

No. 17-243

IN THE
Supreme Court of the United States

LIBAN H. ABDIRAHMAN, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Armed Forces**

PETITION FOR REHEARING

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July 9, 2018

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioners suggest that there are “intervening circumstances of a substantial or controlling effect” that arose subsequent to the completion of briefing at the certiorari stage—and that militate in favor of granting rehearing (and certiorari) with respect to one of the Petitioners, vacating the decision below in his case, and remanding the matter to the Court of Appeals.

1. The petition for certiorari presented the same merits questions as those this Court resolved in *Ortiz v. United States*, No. 16-1423, 2018 WL 3073840 (U.S. June 22, 2018). Presumably in light of *Ortiz*, this Court denied the petition on June 28, 2018.

2. Air Force Lieutenant Colonel Michael Briggs (Court of Appeals Docket # 16-711) was convicted of rape in 2014 for an offense that allegedly took place in July 2005. *See* 1 Pet. App. 130a.

2. At the time of both the charged offense and conviction, the Court of Appeals for the Armed Forces (CAAF) interpreted Article 43 of the Uniform Code of Military Justice, 10 U.S.C. § 843, to impose no statute of limitations for rape—because, in CAAF’s view, it was an “offense punishable by death.” *See Willenbring v. Neurater*, 48 M.J. 152, 178, 180 (C.A.A.F. 1998).

3. If rape was not an “offense punishable by death,” the statute of limitations in Lt. Col. Briggs’s case would have been five years, 10 U.S.C. § 843(b)(1) (2006), and would therefore have barred his 2014 prosecution and conviction.¹

1. In 2006, Congress amended Article 43 to provide that “[a] person charged with . . . rape . . . may be tried and punished at any time without limitation.” National Defense Authorization

4. On February 6, 2018 (after the certiorari briefing was complete), CAAF unanimously overruled *Willenbring* in *United States v. Mangahas*, holding that, at least for pre-2006 conduct, “the offense of rape is not exempt from the five-year statute of limitations.” 77 M.J. 220, 222 (C.A.A.F. 2018); *see id.* at 222 & n.2; *cf. Kennedy v. Louisiana*, 554 U.S. 407, 428 (2008) (holding that the Eighth Amendment forbids a capital sentence for rape that does not result in the death of the victim).

5. The government has not sought further review of *Mangahas* in this Court.

6. Because Lt. Col. Briggs’s direct appeal is still pending, he is entitled to pursue relief under CAAF’s decision in *Mangahas*. *See Griffith v. Kentucky*, 479 U.S. 314, 327–28 (1987).

7. On March 19, 2018, the Petitioners filed a supplemental brief with this Court, suggesting that, even if this Court affirmed CAAF’s decision in *United States v. Ortiz*, 76 M.J. 189 (C.A.A.F. 2017), it should nevertheless grant certiorari at least with respect to Petitioner Briggs, vacate CAAF’s decision below in his case, and remand for reconsideration in light of *Mangahas*. *See* Pet’rs Supp. Br. at 2.

Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553(a), 119 Stat. 3136, 3264 (codified as amended at 10 U.S.C. § 843(a)).

Whether or not retroactive extensions of unexpired statutes of limitations raise ex post facto concerns, *Stogner v. California*, 539 U.S. 607, 618 (2003), CAAF has held that amendments to Article 43 extending unexpired statutes of limitations do not apply retroactively absent express language that they do. *United States v. Lopez de Victoria*, 66 M.J. 67, 74 (C.A.A.F. 2008). The 2006 amendment to Article 43 includes no such language.

8. On March 29, 2018, the Solicitor General filed a supplemental brief stipulating that “the government does not oppose Briggs’s request that his case be remanded to the CAAF so that military courts can consider in the first instance his claimed entitlement to relief from [*Mangahas*].” U.S. Supp. Br. at 2.

9. Because of the longstanding constraints on collateral review of military convictions by civilian courts, *see Burns v. Wilson*, 346 U.S. 137 (1953) (plurality opinion), this Court should allow Petitioner Briggs to pursue any entitlement to relief under *Mangahas* on direct appeal—and should therefore grant the petition for rehearing, grant the petition for a writ of certiorari as to Petitioner Briggs, vacate the decision below in his case, and remand for further proceedings in light of *Mangahas*.

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Respectfully submitted,

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