IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**BRIEF ON SPECIFIED ISSUE**
Appellee	)	**(STATUTE OF LIMITATIONS)**
	)	
v.	)	
	)	**USCA Dkt. No. 17-0434/AF**
EDZEL D. MANGAHAS	)	
Lieutenant Colonel (O-5)	)	**Crim. App. No. 2016-10**
United States Air Force,	)	
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

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SPECIFIED ISSUE PRESENTED

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STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals reviewed this case under Article 62, Uniform Code of Military Justice. This Court has jurisdiction under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

A charge with one specification alleging rape under Article 120, UCMJ was preferred against Lt Col Mangahas on October 28, 2015. Charge Sheet. He is accused of raping DS when they were both cadets at the Coast Guard Academy in 1997. A preliminary hearing pursuant to Article 32, UCMJ, was conducted on April 19, 2016 and the Preliminary Hearing Officer issued his report on April 27, 2016. App. Ex. VIII, Att. 2. Despite the PHO's determination that there was no probable cause to believe that Lt Col Mangahas committed the charged offense and his recommendation to dismiss, the convening authority referred the charge and specification to trial by general court-martial on June 2, 2016. Lt Col Mangahas was arraigned, over Defense objection, on June 14, 2016. R. 11-12.

On July 10, 2016, Lt Col Mangahas filed three Motions to Dismiss the Charge and Specification: one based on the statute of limitations (App. Ex. VI), another based on improper referral (App. Ex. VIII), and the last based on a violation of the constitutional right to a speedy trial (App. Ex. X). The military judge held an Article 39(a), UCMJ session on July 29, 2016 and heard argument on all three motions to dismiss. The Government stipulated to the facts in the Motions. R. 26-29. The military judge dismissed the charge and specification with prejudice on August 2, 2016, finding that the Government's inaction over 17 years prior to preferring charges violated the speedy trial guarantee embodied in the Fifth Amendment's due process clause. App. Ex. XV.

The Government appealed the dismissal to the Air Force CCA under Article 62, UCMJ. On April 4, 2017, the Air Force CCA vacated the military judge's order, concluding that there was insufficient evidence of actual prejudice resulting from the lengthy pre-preferral delay and thus no due process violation. *United States v. Mangahas*, Misc. Dkt. No. 2016-10 (A.F. Ct. Crim. App. Apr. 4, 2017). The CCA returned the case to the Judge Advocate General of the Air Force, who returned it to the convening authority. The convening authority, in turn, directed the military judge to proceed to trial.

Lt Col Mangahas filed his Petition for Grant of Review with this Court on June 2, 2017 and his Supplement to the Petition on July 7, 2017. On 31 July 2017, this Court granted review of the speedy trial issue and by separate Order, granted Lt Col Mangahas' Motion to stay the court-martial proceedings pending the completion of appellate review. The Court held oral argument on 11 October 2017. On 25 October 2017, this Court ordered briefing on the specified issue.

STATEMENT OF FACTS

On October 5, 2014 the complaining witness, DS, gave a videotaped statement to the Coast Guard Investigative Service alleging that Lt Col Mangahas raped her when they were both cadets at the Coast Guard Academy in 1997. App. Ex. I, Att. 1. She also claimed that in 1997, she reported this rape verbally and in writing to Academy officials, including the Staff Judge Advocate (SJA), the Deputy SJA, PM – who was a female Academy counselor, and other Academy officials via her witness testimony at an Executive Board hearing in an unrelated rape allegation involving one of her friends. She alleged that the Academy officials – specifically, the SJA, Deputy SJA, and counselor – discouraged her from participating in counseling beyond the initial session after reporting the rape and from going forward with a case. *Id.*; App. Ex. X, Att. 3. Finally, she made a written, sworn statement to the CGIS and local law enforcement on January 20, 1998, alleging that she was raped the year prior. AE X,

Att.8. Neither CGIS nor the local police conducted any investigation whatsoever into the rape allegation between 1998 and DS's statement to CGIS in 2014. R. 73, 77-78.

There was no investigation whatsoever in connection with DS's rape allegation against Lt Col Mangahas from 1997 until January 2014, when DS reported to the Department of Veterans Affairs that she was a rape victim after she failed to promote. App. Ex. XV. Lt Col Mangahas was not charged with any offense relating to this allegation until charges were preferred and received by the summary court-martial convening authority on October 28, 2015.

It is uncontested that no one notified Lt Col Mangahas that DS had accused him of rape until October 2014, after DS made her videotaped statement to CGIS. Lt Col Mangahas entered a plea of not guilty and denies that he ever had any sexual contact with DS. App. Ex. XIII. He therefore contests the accuracy of DS's claims regarding the alleged rape and other pertinent events she described in her 2014 videotaped statement to CGIS, but acknowledges for purposes of this appeal only that in 1997, she made an accusation that he raped her. App. Ex. X.

SUMMARY OF ARGUMENT

The answer to the Court's question is no, the offense alleged at issue in this case is not a crime punishable by death now, nor was it at the time of the alleged offense. This is based on fundamental rules of statutory construction, meaning one

looks to the plain language of the statute, Article 43(a); Congress means what it says and says what it means. The plain language of Article 43(a) indicates that it only applies to offenses "punishable by death." Rape in the instant case (not involving a child under the age of 12, death, or contemplated death of any person)[1] is not an offense punishable by death because:

- The Supreme Court found that a statute providing for the death penalty in this circumstance violates the Eighth Amendment and thus is unconstitutional.
- An unconstitutional statute is null and void *ab initio* and may not be used for any purpose (which, logically, means that it cannot be used to determine the applicable statute of limitations).

Applying an unlimited statute of limitations for the rape alleged in the instant case violates not only the Eighth Amendment, but also violates Lt Col Mangahas' right to equal protection via the Due Process clause of the Fifth Amendment, because the federal civilian statute of limitations for rape in 1997 was five years. 18 U.S.C. § 3282. There is no justification for treating servicemembers differently in this respect.

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[1] This Brief does not challenge the constitutionality of the death penalty for rapes involving the attempted or actual death of the victim. For simplicity, the discussion in the Brief is intended to apply only to cases, such as the instant case, that do not involve attempted or actual death of the victim.

ARGUMENT

A. The Statute of Limitations and the Punishment for Rape at the Time of the Alleged Offense.

Lt Col Mangahas is charged with raping D.S. in 1997. In 1997, Article 43, UCMJ stated:

> § 843. 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.

The 1995 version of Article 120, UCMJ authorized a maximum punishment of "Death or such other punishment as a court-martial may direct."

B. Article 120, UCMJ's Maximum Punishment of Death is Unconstitutional and Void for All Purposes; Article 43(a) is Unconstitutional in that it Attempts to Incorporate an Unconstitutional Statute.

1. *Coker v. Georgia*

In 1977 the United States Supreme Court held that executing a person for rape without the attempted or actual death of a person would violate the Eighth Amendment's prohibition of cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977). It is well-settled that the judicial branch has authority to

declare a statute unconstitutional and thus unenforceable. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

2. Coker applies to the military justice system

There is no language in the Supreme Court's opinion in *Coker* that limits its application to civilian jurisdictions. Nor is there any justification whatsoever for finding that the death penalty for a non-death rape is any less cruel and unusual punishment for a servicemember than for a civilian. Rape is not a uniquely military offense. Finally, numerous military and civilian courts – including this one – as well as commentators, have observed that *Coker* applies to courts-martial.

a. Court of Appeals for the Armed Forces

> The Uniform Code and many state penal codes authorize death sentences for rape; but *in the absence of aggravating circumstances, such punishment cannot be constitutionally inflicted. Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

United States v. Hickson, 22 M.J. 146, 154 n.10 (C.M.A. 1986) (emphasis added).

> Congress obviously intended that in cases where an accused servicemember is convicted of premeditated murder, certain types of felony murder, or rape, the court-martial members should have the option to adjudge a death sentence. *See* Articles 118 and 120. *Probably this intent cannot be constitutionally effectuated in a case where the rape of an adult female is involved, Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)—at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense.

United States v. Matthews, 16 M.J. 354, 380 (C.M.A. 1983) (emphasis added).

> In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court held that executing a defendant for rape of an adult female would violate the Eighth Amendment. *We intimated in Matthews that this same principle would apply to trials by courts-martial, "at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense*."

United States v. Curtis, 32 M.J. 252, 266 (C.M.A. 1991) (citations omitted, emphasis added).

b. Air Force Court of Criminal Appeals

> [W]e hold that this is not a capital case. In its opinion in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the United States Supreme Court concluded that the death sentence is grossly disproportionate and excessive punishment for the crime of rape of an adult woman and prohibited under the Eighth Amendment to the United States Constitution as cruel and unusual punishment. *That opinion is binding upon us*.

United States v. McReynolds, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (citing *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967)) (emphasis added).

c. Army Court of Criminal Appeals

> [W]e conclude that a plea of guilty lawfully could have been received by the military judge, since *the Supreme Court had effectively invalidated that portion of Article 120, UCMJ, making rape a capital offense*.

United States v. Matthews, 13 M.J. 501, 515 (A.C.M.R. 1982), *sentence rev'd on other grounds*, 16 M.J. 354 (C.M.A. 1983) (emphasis added).

d. Navy-Marine Corps Court of Criminal Appeals

> Current appellate decisional authority indicates that the offense of rape, as alleged against the appellant, is not an offense for which the death penalty can be adjudged. Therefore, the offenses in this case could not have been properly referred as capital offenses. Both rapes of which the appellant was convicted involved "adult" victims, within the meaning of that term under the UCMJ. *See* Article 120(b), UCMJ; para. 127c, MCM. *A sentence of death for the crime of rape of an adult woman is prohibited by the Eighth Amendment to the U.S. Constitution. Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Therefore, *the capital aspect of punishment purportedly authorized under Article 120 has been effectively invalidated*.

United States v. Clark, 18 M.J. 775, 776 (N-M. C.M.R. 1984) (citations omitted, emphasis added).

> We note, however, that *the death sentence for rape, Article 120, UCMJ, 10 U.S.C. § 920, has been abrogated by the Supreme Court in Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1978).

United States v. Rojas, 15 M.J. 902, 927 n.9 (N-M. C.M.R. 1983), *judgment set aside*, 17 M.J. 154 (C.M.A. 1984), *aff'd*, (C.M.A. June 27, 1985) (emphasis added).

e. Supreme Court of Colorado

> The statutory penalty for rape under [Article 120, UCMJ] is "death or such other imprisonment as a court-martial may direct." *Military courts have determined that the death sentencing authorized by Article 120 has been effectively nullified by the decision of the United States Supreme Court in Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which invalidated a death sentence for rape as an excessive penalty in violation of the constitutional proscription against cruel and unusual punishment.

Apodaca v. People, 712 P.2d 467, 471 (Colo. 1985) (citations omitted, emphasis added).

f. Commentators

> UCMJ, article 120(a) is a capital rape provision. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court concluded that the imposition of the death penalty for the offense of rape of an adult woman is grossly disproportionate and excessive, and therefore cruel and unusual punishment forbidden by the eighth amendment. *This decision in all probability invalidates per se the capital punishment provision of the Article*.

Lieutenant Commander Mark Dawson, JAGC, USN, *Is the Death Penalty in the Military Cruel and Unusual?*, 31 JAG Journal 53, 73 (1980) (emphasis added).

> Strictly speaking, *Coker* eliminated capital punishment for rape of an adult woman.

Christine Daniels, *Capital Punishment and the Courts-Martial: Questions Surface Following Loving v. United States*, 55 Wash. & Lee L. Rev. 577, 609 (1998).

The Supreme Court has not specifically addressed this issue. In denying rehearing in a case in which the Court found that a civilian statute authorizing death for rape of a child was unconstitutional, the Court noted that the UCMJ authorized death for rape but only in the context of whether there was a national consensus on the issue. The Court specifically noted that the military statute was not before the Court in that case and therefore, it was "a matter not presented here for our decision." *Kennedy v. Louisiana*, 129 S.Ct. 1, 2 (2008) (statement of Kennedy, J. denying

rehearing). Counsel could not find any case in which the constitutionality of the military death penalty for rape was before the Court.

Therefore, the portion of Article 120 authorizing the death penalty for a non-death rape was unconstitutional in 1997 per the Supreme Court of the United States.

3. An unconstitutional statute is void for all purposes

It is undisputed that, "a law repugnant to the constitution is void." *Marbury*, 5 U.S. at 180. The Supreme Court held over 100 years ago that, "a void statute [is] not law *for any purpose*." *Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 567 (1913) (emphasis added).[2] It is "as inoperative as if it had never been passed." *Id.* Therefore, since the death provision of Article 120 is void for all purposes, Article 43(a) cannot validly incorporate it. Logically, Article 43(a) is itself unconstitutional if applied to prescribe no statute of limitations for the offense of rape without death or attempted death, such as in the instant case.

C. This Court Can and Should Overrule *Willenbring v. Neurauter*, 48 M.J. 152, 180 (C.A.A.F. 1998).

We acknowledge that this Honorable Court has rejected the proposition that the five-year statute of limitations applies in cases not involving death. *Willenbring v. Neurauter*, 48 M.J. 152, 180 (C.A.A.F. 1998). The Court found that regardless of

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[2] Authorities from various jurisdictions have held similarly. *See* Summary of Case Law on Unconstitutional Statutes at Appendix 1; *see also* "Void," Black's Law Dictionary (10th ed. 2014) (stating that a void act is "of no effect whatsoever").

whether the Government actually could impose the death penalty, the relevant inquiry was whether the penal statute (Article 120, UCMJ) "authorized" death as a punishment. *Id.* Importantly, however, it appears that the parties did not raise, nor did the Court discuss – or even mention – the unconstitutionality of the death provision of Article 120, or whether Article 43(a) itself is unconstitutional because it purports to incorporate the unconstitutional death provision of Article 120.

This Court recently held, "*Stare decisis* is a principle of decision making, not a rule, and need not be applied when the precedent at issue is "unworkable or ... badly reasoned." *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015) (citation omitted); *see Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("However, when convinced of former error, this Court has never felt constrained to follow precedent."). In determining whether the Court should overrule prior precedent, it considers, "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Quick*, 74 M.J. at 336 (citations omitted).

1. Poorly reasoned

Willenbring is poorly reasoned for at least three reasons. First of all, it conflicts with Supreme Court cases – *Coker* itself, and those cases regarding the effect of an unconstitutional statute.

a. Coker

The Supreme Court clearly found that, "death is indeed a disproportionate penalty for the crime of raping an adult woman." *Coker* 433 U.S. at 597. A plain reading of this language means that not only can the government not *impose* the death penalty, but it also cannot *prescribe* the death penalty for this offense.

b. Effect of unconstitutionality

Willenbring allows the Government to use an unconstitutional provision (the "authorized" punishment of death) to apply an unlimited statute of limitations, when a void statute should not be used *for any purpose*. This violates the principles the Supreme Court set forth over two hundred years ago. *See Marbury*, 5 U.S. at 177; *see also Chicago, I. & L.R. Co.*, 228 U.S. at 567. In other words, the word "death" should be stricken through with respect to rape cases not involving death – it is as if Congress had never enacted that part of the statute. Therefore, Lt Col Mangahas is not charged with an offense punishable by death.

Secondly, this theory (that one merely looks to the original language of the penal statute, regardless of whether the punishment actually may be imposed) ignores the plain language of the statute. The words Congress chooses to use are important; examining them is the first step in analyzing a statute. *United States v. Fetrow*, 76 M.J. 181, 186 (C.A.A.F. 2017) ("We begin by simply reading the plain language of

the rule giving effect to every clause and word. The words used in the rule "should be given their common and approved usage.") (citations omitted). "Punishable" is not a term of art. "In the absence of any specific statutory definition, we look to the ordinary meaning of the word." *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015), *cert. denied*, 136 S. Ct. 915 (2016). The UCMJ contains no definition of "punishable." The ordinary meaning of the word is clear: an offense that is punishable by death is one for which a person is *able* to be *punished*. If the death penalty is not an authorized punishment for rape (because the Supreme Court says so, or because it is not referred capital, or for other reasons making the death penalty inapplicable), then it is not *punishable* by death. This Court has held that, "Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).

This Court will "presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). As mentioned, the *Willenbring* Court interpreted the word "punishable" to mean what punishment Article 120 purported to authorize, as opposed to being a punishment that actually could be

imposed. With respect, this is an incorrect reading of Article 43(a), as explained above. Had Congress intended to say that, it would have used language such as "offenses for which the maximum authorized punishment under a punitive Article of the Code includes death." Instead, Congress said merely "punishable" without referencing any authorized maximum punishment under the Code. "Punishable" is different from "authorized by Congress or the Code," and that distinction makes a difference. Holding otherwise allows the Government to benefit from a statute of limitations intended for crimes serious enough to warrant the death penalty even in cases such as the instant one in which the Government has no intention or ability to seek the death penalty. This is an absurd result.

Third, the holding is inconsistent with the rationale for an unlimited statute of limitations. That rationale is that some offenses are so serious – with respect to Article 43(a), it is those that are enumerated and any offense punishable by death – that it is appropriate to allow the Government to charge someone accused of committing one of those offenses at any time. While rape certainly is a serious criminal offense that deserves harsh punishment when the Government is able to prove that it occurred beyond a reasonable doubt, Congress chose not to enumerate it as an offense with an unlimited statute of limitations until 2006. NATIONAL

DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006, Pub.L. No. 109-163, Title V, § 553, 119 Stat. 3264 (2006).

Finally, the *Willenbring* Court did not rely on any military cases as authority. The fact that it cited three federal civilian decisions does not save its logic. *See Willenbring*, 48 M.J. at 180 (citing *United States v. Manning*, 56 F.3d 1188, 1196 (9th Cir. 1995); *Coon v. United States*, 411 F.2d 422, 424 (8th Cir. 1969); *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973)). None of those cases controls, and this Court does not have to disagree with those federal civilian jurisdictions in order to overrule *Willenbring*. Nor do any of those cases involve a constitutional challenge to the statute of limitations based on *Coker*, or even mention *Coker*. And, there is a basic and significant difference between the underlying factual and procedural bases of those cases as opposed to the instant case. In those cases, the death penalty was an available punishment for the offenses in question, but only an applicable procedural bar (such as that the government did not seek the death penalty or there was a procedural problem with the application of the death penalty) prevented its imposition. In the instant case, however, there is a substantive bar to the death penalty due to the Supreme Court's finding that it violates the Constitution. In other words, the reason the death penalty was not imposed in those cases was due to a procedural issue concerning how the death penalty was to be administered, not the

substantive basis that the punishment cannot ever be constitutionally prescribed for the offense at issue.

Manning, for example, involved the question whether the invalidation of the death penalty scheme due to problems with its administration – akin to the problems raised in *Furman v Georgia*, 408 U.S. 238 (1972)[3] – converted what once was a capital crime into a non-capital crime. *Manning*, 56 F.3d at 1196. The Ninth Circuit held that the procedural issues did not invalidate Congress' intent that the crime be punished by the death penalty, but only affected the procedural protections the defendant was to receive: "[I]n [*United States v. Cheely*, 36 F.3d 1439 (9th Cir. 1994)] we held that the provisions authorizing the death penalty for crimes committed in violation of 18 U.S.C. § 1716 are unconstitutional because those provisions 'do not genuinely narrow the class of persons eligible for the death penalty.'" *Manning*, 56 F.3d at 1196 (citing *Cheely*, 36 F.3d at 1446). "*Cheely* did not effect (sic) the statute of limitations in sections 3281 and 3282, because those provisions derive their justification from the serious nature of the crime rather than from a concern about, for example, what procedural protections those who face a penalty as grave as death are to receive." *Id.*

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[3] "[*Furman*] did not hold that the death penalty was unconstitutional, but only that the capital sentencing procedures violated the Eighth Amendment." *United States v. Loving*, 41 M.J. 213, 294 (C.A.A.F. 1994), *opinion modified on reconsideration*, (C.A.A.F. Feb. 2, 1995), *aff'd*, 517 U.S. 748 (1996).

In contrast, *Coker* found that the death penalty for a non-death rape is always unconstitutional, regardless of the procedures employed to adjudge it. Finally, it is important to note that *Manning* was convicted of murder by sending a bomb in the mail. This crime survives a *Coker* analysis because a death resulted.

Likewise, the Eighth Circuit's analysis in *Coon* relies on procedural grounds as opposed to the general unavailability of the death penalty due to constitutional concerns. In that case, the statute was invalidated due to the fact that the jury, but not the judge, was authorized to impose the death penalty. *Id.* at 424. Again, *Coker* is not implicated in that case and it also does not control.

Finally, *Willenbring's* reliance on *Watson* is unpersuasive. The issue in that case was whether the defendant was entitled to the assistance of two appointed lawyers rather than one due to the nature of the offense of which he was indicted. The court found that the infirmities noted in *Furman* did not invalidate the statute authorizing the appointment of two lawyers in serious cases. *Id.* at 1129. Of note, Watson was convicted of first degree murder which again, does not raise the constitutional issue the Supreme Court addressed in *Coker*.

None of the subsequent cases to consider the statute of limitations in this context has addressed the substantive bar to imposing death as punishment in *Coker*. Rather, they all address procedural bars as did the circuit cases *Willenbring* cites,

which are based on the aftermath of *Furman*. In all of these cases, death was a substantively available sentence because the defendant was charged with a homicide or other crime prescribing the death penalty, but not rape, which the Supreme Court held was not punishable by death in *Coker*. *See, e.g., United States v. Martinez*, 505 F. Supp. 2d 1024, 1034 (D.N.M. 2007) (first-degree murder committed in Indian country still "punishable by death" even though tribe had elected procedurally, pursuant to 18 U.S.C. § 3598, to opt out of death penalty; tribes have "the authority to execute capital offenders if they so choose."); *United States v. Johnson*, 239 F. Supp. 2d 897, 905 (N.D. Iowa 2002) (charged murders were "punishable by death," "whether or not a *constitutionally effective* death penalty was available, on procedural grounds [based on *Furman*], at the time that she allegedly committed the offenses") (emphasis in original); *United States v. Church*, 151 F. Supp. 2d 715, 722 (W.D. Va. 2001), *aff'd sub nom. United States v. Ealy*, 363 F.3d 292 (4th Cir. 2004) (no statute of limitations for killings even though death penalty unenforceable due to *Furman* concerns).

2. Intervening events

Since *Willenbring*, the law has changed – death is no longer an authorized punishment for rape. In 2006, Congress completely re-wrote Article 120(a); the previous version stated that a person guilty of rape . . . shall be punished by death or

such other punishment as a court-martial may direct"; in 2006 that language changed to a person "guilty of rape . . . shall be punished as a court-martial may direct." *Compare* Article 120, UCMJ (2005) *with* NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006, Pub.L. No. 109-364, Div. A, Title X, § 1071(a)(4), 120 Stat. 2398 (2007). In 2012, the President explicitly stated that the maximum punishment for this offense included only dishonorable discharge, total forfeitures, and confinement for life without parole – not death. Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013).

3. Other factors

a. Reasonable expectations of servicemembers and the risk of undermining public confidence in the law

The other two factors to consider pursuant to *Quick* militate in favor of overruling *Willenbring*. Servicemembers expect that courts will adhere to the plain language of the statutes that apply to them, especially when the consequences can be so severe (a five year statute of limitations versus an unlimited one). When courts apply a rule in a way that conflicts with the plain language of the statute concerned, in contravention of the rationale for the statute, the public will lose confidence in the law.

b. The relationship between the due process violation and the statute of limitations in this case

This Court has held:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity....

United States v. Reed, 41 M.J. 449, 451 (C.A.A.F. 1995) (quoting *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)).

The Court already heard oral argument on the due process speedy trial violation alleged in this case. The government waited almost two decades to begin investigating an alleged rape that was reported several times verbally and in writing. Despite these reports, Lt Col Mangahas was not on notice of this allegation until 2014. The government had the opportunity to investigate and prosecute this alleged offense many years ago and chose not to do so. It is unfair to allow the government to avail itself of an unlimited statute of limitations under these circumstances, especially considering that death is no longer authorized for the offense of which he is accused. The statute of limitations, if it truly is unlimited, does not protect Lt Col Mangahas from the dangers described above.

We respectfully request that this Court overrule *Willenbring.*[4]

D. The 2006 Change to Article 43(a), UCMJ Does Not Apply to the Instant Case.

In 2006 Congress modified Article 43(a) to expressly include rape as an offense for which no statute of limitations applied. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006, PL 109-163, Title V, § 553, 119 Stat. 3264 (2006). However, this change did not affect Lt Col Mangahas because such changes are not retroactive. *United States v. Lopez de Victoria*, 66 M.J. 67, 74 (C.A.A.F. 2008).[5]

E. Applying Article 43(a) Violates Due Process.

As argued above, there is nothing uniquely military about Article 120, UCMJ. There is no reason to apply a different statute of limitations in cases such as the instant one than what a federal civilian jurisdiction would have applied at the relevant time – five years, which is what Article 43(b) provides. There is no "reasonable basis for a difference in treatment." *United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015), *reconsideration denied*, (C.A.A.F. Nov. 9, 2015), *cert. denied*, 137 S. Ct.

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[4] The core holding of this Court's opinion in *United States v. Stebbins*, 61 M.J. 366, 369 (C.A.A.F. 2005) was that life without parole was available for rape. This does not contradict the arguments in this Brief.

[5] Note that federal civilian law also changed in 2006, applying an unlimited statute of limitations to an analogous offense. 18 U.S.C. § 3299.

(2016) (citations omitted). The different treatment constitutes "unjustifiable discrimination" because Lt Col Mangahas is similarly situated in all relevant respects to civilian defendants charged with rape alleged to have occurred in 1997.

F. The Statute of Limitations is a Bar to Prosecution and is Subject Only to a Knowing Waiver.

It is well-settled that while an accused may waive his right to challenge the jurisdiction of a court-martial based on the argument that the statute of limitations has expired, this waiver "must be consciously and knowingly made." *United States v. Wiedemann*, 36 C.M.R. 521, 526 (1966) (citing *United States v Troxell*, 30 C.M.R. 6 (C.M.A. 1960)). There is no such waiver in the instant case – Lt Col Mangahas specifically asserts the statute of limitations as a bar to his prosecution and has done so since before the motions hearing in this case.

G. Conclusion.

Because the death provision in Article 120 is unconstitutional with respect to cases not involving death or contemplated death, it is as if it had never been written, and the 1995 version of Article 43(a) could not validly incorporate it. Therefore, the five-year statute of limitations in Article 43(b) applies in this case. The alleged rape in this case took place in 1997, and an officer exercising summary court-martial jurisdiction over the command did not receive sworn charges until 2015. Lt Col Mangahas does not waive the argument that his prosecution is barred by the statute

of limitations. A court-martial lacks jurisdiction to try him in 2017 (or any time in the future) for a rape not involving actual or attempted death that allegedly occurred in 1997 and therefore, this Honorable Court should dismiss the charge and specification with prejudice.

PRAYER

Lt Col Mangahas respectfully requests that this Court dismiss the Charge and Specification with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This Brief complies with the type-volume limitation of Rule 24(c) because this Brief contains 5958 words.

2. This Brief complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing Brief on the Specified Issue was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on November 14, 2017.

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Summary of Case Law on Unconstitutional Statutes

An unconstitutional statute is void from its inception and cannot provide a basis for any right or relief. See 12 Tex.Jur.3d, *Constitutional Law*, § 41, at 548 (and cases in n. 33 thereof).

In 12 Tex.Jur.3d, Const. Law, § 41, p. 548, it is written:

> "It is the general rule that ***an unconstitutional statute, even though having the form and name of law, in reality is no law and in legal contemplation is as inoperative as if it had never undergone the formalities of enactment***. Such a statute leaves the question that it purports to settle just as it was prior to its ineffectual enactment. It is invalid and imposes no duties, confers no rights, creates no office, bestows no power, affords no protection, and ***justifies no acts performed under it***...."

Ex parte Halsted, 147 Tex.Cr.R. 453, 182 S.W.2d 479 (1944), held that an act of the Legislature which violates either of said constitutions is void and unenforceable. And *Ex parte Bockhorn,* 138 S.W. 706 (Tex.Cr.App.1911), held an unconstitutional statute is void from its inception, citing, inter alia, Cooley's work on Constitution Limitations, which used the language "when a statute is adjudged to be unconstitutional, ***it is as if it had never been passed***. Rights cannot be built up under it." Indicating that ***an unconstitutional statute is stillborn***, *Bockhorn* quoted with approval from *Boales v. Ferguson,* 55 Neb. 565, 76 N.W. 18 (1898), to the effect "The Court did not annul the statute for it was already lifeless. ***It had been fatally smitten by the Constitution at its birth***." *Bockhorn* also quoted from *Seneca Min. Co. v. Secretary of State,* 82 Mich. 573, 47 N.W. 25, 9 A.L.R. 770 (1890), that ***an unconstitutional statute "is of no more force or validity than a piece of blank paper, and is utterly void***."

Later Texas cases are in accord. *In re Johnson,* 554 S.W.2d 775, 787 (Tex.App.—Corpus Christi 1977), ref. n.r.e. 569 S.W.2d 882, held that ***an unconstitutional statute, as a general rule, amounts to nothing and accomplishes nothing and is no law*** citing *Colden v. Alexander,* 141 Tex. 134, 171 S.W.2d 328 (1943), and *Miller v. Davis,* 136 Tex. 299, 150 S.W.2d 973 (1941). *Newson v. Starkey,* 572 S.W.2d 29 (Tex.Civ.App.—Dallas 1978), held that generally ***a void law is no law and confers no rights, bestows no power on anyone and justifies no act performed under it*** citing *Sharber v. Florence,* 131 Tex. 341, 115 S.W.2d 604 (1938). See also *Lowry v. State,* 671 S.W.2d 601 (Tex.App.—Dallas 1984), affirmed in part, reversed in part 692 S.W.2d 86 (an unconstitutional statute is void from its inception); *Fite v. King,* 718 S.W.2d 345 (Tex.App.—Dallas 1986) ref. n.r.e. (unconstitutional act confers no right, imposes no duty, and affords no protection).

It has also been said that ***an unconstitutional statute in the criminal area is to be considered no statute at all***. *Hiett v. United States,* 415 F.2d 664, 666 (5th Cir.1969), cert. den. 397 U.S. 936, 90 S.Ct. 941, 25 L.Ed.2d 117, and that a statute unconstitutional in toto falls and carries with it all remedies provided therein. *El Paso Electric Co. v. Elliott,* 15 Fed.Supp. 81, rev'd. 88 F.2d 505, cert. den. 301 U.S. 710, 57 S.Ct. 945, 81 L.Ed. 1363.

In 16 Am.Jur.2d, Constitutional Law, § 256, p. 724, it is written:

> "The general rule is that ***an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose, since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted***. No repeal of such an enactment is necessary.
>
> "Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it...."

In § 257 of the same authority at page 728 it is further stated:

> > "And where the invalidity of an act or a portion thereof goes to the power of the legislature to enact the law, and not merely to the form of the enactment, no rights or correlative obligations may arise under such invalid statute."

Out-of-state cases examined are in accord with Texas law. In *Melbourne Corp. v. City of Chicago*, 76 Ill.App.3d 595, 31 Ill.Dec. 914, 394 N.E.2d 1291 (1979), it was held that ***an invalid law is void ab initio and confers no rights, imposes no duties and affords no protection***. See also *Shirley v. Getty Oil Co.*, 367 So.2d 1388 (Ala.1979); *People v. Nicholson*, 61 Ill.App.3d 621, 18 Ill.Dec. 427, 377 N.E.2d 1063 (1978); *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich. 135, 253 N.W.2d 114 (1977); *Ulrich v. Beatty*, 139 Ind.App. 174, 216 N.E.2d 737, reh. den. 139 Ind.App. 174, 217 N.E.2d 858 (1966); *Johnson v. State*, 271 Md. 189, 315 A.2d 524 (1974).

Reyes v. State, 753 S.W.2d 382, 383-84 (Tex. Crim. App. 1988) (emphasis added).