22 October 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 16-0711/AF
Lieutenant Colonel (O-5), MICHAEL J.D. BRIGGS, USAF, *Appellant.*	)	Crim. App. No. 38370

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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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

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. The Supreme Court had jurisdiction to review and remand this case under Article 67a, UCMJ. This Court has continuing jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct.

STATEMENT OF FACTS

a. Statutes in effect at the time of Appellant's offense.

Appellant was convicted of a rape offense committed between on or about 1 May 2005 and on or about 30 June 2005. (J.A. at 30.)

At the time of Appellant's offense in 2005, Article 43, UCMJ, which addresses military statutes of limitations, read:

> (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.

10 U.S.C. § 843 (2005).

In 2005, Article 120, UCMJ, "Rape," provided: "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." 10 U.S.C. § 920 (2005).

Appellant was tried and convicted in August 2014. (J.A. at 9.) Appellant did not assert a statute of limitation defense at trial. (J.A. at 51-52.)

b. History of relevant amendments to Article 43, UCMJ and case law interpreting those amendments.

i. 1986 amendment to Article 43

Prior to 1986, Article 43 did not provide for an unlimited statute of limitations for offenses "punishable by death." On 14 November 1986, Congress amended Article 43 to add that "any offense punishable by death" may be tried without limitation. National Defense Authorization Act (NDAA) for Fiscal Year (FY) 1987, Pub. L. 99-661, Div. A, Title VIII, §805(a), 100 Stat. 3908. (J.A. at 82.)

In 1986, as at the time of Appellant's offense in 2005, the text of Article 120 listed death as a possible punishment for rape. 10 U.S.C. § 920 (1984).

ii. Willenbring v. Neurauter (1998)

On 30 June 1998, this Court decided Willenbring v. Neurauter, 48 M.J. 152, 178 (C.A.A.F. 1998). In Willenbring, the appellant argued that his prosecution for rape was time-barred because, pursuant to Coker v. Georgia, the death penalty

could not constitutionally be imposed for the offense of rape of an adult woman. Therefore, the appellant argued, his crime was not "punishable by death" and only subject to a five-year statute of limitations. Id. at 178. This Court disagreed and held that "rape is an 'offense punishable by death' for purposes of exempting it from the 5-year statute of limitations of Article 43(b)(1)." Id. at 180.

iii. The 2003 amendment to Article 43 and United States v. Lopez de Victoria (2008).

In 2003, Congress changed Article 43 with respect to certain child abuse offenses to state that the statute of limitations for these offenses would expire when the child reaches the age of twenty-five years, rather than five years after the commission of the offense. NDAA FY 2004, Pub. L. No. 108-136, §551, 117 Stat. 1392, 1481 (2003). In United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008), this Court held that the 2003 amendment to Article 43 did not apply retroactively to offenses committed before the amendment's effective date. Id. at 73. This Court asserted there was no "indication of congressional intent to apply the 2003 amendment retrospectively" and applied "the general presumption against retrospective legislation in the absence of such an indication." Id. at 74.

iv. United States v. Stebbins (2005)

In 2005, this Court reaffirmed its holding in Willenbring in United States v. Stebbins, 61 M.J. 366, 369 (C.A.A.F. 2005). This Court again emphasized that "rape [wa]s an offense punishable by death for purposes of exempting it from the

5-year statute of limitations in Article 43(b)(1)" Id. (quoting Willenbring, 48 M.J. at 178).

v. The 2006 amendment to Article 43

On 6 January 2006, Congress passed the NDAA FY 2006, which amended Article 43 again. 109 Pub. L. 163, §553, 119 Stat. 3136, 3264 (2006). (J.A. at 141.) Section 553 of the NDAA FY 2006 was entitled "Extension of Statute of Limitations for Murder, Rape, and Child Abuse Offenses Under the Uniform Code of Military Justice." Section 553(a) read:

> 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."

Id.

Thus, after the 2006 amendment, Article 43(a) stated: "A person charged with absence without leave or missing movement in a time of war, with murder or rape, or with any other offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a)(2006).

Section 533 of the NDAA FY 2006 did not include an effective date, meaning the section was effective on the date the amendment was passed: 6 January 2006.[1]

vi. United States v. Mangahas (2018)

On 6 February 2018, twelve years after the 2006 amendment to Article 43 specifically delineated rape as an offense with no statute of limitations, this Court issued its opinion in United States v. Mangahas, 77 M.J. 220 (C.A.A.F. 2018). Mangahas overruled Willenbring and Stebbins "to the extent that they hold that rape was punishable by death at the time of the charged offense." Id. at 222. This Court held that "where the death penalty could *never* be imposed for the offense charged, the offense is *not* punishable by death for purposes of Article 43, UCMJ," and that "the offense of rape is not exempt from the five-year statute of limitations." Id. at 222, 224-25 (emphasis in original). This Court determined that the offense at issue in Mangahas, which allegedly had been committed in 1997, was subject to a five-year statute of limitations. Id. at 220, 225.

vii. United States v. Williams (2018)

On 27 June 2018, this Court issued its opinion in United States v. Williams, 77 M.J. 459 (C.A.A.F. 2018). In Williams, the appellant was charged in the

[1] *See* Johnson v. United States, 529 U.S. 694, 702 (2000) ("when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment") (internal quotations omitted).

Specification of Charge I with raping a victim "on divers occasions between late 2000 and early 2003." Id. at 461. On appeal, the appellant moved this Court "to dismiss the Specification of Charge I on a statute of limitations ground" in light of Mangahas. Id. at 465 n 5. However, this Court "denied [the motion] without prejudice" and instructed that "[t]he parties may address any potential retroactivity issues concerning the statute of limitation on remand or at the rehearing." Id. In doing so, this Court specified:

> The record is returned to the Judge Advocate General of the Army with a rehearing as to the Specification of Charge I authorized to the extent that the charge and specification are not barred by the statute of limitations. *See* United States v. Mangahas, 77 M.J. 220 (C.A.A.F. 2018); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998) (recognizing that the federal circuits are in agreement "that extending a limitations period before the prosecution is barred does not violate the Ex Post Facto Clause."). *But see* United States v. Lopez de Victoria, 66 M.J. 67, 73-74 (C.A.A.F. 2008) (holding that the 2003 amendment to Article 43, UCMJ, 10 U.S.C. § 843, did not retroactively extend the statute of limitations due to statutory construction).

Id.

SUMMARY OF THE ARGUMENT

With respect to Issue I, the 2006 amendment to Article 43, UCMJ applies to Appellant's 2005 rape offense, meaning there is no statute of limitations for his crime. Despite the general presumption against "retroactive" legislation, in some circumstances, a new statute may be applied to conduct occurring before its

enactment. Landgraf v. Usi Film Prods., 511 U.S. 244, 269 (1993). In Landgraf, the Supreme Court articulated a test for determining when new legislation may be applied to past conduct. Under Step 1 of Landgraf, a new statute may be applied to prior conduct if Congress has clearly manifested its intent that the statute will so apply. Id. at 280.

But a statute does not act "retroactively" just because it is applied to conduct occurring before the statute's enactment. Id. at 269. Therefore, under Step 2 of Landgraf, if Congress has not spoken with the requisite clarity required under Step 1, the new statute may still be applied to prior conduct if it does not have an impermissibly "retroactive" effect. Id. at 280. A statute does not have a "retroactive" effect if it does not "attach new legal consequences to events completed before its enactment." Id. at 269.

Finally, Congress' ability to pass retroactive legislation is also subject to the Ex Post Facto Clause of the Constitution, U.S. Const. Art. I, §9, cl.3. Id. at 266.

Applying Landgraf Step 1 to Appellant's case, statutory construction and legislative history show that Congress unmistakably intended the 2006 amendment to codify this Court's 1998 decision in Willenbring, which held that rape is an offense with no statute of limitations. Since Congress intended to maintain the status quo, it logically follows that Congress intended for an unlimited statute of

limitations to continue to apply to rape offenses, like Appellant's, that were committed in 2005.

Even if Congress' intent in passing the 2006 amendment was ambiguous, the 2006 amendment is not impermissibly retroactive with respect to Appellant under Landgraf Step 2. At the time it was passed, the amendment did not actually change the statute of limitations and therefore did not attach a new legal consequence to Appellant's crime. Appellant was, at all times, on fair notice that his crime would be subject to no statute of limitations. Thus, under either Landgraf Step 1 or Landgraf Step 2, the unlimited statute of limitations articulated in the 2006 amendment may be applied to Appellant's 2005 crime.

Lastly, even if the 2006 amendment did act retroactively, its application to Appellant would not violate the Ex Post Facto Clause, because the statute of limitations had not yet run on his 2005 crime at the time the amendment was passed. Since Appellant's rape offense was not subject to any statute of limitations, his conviction was proper.

With respect to Issue II, Appellant cannot successfully raise the statute of limitations for the first time on appeal. Musacchio v. United States, 136 S.Ct. 709, 718 (2016), holds that if an accused fails to plead the statute of limitations defense at his trial, there can never be plain error in the trial court failing to enforce that defense. Musacchio applies to military courts-martial, even though R.C.M.

907(b)(2)(B) creates a duty for the military judge to inform an accused about his right to raise the statute of limitations, if the accused appears unaware of the right to assert that defense.

By its own terms, R.C.M. 907(b)(2)(B) relates only to whether the accused knowingly and intentionally waived the defense. Waiver of the defense will not be recognized if the accused was not properly informed. But, the Rule does not preclude the accused from forfeiting the defense, and it is here that Musacchio applies. Pursuant to Musacchio, whether an accused knowingly waived or accidentally forfeited the statute of limitations defense, the accused's ultimate failure to assert the defense will always result in a finding of no plain error.

Even if Musacchio is inapplicable to military courts-martial, the appropriate standard of review is plain error. Under a plain error analysis, the military judge could not have committed plain error by failing to inform Appellant that he could raise the statute of limitations in bar of trial, because the question of which statute of limitations applies to Appellant's 2005 crime is currently unsettled. Since there was no plain error under any scenario, Appellant is not entitled to relief on appeal.

ARGUMENT

I.

THE 2006 AMENDMENT TO ARTICLE 43, UCMJ APPLIES TO APPELLANT'S 2005 RAPE OFFENSE.

Standard of Review

Questions of statutory construction are reviewed *de novo*. Lopez de Victoria, 66 M.J. at 73.

Law and Analysis

"It is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retroactive effect." INS v. St. Cyr, 533 U.S. 289, 316 (2001). However, there is a general presumption against retroactive legislation. Landgraf, 511 U.S. at 269 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent"). Indeed, this Court echoed this sentiment in Lopez de Victoria, stating "[w]hile Congress certainly possesses the constitutional authority to apply legislation retroactively, subject to the limits of the Ex Post Facto Clause . . . retroactive application of statutes is normally not favored in the absence of explicit language in the statute or necessary implication therefrom." 66 M.J. at 72.

The Supreme Court applies this presumption against retroactive legislation because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct

accordingly; settled expectations should not be lightly disrupted." Landgraf, 511 U.S. at 265.

In Landgraf, 511 U.S. at 280, the Supreme Court developed a two-step test for determining whether a statute may be applied to conduct that predates its enactment. The first step is for a court "to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so . . . there is no need to resort to judicial default rules." Id. The second step of the Landgraf analysis arises when "the statute contains no such express command." Id. Then, "the court must determine whether the new statute would have a retroactive effect" that is, whether it "attaches new legal consequences to events completed before its enactment." Id. at 269, 280. If the statute has a retroactive effect, "it does not govern absent clear congressional intent favoring such a result." Id. at 280. In essence, the Court asks whether application of the statute to past conduct "would have retroactive effect Congress did not authorized." Vartelas v. Holder, 566 U.S. 257, 266 (2012). "[I]f a new rule has no retroactive effect, the presumption against retroactivity will not prevent its application to a case that was already pending when the new rule was enacted." Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006). *See also* Weingarten v. United States, 865 F.3d 48, 55 (2d Cir. 2017) (If a statute would *not* act retroactively, "then the court shall apply the statute to the antecedent conduct").

"Landgraf analysis applies to both civil and criminal statutes." Weingarten 865 F.3d at 55 n.6 (collecting cases). *See e.g.* Johnson, 529 U.S. at 701 (Citing Landgraf to determine whether a statute governing supervised release was intended to apply retroactively).

Although this Court's opinion in Lopez de Victoria cites Landgraf, it does not specifically cite the two-step Landgraf test for analyzing retroactivity. *See* 66 M.J. at 73. Nonetheless, nothing about Lopez de Victoria purports to be establishing a different test for the military. Indeed, applying the full Landgraf test to the facts in Lopez de Victoria would have produced the same result. For the first step of the analysis, this Court would have determined that Congress did not express any discernible intent that the 2003 amendment apply to conduct predating its enactment. Then, because the amendment indisputably *changed* the statute of limitations for the appellant's offense, this Court would have concluded that the statute would have had retroactive effect as applied to Lopez de Victoria, thus triggering the presumption against retroactive application of statutes. In sum, in analyzing whether the 2006 amendment applies to rape offenses committed before its enactment, this Court should apply the two-step test from Landgraf.

As noted in Landgraf, 511 U.S. at 266, and Lopez de Victoria, 66 M.J. at 72, Congress' ability to pass retroactive legislation is also subject to the Ex Post Facto Clause of the Constitution. Therefore, in addition to conducting a Landgraf

analysis, this Court should also ensure that applying the 2006 amendment to Appellant does not violate the Ex Post Facto Clause.

a. Landgraf Step 1: Congress plainly intended that the 2006 version of Article 43 would apply to rape offenses committed before its enactment.

Pursuant to Landgraf and consistent with Lopez de Victoria, the first step this Court takes in determining whether a statute applies to past conduct, is to determine "whether Congress has directed with the requisite clarity that the law be applied retrospectively."[2] St. Cyr, 533 U.S. at 316.

Appellant contends that since the 2006 amendment is silent as to retroactivity that "should end the matter." (App. Br. at 14.) But "[c]ongressional silence on an issue is not always indicative of congressional intent." United States v. Buchanan, 638 F.3d 448, 456 (4th Cir. 2011). *See also* Burns v. United States, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.")[3]

Furthermore, in the absence of "helpful" language in a statute prescribing the statute's proper reach, during the first step of the Landgraf analysis, the Supreme Court will "try to draw a comparably firm conclusion about the temporal

[2] The Supreme Court uses the words "retroactively" and "retrospectively" interchangeably. Landgraf, 511 U.S. at 254 n.23.

[3] In any event, the inability to discern Congress' intent would not end the matter, but would instead require the Court to proceed to Step 2 of the Landgraf analysis.

reach specifically intended by applying our normal rules of construction." Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 37 (2006). In short, Congress does not have to state specifically in a statute that it is to be applied retroactively in order for it apply to prior conduct. The requisite congressional intent can be established through other methods of statutory construction.

Appellant is correct that the text of the 2006 amendment itself is silent as to whether it is to apply to rape offenses committed before 2006. Therefore, this Court must apply other normal rules of construction to "try to draw a comparably firm conclusion" about the amendment's "temporal reach."

After considering the practical effect of the passage of the 2006 amendment, its contemporary legal context, as well as its legislative history, there can be no reasonable dispute that Congress intended that the 2006 amendment would apply to rape crimes committed before its enactment, for which there already was an unlimited statute of limitations under Willenbring.

i. At the time it was passed, the 2006 amendment did not have the practical effect of changing the statute of limitations for rape.

The Supreme Court has said that when evaluating congressional action, courts "must take into account" the "contemporary legal context." Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979). Part of evaluating that "contemporary legal context" with respect to the 2006 amendment is considering the practical effect that the amendment had on the extant statute of limitations.

At the time Congress passed the 2006 amendment to Article 43, it did not actually change the then-existing statute of limitations for rape.[4] This Court issued its decision in Willenbring in 1998, and from that point, through the passing of 2006 amendment, military courts recognized that there was no statute of limitations for rape under the UCMJ. *See e.g.* Stebbins, 61 M.J. at 369. Thus, in 2006, when the amendment was passed specifically enumerating rape as an offense with no statute of limitations, it did not have the practical effect of changing the statute of limitations for rape; rather, it maintained the judicially recognized status quo.[5]

The fact that the 2006 amendment did not effect a change in the law at the time it was passed is important for three reasons. First, it immediately distinguishes this case from Lopez de Victoria. Appellant cites Lopez de Victoria in order to argue that Congress did not intend the 2006 amendment to apply

[4] The mere fact that a statute is amended does not indicate that the amendment changed the law. Piamba Cortez v. American Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999) ("[A]n amendment containing new language may be intended to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. Thus, an amendment does not necessarily indicate that the unamended statute meant the opposite of the language contained in the amendment") (internal citations omitted).

[5] One might argue that after Mangahas was decided in 2018, the 2006 amendment can now be seen as effecting a change the law. However, Mangahas simply is not relevant to determining Congress' intent in amending the statute of limitation in 2006. Congress could not have known in 2006 that this Court would overrule Willenbring twelve years later.

retroactively to rape offenses committed before 2006. He contends that Lopez de Victoria presents "virtually the exact same scenario as the first issue specified here." (App. Br. at 10.) This is unpersuasive because of a fundamental difference between the 2003 and 2006 amendments to Article 43. The 2003 amendment discussed in Lopez de Victoria unequivocally changed the statute of limitations for certain child abuse offenses. The 2006 amendment did not change the extant statute of limitations.

Second, the fact that the law did not change explains why Congress did not specifically express the temporal reach of the 2006 amendment in the text of the amendment itself. Since the statute of limitations did not change with respect to rape offenses committed before 2006, there simply was no reason to do so. The Supreme Court has explained that its requirement that Congress show "clear intent" in order to make a statute retroactive "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." Landgraf, 511 U.S. at 272-73. Here, there was no potential unfairness for Congress to consider. No one's rights were changed. Under such circumstances, Congress should not have been expected to articulate specifically in the 2006 amendment that it applied to crimes committed prior to 2006.

Third, the fact that the law did not change means the term "retroactivity" is somewhat of a misnomer.[6] The better question to ask is, thus, not whether Congress intended the 2006 amendment to apply "retroactively" but whether Congress, in passing the 2006 amendment, intended that no statute of limitation apply (or continue to apply) to rape offenses that occurred prior to 6 January 2006.

The answer is yes. For the reasons described below, it is unmistakable that Congress, in passing the 2006 amendment, intended not to *change* the law, but rather to *codify* the holding of Willenbring and *clarify* the correct statute of limitations for rape. By doing so, Congress demonstrated its intent that an unlimited statute of limitations would continue to apply to rape offenses, including those committed in 2005, like Appellant's.

ii. Supreme Court-recognized canons of statutory construction support that Congress intended in the 2006 amendment to adopt this Court's holding in Willenbring that there was no statute of limitations for rape.

Appellant discusses two canons of statutory construction that he argues weigh against "retroactive" application of the 2006 amendment: specifically, "the presumption against retroactive legislation" and the "rule of lenity." (App. Br. at 16-18.) But looking only to these two canons does nothing to help divine

[6] As will be explored later, the fact that the 2006 amendment did not actually change the law is also relevant to Step 2 of the Landgraf analysis: whether the amendment had a "retroactive" effect with respect to Appellant's 2005 crime.

Congress' intent in passing the 2006 amendment, as it is this Court's duty to do.[7] *See* Callejas v. McMahon, 750 F.2d 729, 731 (9th Cir. 1984) ("It is the duty of a court in construing a statute to consider time and circumstances surrounding the enactment as well as the object to be accomplished by it. This general rule of statutory construction is also applicable to the interpretation of amendatory acts") (internal citations omitted); United States v. Anderson, 76 U.S. 56, 65-66 (1896) (same).

Appellant does not address two complementary, Supreme Court-endorsed rules of statutory construction that do consider congressional intent. First, the Supreme Court has said, "The normal rule of statutory construction is that if Congress intends for legislation to *change* the interpretation of a judicially created concept, it makes that intent specific." Midatlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501 (1986) (emphasis added). Conversely, "[w]hen Congress *codifies* a judicially defined concept, absent express statements to the contrary . . . Congress intended to adopt the interpretation placed on that concept by the courts." Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989) (emphasis added). *See also* Keene Corp. v. United States, 508 U.S. 200,

[7] Moreover, the Supreme Court has said that it is incorrect to use "the presumption against retroactivity as a tool for interpreting the statute at the first Landgraf step." Fernandez-Vargas, 548 U.S. at 40. "It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do." Id.

212 (1993) (Where there is settled case law interpreting a statute at the time Congress reenacts the statute, the Supreme Court "appl[ies] the presumption that Congress was aware of these earlier judicial interpretations, and in effect, adopted them.")

Similarly, "it is not only appropriate but also realistic" to presume that Congress is "thoroughly familiar" with federal court precedents and that Congress expects its enactment of a law "to be interpreted in conformity with them." Cannon, 441 U.S. at 699. *See also* Miles v. Apex Marine Corps, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation").

Applying these canons of statutory interpretation, it cannot reasonably be disputed that Congress, in passing the 2006 amendment, had the express intention of maintaining the status quo of an unlimited statute of limitations for rape. Like the Supreme Court did in the above cited cases, this Court must assume that Congress was aware of the Willenbring decision when it passed the 2006 amendment to Article 43, enumerating rape as an offense with no statute of limitations. Because in 2006 Willenbring represented settled case law on the interpretation of Article 43, this Court also applies the presumption that when Congress amended Article 43 consistent with Willenbring, Congress intended to adopt or codify that earlier judicial interpretation.

Applying these presumptions, it is evident that Congress intended an unlimited statute of limitations to continue to apply to rape offenses committed before the 2006 amendment – including those committed in 2005. Indeed, this is the only reasonable interpretation of Congress' actions. It is simply not reasonable to believe Congress intended a five-year statute of limitations to apply to rape offenses committed before the amendment, but for an unlimited statute of limitations to apply to offenses committed after the amendment. Such an interpretation would wrongly ignore the "contemporary legal context" in which the amendment was passed.

iii. The legislative history of the 2006 amendment supports that Congress intended to *clarify* and *codify* the existing statute of limitations for rape, not to change the law.

Even if well-accepted rules of statutory construction did not dictate that Congress intended the 2006 amendment to codify Willenbring and maintain an unlimited statute of limitations for rape, the legislative history behind the 2006 amendment to Article 43 supports that same conclusion.[8]

[8] Legislative history is an appropriate consideration in determining congressional intent under Step 1 of Landgraf. The Eleventh Circuit has stated, "we conclude that even absent explicit statutory language mandating retroactivity, laws may be applied retroactively if courts are able to discern 'clear congressional intent' favoring such a result." United States v. Olin Corp., 107 F.3d 1506, 1512-13 (11th Cir. 1997). Specifically, the Court pointed to the Landgraf majority's choice of the words "clear congressional intent" instead of the "clear statement" standard proposed by the concurrence in Landgraf. Id. at 1513 n. 16. Thus, the Court asserted that it must "review the language, structure and purpose of the statute, as

Looking at how the 2006 amendment came to be, in the NDAA for FY 2005, 108 Pub .L. 375 §571, 118 Stat. 1811, 1919 (2004), Congress directed the Department of Defense (DoD) to:

> review the Uniform Code of Military Justice and the Manual for Courts-Martial 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 the Uniform Code of Military Justice and the Manual for Courts-Martial more closely to other Federal Laws and regulations that address such issues.

See United States v. Johanson, 71 M.J. 688, 692 (C.G. Ct. Crim. App. 2012) (describing the legislative history behind the 2006 and 2007 amendments to the UCMJ); (J.A. at 120.) ;

The NDAA FY05 also required the Secretary of Defense to "submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the review carried out under subsection (a)." Johanson, 71 M.J. at 692. The report was required to include the Secretary's recommendations for revisions to the UCMJ and, "for each such revision, the rationale behind that revision." (J.A. at 120.)

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well as its legislative history to determine whether Congress made clear its intent to apply" the statute to conduct pre-dating the statute's enactment. Id. at 1513. *See also* Lopez de Victoria, 66 M.J. at 73-74 (Considering whether evidence from legislative history demonstrated an unambiguous congressional intent).

(A) The DoD recommended clarifying that there is an unlimited statute of limitations for rape, even if death is not a constitutionally permitted punishment.

In response to this congressional directive, the DoD produced Sex Crimes and the UCMJ: A Report for the Joint Services Committee on Military Justice (2005). Id. The Report proposed a revision to Article 43, UCMJ and the rationale for the revision:

> Subsection 843(a) at page 302 as amended, ensures that the offenses which have a potential sentence of death, are included. As examples, murder, rape, and rape of a child are included in subsection 843(a). The Supreme Court in Coker v. Georgia, 433 U.S. 584, 592 (1977) prohibited the death penalty for rape of an adult woman. Notwithstanding, the Coker prohibition against the death penalty for rape, the military statute of limitations for rape of an adult female *should continue* to be unlimited**.** *See* Willenbring v. Neurauter, 48 M.J. 152 (C.A.A.F. 1998). Adding "rape and rape of a child" to subsection 843(a) *clarifies that the holding of the Willenbring decision 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. [9]

[9] Incidentally, the legislative history surrounding the 1986 amendment to Article 43 strongly suggests that, even back in 1986, Congress intended for rape to have an unlimited statute of limitations. The Senate Report concerning the 1986 amendment stated: "Under the committee provision, no statute of limitation would exist in prosecution of offenses for which the death penalty is a punishment *prescribed by or pursuant to the UCMJ*." S. Rep. No. 99-331, at 249 (1986) (emphasis added) (J.A. at 96). In other words, the 1986 amendment to Article 43 was designed to focus on what is *statutorily* punishable by death rather than what is *actually* punishable by death. Because under Article 120 the UCMJ prescribed the death penalty as a punishment for rape in 1986, based on the language in the Senate Report, Congress intended that rape would have no statute of limitations.

(Emphasis added) (J.A. at 125).

(B) In its committee reports on the NDAA FY06, Congress stated its intention to clarify that rape has no statute of limitations.

Subsequent legislative history regarding the 2006 amendment shows that Congress adopted the DoD's recommended revisions to Article 43. The Report of the House of Representatives Committee on Armed Services, stated that Section 553 of the NDAA FY06 "would *clarify* that rape is an offense with an unlimited statute of limitations." H.R. Rep. No. 109-89, at 322 (2005)(emphasis added) (J.A. at 155.) Although the Senate Report merely says that 2006 amendment to Article 43 would "included rape in that class of offenses" that has an unlimited statute of limitations, S. Rep. No. 109-69, at 316 (2005) (J.A. at 149), when the NDAA FY

Congress' stated intent in amending Article 43 in 1986 is consistent with how other federal courts have interpreted the term "punishable by death" in similar statutes. *See e.g.* United State v. Ealy, 363 F.3d 292, 296-97 (4th Cir. 2004) ("whether a crime is 'punishable by death' under §3281 or 'capital' under §3282 depends on whether the death penalty may be imposed for the crime under the enabling statute, *not* 'on whether the death penalty is in fact available for defendants in a particular case.'"); United States v. Gallaher, 624 F.3d 934, 940-41 (9th Cir. 2010) ("'punishable by death' is a calibration of the seriousness of the crime as viewed by Congress, not of the punishment that could actually be imposed on the defendant in an individual case"); United States v. Rodriguez, 679 F. Appx. 41, 43 (2d Cir. 2017) (unpub. op) ("We have held that what matters in determining which statute of limitations applies is whether the crime is one for which Congress has statutorily authorized the death penalty, regardless of whether the death penalty is sought or available in a given case.")

2006 reached the Committee of Conference, the Committee once against uses the word "clarify." Specifically, the Conference Report asserts:

> The House Bill contained a provision (Section 533) that would amend article 43 of the Uniform Code of Military Justice to (1) include all murders in the class of offenses that have an unlimited statute of limitations; (2) ***clarify*** **that rape is also an offense with an unlimited statute of limitations**; (3) extend the statute of limitations for certain child abuse offenses to the life of the child or 5 years from the date of the offense, whichever is later.

H.R. Rep. 109-360, at 703 (2005) (emphasis added) (J.A. at 162.)

As the Ninth Circuit Court of Appeals has recognized, "[b]ecause the conference report represents the final statement of the terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent." Department of Health and Welfare v. Block, 784 F.2d 895, 901 (9th Cir. 1986).

(C) Congress' use of the term "clarify" in its Committee of Conference Report indicates it did not believe the 2006 amendment to be a change in the law.

Here, the Committee of Conference's choice of language should be also contrasted with the clause immediately following it, which states that Section 533 of the NDAA would "*extend* the statute of limitations for certain child abuse offenses." (J.A. 162.) (emphasis added). It is significant that the Committee of Conference used the word "clarify" to explain the effect of the amendment on the statute of limitations for rape, rather than words such as "extend" or "change."

The word choice signifies Congress' understanding that it was maintaining the status quo with respect to the statute of limitations for rape, not changing it. Thus, the Conference Report is persuasive evidence that Congress, in passing the 2006 amendment, intended an unlimited statute of limitation to continue to apply to rape offenses after Willenbring.

(D) Congress' choice to codify existing law shows it intended the 2006 amendment to apply to 2005 rape offenses.

In short, the legislative history supports that Congress intended the 2006 amendment not to change the law, but to codify Willenbring and to clarify that there was an unlimited statute of limitations for rape offenses. It therefore logically follows that Congress meant for the 2006 amendment to apply to conduct that preceded its enactment. Nothing in the legislative history suggests that Congress intended a five-year statute of limitations to apply to rape offenses committed before 6 January 2006, but for an unlimited statute of limitations to apply after that date.[10]

[10] The title of Section 553 is "Extension of the Statute of Limitations for Murder, Rape, and Child Abuse Offenses. . . ," which might suggest the statute of limitations for rape was being changed. (J.A. at 141.) However, Appellant himself acknowledges that section titles are not probative evidence of congressional intent. (App. Br. at 13, n.2). As this Court has stated, "Catchlines or sections headings . . . 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." Lopez de Victoria, 66 M.J. at 73. Here the section title conflicts with the practical effect of the amendment. The extant statute of limitations for rape was not extended, it was maintained. Notably, the 2006 amendment *did* extend the statute

In sum, the ultimate question under Landgraf Step 1, as applied to Appellant, is whether Congress intended the 2006 amendment to Article 43 to apply to rape offenses, like Appellant's, that occurred in 2005. The contemporary legal context and legislative history of the 2006 amendment demonstrate that Congress recognized that, pursuant to Willenbring, there was no extant statute of limitations for rape and that Congress intended that status quo to be maintained. Therefore, the answer is yes, Congress intended the 2006 amendment and its unlimited statute of limitations to apply to Appellant's 2005 rape offense. Indeed, there is no other reasonable interpretation of Congress' intent.

Although Appellant invokes the "rule of lenity" as a canon of statutory interpretation that militates against the retroactive application of the 2006 amendment, "the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress." Liparota v. United States, 471 U.S. 419, 429 (1985). *See also* Duhany v. AG of the United States, 621 F.3d 340, 351 (3d Cir. 2010) ("[A] doctrine of repose should not be applied so as to frustrate clearly expressed congressional intent"). Applying the rule of lenity in this case

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of limitations for certain murder offenses for which the death penalty was not prescribed and for child abuse offenses. Therefore, the title of Section 553 is best viewed as accurately describing most, but not all, of what Section 553 actually accomplishes.

would thwart clear congressional intent that an unlimited statute of limitations continue to be applied to rape offenses committed in 2005.

Since Congress intended the 2006 amendment to apply to rape offenses committed before its enactment, that effectively ends the Landgraf inquiry and overcome any presumption against "retroactivity." So long as the 2006 amendment does not violate the Ex Post Facto Clause, it may be applied to Appellant's 2005 rape offense.

b. Landgraf Step 2: The 2006 amendment to Article 43, UCMJ does not have an impermissible retroactive effect on Appellant and therefore should be applied to his case.

Even if the NDAA FY 2006 and its legislative history are ambiguous as to whether the 2006 amendment to Article 43 was intended to apply to rape offenses committed before its enactment, that does not end the Landgraf inquiry. As the Supreme Court has enunciated, "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionable proper in many situations." Landgraf, 511 U.S. at 273.

The application of the 2006 amendment to prior rape offenses is unquestionably proper in this situation for three reasons. First, the circumstances of Appellant's crime and the passage of the 2006 amendment do not implicate any of the traditional concerns with the retroactive legislation. Second, legislation, like the 2006 amendment, that merely clarifies but does not change the law is not

considered to have retroactive effect. Finally, legislation, like the 2006 amendment, that codifies existing case law is also not considered to have retroactive effect.

i. Applying the 2006 amendment to Appellant's 2005 crime does not raise any of the typical concerns about retroactive legislation.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." Landgraf, 511 U.S. at 254-55. The Supreme Court acknowledged that it may be difficult to determine retroactivity, but that "retroactivity is a matter on which judges tend to have sound instincts . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." Landgraf, 511 U.S. at 270.

None of these considerations leads to the conclusion that the 2006 amendment acts retroactively with respect to Appellant's crime. Based on this Court's decision in Willenbring, Appellant already had "fair notice" before the 2006 amendment that his 2005 rape offense would have an unlimited statute of limitations. Moreover, Appellant had no grounds to reasonably rely on the previous iteration of Article 43, UCMJ for the proposition that there was only a five-year statute of limitations. By the time Appellant committed his 2005 offense, Willenbring had interpreted the then-existing Article 43 to mean there was no statute of limitations for rape. Finally, given the state of the law in 2005, Appellant had no "settled expectation" that he would be subject to anything less

than an unlimited statute of limitations. This lack of settled expectation was evidenced by Appellant's own testimony at trial. Appellant testified that after being confronted by the victim eight years after the offense, he looked up the statute of limitations for rape and determined that no statute of limitations applied. (J.A. at 45, 74.) Indeed, it was not until more than three years after he was convicted that Appellant would have had any notion that anything less than an unlimited statute of limitations might apply to his case. *Cf.* United States v. Reynard, 473 F.3d 1008, 1016 (9th Cir. 2007) (Finding no impermissibly retroactive effect in applying in the DNA Act of 2000 to Reynard's 1998 crime, because, due to prior existing law, "Reynard did not have a settled expectation that he would not have to submit to DNA extraction").

Since Appellant had fair notice that an unlimited statute of limitations would apply to his crime, had no settled expectation that a different statute of limitations would apply, and could not have reasonably relied on any other law, the 2006 amendment does not have a retroactive effect as applied to Appellant's 2005 rape offense.[11]

[11] Appellant's lack of settled expectations represents a key difference between his case and Mangahas. Appellant's crime occurred in 2005, well after this Court interpreted ambiguous language in Article 43 in Willenbring, to hold that there was no statute of limitations for rape. Mangahas' alleged crime occurred in 1997, *before* Willenbring was decided. One could argue that, as such, Mangahas was not on fair notice that an unlimited statute of limitations could be applied to his crime, and applying the 2006 amendment to him would have been unfairly retroactive.

ii. Since the 2006 amendment was only clarifying existing law rather than changing the law, it did have a retroactive effect with respect to Appellant.

Numerous federal circuit courts have asserted that when a statute merely clarifies existing law, it does not act retroactively with respect to prior conduct. The Eleventh Circuit has opined that in determining whether to apply an amended law to conduct that took place before the amendment, "[w]e first look to see whether the amendment effects a substantive change in the legal standard or merely clarifies the prior law." Piamba Cortes, 177 F.3d at 1283. "[I]f the amendment clarifies prior law rather than changing it, no concerns about retroactive application arise and the amendment is applied to the present proceeding as an accurate restatement of prior law." Id.

Similarly, the Ninth Circuit has said, "We have long recognized that clarifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment." ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 689 (9th Cir. 2000). *See also* Levy v. Sterling Holding Co. LLC, 544 F.3d 493, 506 (3d Cir. 2008) ("where a new rule constitutes a clarification – rather than a substantive change – of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct does not have an impermissible retroactive effect"); Middleton v. City of Chicago, 578 F.3d 655, 663 (7th Cir. 2009) ("concerns about retroactive application are not

implicated when an amendment . . . is deemed to clarify relevant law rather than effect a substantive change in the law"); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992) ("Clarification, effective *ab initio*, is a well recognized principle.") These opinions all comport with Landgraf, 511 U.S. at 270, which states that whether a law operates retroactively depends on "the nature and extent of the *change* in the law and the degree of connection between the operation of the new rule and a relevant past event" (emphasis added).

As discussed above, statutory construction and legislative history show an unmistakable intent by Congress that the 2006 amendment clarify rather than change the statute of limitations for rape.[12] Indeed, the passage of the 2006 amendment did not change the law in 2006. Thus, "the court applies the law as set forth in the amendment to the present proceeding because the amendment accurately restates the prior law." Piamba Cortes, 177 F.3d at 1283. Again, there are no retroactivity issues with applying the 2006 amendment to Appellant's crime.

iii. Since the 2006 amendment merely codified Willenbring and did not change the law, it did not have a retroactive effect with respect to Appellant.

State, federal circuit, federal district courts have recognized that where new legislation *codifies* rather than changes existing rules, those laws do not have a

[12] *Cf.* Brown v. Thompson, 374 F.3d 253, 259-60 (2004) (examining Joint Conference Committee and House Reports discussing an amendment to conclude that Congress intended that amendment to be clarifying rather than a substantive change in the law).

"retroactive" effect. In Tapia v. Superior Court, 53 Cal. 3d 282, 301-02 (Cal. 1991), the Supreme Court of California addressed whether section 10 of Proposition 115, the "Crime Victims Justice Reform Act," which related to the applicability of certain special circumstances to felony murder crimes, could be applied to crimes committed before the Proposition's effective date. The Supreme Court of California concluded that such application was permissible, because section 10 codified an existing judicial decision, People v. Anderson, 43 Cal.3d 1104 (Cal. 1987), rather than changing the existing law. Id. *See also*, Eco Mfg. LLC v. Honeywell Int'l, Inc., 357 F.3d 649, 652 (7th Cir. 2003) ("To the extent Congress codified rather than changed the governing rules, no retroactivity issues exist"); Blanch v. Chubb & Sons, Inc., 124 F. Supp. 3d 622, 631 (D. Md. 2015) ("Where the legislature codifies an existing judicial interpretation for the sake of clarity, it has not substantively changed the law . . . It follows that where an amendment merely clarifies the meaning of a statute as it existed before that amendment, enforcing that meaning does not amount to applying the amendment retroactively") (internal citations omitted); First Nat'l Bank v. Colonial Bank, 831 F.Supp. 637, 641 n.4 (N.D. Ill. 1993) ("Because the amendment merely codifies existing case law, the retroactivity argument is baseless").

Here, the contemporary legal context and legislative history of the 2006 amendment establish that it was intended to codify Willenbring, not to change the

law. Applying the 2006 amendment to Appellant's 2005 conduct does amount to applying the amendment retroactively.

iv. Mangahas does not mean that the 2006 amendment now has a retroactive effect on Appellant.

It may be argued that this Court's intervening decision in Mangahas means the statute of limitation for rape in 2005 was five years[13] and that therefore, the 2006 amendment should be now be viewed as having changed the law. However, this is not a proper consideration in a Landgraf analysis. Landgraf focuses on the unfairness of Congress imposing new burdens on persons after the fact and its ability to "sweep away settled expectations suddenly and without individualized consideration." 511 U.S. at 266. Congress did no such things when it passed the 2006 amendment. The unfairness generally associated with retroactive legislation simply does not exist for Appellant, as no *new* legal consequences were attached to his crime at the time the amendment was passed. Congress' legitimate action in 2006 codifying Willenbring should not be invalidated based on a judicial change to the law twelve years later that Congress (and Appellant) could not have foreseen. To now consider Mangahas as part of the retroactivity analysis would frustrate the clear intent of Congress to impose an unlimited statute of limitations on rape offenses committed in 2005. "Although penal laws are to be construed strictly,

[13] AFCCA made this point recently in United States v. Collins, 78 M.J. 530, 536 (A.F. Ct. Crim. App. 2018).

they ought not be construed so strictly as to defeat the obvious intention of the legislature." Huddleston v. United States, 415 U.S. 814, 831 (1974) (internal citations omitted).

Support exists in Supreme Court precedent for the conclusion that, even after Mangahas, the 2006 amendment should not now be viewed as having a retroactive effect on Appellant. The Supreme Court's treatment of statutes that have later been deemed unconstitutional presents an analogous situation. Even if a statute is later judged by a court to be unconstitutional, the "actual existence" of the statute prior to such a determination "is an operative fact that may have consequences that cannot justly be ignored." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940). "The past cannot always be erased by a new judicial decision." Id. For these reasons, the Supreme Court concluded that it was incorrect to view the unconstitutional statute as never having been the law, as having been inoperative, or as having conferred no rights or imposed no duties. Id.

In Dobbert v. Florida, 432 U.S. 282, 288 (1977), the Petitioner murdered his two children in January 1971 and April 1972, when a certain death penalty statute was in effect in Florida. After the second murder, in July 1972, the Florida Supreme Court found that death penalty statute to be unconstitutional in a case called Donaldson v. Sack, 265 So. 2d 449 (Fla. 1972). Dobbert, 432 U.S at 288.

Florida then enacted a new death penalty statute in late 1972. Id. The Petitioner claimed that applying the new death penalty statute to his crime violated the Ex Post Facto Clause, because after Donaldson, "there was no 'valid' death penalty in effect in Florida as of the date of his action." Id. at 297.

The Supreme Court asserted, "this sophist argument mocks the substance of the Ex Post Facto Clause." Id. Applying Chicot, the Court continued, "Whether or not the old statute would, in the future, withstand constitutional attack . . . the existence of the statute served as an 'operative fact' to warn petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder." Id. at 297-98.

Even if Willenbring was overturned by Mangahas, like the Florida statute was overturned by Donaldson, it does not mean that Willenbring was never the law. As the Tenth Circuit Court of Appeals has recognized, "while a judicial decision in in effect, it is an existing juridical fact." United States v. Cuch, 79 F.3d 987, 995 (10th Cir. 1996). Like the Florida statute in Dobbert, while Willenbring was in effect, it was an operative or juridical fact that was a fair warning to Appellant at the time he committed his crime, that there was no statute of limitations for rape. As in Dobbert, there are no Ex Post Facto or retroactivity concerns in applying the new law - in this case, the 2006 amendment - to Appellant's crime.

c. Applying the 2006 amendment to Article 43 to Appellant does not violate the Ex Post Facto Clause.

Even assuming the 2006 amendment could be considered "retroactive" under a Landgraf analysis, its application to Appellant's case does not violate the Ex Post Facto Clause of the Constitution. As this Court noted in Williams, "the federal circuits are in agreement that extending a limitations period before prosecution is barred does not violate the Ex Post Facto Clause." 77 M.J. at 465 n.5 (citing Grimes, 142 F.3d at 1351). *See* Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928); United States v. Richardson, 512 F.2d 105, 106 (3d Cir. 1975); United States v. Brechtel, 997 F.2d 1108, 1113 (5th Cir. 1993); United States v. Knipp, 963 F.2d 839, 843-44 (6th Cir. 1992); United States ex rel Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir. 1982); United States v. Madia, 955 F.2d 538, 539-40 (8th Cir. 1992); Clements v. United States, 266 F.2d 397, 399 (9th Cir. 1959); United States v. Taliaferro, 979 F.2d 1399, 1402-03 (10th Cir. 1992).

These circuit court holdings are reinforced by the Supreme Court's decision in Stogner v California, 539 U.S. 607 (2003). Stogner held that extending a statute of limitations with respect to offenses whose prosecution was *already* time-barred violated the Ex Post Facto Clause. Id. at 632. The Supreme Court made clear, however, that its holding did not affect cases "where courts have upheld extensions of *unexpired* statutes of limitations." Id. at 618 (emphasis in original). In fact, the

Supreme Court affirmatively stated that its holding "does not prevent the State from extending time limits . . . for prosecutions not yet time barred." Id. at 632.

There is no reason for this Court to deviate from these circuit court decisions or the implications of Stogner. Significantly, Appellant does not contend that application of the 2006 amendment to Appellant would violated the Ex Post Facto Clause. Instead, he argues that because Congress stated no intent to apply the 2006 amendment retroactively, it should not be applied to his case.

Assuming *arguendo* the statute of limitations for rape was five years when 2006 amendment was passed, that limitations period had not yet run for Appellant's crime on 6 January 2006 when the amendment would have extended the statute of limitations. Indeed, less than a year had passed since Appellant's crime. Pursuant to Grimes and the other cases referenced therein, any extension of the statute of limitations would not have violated the Ex Post Facto Clause with respect to Appellant.

To summarize, under Step 1 of a Landgraf analysis, Congress undeniably intended the 2006 amendment to Article 43 apply to rape offenses committed before the amendment's enactment, including rape offense committed in 2005, like Appellant's. Even assuming Congress' intent was ambiguous, under Step 2 of a Landgraf analysis, the 2006 amendment simply does not have a retroactive effect on Appellant. Under either Landgraf Step 1 or Landgraf Step 2, the unlimited

statute of limitations articulated in the 2006 amendment must be applied to Appellant's 2005 rape offense. Finally, even if the 2006 amendment could be considered "retroactive" legislation, its application to Appellant does not violate the Ex Post Facto Clause because the statute of limitations had not run on his crime at the time the amendment was passed.

There was no statute of limitations for Appellant's 2005 rape offense. Appellant was properly convicted and is not entitled to relief.

II.

APPELLANT CANNOT SUCCESSFULLY RAISE A STATUTE OF LIMITATIONS DEFENSE FOR THE FIRST TIME ON APPEAL.

Standard of Review

Whether a defense can be successfully raised for the first time on appeal is a question of law. Questions of law are reviewed *de novo*. United States v. Salazar, 44 M.J. 464, 471 (C.A.A.F. 1996).

Law and Analysis

In Musacchio v. United States, 136 S. Ct. at 716, the Supreme Court held that a defendant cannot raise a §3282(a) statute of limitations bar for the first time on appeal. The Supreme Court noted that statutes of limitations are not ordinarily jurisdictional, and the text, context, and relevant historical treatment of 18 U.S.C. §3282(a) demonstrated that it was "a nonjurisdictional defense, not a jurisdictional

limit." Id. at 716-18. Historically, §3282(a) "is a defense that becomes part of a case only if the defendant presses it in the district court." Id. at 717.

The Supreme Court continued, "Because §3282(a) does not impose a jurisdictional limit, the failure to raise it at or before trial means it is reviewable on appeal – if at all –only for plain error." Id. at 718. The Court concluded, however, "that a district court's failure to enforce §3282(a) cannot be plain error," explaining "[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. at 718. The Supreme Court declined to decide whether a defendant's failure to raise the defense amounted to waiver or forfeiture, because even applying a plain error analysis, no plain error could be found. Id. at 718 n.3.

For a military accused, R.C.M. 907(b)(2)(B) discusses the procedures in a court-martial for raising a statute of limitations defense. From the time of Appellant's crime, through the present, R.C.M. 907(b)(2)(B) has read:

> Waivable grounds. A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that cases 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.

Assuming *arguendo* that Mangahas applies retroactively to all cases pending on direct review,[14] it does not automatically dictate the outcome of Appellant's case. First, unlike in Mangahas, 77 M.J. at 221, Appellant did not raise the statute of limitations at his trial, and Musacchio's holding that an appellant cannot successfully raise the statute of limitations for the first time on appeal applies equally to Appellant's case. Even if a military appellant can raise the statute of limitations for the first time on appeal, the appropriate standard of review is plain error. Under a plain error analysis, the military judge could not have committed plain error in failing to inform Appellant that he could raise the statute of limitations, because this Court has not yet settled the issue of whether Mangahas applies to rape offenses committed in 2005.

a. Pursuant to Musacchio, Appellant cannot raise the statute of limitations for the first time on appeal.

i. Musacchio applies equally to Article 43, UCMJ as it does to 18 U.S.C. §3282(a).

Although Musacchio interprets 18 U.S.C. §3282(a), and not Article 43, UCMJ, its reasoning should apply equally to the military statute of limitations.

At the time of Appellant's offense, Article 43(b)(1) read "Except as otherwise provided in this section (article), a person charged with an offense is not

[14] *See e.g.*, United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970) ("In rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute.")

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."

There is no practical difference between the general structure of Article 43 and 18 U.S.C. §3282(a) (Chapter 213 of title 18), which reads, "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Indeed, when Article 43, UCMJ was amended in 1986, the House Report discussing the NDAA FY87 explained that the proposed changes "would improve the quality and efficiency of the military justice system" by "adapting chapter 213 of title 18, United States Code (relating to Federal Civilian practice), to the procedures applicable in courts-martial." H.R. Rep. 99-728 at 228 (1986) (J.A. at 101.) The Senate Report concerning the NDAA FY87, similarly acknowledged that the amendment "would reform the statute of limitations provisions now contained in the UCMJ and bring those provisions more in line with federal criminal code provisions (See Chapter 213 of title 18, United States Code)." S. Rep. 99-31, at 249 (1986) (J.A. at 96).

Considering that Congress intended Article 43 to follow Chapter 213 of title 18, which includes §3282(a), there is no reason to believe that the Musacchio analysis would not govern Article 43. Nothing suggests that Congress intended to create a statute of limitations defense for the military that functioned differently than in the federal system with respect to who must plead the defense and when. Moreover, Article 43, like §3282, is nonjurisdictional. Nothing in the text, context, or history of Article 43 provides "a clear indication that Congress wanted that provision to be treated as having jurisdictional attributes." Musacchio, 136 S. Ct. at 717. Therefore, the Supreme Court's interpretation in Musacchio of how the federal statute of limitations functions applies equally to Article 43.

ii. R.C.M. 907(b)(2)(B) does not preclude application of Musacchio.

Appellant argues that Musacchio is inapplicable to the military because R.C.M. 907(b)(2)(B) "imposes an affirmative duty on the trial judge to bring any statute of limitations issue to the attention of the accused." (App. Br. at 19.) The President has indeed spoken on the issue in R.C.M. 907(b)(2)(B) and has described the statute of limitations as a "waivable ground" for dismissal of a charge. But a rule for courts-martial is not a congressional statute. It is a rule of trial procedure that is to "apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts" and cannot be "contrary to or inconsistent with" the UCMJ. *See* Article 36(a), UMCJ. The President can grant a

military accused greater rights than provided by statute, but such rights cannot contradict the UCMJ. United States v. Czeschin, 56 M.J. 346, 348 (C.A.A.F. 2002).

Put as succinctly as possible, R.C.M. 907(b)(2)(B) indicates that waiver of the statute of limitations defense will not be recognized unless the accused has been informed of his right to raise the defense. But the Rule still requires the accused, not the military judge, to raise the statute of limitations defense in order to insert it into the trial. Moreover, the Rule does not say that an accused cannot forfeit the defense, and the plain language of the Rule does not require that an accused be informed of his right before the right is forfeited. In the military context, if the accused is not advised under R.C.M. 907(b)(2)(B), he can only forfeit raising the statute of limitations, and a plain error analysis ensues. But at this point, Musacchio applies, and there can be no plain error where the accused himself did not insert the statute of limitations defense into the trial.

Although R.C.M. 907 (b)(2)(B) is inartfully worded, the context indicates the statute of limitations, as a ground for dismissal of charges, is waivable "provided that, if it appears 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." Based on the plain language of the rule, the military judge's duty to advise the accused exists to ensure that any "waiver" of the statute of limitations defense

by the accused was done knowingly and intentionally. Significantly, the Rule does not remove from the accused the onus to "put the defense in issue" by making a motion to dismiss. Since the Rule only requires the military judge to "inform" the accused of his right, it does not create a *sua sponte* duty for the military judge to plead the statute of limitations for the accused or to *dismiss* charges on statute of limitations grounds.

Essentially, what R.C.M. 907(b)(2)(B) says, is that waiver of right to raise the statute of limitation will only be recognized if that waiver is knowing and intentional. This follows the traditional definition of waiver, which is the "intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 752, 732-33 (1993). Waiver extinguishes an error completely so it cannot be raised on appeal. Id.

Given the military judge's duty under Rule 907(b)(2)(B), the question becomes, if the military judge did not ensure Appellant knowingly waived the right to raise the statute of limitations, what is Appellant's remedy? After all, a military judge's mere failure to inform under R.C.M. 907(b)(2)(B) does not deprive an accused of his right to raise the statute of limitations defense; the accused always can raise the defense on his own. Based on the plain language of the Rule, which identifies this as an issue of waiver, the appropriate penalty or remedy for failure to comply with R.C.M. 907(b)(2)(B) is simply that waiver is not enforced by

appellate courts. *See e.g.* United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008) (Declining to enforce waiver where the appellant had not intentionally relinquished or abandoned his right to confrontation and reviewing for plain error).[15] In other words, Rule 907(b)(2)(B) entitles Appellant to plain error review on appeal, rather than none at all. Unfortunately for an accused, pursuant to Musacchio, this right is essentially hollow, because when the burden to assert a right ultimately resides with an accused, whether or not the right was waived or merely forfeited is irrelevant. The result is no plain error either way.

Even following a traditional waiver versus forfeiture analysis, if this Court concluded that Appellant did not knowingly and intentionally waive his right to plead the statute of limitations, he still could have forfeited the issue by failing to plead the statute of limitations at trial, as it remains his burden to do. The Court would then proceed to a forfeiture analysis, since Appellant did not make a timely assertion of the statute of limitations defense. *See* Harcrow, 66 M.J. at 158; United

[15] Overturning a case due to a failure to advise under R.C.M. 907(b)(2)(B), as AFCCA recently did in Collins, 78 M.J. at 536 is an inappropriate remedy for several reasons. First, it incorrectly assumes an accused can never forfeit the statute of limitations defense, which is contrary to the plain language of R.C.M. 907(b)(2)(B) and to Musacchio's interpretation of how the defense functions. Second, it relieves an accused of his ultimate burden to raise the statute of limitations, which is incompatible with both the text of the Rule and Musacchio. Third, since the military judge's failure to inform under R.C.M. 907(b)(2)(B) does not deprive an accused of his right to raise the statute of limitations defense, it is difficult to argue that a failure to inform *materially* prejudiced a substantial right.

States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011) (Declining to find that an appellant intentionally waived an issue, determining the appellant forfeited the issue instead, and reviewing for plain error.) "If an appellant has forfeited a right by failing to raise it at trial, [this Court] review[s] for plain error." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). In a plain error analysis, the burden is on the appellant to demonstrate that there was error; the error was plain and obvious; and the error materially prejudiced a substantial right of the appellant. United States v. Payne, 73 M.J. 19, 23 (C.A.A.F. 2014).

Significantly, forfeiture is not mentioned in Rule 907(b)(2)(B). The Rule does not say or imply that an accused cannot forfeit his right to raise the statute of limitations defense or that such forfeiture must be "knowing" and "intentional" to be enforced. *Cf.* Henderson v. United States, 568 U.S. 266, 272 (2013) (Any right, even a constitutional right, may be forfeited in a criminal case by the failure to make a timely assertion of the right); United States v. Haddad, 462 F.3d 782, 793 (7th Cir. 2006) ("Forfeiture occurs when a defendant *accidentally* or *negligently* fails to assert his or her rights in a timely fashion") (emphasis added).

In evaluating for forfeiture, this Court does not ask whether the military judge erred by failing to advise Appellant under R.C.M. 907(b)(2)(B). If the military judge did err, the remedy was to apply a forfeiture analysis rather than strict waiver. Because any R.C.M. 907(b)(2)(B) error has already been addressed,

this Court solely reviews for plain error under Musacchio. Pursuant to Musacchio, since Appellant himself did not raise the statute of limitations, as Rule 907(b)(2)(B) still requires him to do, there could be no plain error in the military judge failing to insert the issue into the trial or dismiss the charge against Appellant.

In short, the additional "right" the President purported to confer will not help Appellant here, because under Musacchio, failure to raise the statute of limitations is a question of plain error - not waiver. Whether or not an accused knowingly waived the statute of limitations is not at issue.

Under Musacchio, R.C.M. 907(b)(2)(B) is not a right that an appellant can successfully enforce on appeal.[16] Practical application of the Rule only means that forfeiture, rather than waiver, is applied when an accused fails to raise the statute of limitations, and Appellant is only entitled to a plain error analysis. Pursuant to Musacchio, there was no plain error in the military judge failing to plead the statute

[16] This Court's prior case law interpreting R.C.M. 907(b)(2)(B) has therefore become obsolete after Musacchio. *See e.g.* United States v. Salter, 20 M.J. 116 (C.M.A. 1985); United States v. Thompson, 59 M.J. 432 (C.A.A.F. 2004). These cases addressed this Court's willingness to apply waiver when an accused was not advised of his right to plead the statute of limitations. Again, after Musacchio, whether an accused knowingly waived the right to raise the statute of limitations is no longer at issue and does not change the outcome where the accused failed to plead the statute of limitations.

of limitations for Appellant or failing to dismiss the charge. Appellant cannot successfully raise the statute of limitations now for the first time on appeal.

As a final point, despite Appellant's contention, there is no reason to believe that the Supreme Court would have decided Musacchio differently if that case had involved an intervening change in the law that Musacchio had been unaware of at his trial. By analogy, federal courts have held that an intervening change in law does not render a plea agreement unknowing, involuntary, or undo its binding nature. *See e.g.* Brady v. United States, 397 U.S. 742, 757 (1970); United States v. Morrison, 852 F.3d 488, 490 (6th Cir. 2017); United States v. Lockett, 406 F.3d 207, 213 (3d Cir. 2005). Entering into a plea agreement and raising a statute of limitations defense are both choices that an accused might make in the course of criminal litigation. Appellant's choice not to plead the statute of limitations, "made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that [choice] rested on a faulty premise." *See* Brady, 397 U.S. at 757.

This Court has likewise questioned whether an intervening judicial decision can "undo or undermine" choices made by an appellant prior to the change in the law:

> While the rule from [Griffith v. Kentucky, 489 U.S. 314, 328 (1987)] provides the benefit of the holding from a case decided while another case is on direct appeal, it is at best unclear that the benefit stretches beyond the actual holding

> of the case. . . It likewise follows that the Griffith rule does not extend so far as to encompass, and undo or undermine, any and all matters that might have been decided differently if Appellant was aware at point in time A that the law at point in time B would be different while his case was on direct appeal.

United States v. St. Blanc, 70 M.J. 424, 429 (C.A.A.F. 2012) (internal citations omitted).

In contrast, Appellant has cited no precedent for the Supreme Court giving Musacchio a second chance to plead the statute of limitations because his original choice not to raise it was ill-informed due to a later change in the law. The lack of such precedent is unsurprising because a statute of limitations defense "does not render the underlying conduct noncriminal." Smith v. United States, 586 U.S. 106, 112 (2013). Thus, Appellant's inability to plead the statute of limitations for the first time on appeal, after he has already been convicted of a crime beyond a reasonable doubt, is much less likely to be seen as a miscarriage of justice. Appellant may now regret not raising the statute of limitations in light of Mangahas, but his "lack of clairvoyance cannot undo that decision." *See* Morrison, 852 F.3d at 491.

In conclusion, Musacchio applies to Appellant's case and means he cannot successfully raise the statute of limitations for the first time on appeal. His request for relief should be denied.

b. Since Appellant did not plead the statute of limitations at trial, assuming Musacchio does not apply, the standard of review is plain error.

Assuming Musacchio does not apply to military cases, the appropriate standard of review is plain error. As Appellant notes, AFCCA has questioned whether plain error is the applicable standard of review in cases where an appellant failed to raise the statute of limitations at trial. Collins, 78 M.J. at 534 n.8. (App. Br. at 20.) Without resolving the question, AFCCA proposed that because the military judge had an affirmative duty to act under R.C.M. 907(b)(2)(B), the proper standard of review might be *de novo*. Id. However, the Supreme Court and other federal courts have applied a plain error standard of review in other situations where a trial court has a statutorily-imposed or rule-imposed affirmative duty to act.

For example, the Supreme Court has applied a plain error standard of review when a defendant does not object to a trial judge's failure to advise the defendant of his right to counsel before pleading guilty to a crime. United States v. Vonn, 535 U.S. 55 (2002). In Vonn's case, the judge failed to advise Vonn that he would have the right to assistance of counsel if he went to trial rather than pleading guilty, as specifically required by Federal Rule of Criminal Procedure 11. Id. at 60, 62. Despite this rule-based duty – akin to the military judge's rule-based duty to inform an accused about the statute of limitations – the Supreme Court held "a silent defendant has the burden to satisfy the plain-error rule." Id. at 59.

The Supreme Court rejected Vonn's argument that applying a plain error rule "would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge." Id. at 73. On the contrary, the Supreme Court asserted, "that is always the point of plain error review: the value of finality requires defense counsel to be on his toes, not just the judge, and the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on." Id. *See also* United States v. Ellis, 326 F.3d 593, 598 (4th Cir. 2003) (applying a plain error standard where the district court failed to conduct a colloquy regarding prior convictions required by 21 U.S.C. §851(b), but defendant did not raise the error at the district court); United States v. Severino, 316 F.3d 939, 947 (9th Cir. 2003) (following Vonn and applying a plain error standard to the trial judge's failure to advise defendant as required under 21 U.S.C. §851(b)).

The same principles described by these courts apply here. Whether the military judge *sua sponte* failed to advise an accused of his right to raise the statute of limitation will always be raised for the first time on appeal – if the accused had raised it at trial, then the statute of limitations matter would have been resolved then and there. Such errors raised for the first time on appeal are normally reviewed for plain error. Olano, 507 U.S at 731-32. Moreover, the value of finality and the need to "reduce wasteful reversals"[17] requires the defendant and

[17] *See* United States v. Dominguez-Benitez, 542 U.S. 74, 82 (2004).

counsel, not just the military judge, to recognize and raise such issues at the trial level. This is a fair burden to place on the accused and his lawyer, especially where the ultimate burden of inserting the statute of limitations into the trial resides with the accused.

Notably, this Court has also applied plain error review in situations where a military judge fails to give a required instruction, but the accused has also failed to request the instruction. United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017). This Court rejected the argument that failure to give a required instruction should be reviewed *de novo* or that the required instructions could not be forfeited. Id. Similarly, here, even if the military judge had some affirmative duty to inform Appellant about the statute of limitations, it does not follow that the issue should be reviewed *de novo* or that Appellant did not forfeit the issue by failing to raise it himself at trial. Rather, where Appellant has failed to raise an issue at trial, plain error review applies.

In conclusion, there is ample support from federal courts and this Court for the proposition that plain error review is appropriate in this case, even if the military judge had an affirmative duty to inform Appellant of his right to raise the statute of limitations.

c. The military judge could not have committed plain error because even now, at the time of Appellant's appeal, the law is unsettled as to what statute of limitations applies to Appellant's crime.

Under a plain error standard of review, Appellant cannot prevail. The question of whether a five-year or unlimited statute of limitations applies to rape offense committed in 2005 is currently unsettled.

In its recent opinion in Williams, this Court specifically declined to answer whether the 2006 amendment to Article 43 applied retroactively to a rape offense committed on divers occasions between late 2000 and early 2003. Williams, 77 M.J. at 461, 465 n.5. Thus, questions as to whether the 2006 amendment applies to prior conduct are currently unsettled. Since the question of whether Mangahas applies to Appellant's case is currently unsettled now at the time of Appellant's appeal, it could not have been plain error for the military judge to have failed to apply the law from Mangahas at Appellant's trial.

Chief Judge Stucky wrote in concurrence in Harcrow:

> Where the law was unsettled at the time of trial and remained unclear at the time of appeal, a decision by a trial court cannot be plain error. It would seem to follow, then, that where the court *correctly* applied existing law at trial, but the law subsequently became unsettled and was unsettled when the case was on appeal, there could be no plain error.

66 M.J. at 162 (Stucky, J. concurring) (emphasis in original). This is exactly the situation here: pursuant to Willenbring, the statute of limitations for Appellant's

2005 rape offense was settled at the time of Appellant's 2014 trial. Subsequently, after Mangahas in 2018, the law became unsettled as to what statute of limitations applied to Appellant's offense, and that law remains unsettled now. Therefore, there could be no plain error at Appellant's trial.

Chief Judge Stucky's reasoning in Harcrow is echoed in several other federal circuit courts. The Second Circuit has said, "Whether an error is plain is determined by reference to the law as of the time of appeal . . . Typically, we will not find plain error where the operative legal question is unsettled." United States v. Gamez, 577 F.3d 394, 400 (2d Cir. 2008). *See also* United States v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001) (Refusing to find plain error where there was no binding precedent at the time of trial or appeal from either the circuit court itself or the Supreme Court).

Similarly, the Ninth Circuit declined to find plain error in a case where "prior to our holding here, the relevant law in this area was highly unsettled . . ." United States v. Kilbride, 584 F.3d 1240, 1255 (9th Cir. 2009). Although the Court's holding in the case was a distillation of opinions in a prior case, that "conclusion was far from clear and obvious to the district court." Id. *See also* United States v. McClellan, 794 F.3d 743, 755 (7th Cir. 2015) (district court did not commit plain error where the "operative legal question" was "unsettled");

United States v. Brewer, 1 F.3d 1430, 1435 (4th Cir. 1993) (alleged error was not plain because law at issue remained unsettled).

Since this Court has not yet determined what statute of limitations applies to rape offenses committed in 2005, it could not have been plain or obvious to the military judge at trial that Appellant could meritoriously assert the statute of limitations in bar of trial. Thus, it could not have been plain and obvious error for the military judge to have failed to inform Appellant about his right to raise the statute of limitations in defense of his 2005 rape charge.[18]

To summarize, Musacchio applies to military courts-martial and dictates that the military judge's failure to enforce an unraised statute of limitations defense cannot be plain error. Therefore, Appellant cannot successfully raise the statute of limitations for the first time on appeal. Even if Musacchio is inapplicable to

[18] Reading the plain language of R.C.M. 907(b)(2)(B) literally, one could also argue that the military judge did not commit plain error because, based on the facts available to him, it appeared that Appellant was already aware of the general "right to assert the statute of limitations in bar of trial," and, as such, there was no duty to advise him of that right. Evidence presented at trial showed that Appellant had researched the statute of limitations for rape prior to his trial. (J.A. at 45, 74.) The United States acknowledges that this Court has not interpreted the Rule in this literal manner in its past decisions. Thompson, 59 M.J. at 439. This also raises the question of whether Appellant can demonstrate material prejudice to a substantial right. Appellant undoubtedly knew he *could* raise a statute of limitations defense, even if he did not believe it would be meritorious due to existing state of the law. The military judge's failure to advise Appellant did not deprive him of the general understanding of the right, and it did not in any way prevent him from attempting to assert it.

military courts-martial, the standard of review is plain error. Under a plain error analysis, the military judge could not have committed plain error at Appellant's trial, because the question of which statute of limitations applies to Appellant's 2005 crime is currently unsettled. Since there was no plain error under any scenario, Appellant is not entitled to relief on appeal.

CONCLUSION

WHEREFORE the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian defense counsel, and to the Appellate Defense Division on 22 October 2018.

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/s/_____

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