S. Ct. 2702 (2018) (No. 17-243).

5. While that petition 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 *ibid.* The court did not address the 2006 NDAA provision that expressly authorized rape prosecutions without a limitations period.

Following the CAAF's decision in *Mangahas*, respondent filed a supplemental brief in this Court requesting that, if the Court declined to grant review on the AFCCA composition question, it nevertheless grant his petition, vacate the CAAF's judgment, and remand so that the CAAF could consider the effect of *Mangahas* on his case. Pet. Supp. Br. at 1-2, *Abdirahman*,

supra (No. 17-243). After upholding the composition of the AFCCA in *Ortiz* v. *United States*, 138 S. Ct. 2165 (2018), this Court ultimately granted respondent's request to remand his case to the CAAF to address the limitations issue. 139 S. Ct. 38.

6. On remand, the CAAF ordered dismissal of the rape charge against respondent on statute-of-limitations grounds. App., *infra*, 1a-15a. The CAAF stated that, under its decision in *Mangahas*, the UCMJ at the time of respondent's 2005 offense "established a five-year period of limitations," which had run before the 2014 prosecution. *Id.* at 7a. The CAAF also concluded that the 2006 NDAA provision expressly providing that rape could be prosecuted without a limitations period did not apply to respondent's offense. *Id.* at 7a-12a. In the court's view, even though the 2006 NDAA was consistent with the CAAF's own interpretation of the UCMJ's limitations provision at the time of respondent's offense and the time of his court-martial, applying the amendment to respondent's case would constitute an improper retroactive application of the law. *Ibid.*

REASONS FOR GRANTING THE PETITION

The CAAF erred in reversing course and interpreting the UCMJ to bar the Air Force's prosecution of respondent for raping DK. Recognizing that sexual assault within the military is devastating to the morale, discipline, and effectiveness of our Armed Forces, but also difficult to uncover, Congress long made rape a capital offense and has enabled rape to be prosecuted whenever it is discovered. Now, however, the CAAF has closed the door on prosecuting rapes that occurred before 2006—even admitted rapes like the one at issue here—unless the rape was reported and charged within

five years (*i.e.*, by 2011 at the latest). That result contravenes the statutory text, Congress's evident intent to root out and punish military rape, and the military's constitutional latitude to punish military crimes more strictly than civilian ones. And it will prevent the military from holding rapists accountable in a number of cases. This Court should grant review on this important issue and reverse the CAAF's misunderstanding of the law.

A. The CAAF Erred In Holding That The Air Force's Prosecution Of Respondent For Rape Was Time-Barred

The CAAF had it right the first two times: under the version of the UCMJ in effect when respondent raped DK, rape was "punishable by death," 10 U.S.C. 843(a) (2000), and therefore not subject to a limitations period. See *Willenbring* v. *Neurauter*, 48 M.J. 152, 178-180 (C.A.A.F. 1998); see also *United States* v. *Stebbins*, 61 M.J. 366, 369 (C.A.A.F. 2005). The CAAF erred in *United States* v. *Mangahas*, 77 M.J. 220 (2018), by abandoning that longstanding construction. And it compounded that error in this case by refusing to give effect to Congress's codification of its earlier precedent.

1. Respondent's 2005 rape offense was "punishable by death" under Article 43 as then in force and therefore not subject to a limitations period

Respondent's 2005 rape offense was not subject to a limitations period under Article 43 of the UCMJ as then in force for two independent reasons. First, Article 43's provision that offenses "punishable by death," 10 U.S.C. 843(a) (2000), may be prosecuted without a time limitation refers to offenses *statutorily* punishable by death—as rape undisputedly was under the UCMJ in

2005, see 10 U.S.C. 920(a) (2000). Second, even assuming that Congress intended to import constitutional death-penalty jurisprudence into the UCMJ statute of limitations, the Constitution does not preclude capital punishment for rape in the military context.

a. Article 43(a) allowed prosecution without a time limitation for crimes statutorily "punishable by death," as rape was under the UCMJ in 2005

A statute of limitations "reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution." *Smith* v. *United States*, 568 U.S. 106, 112 (2013). For some crimes, the legislature may conclude that evidentiary considerations or interests in repose justify a bar on prosecution after a certain "passage of time." *Toussie* v. *United States*, 397 U.S. 112, 114 (1970). For other crimes, the legislature may determine that "no statute of limitations" is justified. *Dickey* v. *Florida*, 398 U.S. 30, 47 (1970) (Brennan, J., concurring). "In general, the graver the offense, the longer the limitations period; indeed, many serious offenses, such as murder, typically carry no limitations period." *Doggett* v. *United States*, 505 U.S. 647, 668 (1992) (Thomas, J., dissenting). Because statutes of limitations represent an exclusively "legislative judgment," they must be given "effect in accordance with what [courts] can ascertain the legislative intent to have been." *United States* v. *Kubrick*, 444 U.S. 111, 117, 125 (1979); see, *e.g.*, *Stogner* v. *California*, 539 U.S. 607, 615 (2003) (stating that a criminal statute of limitations "reflects a legislative judgment"); *United States* v. *Marion*, 404 U.S. 307, 322 (1971) (similar). Here, Congress's plainly expressed intent was to allow for prosecution of rapes within the military at any time.

i. At the time of respondent's 2005 rape offense, Article 43(a) of the UCMJ provided that "[a] person charged * * * with any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2000). Article 120(a) of the UCMJ, in turn, provided that "rape * * * shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 920(a) (2000). Under a straightforward reading of those interlocking provisions, respondent's 2005 rape offense was not subject to a limitations period. Because no limitations period applied to an "offense punishable by death," 10 U.S.C. 843(a) (2000), and the UCMJ provided that rape could be "punished by death," 10 U.S.C. 920(a) (2000), Congress's "legislative judgment" was that no limitations period applied to a prosecution for military rape, *Kubrick*, 444 U.S. at 117.

As the CAAF originally recognized, Article 43's directive that offenses "punishable by death" may be prosecuted without a time limitation was Congress's way of ensuring that "the most serious offenses" could be prosecuted at any time "without listing each one" of those offenses "in the statute." *Willenbring*, 48 M.J. at 178, 180. Article 43(a) thus reflected Congress's "policy judgment" that any offense sufficiently serious to be deemed punishable by death was also sufficiently serious to warrant punishment without a time limitation. *Smith*, 568 U.S. at 112. That type of judgment is well within Congress's authority to define crimes and available defenses. See *ibid.*; *Marion*, 404 U.S. at 322; *Toussie*, 397 U.S. at 115.

ii. It makes little sense to interpret the language of former Article 43 to make the timeliness of a rape charge contingent on future judicial decisions about the

constitutionality of capital punishment for military rape. Whatever a court might ultimately conclude about the constitutional permissibility of capital punishment for rape in the military, Congress's express authorization of such punishment made clear its own classification of rape in the tier of offenses so serious as to warrant prosecution at any time.

Congress itself evidently did not believe that capital punishment for military rape is constitutionally impermissible, or it would not have prescribed such punishment. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) ("assum[ing]" that Congress "legislates in the light of constitutional limitations"). A contrary conclusion by a court on that constitutional question would not undermine Congress's own judgment that rape is among the few particularly "serious offenses" for which prosecution at any time is warranted. *Willenbring*, 48 M.J. at 180. And Congress had no sound reason to permit such a judicial conclusion to affect the statute of limitations. By doing so, Congress would have allowed an adverse decision on the constitutional question to preclude not only the imposition of capital punishment, but the imposition of *any* punishment, for military rapes that occurred more than five years before charges were brought. Congress would not have intended that result.

The CAAF's reliance on *Coker* v. *Georgia*, 433 U.S. 584 (1977), to curtail the limitations period for military rape prosecutions, see *Mangahas*, 77 M.J. at 223-224, was especially misplaced. *Coker*, which was decided in 1977, *predated* the 1986 enactment at issue here, and Congress was aware of *Coker*'s holding that the death penalty for rape is unconstitutional in the civilian context. Indeed, Congress in 1986 repealed the federal

criminal statute, 18 U.S.C. 2031 (1982), that had previously authorized the death penalty for rape in the civilian system. Sexual Abuse Act of 1986, Pub. L. No. 99-654, § 3(a)(1), 100 Stat. 3663; see *Coker*, 433 U.S. at 593 n.6 (plurality opinion) (noting that former Section 2031 authorized the death penalty for rape under federal criminal law). Congress nevertheless retained capital punishment for military rape long after *Coker*, reflecting its view that such a crime is "punishable by death," 10 U.S.C. 843(a) (2000), notwithstanding *Coker*'s holding. That view should be controlling for purposes of interpreting the statute of limitations at issue here. See *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (explaining that congressional labels are "dispositive * * * for purposes of matters that are within Congress's control").

iii. The circumstances surrounding Congress's enactment of the UCMJ limitations provision in force at the time of respondent's offense confirm that Congress did not make the military's ability to prosecute late-discovered rapes contingent on judicial agreement about the constitutionally permissible punishments for such rapes. The Senate Report accompanying the 1986 revision of Article 43 explained that, under the provision's text, "no statute of limitations would exist in prosecution of offenses for which the death penalty is a punishment *prescribed by or pursuant to the UCMJ*." S. Rep. No. 331, 99th Cong., 2d Sess. 249 (1986) (emphasis added) (Senate Report). And as explained above, rape could be punished by death "pursuant to the UCMJ" at the time of respondent's offense. *Ibid.*; see 10 U.S.C. 920(a) (2000).

The Senate Report accompanying the 1986 revision of Article 43 illustrates that the provision's "punishable

by death" language was copied from language that courts had uniformly construed to refer solely to punishments authorized by statute. The report explains that the 1986 amendment was designed to bring the UCMJ limitations provision "more in line with federal criminal code provisions." Senate Report 249. The principal relevant federal criminal code provision provides that "[a]n indictment for any offense punishable by death may be found at any time without limitation." 18 U.S.C. 3281. In construing that provision and parallel federal statutes, courts of appeals had determined that an offense was "punishable by death" so long as the death penalty was *statutorily* authorized for the offense. See *Coon* v. *United States*, 411 F.2d 422, 425 (8th Cir. 1969) ("[I]n deciding which limitation is applicable [under Section 3281], we must look directly to the statute."); see also *United States* v. *Kennedy*, 618 F.2d 557, 557 (9th Cir. 1980) (per curiam) (adopting the same reading of "punishable by death" in the federal bail statute, 18 U.S.C. 3148 (1976)); cf. *United States* v. *Payne*, 591 F.3d 46, 59 (2d Cir.) (observing that federal courts of appeals continue to uniformly interpret Section 3281 in the same way today), cert. denied, 562 U.S. 950 (2010). If Congress in fact intended to inject a novel incorporation of the Eighth Amendment into a statute of limitations, it chose its words poorly. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 590 (2010) (presuming that Congress intended to incorporate circuits' preexisting interpretation of identical language).

b. Rape was constitutionally "punishable by death" in the military-justice system in 2005

In any event, even assuming that Congress designed a statute of limitations for military rape that turns on

whether capital punishment for that crime is constitutionally permissible, Congress correctly determined that the Constitution does not foreclose capital punishment for rape in the military context. The crime of military rape was therefore "punishable by death," 10 U.S.C. 843(a) (2000), at the time of respondent's offense under any plausible understanding of that phrase.

This Court has long recognized that the Constitution imposes fewer restrictions on military prosecutions than it does on civilian ones. Article I of the Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, and the Fifth Amendment exempts "cases arising in the land or naval forces" from the grand-jury requirement, U.S. Const. Amend. V. This Court has thus long held that the military may try service members by court-martial without a grand jury. See, *e.g.*, *Kahn* v. *Anderson*, 255 U.S. 1, 8 (1921); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 78-79 (1858). And despite the absence of a similarly express textual exemption, this Court has likewise held that the jury-trial requirement does not apply to courts-martial. See *Anderson*, 255 U.S. at 8-9. The Court has also explained that it will enforce procedures adopted by Congress for military prosecutions unless the "factors militating in favor" of broader due-process protections "are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976) (concluding that right to counsel does not apply to summary courts-martial); see *Weiss* v. *United States*, 510 U.S. 163, 177-178 (1994) (holding that military judges need not have fixed terms of office).

The Court has never determined whether—and, if so, how—the Eighth Amendment might apply to courts-

martial. See *Kennedy* v. *Louisiana*, 554 U.S. 945, 946-947 (2008) (statement of Kennedy, J., respecting the denial of rehearing) (reserving the question); *Loving* v. *United States*, 517 U.S. 748, 755 (1996) (same); *Schick* v. *Reed*, 419 U.S. 256, 260 (1974) (same). But the Court has repeatedly recognized the "need for special regulations in relation to military discipline" that make distinctive "demands on [military] personnel 'without counterpart in civilian life.'" *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983) (citation omitted); see *ibid.* (describing the imperative of military discipline as "wholly different" from that in civilian life). And the Court has resolved constitutional challenges to such regulations with a focus on the "very significant differences between military law and civilian law and between the military community and the civilian community." *Parker* v. *Levy*, 417 U.S. 733, 752 (1974); see, *e.g.*, *Chappell*, 462 U.S. at 300-305; *Brown* v. *Glines*, 444 U.S. 348, 360 (1980); *Greer* v. *Spock*, 424 U.S. 828, 840 (1976); *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion).

Here, those significant differences show that the military may impose capital punishment for rape, even if civilian jurisdictions may not. In explaining its Eighth Amendment holding, *Coker* "made no mention of the military penalty" for rape, *Kennedy*, 554 U.S. at 947 (statement of Kennedy, J.), and its reasoning with respect to civilian rape offenses does not account for the distinctive concerns of rape within the military. As explained above, military rapes create unique dangers not present in the civilian community, including subversion of "morale, good order and discipline and the unit cohesion and combat effectiveness of military personnel and units." UCMJ Sex Crimes Report 2-3; see pp. 3-4, *supra*. As harmful and destructive as rapes within civilian

society are, "the fact of the malefactor's membership in the Armed Forces makes the offense [even] more grievous." *Kennedy*, 554 U.S. at 949 (statement of Scalia, J., respecting the denial of rehearing). Those distinctive harms explain why Congress authorized capital punishment for rape under military law "for more than a century," including long after this Court's decision in *Coker*. *Id.* at 946 (statement of Kennedy, J.); see 10 U.S.C. 920(a) (2000); 2006 NDAA § 552(b), 119 Stat. 3263.

The CAAF in *Mangahas* gave short shrift to Congress's determination that rape is constitutionally punishable by death in the military context, dismissing that position in a footnote. See 77 M.J. at 223 n.3 ("The argument that the Supreme Court's modified opinion in *Kennedy* v. *Louisiana* forges a constitutional distinction between the civilian and military spheres on the issue of the death penalty for rape is unfounded."). But Congress's judgment that rape within the military creates such distinctive harms that it may be punished by death falls squarely within its "plenary" authority to determine "regulations, procedures, and remedies related to military discipline." *Chappell*, 462 U.S. at 301. "[I]n no other area has the Court accorded Congress greater deference." *Ibid.* (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981)). "The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)).

And it is not only Congress but also the President—the "Commander in Chief of the Army and Navy of the

United States," U.S. Const. Art. II, § 2—that has recognized a need for capital punishment for military rape. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment and opinion of the Court) (explaining that an action "by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation"); see also *Loving*, 517 U.S. at 760-761, 769 (discussing the President's longstanding role in setting punishments for military crimes). Even after Congress in 2006 gave the President discretion to set the maximum punishment for rape, President Bush provided that the death penalty should remain available. See pp. 7-8, *supra*. Although current law does not expressly authorize that penalty, see p. 8 n.*, *supra*, the Constitution should not be interpreted to preclude both Congress and the President from determining that it is warranted.

2. Respondent's rape offense can be prosecuted without a time limitation under the 2006 NDAA

Even assuming that military rapes were not "punishable by death" for purposes of the pre-2006 statute of limitations, Congress's 2006 amendment to that statute would independently allow for prosecution of respondent's 2005 rape offense without a time limitation.

By its plain terms, the 2006 amendment provides that "rape * * * may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2012 & Supp. V 2017). The CAAF identified no constitutional impediment to the application of that amendment to respondent, as to whom even the default five-year statute of limitations, see 10 U.S.C. 843(b) (2000), would not yet have expired at the time the amendment was enacted, see

Stogner, 539 U.S. at 616-617 (distinguishing "resurrection of a time-barred prosecution," which is impermissible under the Ex Post Facto Clause, from "a law extending *unexpired* limitations periods"). The CAAF instead relied on the "presumption against retroactive legislation" to conclude that Congress would not have intended an unlimited limitations period for defendants like respondent. App., *infra*, 8a. The CAAF's reliance on that presumption was misplaced.

The "presumption against retroactive legislation" is based on the principle "that individuals should have an opportunity to know what the law is and to conform their conduct accordingly"—*i.e.*, that "settled expectations should not be lightly disrupted." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994); see *Martin* v. *Hadix*, 527 U.S. 343, 358 (1999) (recognizing that retroactivity analysis "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations'") (citation omitted). That principle has no application where, as here, no settled expectations were disrupted. As previously discussed, when respondent raped DK, he had clear notice that, under the CAAF's then-binding decision in *Willenbring*, the UCMJ did not limit the timing of prosecutions for rape. See 48 M.J. at 178. Even if that reading of the statute were wrong, application of a lifetime statute of limitations should not have surprised respondent; it was instead exactly what he would have expected.

A lifetime statute of limitations is also plainly what *Congress*—whose intent controls the applicability of its enactments, see *Landgraf*, 511 U.S. at 280—would have expected. As previously discussed, see p. 7, *supra*, Congress's 2006 amendment responded to a report from the Department of Defense recommending that Congress

"clarif[y] that the holding of [*Willenbring*] is still good law and that there is an unlimited statute of limitations for all offenses that list death as a statutorily potential sentence—even if death is not a Constitutionally permitted punishment." UCMJ Sex Crimes Report 285; see *ibid.* (stating that the "military statute of limitations for rape of an adult female should *continue to be* unlimited") (emphasis added). Accordingly, both the Conference Report and the House Report explained that the 2006 amendment was adopted to "*clarify* that rape is * * * an offense with an unlimited statute of limitations." Conference Report 703 (emphasis added); see House Report 332. Given its awareness, and approval, of *Willenbring*, Congress would have understood and intended that no limitations period would apply to a military officer, like respondent, who had raped another service member just a year before.

B. The Question Presented Warrants This Court's Review

The CAAF's decisions interpreting the current and former versions of Article 43 will undermine military discipline and should be addressed by this Court. While the military continues to discover previously unreported pre-2006 rapes of the kind at issue here, the CAAF's reading of the UCMJ bars prosecution of any of them. That reading is, moreover, inconsistent with the interpretation uniformly adopted by civilian courts of appeals of identical statutory language in the federal criminal statute of limitations. This Court should grant certiorari and correct the CAAF's error.

1. The CAAF's flipped interpretation of the UCMJ upsets settled expectations about the availability of prosecutions for military rapes and undermines the Nation's "overriding" interest in maintaining military morale, discipline, and effectiveness. *Middendorf*,

425 U.S. at 43 (citation omitted). As explained above, sexual assaults in the military "negatively affect morale, good order and discipline and the unit cohesion and combat effectiveness of military personnel and units." UCMJ Sex Crimes Report 2-3; see pp. 3-4, *supra*. Because of reporting delays, however, many sexual assaults cannot be prosecuted within the five-year limitations period that the CAAF has deemed applicable. See *Mangahas*, 77 M.J. at 225; App., *infra*, 7a.

Although the CAAF's decisions affect only a closed set of crimes committed before 2006, the Department of Defense informs this Office that the military continues to receive reports of such crimes. Indeed, as a result of the CAAF's 2018 decision in *Mangahas*, the Air Force, the Army, and the Coast Guard have in the last 18 months collectively dismissed or declined to prosecute at least ten rape cases that they otherwise would have pursued. The CAAF also recently relied on *Mangahas* and the decision below to vacate a rape conviction obtained by the Air Force. See *United States* v. *Collins*, 78 M.J. 415 (2019). The AFCCA has done the same. See *United States* v. *Daniels*, No. ACM 39407, 2019 WL 2560041 (June 18, 2019), appeal pending, No. 19-345/AF (C.A.A.F. June 19, 2019). And the Army Court of Criminal Appeals relied on *Mangahas* to vacate a conviction for multiple rapes obtained by the Army. See *United States* v. *Thompson*, No. 20140974, 2018 WL 1092097 (A. Ct. Crim. App. Feb. 26, 2018).

Allowing the CAAF's flawed construction of Article 43 to remain in place would subvert the military's concerted effort to eradicate sexual assault, erode confidence in the military-justice system, and fuel the impression that "nothing will happen to the[] perpetrator" of military rapes, all of which could further deter

sexual-assault reporting and ultimately undermine military effectiveness. RSP Report 60 (citation omitted). This Court has intervened on similar issues "of central importance for military courts." *United States* v. *Denedo*, 556 U.S. 904, 917 (2009); see, *e.g.*, *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999); *United States* v. *Scheffer*, 523 U.S. 303 (1998); *Loving*, 517 U.S. at 751; cf. *United States* v. *Kebodeaux*, 570 U.S. 387 (2013) (reviewing whether a former service member convicted by court-martial was subject to sex-offender registration requirement). This Court should likewise intervene on the question presented here.

2. The Court's intervention is all the more warranted in light of the inconsistency between the CAAF's interpretation of the phrase "punishable by death" and the civilian courts of appeals' interpretation of identical statutory language in a parallel statutory context.

As previously noted, the federal criminal code provides that "any offense punishable by death" may be prosecuted "at any time without limitation." 18 U.S.C. 3281. This Court has not squarely addressed the "important" question of how to interpret "'punishable by death'" in Section 3281. *United States* v. *Seale*, 558 U.S. 985, 986 (2009) (statement of Stevens, J.) (citation omitted). But civilian courts of appeals have agreed for 50 years that an offense is "'punishable by death'" under Section 3281 if "the statute authorizes death as a punishment, regardless of whether the death penalty" can be constitutionally imposed. *Payne*, 591 F.3d at 59 (citation omitted); see *ibid.* (collecting cases); see, *e.g.*, *United States* v. *Ealy*, 363 F.3d 292, 296 (4th Cir.), cert. denied, 543 U.S. 862 (2004); *United States* v. *Edwards*, 159 F.3d 1117, 1128 (8th Cir. 1998), cert. denied,

528 U.S. 825 (1999); *United States* v. *Manning*, 56 F.3d 1188, 1196 (9th Cir. 1995); *Coon*, 411 F.2d at 425.

The CAAF sought to distinguish some civilian appellate decisions on the theory that "the death penalty was, in fact, at least a potentially available punishment for the respective charges at the time the offenses [in the relevant cases] were committed." *Mangahas*, 77 M.J. at 224. But none of the decisions cited by the CAAF relied on that distinction. And other decisions make clear that such a distinction is irrelevant. The Fourth Circuit, for example, has reasoned that "[e]ven assuming * * * that the death penalty could not have been constitutionally imposed for [particular] crimes * * * whether a crime is 'punishable by death' under § 3281 * * * depends on whether the death penalty may be imposed for the crime *under the enabling statute*." *Ealy*, 363 F.3d at 296 (emphasis added); see, *e.g.*, *United States* v. *Gallaher*, 624 F.3d 934, 940 (9th Cir. 2010), cert. denied, 564 U.S. 1005 (2011) (similar). The CAAF's position is irreconcilable with that reasoning.

This Court has previously granted review of CAAF decisions whose reasoning is out of step with the reasoning of civilian courts of appeals. See, *e.g.*, *Scheffer*, 523 U.S. at 311-312; *Davis* v. *United States*, 512 U.S. 452, 456 (1994). It should do the same here.

3. This case is a good vehicle for resolving the question presented. The CAAF ordered dismissal of the rape charge solely on limitations grounds, and the Air Force contended throughout the litigation that its prosecution of respondent was timely. Although the Air Force in this case did not expressly ask the CAAF to overrule its recent decision in *Mangahas*, its brief reiterated the consistent position that "Congress intended

for rape[s]" of the kind at issue here "to have an unlimited statute of limitations." Gov't C.A. Br. 23 n.9; see *United States* v. *Vonn*, 535 U.S. 55, 58 n.1 (2002) (concluding that argument was adequately preserved in similar circumstances); *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992) (same).

Furthermore, because the effect of *Mangahas* and the decision below is to foreclose future prosecutions, additional vehicles for deciding the question presented will not be readily available. As discussed above, see p. 23, *supra*, the military branches are now declining to bring prosecutions that would be barred under the CAAF's interpretation of the UCMJ limitations provision, meaning that the question presented will become effectively unreviewable in this Court unless it grants certiorari in either this case or one of the very small number of other still-pending cases that may present it.

Granting certiorari in this particular case would allow the Court to address not only the correctness of *Mangahas*, but also, if necessary, the CAAF's interpretation of the 2006 NDAA. The Court should do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
PAUL T. CRANE
Attorney

MARY ELLEN PAYNE
Associate Chief
BRIAN C. MASON
Lt. Col., USAF
Deputy Chief
Government Trial and Appellate Counsel Division
Department of the Air Force

JULY 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 16-0771
Crim. App. No. 38370

UNITED STATES, APPELLEE

v.

MICHAEL J. D. BRIGGS, LIEUTENANT COLONEL,
UNITED STATES AIR FORCE, APPELLANT

Argued: Dec. 4, 2018
Decided: Feb. 22, 2019

Military Judges: DAWN R. EFLEIN (arraignment)
and DONALD R. ELLER (trial)

Judge MAGGS delivered the opinion of the Court, in which Chief Judge STUCKY, and Judges RYAN, OHLSON, and SPARKS, joined.

Judge MAGGS delivered the opinion of the Court.

In 2014, a general court-martial composed of a military judge alone found Appellant guilty, contrary to his plea, of one charge and one specification of rape in violation of Article 120(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(a) (2000), for conduct that occurred in 2005. For reasons set out below, we conclude that the applicable statute of limitations requires the finding and sentence to be set aside and the charge and specification to be dismissed.

I. Factual and Procedural Background

In May 2005, Appellant was a Captain and an F-16 instructor pilot. Airman First Class (A1C) DK was assigned to the aircrew life support equipment section of Appellant's squadron. Following an evening of heavy drinking at or near Mountain Home Air Force Base in Idaho, Appellant went to A1C DK's room and forced her to have sex with him even though she said "no" and "stop" and tried to roll away. A1C DK did not immediately report the incident to law enforcement authorities, but she did tell others about it.

Both Appellant and A1C DK remained in the Air Force after their 2005 encounter. By July 2013, Appellant had become a Lieutenant Colonel, and DK had become a Staff Sergeant (SSgt). SSgt DK telephoned Appellant to discuss the incident. Without Appellant's knowledge, SSgt DK recorded their conversation. During the telephone call, Appellant acknowledged his misconduct. He specifically told SSgt DK: "I will always be sorry for raping you."

The recording of the telephone call and other information led to the preparation of a sworn charge and specification of rape, which was received by the summary court-martial convening authority on February 18, 2014, more than eight years after the rape occurred.[1] The case was subsequently referred to a general court-

---

[1] For offenses that have a period of limitations, the accused has a defense if the period of limitations expires before the "receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." Article 43(b)(1), (2)(A), 10 U.S.C. §§ 843(b)(1), (2)(A).

martial. Appellant did not raise the statute of limitations before or during the trial, and the military judge did not advise Appellant that the statute of limitations might provide a basis for dismissing the charge and specification.[2] Contrary to his plea, the military judge found Appellant guilty of the charge and specification and sentenced him to a dismissal, confinement for five months, and a reprimand. The convening authority approved the sentence as adjudged.

Appellant first attempted to raise the statute of limitations when he appealed to the United States Air Force Court of Criminal Appeals (AFCCA). After initially asserting several unrelated assignments of error, Appellant sought leave to file a supplemental assignment of error asserting the statute of limitations. The AFCCA, however, denied leave to file the supplemental assignment of error because Appellant had not raised the statute of limitations at trial. The AFCCA subsequently rejected Appellant's other assignments of error and affirmed the adjudged and approved findings and sentence. *United States v. Briggs*, No. ACM 38730, 2016 CCA LEXIS 385, 2016 WL 3682568 (A.F. Ct. Crim. App. June 23, 2016).

Appellant then filed a petition for grant of review in this Court. The assignments of error in the petition's supplement did not address the statute of limitations, but pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant personally asserted that his

---

[2] As discussed further below, Rule for Courts-Martial (R.C.M.) 907(b)(2)(B) requires the military judge to inform the accused of the right to assert the statute of limitations as a defense "if it appears that the accused is unaware of [this] right."

trial counsel was ineffective for failing to raise and litigate a statute of limitations defense. We granted review of one assignment of error concerning the judicial composition of the AFCCA. *United States v. Briggs*, 75 M.J. 467 (C.A.A.F. 2016). We denied review of the ineffective assistance of counsel issue concerning counsel's failure to raise the statute of limitations. *United States v. Briggs*, 76 M.J. 36 (C.A.A.F. 2016). We then affirmed the decision of the AFCCA by summary disposition.[3] *United States v. Briggs*, 76 M.J. 338 (C.A.A.F. 2017).

Appellant next petitioned the Supreme Court of the United States for a writ of certiorari. The Supreme Court initially denied Appellant's petition along with others presenting the judicial composition issue. *Abdirahman v. United States*, 138 S. Ct. 2702 (2018) (mem.). But on reconsideration, the Supreme Court granted the petition as to Appellant, vacated our judgment affirming the AFCCA, and remanded the case to us for further consideration in light of our decision in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). *Abdirahman v. United* States, 139 S. Ct. 38 (2018).

Mangahas is a case concerning the statute of limitations for rape that we decided while Appellant's petition for certiorari was pending. In *Mangahas*, we corrected our interpretation of the version of Article 43(a), UCMJ, 10 U.S.C. § 843(a), that was in force from 1986

---

[3] Appellant contended that one judge on the AFCCA was disqualified because he was also assigned as a judge on the United States Court of Military Commission Review. We rejected the argument because we previously had rejected the same argument in *United States v. Ortiz*, 76 M.J. 189 (C.A.A.F. 2017). The Supreme Court subsequently affirmed our judgment. *United States v. Ortiz*, 138 S. Ct. 2165 (2018).

until 2006. 77 M.J. at 222. That version of Article 43(a), UCMJ, provided that "any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. § 843(a) (1994). Two precedents of this Court, *United States v. Stebbins*, 61 M.J. 366, 369 (C.A.A.F. 2005), and *Willenbring v. Neurauter*, 48 M.J. 152, 178 (C.A.A.F. 1998), had interpreted this language to mean that the offense of rape did not have a period of limitations because at the time those cases were decided, Article 120(a), UCMJ, provided that rape may "be punished by death or such other punishment as a court-martial may direct." In *Stebbins* and *Willenbring*, we recognized that the Supreme Court had earlier held in *Coker v. Georgia*, 433 U.S. 584, 598 (1977), that imposing capital punishment for the offense of rape of an adult woman would violate the Eighth Amendment of the United States Constitution. *Stebbins,* 61 M.J. at 369; *Willenbring*, 48 M.J. at 178. But in both cases we concluded that the *Coker* decision did not affect the application of Article 43(a) to the offense of rape as defined in Article 120(a). *Stebbins,* 61 M.J. at 369; *Willenbring*, 48 M.J. at 178. In *Mangahas*, however, we reconsidered this view because there is, in fact, no set of circumstances under which anyone could constitutionally be punished by death for the rape of an adult woman. 77 M.J. at 223-24. Accordingly, we overruled *Stebbins* and *Willenbring* to the extent that they held that rape was punishable by death at the time of the charged offenses. *Id.* at 222. We then concluded that the period of limitations for rape of an adult woman under the version of Article 43(a), UCMJ, in force from 1986 until 2006, was five years. *Id.*

Reconsidering Appellant's statute of limitation defense in light of *Mangahas* in this remand also requires

us to address whether a 2006 amendment to Article 43, UCMJ, made by the National Defense Authorization Act for Fiscal Year 2006 (NDAA FY 2006), Pub. L. No. 109-163, §§ 552-53, 119 Stat. 3136, 3264 (2006), applies to an offense that occurred before its enactment. The relevant amendment, as discussed further below, provides that the offense of rape "may be tried and punished at any time without limitation." Article 43(a), UCMJ, 10 U.S.C. § 843(a) (2012) (as amended by NDAA FY 2006 § 553). The Court in *Mangahas* noted the existence of the 2006 amendment to Article 43, UCMJ, but concluded that the amendment did not affect the issues before it. *See generally Mangahas*, 77 M.J. at 222 n.2.[4] To determine the effect, if any, of the 2006 amendment to Article 43, UCMJ, on this case, we asked the parties to brief and argue two issues:

I. DOES THE 2006 AMENDMENT TO ARTICLE 43, UCMJ, CLARIFYING THAT RAPE IS AN OFFENSE WITH NO STATUTE OF LIMITATIONS, APPLY RETROACTIVELY TO OFFENSES COMMITTED BEFORE ENACTMENT OF THE AMENDMENT BUT FOR WHICH THE THEN EXTANT STATUTE OF LIMITATIONS HAD NOT EXPIRED?

II. CAN APPELLANT SUCCESSFULLY RAISE A STATUTE OF LIMITATIONS DEFENSE FOR THE FIRST TIME ON APPEAL?

---

[4] In *Mangahas*, the statute of limitations had run prior to the enactment of the 2006 amendment. The Supreme Court has held that applying a new statute of limitations to revive a previously time-barred prosecution violates the Constitution's *Ex Post Facto* Clause. *Stogner v. California*, 539 U.S. 607, 610 (2003). The 2006 amendment therefore could not apply to the case.

United States v. Briggs, 78 M.J. 106 (C.A.A.F. 2018). We turn now to these issues.

II. Effect of the 2006 Amendment to Article 43, UCMJ

In light of our decision in *Mangahas*, the parties agree that the version of Article 43, UCMJ, that existed at the time of Appellant's charged offense in 2005 established a five-year period of limitations. They further agree that, if Congress had not amended Article 43, UCMJ, in 2006, the period of limitations would have run in 2010, long before the charges in this case were received by the convening authority in 2014. What they disagree about is whether the 2006 amendment to Article 43, UCMJ, applies retroactively to a rape that occurred in 2005, thereby eliminating the statute of limitations for that offense. In other words, if the 2006 amendment does not apply retroactively, the finding of guilt in this case should be set aside and the charge and specification of this case should be dismissed. But if the 2006 amendment does apply retroactively, the conviction may stand.

The relevant portion of the 2006 amendment is as follows:

> SEC. 553. EXTENSION OF STATUTE OF LIMITATIONS FOR MURDER, RAPE, AND CHILD ABUSE OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.
>
> (a) NO LIMITATION FOR MURDER OR RAPE.—Subsection (a) of section 843 of title 10, United States Code (article 43 of the Uniform Code of Military Justice), is amended by striking "or

> with any offense punishable by death" and inserting "with murder or rape, or with any other offense punishable by death".

NDAA FY 2006 § 553(a).

Appellant contends that the 2006 amendment applies only to conduct occurring after its enactment, and that the period of limitations applicable to his conduct is five years based on the statute of limitations in effect when the rape occurred. The Government takes the opposite position, asserting that the 2006 amendment applies and permits Appellant to be tried and punished for a rape that occurred in 2005, before the enactment of the 2006 amendment.

We generally apply the statute of limitations that was in effect at the time of the offense. *Mangahas*, 77 M.J. at 222 (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)). We generally presume that subsequent amendments do not apply because there is both a presumption against retroactive legislation, *see INS v. St. Cyr*, 533 U.S. 289, 316 (2001), and a presumption in favor of repose, *United States v. Habig*, 390 U.S. 222, 227 (1968). The Supreme Court, moreover, has instructed that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

We followed these principles in *United States v. Lopez de Victoria*, 66 M.J. 67, 73-74 (C.A.A.F. 2008). In that case, the accused was charged in 2006 with committing indecent acts with a child between 1998 and 1999. *Id.* at 68. At the time of the offense, the period of limitations for this offense under Article 43(b), UCMJ, was

five years. *Id.* at 71. But in 2003, Congress amended Article 43(b), UCMJ, establishing a new period of limitations for indecent liberties with a child that expires when the child turns twenty-five years old. *Id.* at 72 (citing Article 43(b)(2)(A), UCMJ, 10 U.S.C. § 843(b)(2)(A)). The question was whether the amended statute of limitations governed the case. We concluded that the 2003 amendment did not apply based on the general presumption against retroactive legislation, the general presumption in favor of liberal construction of criminal statutes of limitation in favor of repose, and the absence of any indication of congressional intent to apply the 2003 amendment retrospectively. *Id.* at 74.

Appellant argues that we should apply the same analysis to this case that we applied in *Lopez de Victoria* and that we should similarly conclude that the 2006 amendment to Article 43, UCMJ, does not apply to his case. We agree. The presumption against retroactive legislation and the presumption in favor of liberal construction of criminal statutes of limitation in favor of repose apply with equal force because we see nothing in the text of the 2006 amendment that indicates that the amendment should have a retroactive effect. Section 553(a) does not distinguish between offenses that have already occurred and those that have not and does not specify an effective date. In *Lopez de Victoria*, we concluded that similar silence in the text of the 2003 amendment was ineffective to overcome the presumption against retroactivity and the presumption in favor of repose. *Id.* at 73-74.

To the extent that legislative history might be relevant,[5] we also see nothing that indicates any intention for the 2006 amendment to apply retroactively. The NDAA FY 2006 was introduced in Congress in 2005 as H.R. 1815. No version of this bill as it worked its way through the House and Senate contained any provision indicating that the amendment would apply retroactively. *See* National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (2005), https://www.congress.gov/bill/109th-congress/house-bill/1815/text (providing the text of H.R. 1815 as introduced, reported, and engrossed in the House, as referred and engrossed in the Senate, and as an enrolled bill). The discussions of the amendment in the House Report and the Conference Report also say nothing about retroactivity. *See* H.R. Rep. No. 109-89, at 314, 342 (2005) (House Report); H.R. No. 109-360, at 703 (2005) (Conference Report). In *Lopez de Victoria*, we recognized a similar absence of evidence in the legislative history as a key factor in concluding that the 2003 amendment did not establish the period of limitations for offenses that had already occurred. 66 M.J. at 73.

---

[5] We considered legislative history in *Lopez de Victoria*, 66 M.J. at 73. Since that decision, the Supreme Court has explained that "legislative history is not the law" and that courts "do not inquire what the legislature meant" but instead "ask only what the statute means." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (internal quotation marks omitted) (citations omitted). In the matter before us, however, no party has asked us to reconsider the approach of *Lopez de Victoria* and whether relying on legislative history is appropriate when determining whether statutory amendments apply retroactively. We therefore leave that question for another case.

The Government, however, argues that Congress intended the 2006 amendment to apply retroactively because the context of the 2006 amendment is different from the context of the 2003 amendment that we considered in *Lopez de Victoria*. In 2003, Congress clearly intended to change the period of limitations applicable to the offense of indecent liberties. But in 2006, the *Stebbins* and *Willenbring* precedents had established that rape had no period of limitations. Thus, according to the Government, Congress must have believed that it was merely codifying this Court's precedent, not changing the law. In such circumstances, the Government asserts, Congress would have intended to maintain the status quo and would have wanted the amendment to apply to offenses occurring both before and after the effective date of the amendment.

We reject this argument for two reasons urged by Appellant. First, the 2006 amendment to Article 43(a), UCMJ, was not limited to rape; it also eliminated the previous five-year period of limitations for unpremeditated murder.[6] Congress therefore did not intend the 2006 amendment simply to maintain the status quo. Second, even if Congress believed that the amendment was

---

[6] From 1986 until 2006, Article 43(a), UCMJ, provided no period of limitations for "offenses punishable by death" and a five-year period of limitations for other offenses. *See* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 805(a), 100 Stat. 3816, 3908 (1986) (subsequently amended by NDAA FY 2006 §§ 552-53). Unpremeditated murder in violation of Article 118(2), UCMJ, is not an offense punishable by death. Article 118(2), (4), UCMJ, 10 U.S.C. § 918(2), (4). Accordingly, any unpremeditated murder committed between 1986 and 2006 had only a five-year period of limitations. *See Willenbring*, 48 M.J. at 178-79 (discussing the history of amendments to Article 43, UCMJ).

codifying existing law with respect to the statute of limitations for rape, that belief alone would not imply that Congress intended for the amendment to apply retroactively. In such circumstances, Congress would have had no reason to consider the issue of retroactivity. And if Congress did not actually decide to make the statute apply retroactively, then the presumption of nonretroactivity should control. *See Lopez de Victoria*, 66 M.J. at 74.

The Government alternatively argues that applying the 2006 amendment to Appellant's conduct is not truly a "retroactive" application of the law because the 2006 amendment did not attach any new legal obligations on Appellant. The Government explains that the 1998 *Willenbring* precedent put Appellant on notice that his offense might not have a period of limitations. The 2006 amendment merely confirmed what *Willenbring* already said.

We recognize that not all changes to a statute that affect conduct that occurred prior to its enactment have a "retroactive effect." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). But the Government's argument that the 2006 amendment did not have a retroactive effect is foreclosed by our analysis in *Lopez de Victoria*. In *Lopez de Victoria*, we held that applying an extended statute of limitations to conduct that had already occurred attached new legal consequences to that conduct and thus was a retroactive application of the law. 66 M.J. at 73. On the basis of this precedent, we conclude that applying the 2006 amendment to Appellant's conduct, which occurred in 2005 and prior to the amendment, has an impermissible retroactive effect.

III. Waiver, Forfeiture, and Related Arguments

R.C.M. 907(b)(2)(B) addresses the procedure for asserting the statute of limitations. It provides:

> A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:
>
> . . . .
>
> (B) The statute of limitations (Article 43) has run, provided 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. . . .

The parties agree on two points about the meaning of this complex provision. First, the accused has a right before final adjournment of the case to assert the statute of limitations as a ground for dismissing a charge or specification. Second, the military judge must inform the accused of this right if it appears that the accused is unaware of it. They disagree, however, about what should happen in a case like this in which (1) the accused did not raise the statute of limitations before or at trial, (2) the military judge did not inform the accused of the right to raise the statute of limitations, and (3) raising the statute of limitations most likely would have been futile because precedents in effect at the time of trial held that there was no period of limitations for the offense of rape.

In the Government's view, R.C.M. 907(b)(2)(B) merely prevents a reviewing court from concluding that the accused *knowingly and intentionally waived* the statute of limitations as a defense. The Government asserts that the reviewing court still must treat the defense as

forfeited, and may reverse a finding of guilt only if it finds plain error. *See United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (forfeited issues are reviewed for plain error). In this case, the Government contends that the Court cannot find plain error because the Supreme Court held in *Musacchio v. United States*, 136 S. Ct. 709, 718 (2016), that an accused's failure to assert the statute of limitations is not plain error.

We disagree. In *Musacchio*, the Supreme Court reasoned that a statute of limitations defense is not jurisdictional and therefore the "defense becomes part of a case only if the defendant puts the defense in issue." *Id.* Accordingly, "[w]hen a defendant does not press the defense, then, there is no error for an appellate court to correct—and certainly no plain error." *Id.* The Supreme Court, however, made this decision in the context of a federal criminal prosecution governed by the Federal Rules of Criminal Procedure. We think that cases under the Rules for Courts-Martial are distinguishable. As indicated above, R.C.M. 907(b)(2)(B) requires the military judge to inform the accused of the right to assert the statute of limitations. The Federal Rules of Criminal Procedure have no analogous provision. Accordingly, in a court-martial, R.C.M. 907(b)(2)(B) makes the statute of limitations "part of a case" whenever the accused has a statute of limitations defense and does not appear to know it. We therefore can review Appellant's failure to raise the statute of limitations for plain error.

To establish plain error, Appellant must show "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (internal

quotation marks omitted) (citation omitted). Plain error is assessed at the time of appeal. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be plain at the time of appellate consideration" (internal quotation marks omitted) (citation omitted)). Our decision in *Mangahas* has now established that the period of limitations for a rape committed in 2005 was five years. Accordingly, it was clear and obvious error—at least as assessed in hindsight on appeal, entertaining the fiction that *Mangahas* had been decided at the time of Appellant's court-martial—for the military judge not to inform Appellant of the five-year period of limitation when the sworn charges against him were received by the summary court-martial convening authority in 2014.

This clear and obvious error warrants relief because the error "results in material prejudice to [Appellant's] substantial rights." *Armstrong*, 77 M.J. at 469. If the military judge had informed Appellant of a possible statute of limitations defense, it requires no speculation to believe that Appellant would have sought dismissal. Indeed, Appellant testified that after being confronted by the victim eight years after the offense, he researched the statute of limitations to see if it provided a defense.

IV. Judgment

The judgment of the United States Air Force Court of Criminal Appeals is reversed. The finding and sentence are set aside. The charge and specification are dismissed.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

ACM 38730

UNITED STATES

v.

LIEUTENANT COLONEL MICHAEL J.D. BRIGGS
UNITED STATES AIR FORCE

---

23 June 2016

OPINION OF THE COURT

Sentence adjudged 7 August 2014 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: DAWN R. EFLEIN (arraignment) and DONALD R. ELLER, JR. (sitting alone).

Approved Sentence: Dismissal, confinement for 5 months, and a reprimand.

Before: ALLRED, MITCHELL, and MAYBERRY,
Appellate Military Judges

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under Rule of Practice and Procedure 18.4.

MAYBERRY, Judge:

At a general court-martial composed of a judge alone, Appellant was convicted, contrary to his plea, of rape in

violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] The court sentenced Appellant to a dismissal, confinement for 5 months, and a reprimand. The convening authority approved the sentence as adjudged.

On appeal, Appellant raises four issues: (1) his trial defense counsel provided ineffective assistance of counsel, (2) the military judge erred in failing to disclose all of SSgt DK's mental health records, (3) the convening authority erred by denying a request for rehearing, and (4) the evidence is factually insufficient.

Background

In 2005, Appellant was a Captain stationed at Luke Air Force Base (AFB) as an F-16 instructor pilot and DK was an A1C also assigned at Luke AFB in aircrew life-support. In May of 2005, both of them, along with other members from Luke, went TDY to Mountain Home AFB for a two-week exercise. According to SSgt DK they had never engaged in sexual contact prior to the rape. Appellant testified they had two consensual sexual encounters. The event that gives rise to the charge occurred during the last few days of the TDY.

SSgt DK did not formally report the incident until 3 July 2013, when she was a SSgt stationed at RAF Lakenheath and Appellant was a Lieutenant Colonel (Lt Col) stationed at Spangdahlem Air Base. During the intervening eight years, SSgt DK had "reported" a sexual encounter without naming Appellant to five individuals. Of those individuals, her mother and one other witness

---

[1] Because the offense occurred in 2005, Appellant was charged with a violation of Article 120, UCMJ, 10 U.S.C. § 920, for offenses committed prior to 1 October 2017. *Manual for Courts-Martial, United States*, app. 27 at A27-1 (2012 ed.).

testified that she characterized it as rape. On 12 July 2013, SSgt DK participated in a pretext phone call with Appellant. The call lasted approximately 20 minutes. The relevant portions of the phone call follows:

[Appellant]: Lieutenant Colonel Briggs.

[SSgt DK]: Hi, this is Sergeant [K]. Actually, you probably remember me as Airman [W] from when we were stationed at Luke together.

[Appellant]: Yes.

[SSgt DK]: I was wondering if I could have a few minutes of your time to talk to you about something.

[Appellant]: Sure.

[SSgt DK]: Um, I wanted to talk to you about when we were TDY to Mountain Home together.

[Appellant]: Yeah.

[SSgt DK]: I've been going to counseling for a while. Um, my counselor thought that it would be a good idea if I could call you to get closure for what happened the last night—

[Appellant]: Okay.

[SSgt DK]: —of our TDY.

[Appellant]: Sure.

[SSgt DK]: I wanted to know why you had sex with me when I was so drunk?

[Appellant]: Well, I was pretty drunk as well. That's not an excuse. Um, you know, we were both really into each other. Um, I don't know if there was any, you know, off-duty stress in my life or whatever. I'm sure there was, but that's not an excuse either.

I've thought about that a lot, um, over the years at various functions or various, you know, training or whatever. Um, you know,—yeah, so we were both really drunk. I think you were much more drunk than I was. And, um, I think neither one of us—you know, in hindsight neither one of us wanted that to happen. Um, that night it seemed like both of us wanted it to happen. Um, neither one of us—I mean, both of us were coherent throughout the whole evening and then it was—I mean, the next day it was, um, you know, a tremendous amount of regret, um, remorse. "Oh, my God, what happened? How did I do this?" Um, and I'm—and that was from my state of drunkenness. From yours I don't know what happened. I assume you passed out after—afterwards. But, you know, I have relived that decision-making and how did we—how did it get to that point. And, um, I never—I blame myself certainly, um, just based on my position, you know, and being less drunk than you were. Um, it's not like I didn't know what was happening. Uh, I honestly—I honestly don't think that—um, I honestly don't think that—I honestly don't think that we did anything that right at that moment we didn't want to do. Certainly afterwards neither one of us wanted to have done that. Certainly we both regret that. Um, and, you know, our—obviously I haven't had any contact with you since, but I can only imagine that it has affected you in a way as it has affected me, um, in different ways for each of the two of us. Um, it was definitely a turning point or definitely a significant point, but, um,—and it is something I've learned a lot from, but when you asked me why did it happen or why did I do that I didn't—um, I didn't make the—I didn't make the determination

that neither one of us were in our right mind to make decisions and I wasn't really thinking about that.

[SSgt DK]: I told you "no". I said to "stop". I tried to roll away from you and you pulled me back. Why?

[Appellant]: [No response].

[SSgt DK]: Why didn't you just quit? You knew how drunk I was.

[Appellant]: I did. I did. I mean, we could hardly stand when we were getting checked at the front gate. I did.

[SSgt DK]: Why didn't you just—

[Appellant]: Um.

[SSgt DK]: —let [E] take me back to my room? Why did you come with?

[Appellant]: I did. She did take you back to your room. I went back to mine and then I came back over. Um, yeah, we went into each of our buildings or whatever and then after I got to my room and I assume you had gotten to yours that's when I came back over. I think I was—um, well, I was young and immature and, um, younger—um, younger and immature and, um, had a—didn't have an appreciation for, uh, everyone as human beings or everyone as—um, I guess—I don't know. I didn't—I didn't respect people in the way that I should have. I didn't respect everyone as individuals and equals as I should have. Um, you know, I think I told you this, you know, in the week or two before that you're like a little sister. I was really fond of you; really into you. I think that was obvious. I didn't—and, uh, maybe I used your—you know, your—how you reacted to me

when we were, you know, sober when we were at work, when we were not drunk, um, as like what you really, really wanted instead of listening to you when I needed to; when I should have, and doing the responsible and appropriate thing, which would have been probably just not even to go over to your room, you know, in the first place. . . .

But it certainly—I mean, I'm sorry.

[SSgt DK]: I bled for days afterwards. I couldn't sit down. I was so bruised and swollen. What—

[Appellant]: Oh, my God.

[SSgt DK]: What did you do to me?

[Appellant]: I—I don't know what to say. I didn't—I didn't know you were—I didn't know you were physically hurt like that. I didn't know. I mean, not no idea; I have no idea. Um—

[SSgt DK]: I told you it hurt. I tried to get away from you. I told you to stop. Why didn't you listen to me?

[Appellant]: Um—

[SSgt DK]: Why didn't you stop?

[Appellant]: I didn't—

[SSgt DK]: Did you use a condom?

[Appellant]: Yeah.

[SSgt DK]: I want—I need to hear you apologize for what you did.

[Appellant]: I am so, so sorry for being selfish, for disrespecting you, for not listening to you, for not be-

ing your—not just your friend, but not being professional and being a human being when you needed it. I'm so sorry for pushing myself on you; for putting my selfish, distorted needs and subjecting you to that; for not respecting you as a person and listening to you and stopping.

[SSgt DK]: You raped me. You destroyed me. For eight years, I have had to live with this by myself. I can't talk about it; I can't tell anybody. You took everything from me. Why?

[Appellant]: I didn't know the repercussions and even if I did I wasn't—I was selfish. I was—

[SSgt DK]: I need to hear you say you are sorry for raping me.

[Appellant]: I am sorry. I have been sorry. I will always be sorry for raping you.

[SSgt DK]: Thank you.

[Appellant]: If there is anything I could do or can do—if there is any way I can make amends or help you heal or ease your suffering or pain, either let me know or have someone let me know, or whatever.

[SSgt DK]: Just hearing you admit it and say that you did it is enough for right now. Thank you. I—I have to go now.

[Appellant]: Okay.

[SSgt DK]: Bye.

Additional facts necessary to resolve Appellant's assignments of error are provided below.

Ineffective Assistance of Counsel

In reviewing claims of ineffective assistance of counsel, we look at the questions of deficient performance and prejudice de novo. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008).

To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under the first prong, the appellant has the burden to show that his "counsel's performance fell below an objective standard of reasonableness —that counsel was not functioning as counsel within the meaning of the Sixth Amendment." *United States v. Edmond*, 63 M.J. 343, 351 (C.A.A.F. 2006) (quoting *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)). The question is therefore did "the level of advocacy 'fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers?'" *United States v. Haney*, 64 M.J. 101, 106 (C.A.A.F. 2006) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)) (alterations in original). Under the second prong, the deficient performance must prejudice the accused through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (quoting *Strickland*, 466 U.S. at 687). Counsel is presumed competent until proven otherwise. *Strickland*, 466 U.S. at 689.

Trial defense counsel's strategy was to show that SSgt DK "had a regrettable sexual experience with a married officer who was a jerk and after eight years she

reconstructed her memory of the event through the lens of Sexual Assault Prevention and Response (SAPR) training, guilt, and emotional instability." As a tactical choice, trial defense counsel decided not to try to portray SSgt DK as a liar. This strategy was largely driven by the fact that Appellant's statements during the pretext phone call essentially corroborated every aspect of the sexual encounter except for the issue of consent.

Appellant asserts trial defense counsel's decision not to introduce evidence of Appellant's character for truthfulness and non-violence as well as evidence of SSgt DK's character for untruthfulness constituted ineffective assistance of counsel. While appellate counsel may have chosen a different strategy, it does not mean that the strategy used at trial was not reasonable. Trial defense counsel did interview potential character witnesses and made the decision that attacking SSgt DK did not provide them with the best strategy to win. "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Datavs*, 71 M.J. at 424 (citing *United States v. Gooch*, 69 M.J. 353, 362-63 (C.A.A.F. 2011)).

Appellant also alleges his trial defense counsel were ineffective by failing to file a motion to exclude the evidence obtained from his government computer or failing to object to its admission.

Mil. R. Evid. 314(d) states:

> Government property may be searched under this rule *unless* the person to whom the property is issued or assigned has a reasonable expectation of privacy

> therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. . . .

(Emphasis added.) The analysis to this rule recognizes that the presumption that there is no reasonable expectation of privacy in government property is rebuttable. *Manual for Courts-Martial, United States,* app. 22 at A22-26 (2012 ed.).

Whether there is a reasonable expectation of privacy in government property is determined under the totality of the circumstances, which includes the rebuttable presumption that an accused has no reasonable expectation of privacy in government property. *See, e.g., Samson v. California*, 547 U.S. 843, 848 (2006); Mil. R. Evid. 314(d). In *United States v. Long,* 64 M.J. 57, 63 (C.A.A.F. 2006), our superior court held that the accused had a subjective expectation of privacy in emails sent on her government computer, but this decision was based on the facts of that case, primarily the compelling testimony of the command's network administrator asserting the agency practice of recognizing the privacy interests of users in their email. A short time later, in *United States v. Larson*, 66 M.J. 212, 216, (C.A.A.F. 2008), the court reiterated that its decision in *Long* was rooted in the "particular facts of that case," and held that there was no expectation of privacy when the facts established that when the appellant logged on to the computer, he was required to click a button accepting conditions listed in a banner, which stated that the computer was Department of Defense property, was for official use, and that he consented to monitoring.

Appellant's case is more analogous to *Larson* in that to log on to his computer Appellant had to click on a banner acknowledging he was aware his computer activity could be monitored. Moreover, none of the evidence presented was password protected beyond standard system security protocols. The only evidence before us is that the evidence offered and admitted consisted of a history of Appellant's Internet usage immediately prior to and after the pretext phone call on 12 July 2013.

Trial defense counsel's decision not to file a motion to exclude the computer evidence and their decision not to object to its admission was not deficient. As clearly stated in their supporting affidavits, they made the decision based on their understanding of the law as well as the facts and circumstances surrounding a military member's use of government furnished computer equipment. "When an appellant argues that counsel was ineffective for erroneously waiving a motion, it makes sense to deny the claim if the appellant would not be entitled to relief on the erroneously waived motion, because the accused cannot show he was harmed by not preserving the issue." *United States v. Bradley*, 71 M.J. 13 (C.A.A.F. 2012) (citing *United States v. Cornelius*, 37 M.J. 622, 626 (A.C.M.R. 1993)).

After considering the totality of the evidence presented at trial, we find Appellant failed to meet his burden of demonstrating that his trial defense counsel's conduct resulted in prejudice. *See Green*, 68 M.J. at 361. The trial defense counsel made tactical decisions regarding the appropriate strategy they believed would be most successful in light of the totality of the evidence, including admissions by Appellant. This was an "ob-

jectively reasonable choice in strategy from the alternatives available at the time" to the defense. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). We decline to second-guess those reasonable decisions made at trial by defense counsel. *See United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). In light of these conclusions and applying the applicable standards, we find Appellant has failed to meet his burden of demonstrating that any deficiency in his defense counsel's conduct resulted in prejudice.

Failure by Military Judge to Disclose SSgt DK's Mental Health Records[2]

Prior to trial, the defense requested, pursuant to Mil. R. Evid. 513, the mental health records of SSgt DK. The bases for the request were to determine what she may have said regarding the charged offense to her providers, what any diagnosis was, what treatment techniques were used, and what the effects of her treatment were on her ability to accurately recall the events in question and truthfully testify nine years later. The military judge held the required hearing where SSgt DK acknowledged seeing mental health providers at three duty stations but only speaking about the rape at one of those locations. SSgt DK's special victims' counsel (SVC) was present at the hearing and indicated to the military judge that he possessed what he believed to be all of SSgt DK's mental health records from those locations.

---

[2] These briefs were filed under seal and oral argument on this issue was conducted in a closed court proceeding based on the sensitive nature of the evidence. Our opinion excludes any direct references to the contents of the records except as necessary for this holding.

He provided those records, totaling 96 pages, to the military judge.

The military judge performed an in camera review of the records. During that review, he determined that they were incomplete because one page indicated it was "page 1 of 2" but the next page was not in the records. The military judge informed counsel, including the SVC, and signed an order requesting the records be sent directly to him from the facility in question. In response, the military judge received 67 pages by email, some of which were duplicates, some were "new," and the "missing" page was still not provided.[3] After his review, he released 83 pages (out of 127[4]), including all but one page from the facility where she discussed the rape,[5] to the trial and defense counsel. The military judge announced that he reviewed the records with a "did she talk about this case" filter. After reviewing those documents, civilian trial defense counsel indicated that his expert opined that there were some records disclosed that

---

[3] Our review of the record confirms that there is a page in both Appellate Exhibit XXI and Appellate Exhibit XXXI that states it is page 1 of 2 and the page following is not page 2 of 2. However, a thorough comparison of the records reveals that there is a page 2 of 2 located in the records which follows what is marked as page 1 of 1. Furthermore, our review of the content of the page marked 1 of 2 and comparison to similar documents within the same set of records supports that page 1 contains all of the substantive records associated with that date's visit, including the signature of the provider. We do not believe this "missing" page, if it is in fact not contained elsewhere, affects the content of the records for that date.

[4] Although there were 163 total pages reviewed by the military judge, 36 pages were exact duplicates.

[5] One page, the General Instructions for completing the DD Form 2870 (Authorization for Disclosure of Medical or Dental Information) was not provided.

should have generated additional records (questionnaires that typically result in notes when provider discussing those with patient). The consultant further asserted that there was nothing that caused him to ask for the notes, he was really just asking to see if they were present. The military judge indicated that those notes did in fact exist in what he had reviewed, but he did not find them relevant. After SSgt DK testified during sentencing, the military judge released all of her mental health records to both parties.

We review a military judge's ruling on a discovery request for abuse of discretion. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *Id.* In the case before us, like *Roberts*, we are reviewing the military judge's determination of whether this requested evidence was "material to the preparation of the defense" for purposes of the Government's obligation to disclose under Rule for Courts-Martial (R.C.M.) 701(a)(2)(A). "The military judge's determination of materiality in this respect is a question of law that we review de novo." *Id.* "Our review of discovery/disclosure issues utilizes a two-step analysis: first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *Id.* at 325.

Appellant now argues that the records are incomplete because there are no in-patient records despite the fact that a box was checked requesting both in and out patient records and that he should have received all of

the mental health records as discovery, pursuant to R.C.M. 701. He asserts these records were material to the preparation of the defense in that they could have assisted the defense in the development of strategies, cross-examination, and argument on findings as well as sentencing. R.C.M. 701(a)(2)(B) entitles the defense, upon request, "to inspect . . . [a]ny results or reports of physical or mental examinations . . . which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense. . . . " R.C.M. 701(g) places responsibility for regulating discovery on the military judge. R.C.M. 703(a) gives the prosecution and the defense "equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." However, because the information being sought is privileged, the articulated basis for materiality must first justify piercing the privilege.

With regard to the "missing" in-patient records, there is no showing that any actually exist. There is nothing more than a request for records which resulted in the production of only out-patient records. Additionally, when the records were provided to counsel after SSgt DK testified on sentencing, there was no inquiry or request for additional records by any party. Under Mil. R. Evid. 513(a), and in accordance with R.C.M. 701(f), records of psychotherapist-patient communication are generally protected from release during discovery. Among the enumerated exceptions permitting release, only Mil. R. Evid. 513(d)(8)—authorizing disclosure when

"constitutionally required"—applies to the present case.[6] Appellant categorizes the withheld evidence as *Brady* evidence under *Brady v. Maryland*, 373 U.S. 83, 87, (1963) and *Giglio v. United States*, 405 U.S. 150, 154, (1972).

Appellant's reliance on a due process right to compulsory discovery was addressed by the United States Supreme Court in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The court held that the Confrontation Clause[7] does not amount to a constitutionally compelled rule of pretrial discovery. *Id* at 52. Moreover, the holding explicitly stated that the Supreme Court "has never held—even in the absence of a statute restricting disclosures—that a defendant alone may make the determination as to the materiality of the information." *Id.* at 59. "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The Court in *Ritchie* held that in camera review by the judge, guided by a specific request by the defense for information alleged to be material ensures a fair trial. *Ritchie*, 480 U.S. at 60. In camera review balances the need to protect the privilege and the right to discovery of material information. The *Ritchie* ruling indicates that an evidentiary privilege may constitutionally prevent disclosure based on policy reasons, as Mil. R. Evid. 513 does.

Among the records not disclosed to the Defense was a two-page intake form, prepared in 2006, wherein SSgt DK denies being hurt within the last 12 months and does

---

[6] In 2015, Mil. R. Evid. 513 was amended, eliminating the "constitutionally required" exception.

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

not circle the options "sexual abuse" or "victim of violence." Appellant argues before us that the comments on the form were inconsistent with SSgt DK's testimony and should have been released. We note, however, that the cross-examination of SSgt DK at trial repeatedly covered the fact that she had not reported the sexual assault to her providers prior to 2013, so while the intake form is inconsistent with her testimony that she was raped by Appellant in 2005, it is consistent with her testimony that she did not *report* the rape until years later. We recognize that SSgt DK's "statements" when filling out that intake form could constitute an inconsistent statement. We find that the judge abused his discretion by not disclosing these pages in discovery.

In *Roberts*, our superior court clarified the respective tests and burdens articulated in a number of their decisions dealing with materiality of undisclosed, discoverable evidence. They adopted two appellate tests for determining materiality with respect to the erroneous nondisclosure of discoverable evidence; the first test applies to those cases in which the defense either did not make a discovery request or made only a general request for discovery. *Roberts*, 59 M.J. at 326. In those instances, once the appellant demonstrates wrongful nondisclosure, "the appellant will be entitled to relief only by showing that there is a 'reasonable probability' of a different result at trial had the evidence been disclosed." *Id* at 326-27. "The second test is unique to our military practice and reflects the broad nature of discovery rights granted the military accused under Article 46. Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct." *Id.* at 327. In those situations, "the appellant will be

entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt."

In the case before us, the military judge reviewed the evidence under Mil. R. Evid. 513 and R.C.M 701. These facts distinguish the issue before us from a direct application of the process set forth in *Roberts* because there, our superior court held that it was not reviewing any trial level decision. *Roberts*, 59 M.J. at 327 n.3. Here, the military judge's decision to even conduct an in camera review must be given deference because it is a prerequisite to any further consideration of the evidence at issue.

The Defense rationale for piercing the Mil. R. Evid. 513 privilege was the need to consider prior inconsistent statements and possible memory reconstruction techniques. Based on Appellant's assertion that trial defense counsel's strategy was deficient, counsel now urge that we not only review the military judge's decision to conduct an in camera review and subsequent disclosure but also to substitute a completely different rationale for doing an in camera review focusing on SSgt DK's motive to lie. We give deference to the military judge's decision to conduct the in camera review based on the justification provided by trial defense counsel. Using that factual scenario, we will review the military judge's erroneous failure to provide those two pages using the "harmless beyond a reasonable doubt" standard.

SSgt DK's responses on the intake form, that she had not been raped or been a victim of violence, were both relevant to cross-examination. However, Appellant's counsel extensively cross-examined SSgt DK on her failure to report the sexual assault; the fact that while she did seek counseling for a number of issues, she never

mentioned the sexual assault until 2013; her inability to recall details; and how her memory gained more specificity over the course of her interviews with OSI. Disclosure of the additional evidence from the mental health records regarding "untruthfulness by omission" by SSgt DK would not have created reasonable doubt that did not otherwise exist. The undisclosed information might have weakened the reliability of SSgt DK's testimony somewhat, but the fact that she had failed to report the rape for many years despite repeated counseling was before the factfinder. However, in light of the evidence of Appellant's guilt, much of it coming from his own admissions, any argument Appellant could have made would have been minimally effective, at best. This nondisclosure prior to sentencing was harmless beyond a reasonable doubt.

The remainder of the records that Appellant now cites as being impermissibly withheld by the military judge deal with evidence that he asserts could have been used to formulate strategy, investigation, and cross-examination. Primarily, Appellant asserts that if his trial defense counsel had known about the full extent of SSgt DK's insecurities, it *could* have changed their investigative and strategic decisions, to include conducting a stronger cross-examination and arguing this point to the factfinder. The only specific reference as to how these records would have been used comes from the declaration of the area defense counsel which says that it might have provided the "missing link they needed to substantiate their theory that SSgt DK had reconstructed her memory."

We review the military judge's decision not to disclose these matters using the "reasonable probability of

a different result at trial if the evidence had been disclosed" standard. *Roberts*, 59 M.J. at 326-27. Impeachment evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). "The determination of materiality 'calls for assessment of the omission in light of the evidence in the entire record.'" *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1999).

While it is true that SSgt DK's credibility as to whether or not she consented was an issue, the only issue after Appellant's admissions on the pretext phone call, there is not a reasonable probability that the result would have been different had the evidence been disclosed to the Defense during findings.

Convening Authority's Denial of a Rehearing

We review a convening authority's decision not to grant a post-trial hearing for an abuse of discretion. *United States v. Lofton*, 69 M.J. 386, 391 (C.A.A.F. 2011). A convening authority has discretion to order a post-trial Article 39a, UCMJ, session after authentication of the record, but before action under R.C.M. 1102. The purpose of a post-trial Article 39a session is to "resolve a matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). As such, in *United States v. Scaff*, this court observed, "We view the purpose of R.C.M. 1102 as a vehicle for precluding a miscarriage of justice from occurring." 26 M.J. 985, 988 (A.F.C.M.R. 1988), *rev'd on other grounds*, 29 M.J. 60 (C.M.A. 1989). When taking action, the convening authority may order a rehearing under R.C.M. 1107(e).

"A rehearing may be appropriate when an error substantially affecting the finding or sentence is noticed by the convening authority." R.C.M. 1107(e), Discussion. While there is interplay and similarities between a post-trial Article 39a session under R.C.M. 1102 and a rehearing under R.C.M. 1107, these options, and requests for them, are distinct and separate. *See United States v. Hull*, 70 M.J. 145, 151 (C.A.A.F. 2011).

In this case, Appellant requested both a post-trial Article 39a session under R.C.M. 1102 and a rehearing under R.C.M. 1107, but these separate requests were processed simultaneously as attachments to the addendum to the staff judge advocate's recommendation dated 20 November 2014. Both of Appellant's requests were primarily based on two types of evidence not introduced at trial—"Lt Col Brigg's Character" and "SSgt [DK]'s Character" as discussed earlier in the allegation of ineffective assistance of counsel. In the request for a post-trial Article 39a session, appellate defense counsel requested that the convening authority return the record to the military judge to consider the additional evidence (various statements regarding the character of both Appellant and SSgt DK) obtained since the court-martial adjourned that could affect the sufficiency of any findings of guilty or the sentence. In the request for rehearing, appellate defense counsel admitted the evidence "could and should have been found" by trial defense counsel and therefore was not "newly discovered evidence" and asked the convening authority to order a full or partial rehearing if he elected not to disapprove the findings. On Appeal, Appellant only challenges the failure to order a rehearing.

In this case, a rehearing on the single specification of rape would have involved all of the trial stage procedures as a new trial under R.C.M 1210 and Article 73, UCMJ. While the convening authority is not obligated to apply the criteria for a new trial under R.C.M. 1210 and Article 73 when deciding on a request for rehearing, our superior court has indicated that a convening authority may find it useful to do so as a means of addressing such information early in the post-trial process, emphasizing "that 'requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored,' and are granted only if a manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence. *Hull*, 70 M.J. at 151-52 (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)).

The concession by appellate defense counsel that the character evidence they now rely on is not "newly discovered" is significant to the resolution of error because evidence which could have been discovered through due diligence cannot form the basis for a request for new trial. See R.C.M. 1210(f), *United States v. Hecker*, 42, M.J. 640, 646 (A.F.C.C.A. 1995) and *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). Furthermore, new evidence which is merely cumulative or impeaching is not an adequate basis for the basis of a new trial. See *United States v. Thomas*, 11 M.J. 135, 138 (C.M.A. 1981). Furthermore, because trial defense counsel made a tactical decision not to use character evidence, this petition for a new trial is nothing more than a "new tactic, not new evidence. This alone is sufficient to deny the petition." See *United States v. Day*, 14 C.M.A. 186, 33 C.M.R. 398, 401 (C.M.A. 1963).

While appellate defense counsel believes that the evidence of SSgt DK's character for untruthfulness would have been sufficient to alter the findings in this case, the evidence of Appellant's multiple adulterous relationships is equally relevant as to his credibility, not only for the relationships themselves, but also as to his efforts to conceal those relationships from his wife, friends, and co-workers. We are confident that in a judge alone trial, calling character witnesses whose testimony would have included their total ignorance as to Appellant's "other life" would not have altered the finding of guilty or the sentence. As such, the convening authority did not abuse his discretion when he denied a rehearing, and the denial of a rehearing was not manifestly unjust.

Factual Sufficiency

Appellant contends the evidence is factually insufficient to support his conviction in this case. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of factual sufficiency de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we approve only those findings of guilty that we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a reasonable fact finder could have found Appellant guilty of all elements of the offense, 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)). "[I]n resolving questions of legal sufficiency, [this court is] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

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," this court is convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The issue here is solely whether the sexual intercourse between Appellant and SSgt DK was by force and without consent. The testimony of Appellant and SSgt DK conflict as to the details of the sexual encounter and both had significant memory gaps. Their recollections are in accord regarding their mutual consumption of alcohol, the location of the event, and the fact that it occurred the night before they were scheduled to return home from the TDY.

Factual sufficiency does not require that the evidence be free of conflict. While there are inconsistencies in the description of what took place between Appellant and SSgt DK that night in 2005, Appellant's own words to SSgt DK are highly persuasive in convincing us that he committed the offense: "I am so, so sorry for being selfish, for disrespecting you, for not listening to you. . . . I'm so sorry for pushing myself on you . . . and subjecting you to that; for not respecting you as a person and listening to you and stopping." Similarly persuasive, during his interview with the Air Force Office of Special Investigations he said, "[W]as I so selfish and immature and young and just ready to go that I—did I ever disregard what she said, did I ever do

something that she did not want[?] . . . [I've] asked [myself] if rape happened and [my] answer . . . was 'I'm not sure, no' . . . that night altered [my] self-image."

This court is convinced beyond a reasonable doubt that the totality of the evidence is sufficient to support the findings of the military judge that Appellant raped SSgt DK.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are **AFFIRMED**.

FOR THE COURT

/s/ LEAH M. CALAHAN

LEAH M. CALAHAN
Clerk of the Court

APPENDIX C

1. 10 U.S.C. 843(a) and (b) (2000) 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) (2000) 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.