IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF OF APPELLANT
Appellee,	)	ON REMAND FROM THE
	)	SUPREME COURT OF
v.	)	THE UNITED STATES
	)	
Lieutenant Colonel (O-5)	)	
MICHAEL J.D. BRIGGS,	)	
United States Air Force,	)	Crim. App. No. 38370
Appellant.	)	USCA Dkt. No. 16-0711/AF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

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

ISSUES PRESENTED

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?

STATEMENT OF STATUTORY JURISDICTION

On October 19, 2016, this Court granted Appellant's Petition for Review, accepting jurisdiction under Article 67(a)(3) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3). *See United*

States v. *Briggs*, 75 M.J. 465, 466 (C.A.A.F. 2016) (mem.), J.A. 7.[1] This Court subsequently affirmed the decision of the Air Force Court of Criminal Appeals (CCA). *See United States* v. *Briggs*, 76 M.J. 335, 337 (C.A.A.F. 2017) (mem.). On August 6, 2018, the U.S. Supreme Court vacated that decision and remanded it to this Court for further proceedings in light of *United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). *See Abdirahman* v. *United States*, No. 17-243, 2018 WL 3715002 (U.S. Aug. 6, 2018) (mem.), J.A. 3. This Court therefore continues to retain jurisdiction over Appellant's Petition for Review under 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

This Court initially granted Appellant's Petition for Review on the issue it subsequently decided in *United States* v. *Ortiz*, 76 M.J. 189 (C.A.A.F. 2017), *aff'd*, 138 S. Ct. 2165 (2018). While *Ortiz* was pending in the Supreme Court, however, this Court decided *Mangahas*, which held that rape was not an offense "punishable by death." 77 M.J. at 223–24. In the process, this Court overruled its prior decisions in

1. All references to "J.A." are to the Joint Appendix.

Willenbring v. *Neurater*, 48 M.J. 152 (C.A.A.F. 1998), and *United States* v. *Stebbins*, 61 M.J. 366 (C.A.A.F. 2005), insofar as they had held that, as an offense "punishable by death," rape was exempt from the five-year statute of limitations codified in Article 43(a) of the UCMJ, 10 U.S.C. § 843(a). *See* 77 M.J. at 222. Because the Appellant in *Mangahas* was charged in 2015 for an offense that allegedly took place in 1997, his prosecution was time-barred. Subsequently, in light of *Mangahas*, the Supreme Court vacated the decision in Appellant's case and remanded the matter to this Court for further proceedings. *Abdirahman* v. *United States*, No. 17-243, 2018 WL 3715002, at *1 (U.S. Aug. 6, 2018) (mem.), J.A. 3. The central question before this Court is whether Appellant is entitled to relief under *Mangahas*.

STATEMENT OF THE FACTS

As relevant here, Appellant was tried and convicted by general court-martial in 2014 of one count of rape in violation of Article 120 of the UCMJ, 10 U.S.C. § 920, for an offense that allegedly took place in May 2005. Appellant's counsel did not raise a statute of limitations defense at trial, and the trial judge did not raise the matter *sua sponte*. Appellant was convicted and sentenced to a dismissal, confinement for

five months, and a reprimand. The Convening Authority approved the sentence as adjudged.

Appellant initially filed four assignments of error in the Air Force CCA. As relevant here, Appellant's first assignment of error was that his trial counsel provided ineffective assistance of counsel. Appellant subsequently sought leave to file a supplemental assignment of error to the effect that his prosecution was also barred by the statute of limitations. On May 20, 2016, the Air Force CCA denied leave to file, explaining that "*Willenbring* and *Stebbins* are binding on this court," and that "[w]hen a defendant does not press the defense at or before trial, . . . there is no error for an appellate court to correct—and certainly no plain error." *United States* v. *Briggs*, No. ACM 38730, Order at 2 (A.F. Ct. Crim. App. May 20, 2016), J.A. 26. Five weeks later, the Air Force CCA affirmed the court-martial's findings and sentence as approved by the Convening Authority. J.A. 9, 22.

Appellant then petitioned for review in this Court, raising four issues for review, including, under *United States* v. *Grostefon*, 12 M.J. 431 (C.M.A. 1982), whether his trial counsel had provided ineffective assistance by failing to raise a statute-of-limitations defense. On

October 19, 2016, this Court granted Appellant's petition for review solely on the issue presented in *Ortiz*, *i.e.*, whether the Air Force CCA panel that heard Appellant's case was properly constituted. J.A. 7. After and in light of *Ortiz*, this Court summarily affirmed the Air Force CCA's decision on May 3, 2017. That ruling was subsequently vacated by the Supreme Court in *Abdirahman*, and returned to this Court for further proceedings in light of *Mangahas*. 2018 WL 3715002, at *1, J.A. 3.

SUMMARY OF ARGUMENT

"An accused is subject to the statute of limitations in force at the time of the offense." *Mangahas*, 77 M.J. at 222 (citing *Toussie* v. *United States*, 397 U.S. 112, 115 (1970)). In *Mangahas*, this Court settled beyond peradventure that, at the time of the May 2005 offense for which Appellant in this case was convicted, the correct statute of limitations for rape was five years under Article 43(a) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843(a). 77 M.J. at 225. Because the charge and specification in Appellant's case were not received by the Summary Court-Martial Convening Authority until February 18, 2014 (almost nine years after the alleged offense), his

prosecution should have been time-barred under Article 43(a). *See* 10 U.S.C. § 843(b)(1).

Eight months after the offense for which Appellant was convicted, Congress amended Article 43(a) to eliminate any statute of limitations for rape. *See* National Defense Authorization Act for Fiscal Year 2006 ("FY2006 NDAA"), Pub. L. No. 109-163, § 553(a), 119 Stat. 3136, 3264 (codified as amended at 10 U.S.C. § 843(a)). That amendment was immaterial in *Mangahas*, because the statute of limitations in Mangahas's case had already expired by the time of its enactment—such that applying the 2006 amendment retroactively would have violated the Ex Post Facto Clause, U.S. CONST. art. I, § 9, cl. 3. *See Stogner* v. *California*, 539 U.S. 607 (2003). Here, however, the (correct) five-year statute of limitations in Appellant's case had not yet run at the time of the 2006 amendment to Article 43(a).

This Court has never considered whether a statute that retroactively extends an *un*expired statute of limitations violates the Ex Post Facto Clause. *See United States* v. *Lopez de Victoria*, 66 M.J. 67, 73 & n.11 (C.A.A.F. 2008). Given that "[a]n accused is subject to the statute of limitations in force at the time of the offense," *Mangahas*, 77

M.J. at 222, it might. But even assuming *arguendo* that it does not, *see United States* v. *Williams*, 77 M.J. 459, 465 (C.A.A.F. 2018); *see also Stogner*, 539 U.S. at 613, this Court has expressly held that such extensions can only apply to conduct pre-dating their enactment if there is clear evidence of congressional intent to produce such a retroactive effect. *Lopez de Victoria*, 66 M.J. at 73–74; *see also United States* v. *Habig*, 390 U.S. 222, 227 (1968) ("[C]riminal limitations statutes are 'to be liberally interpreted in favor of repose.'" (quoting *United States* v. *Scharton*, 285 U.S. 518, 522 (1932))).

As was true in *Lopez de Victoria*, however, the 2006 amendment to Article 43 is silent as to whether it applies retroactively. And as was true in *Lopez de Victoria*, the silence of the relevant text should be the end of the matter. But even if this Court concludes that the text and legislative history of the 2006 amendment are ambiguous as to retroactivity, rather than silent, the presumption against retroactive application of statutes and the rule of lenity would compel the same conclusion—that the 2006 amendment does not apply retroactively, and that the statute of limitations in Appellant's case, as in *Mangahas* and all similar offenses committed before January 6, 2006, was five years.

Nor is there any argument that Appellant is foreclosed from vindicating his *Mangahas* claim. Although *Musacchio* v. *United States*, 136 S. Ct. 709 (2016), held that statute-of-limitations defenses under 18 U.S.C. § 3282(a) could not be raised for the first time on appeal, this case presents two independent—but equally material—distinctions from that one. First, unlike in *Musacchio*, the trial judge here was bound by Rule 907(b)(2)(B) of the Rules for Courts-Martial, which imposes an affirmative obligation on the judge to correctly instruct the accused as to the statute of limitations in his case. *See, e.g.*, *United States* v. *Salter*, 20 M.J. 116, 117 (C.M.A. 1985); *United States* v. *Collins*, 78 M.J. 530, 533–34 (A.F. Ct. Crim. App. 2018). No such instruction was provided here.

Second, and also unlike in *Musacchio*, what was a meritless statute-of-limitations objection at trial in Appellant's case became a meritorious one on appeal—thanks to an intervening change in the governing law. In those circumstances, as the Supreme Court has expressly held, a criminal defendant is entitled at the very least to plain error review, since he can hardly be blamed for failing to prophesy that an appellate court would overrule one of its earlier rulings. *See Johnson*

v. *United States*, 520 U.S. 461, 467–68 (1997). There is little question that the error in Appellant's case satisfies that standard. *See, e.g.*, *Collins*, 78 M.J. at 535.

A contrary rule would create perverse incentives for trial defense counsel in future courts-martial to inundate trial judges with arguments that are clearly foreclosed by existing law, just in case that settled law is overruled while the accused's direct appeal remains pending. *Johnson*, 520 U.S. at 468 ("[S]uch a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent.").

Nothing in this Court's jurisprudence requires such a wasteful and inefficient result, and common sense (in addition to *Johnson*) ought to foreclose it. Therefore, the first specified issue should be answered in the negative, and the second specified issue should be answered in the affirmative—at least as applied to this case. The findings and sentence affirmed by the Air Force CCA should be vacated, and the charge and specification against Appellant should be dismissed.

ARGUMENT

I. THE 2006 AMENDMENT TO ARTICLE 43 DOES NOT APPLY RETROACTIVELY

As this Court held in *Lopez de Victoria*, when Congress intends retroactive application of an amendment to Article 43—so that the updated statute of limitations also encompasses older offenses for which the prior clock has not yet run—it must unambiguously so provide. 66 M.J. at 73–74. But as in that case, neither the text of the specific amendment to Article 43 at issue here nor its legislative history provides any indicia of such congressional intent. As *Lopez de Victoria* explained, there are multiple, overlapping reasons why courts should construe Congress's silence here—as there—to preclude the retroactive extension of an unexpired statute of limitations. The statute of limitations for the 2005 offense for which Appellant was convicted is therefore five years, *see Mangahas*, 77 M.J. at 225—and expired long before the charge and specification were received in February 2014.

A. Under *Lopez de Victoria*, Congress Must Be Clear When It Intends for an Amendment to Article 43 to Apply Retroactively

In *Lopez de Victoria*, this Court was presented with virtually the exact scenario as the first issue specified here. The question was

whether a 2003 amendment to Article 43's statute of limitations applied to cases in which the unlawful conduct predated the amendment, but where the previous statute of limitations had not yet run—such that a prosecution under Article 43 as amended would still be timely.

Congress enacted the amendment considered in *Lopez de Victoria* as part of the National Defense Authorization Act for Fiscal Year 2004. Titled "Extended Limitation Period for Prosecution of Child Abuse Cases in Courts-Martial," the provision created a new subsection within Article 43(b) authorizing trials by court-martial of certain child abuse offenses so long as "the sworn charges and specifications are received before the child attains the age of 25 years." Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003) (codified as amended at 10 U.S.C. § 843(b)(2)). The 2003 amendment said nothing whatsoever about whether it would apply to prior offenses for which the then-extant statute of limitations had not yet run.

As then-Judge Stucky explained for the Court, Congress's silence on that point was conclusive. "[B]oth the 2003 statute amending Article 43 . . . and its legislative history are silent as to whether Congress intended it to apply retroactively to cases such as this, or only to cases

in which the offense occurred after the effective date of the statute." 66 M.J. at 73. Given "the general presumption against retrospective legislation in the absence of such an indication and the general presumption of liberal construction of criminal statutes of limitation in favor of repose," the absence of any indication that the 2003 amendment was meant to apply retroactively compelled this Court's conclusion that it did not. *Id*. at 74.

B. The 2006 Amendment to Article 43 is Silent as to Retroactive Application

Prior to 2006, Article 43(a) of the UCMJ provided that there was no statute of limitations for "[a] person charged with absence without leave or missing movement in time of war, or with any offense punishable by death." 10 U.S.C. § 843(a) (2005). As this Court clarified in *Mangahas*, 77 M.J. 220, however, rape is not an offense "punishable by death," and was not either in May 2005 (the time of Appellant's alleged offense) or February 2014 (when the charge and specification against him were received). Instead, the statute of limitations for rape as of May 2005 was five years. *See* 10 U.S.C. § 843(b)(1) (2005); *see also Mangahas*, 77 M.J. at 222–23.

As part of the National Defense Authorization Act for Fiscal Year 2006 (enacted on January 6, 2006), Congress added murder and rape to the list of offenses for which there is *no* statute of limitations under Article 43(a). *See* FY2006 NDAA § 553(a), 119 Stat. at 3264 (codified as amended at 10 U.S.C. § 843(a)). Section 553(a) amended the relevant language of Article 43(a), and section 553(b) further amended the 2003 amendment's special rules for "child abuse offenses." *See id*. Like the 2003 amendment, however, section 553 included *no* effective date provision, nor any other text speaking even indirectly to whether it would apply retroactively. Instead, just like the 2003 amendment to Article 43 that this Court considered in *Lopez de Victoria*, section 553 of the FY2006 NDAA is entirely silent as to any congressional intent to produce a retroactive effect.[2]

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2. The title of section 553 is "Extension of Statute of Limitations for Murder, Rape, and Child Abuse Offenses Under the Uniform Code of Military Justice." In *Lopez de Victoria*, this Court concluded that the exact same terminology in the title of the 2003 amendment was at best ambiguous as to whether it reflected Congress's intent to apply the silent text retroactively. *See* 66 M.J. at 73. In any event, "Catchlines or section headings such as this are not part of a statute. They cannot vary its plain meaning and are available for interpretive purposes only if they can shed light on some ambiguity in the text." *Id*. (citing *Bhd. of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528–29 (1947)).

Consider the two provisions side by side:

	2003 AMENDMENT TO ARTICLE 43	**2006 AMENDMENT TO ARTICLE 43**
SECTION	Section 551 of the National Defense Authorization Act for Fiscal Year 2004	Section 553 of the National Defense Authorization Act for Fiscal Year 2006
SECTION TITLE	EXTENDED LIMITATION PERIOD FOR PROSECUTION OF CHILD ABUSE CASES IN COURTS-MARTIAL	EXTENSION OF STATUTE OF LIMITATIONS FOR MURDER, RAPE, AND CHILD ABUSE OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE
ARTICLE 43 ADDITION	"(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 before the child attains the age of 25 years by an officer exercising summary court-martial jurisdiction with respect to that person."	"(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."
EFFECTIVE DATE LANGUAGE	None	None

That the text of the 2006 amendment is silent as to retroactivity should end the matter. But even if legislative history could provide evidence of congressional intent for which there is zero textual support, *but see, e.g.*, *Lopez de Victoria*, 66 M.J. at 73, in this case, it doesn't. Neither the House bill nor the Senate bill included any provision for retroactive application of the amendment to Article 43, and, perhaps unsurprisingly, the Conference Report's discussion of section 553 is silent on the matter, as well. *See* H.R. CONF. REP. No. 109-360, at 703

(2006), J.A. 162. Given the close parallels between the text and structure of the 2003 amendment and the 2006 amendment, it is difficult to understand how, under *Lopez de Victoria*, the silent statutory text and legislative history could somehow provide the necessary quantum of evidence of congressional intent to apply the 2006 amendment retroactively.[3]

C. Any Ambiguity in the 2006 Amendment Should Be Resolved Against Retroactive Application

Even if this Court concludes that the 2006 amendment is somehow *ambiguous* as to whether it applies retroactively, and not simply silent, such that *Lopez de Victoria* could somehow be distinguished, two separate canons of statutory interpretation each

3. The absence of any express discussion of retroactive application is all the more telling in this specific context. Not only had Congress already considered similar questions about retroactive application in enacting the 2003 amendment to Article 43, but the Supreme Court's subsequent ruling in *Stogner* had discussed in considerable detail the difficulties that could arise from legislatures seeking to retroactively apply extended statutes of limitations for sexual assault and child abuse offenses. *See, e.g.*, 539 U.S. at 609–21. That Congress was well aware of these concerns and *still* included no express discussion of retroactivity in the 2006 amendment to Article 43 only further evinces its lack of intent to provide for such an application.

provide that any such ambiguity must be resolved *against* applying it to pre-2006 offenses.

The first canon weighing against retroactive application of the 2006 amendment is, not surprisingly, "the presumption against retroactive legislation," which "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also Kaiser Alum. & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) ("[The] principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."). *See generally Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.). Under the presumption, "courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." *Vartelas* v. *Holder*, 566 U.S. 257, 266 (2012). Thus, even if the 2006 amendment to Article 43 is ambiguous as to whether it applies to offenses pre-dating its enactment (as opposed to silent), it did not "unambiguously instruct[] retroactivity." *Id.*

The second canon militating against retroactive application is the rule of lenity, which "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). If the 2006 amendment to Article 43 is ambiguous as to whether it applies retroactively, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000); *see also Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion). No such "clear and definite" language can be found in the 2006 amendment.

In short, the 2006 amendment to Article 43(a) is on all fours with the 2003 amendment that this Court held to not apply retroactively in *Lopez de Victoria*. To conclude otherwise would not only require ignoring (or overruling) *Lopez de Victoria*; it would require this Court to read into the 2006 amendment evidence of clear congressional intent vis-à-vis retroactive application for which there is absolutely no support in the statutory text or legislative history. Such a reading would not

only fly in the face of *Lopez de Victoria*; it would also contravene both the presumption against retroactive application and the rule of lenity. For all of those reasons, the 2006 amendment to Article 43 does not—and should not be construed to—apply retroactively to offenses committed before its enactment but for which the statute of limitations had not yet run. The statute of limitations at the time of the offense for which Appellant was convicted was, as in *Mangahas*, five years. And as in *Mangahas*, Appellant's court-martial should therefore have been time-barred under Article 43(a).

II. APPELLANT IS ENTITLED TO RELIEF ON HIS *MANGAHAS* CLAIM

Appellant did not raise the statute of limitations at trial (and continues to maintain that his trial counsel provided ineffective assistance by failing to do so). But even if he had, that argument was clearly foreclosed by precedent—as the Air Force CCA acknowledged in denying leave to file a supplemental assignment of error. J.A. 25–26. Given that this precedent has now been upended, that the trial judge had an affirmative duty to advise the Appellant as to the correct statute of limitations, and that his failure to do so constitutes plain error, Appellant is entitled to benefit from *Mangahas*.

A. Appellant's Statute-of-Limitations Defense Should Be Reviewed for No Less Than Plain Error

In *Musacchio*, 136 S. Ct. 709, the Supreme Court held that a statute of limitations defense under 18 U.S.C. § 3282(a) could not be raised for the first time on appeal. But there are two independent—and equally material—distinctions between that case and this one, either of which independently compels the conclusion that the Appellant is entitled to relief on his statute of limitations claim.

First, and unlike in *Musacchio*, the judge in this case was bound by Rule 907(b)(2)(B) of the Rules for Courts-Martial, which imposes an affirmative duty on the trial judge to bring any statute-of-limitations issue to the attention of the accused:

> 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 . . . [t]he 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*.

R.C.M. 907(b)(2)(B) (emphasis added). *See generally Salter*, 20 M.J. at 117 (describing the open-court advisement rule and noting that "[i]t is too well-established in military law to require further elaboration here"). Thus, unlike what is true in civilian federal courts such as the

district court in *Musacchio*, in courts-martial, "[a] statute of limitation must be knowingly waived, not accidentally forfeited." *United States* v. *McElhaney*, 50 M.J. 819, 823 (A.F. Ct. Crim. App. 1999), *rev'd in part on other grounds*, 54 M.J. 120 (C.A.A.F. 2000). Appellant did not "knowingly waive" his statute-of-limitations defense.

As the Air Force CCA recently explained, in light of this obligation, "[i]t might be argued that the plain error standard applicable to forfeited issues is inapposite, and that de novo is the appropriate standard of review" for statute-of-limitations defenses of which the accused was not properly advised by the trial judge. *Collins*, 78 M.J. at 534 n.8. Of course, if Appellant's *Mangahas* claim is subject to de novo review, it would unquestionably provide a complete defense to his conviction. *See* Part I, *supra*. At the very least, however, Rule 907(b)(2)(B) suggests that, whatever is true with respect to statutes of limitations in federal civilian criminal prosecutions, a different calculus applies to courts-martial, given the additional obligation imposed upon trial judges to ensure that this precise issue is not unintentionally forfeited by the accused. *See Collins*, 78 M.J. at 535–36.

Second, and in any event, *Musacchio* did not involve a situation where the relevant statute-of-limitations claim would have been meritless had it been raised at trial, but where an intervening decision by a higher court made it viable while the direct appeal was still pending. This Court "do[es] not construe the failure to object to what was the settled law at the time as an intentional relinquishment of a known right . . . ." *United States* v. *Hoffman*, 77 M.J. 414, 414 (C.A.A.F. 2018) (mem.). Instead, as this Court explained in *United States* v. *Mullins*, "on direct review, we apply the clear law at the time of *appeal*, not the time of trial." 69 M.J. 113, 116 (C.A.A.F. 2010) (citing *United States* v. *Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (emphasis added)).

Thus, whereas *Musacchio* concluded that "a district court's failure to enforce an unraised limitations defense under § 3282(a) cannot be a plain error," 136 S. Ct. at 718, it did not consider whether the same would be true if either (1) the court had an affirmative obligation to enforce such a defense; or (2) the relevant law had *changed* after the trial and while the direct appeal was pending.[4] In those circumstances,

4. As noted above, the Air Force CCA denied leave to Appellant to raise his statute-of-limitations defense as a supplemental assignment of error at least in part because of its conclusion that the defense was

as the Air Force CCA recently explained in *Collins*, a trial court's failure to enforce an unraised but complete statute-of-limitations defense not only *can* be plain error; it usually *will* be: "Under *Mangahas*, *Mullins*, R.C.M. 907(b)(2)(B), and *Salter*, the military judge was required to inform Appellant the statutory bar was available, and she plainly erred to the material prejudice of Appellant's substantial rights by failing to do so." *Collins*, 78 M.J. at 536. So too, here.

To show plain error, Appellant "has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States* v. *Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). All three of those prongs are easily satisfied here.

B. The Trial Judge's Failure to Apply *Mangahas* Was Error

On direct review, appellate courts apply the law at the time of the appeal, not the law at the time of the trial. *Mullins*, 69 M.J. at 116; *see also Griffith* v. *Kentucky*, 479 U.S. 314 (1987). *See generally Mackey* v. *United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the

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meritless. J.A. 25–26. It should hardly redound to Appellant's detriment that this Court only later disagreed.

judgment) ("[T]he Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."). The law at the time of Appellant's appeal is *Mangahas*—and the conclusion that, at the time of the offense for which Appellant was convicted, the governing statute of limitations was five years. Thus, if Appellant is entitled to relief under *Mangahas*, *see* Part I, *supra*, there is no question under either this Court's precedents or those of the Supreme Court that the trial judge's failure to apply *Mangahas*—even though it came later—was error.

C. The Trial Judge's Error Was Plain and Obvious

Nor is there any question whether the trial judge's error was "plain and obvious." *Collins*, 78 M.J. at 534 ("[A]pplying the CAAF's clear holding in *Mangahas* that the five-year statute of limitations had long since run, the military judge's failure to comply with R.C.M. 907(b)(2)(B) was an error that was plain and obvious."). In *Johnson*, the Supreme Court expressly rejected the government's argument that, for an error to meet this standard, "it must have been so both at the time of

trial and at the time of appellate consideration." 520 U.S. at 467. Instead, as Chief Justice Rehnquist explained for the majority, "in a case such as this—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." *Id.* at 468. Here, as in *Johnson*, the trial judge's error is indeed "plain" at the time of appellate consideration thanks to *Mangahas* and *Lopez de Victoria*. Indeed, were it otherwise, "such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Id.*

D. The Trial Judge's Error Materially Prejudiced Appellant's Substantial Rights

Finally, it cannot seriously be disputed that the trial judge's error materially prejudiced Appellant's substantial rights. In this case, application of the statute-of-limitations defense was the difference between a conviction and a dismissal—it was "a complete defense to the only charge and specification in the case." *Collins*, 78 M.J. at 534. Given the sentence Appellant received and the continuing and substantial personal and professional collateral consequences he faces as a result of his conviction, the *Mangahas* error materially prejudiced his

substantial rights—and should therefore be remedied despite the fact that it was not raised at trial.

* * *

CONCLUSION

The answer to the first specified issue is "no," and the answer to the second specified issue is "yes." Appellant is therefore entitled to vacatur of his conviction and sentence in light of *Mangahas*.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 20, 2018, a copy of the foregoing brief in the case of *United States* v. *Briggs*, A.F. Ct. Crim. App. Dkt. No. 38370, USCA Dkt. No. 16-0711/AF, was electronically filed with the Court (efiling@armfor.uscourts.gov) and contemporaneously served on the Government Appellate Division.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 5,008 words. This brief complies with the typeface and type-style requirements of Rule 37.

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