31 October 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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?

SUMMARY OF ARGUMENT

This should not be a difficult case. Like every other appellate court in this country, "on direct review, [this Court] appl[ies] the clear law at the time of the appeal, not the time of trial." *United States* v.

Mullins, 69 M.J. 113, 116 (C.A.A.F. 2010) (citing *United States* v. *Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008)). This cardinal principle of appellate procedure dates back to the Founding. As Chief Justice Marshall explained in one of his first opinions for the Supreme Court,

> if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

The "clear law" at the time of Appellant's direct appeal includes this Court's decisions in *United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), and *United States* v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008). Under *Mangahas*, the statute of limitations applicable to Appellant's alleged 2005 offense was five years — and expired long before the charge and specification were received in 2014. And under *Lopez de Victoria*, the 2006 amendment to Article 43 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843, could only have retroactively extended that time limit if its text or legislative history provides clear evidence to that effect. 66 M.J. at 72–73.

The government's brief is replete with *assertions* that Congress intended the 2006 amendment to apply retroactively, but it offers no actual proof. For starters, the government correctly concedes that "the text of the 2006 amendment itself is silent as to whether it [wa]s to apply to rape offenses committed before 2006." U.S. Br. 15. And even if legislative history could show that Congress meant for the amendment to so apply, the government also concedes that, given how this Court had interpreted Article 43 at that time, "there simply was no reason" for Congress to consider the matter at all. *Id.* at 17.

Under *Mangahas* and *Lopez de Victoria*, Appellant is entitled to relief under any standard of review, including "plain error." *Henderson* v. *United States*, 568 U.S. 266, 273–74 (2013) ("[A]n (un-objected to) error by a trial judge will also fall within Rule 52(b)'s word 'plain' . . . . if the trial judge's decision was plainly correct at the time when it was made but subsequently becomes incorrect based on a change in law." (citing *Johnson* v. *United States*, 520 U.S. 461, 468 (1997))).

The government's brief repeatedly attempts to muddy these waters. On the first issue presented, the government alternatively argues that the 2006 amendment is clearly retroactive or that, even if it

isn't, it doesn't have to be — because it was merely codifying this Court's then-extant interpretations of Article 43 in *Willenbring* v. *Neurauter*, 48 M.J. 152 (C.A.A.F. 1998), and *United States* v. *Stebbins*, 61 M.J. 366 (C.A.A.F. 2005). The government's claims are wrong. Because there is no indication in either the text or legislative history of the 2006 amendment that Congress had the requisite retroactive intent, *Lopez de Victoria* forecloses the first argument. And because *Mangahas* compels the conclusion that, as applied to Appellant, the 2006 amendment produces a "retroactive effect" under *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), the government's second argument also fails. The governing statute of limitations in Appellant's case is five years — and expired long before his 2014 court-martial.

The government's response to the second specified issue fares no better. Asserting (without any support) that *Musacchio* v. *United States*, 136 S. Ct. 709 (2016), somehow applies to courts-martial and/or cases in which the applicable statute of limitations changes between the trial and the appeal, the government reads *Musacchio* as overruling *sub silentio* not only a series of this Court's rulings, but numerous rulings by the Supreme Court, as well.

This Court has consistently declined to construe Article 43 *in pari materia* with civilian statutes of limitations like the one at issue in *Musacchio*, because "[c]ongressional intent to separate military justice from the federal criminal system, evidenced by our distinct and comprehensive criminal code, requires us to 'exercise great caution in overlaying a generally applicable statute specifically onto the military system.'" *United States* v. *McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) (quoting *United States* v. *Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998)); *see also Lopez de Victoria*, 66 M.J. at 72.

That caution is all the more appropriate in light of the distinct, affirmative obligation military trial judges have to raise statute-of-limitations defenses under R.C.M. 907(b)(2)(B). *See, e.g.*, *United States* v. *Thompson*, 59 M.J. 432, 439 (C.A.A.F. 2004) ("The military judge has an affirmative obligation to advise an accused of the right to assert the statute of limitations, and must determine that any waiver of the statute of limitations bar is both knowing and voluntary."). Instead, the correct reading of *Musacchio*, based upon the analysis in Justice Thomas's majority opinion, is that it has no bearing here.

In the alternative, the government falls back on the argument that any error in Appellant's case could not have been "plain" because "the question of which statute of limitations applies to Appellant's 2005 crime is currently unsettled." U.S. Br. 10. In fact, it is not at all clear that plain error is the appropriate standard of review for Appellant's *Mangahas* claim. But even if it is, applying *Lopez de Victoria* to the 2006 amendment compels the conclusion that the *Mangahas* error in Appellant's case is, indeed, plain.

As the Supreme Court recently reiterated, "plain-error review is not a grading system for trial judges. It has broader purposes, including in part allowing courts of appeals better to identify those instances in which the application of a new rule of law to cases on appeal will meet the demands of fairness and judicial integrity." *Henderson*, 568 U.S. at 278. In a case like this one, in which "application of a new rule of law to cases on appeal" is the difference between vacating a time-barred conviction and allowing it to stand, there can be little question as to the result that "fairness and judicial integrity" demand — vacatur of Appellant's conviction and sentence, and dismissal of the sole specification and charge.

ARGUMENT

I. APPELLANT'S CONVICTION IS CLEARLY TIME-BARRED UNDER *MANGAHAS* AND *LOPEZ DE VICTORIA*

Then-Judge Stucky's opinion for this Court in *Lopez de Victoria* could not be clearer: when the text of an amendment to Article 43 and its legislative history are both "silent as to whether Congress intended it to apply retroactively," the amendment will only be given prospective effect. 66 M.J. at 73. Such a result followed in that case from "the lack of any indication of congressional intent to apply the 2003 amendment retrospectively to cases such as this, the general presumption against retrospective legislation in the absence of such an indication and the general presumption of liberal construction of criminal statutes of limitation in favor of repose." *Id.* at 74.

The government's brief repeatedly asserts that, in contrast to the 2003 amendment to Article 43 at issue in *Lopez de Victoria*, Congress "plainly intended" to apply the 2006 amendment to Article 43 to conduct pre-dating its enactment, and that "there can be no reasonable dispute that Congress [so] intended." *E.g.*, U.S. Br. 14, 15, 20, 21, 26. In fact, the government's argument — and the statutory text and legislative history — only support the entirely *distinct* proposition that the 2006

amendment was meant to prospectively codify the judge-made status quo. Not only is there no evidence that Congress "plainly intended" the 2006 amendment to apply to conduct predating its enactment, but there is significant evidence to the contrary. Under *Lopez de Victoria*, those conclusions settle the first specified issue in Appellant's favor.[1]

A. The Government Offers No Actual Evidence That the 2006 Amendment Was Meant to Apply Retroactively

The government concedes that the text of the 2006 amendment to Article 43 is silent as to whether it was to apply retroactively to conduct predating its enactment. U.S. Br. 15. In its view, however, "Congress does not have to state specifically in a statute that it is to be applied retroactively in order for it to apply to prior conduct. The requisite congressional intent can be established through other methods of statutory construction." *Id*. This reasoning suffers from two separate — but equally fatal — flaws.

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1. The government devotes much of its brief to an analysis of the 2006 amendment under *Landgraf*'s retroactivity framework. But the controlling application of *Landgraf* in this Court — and to amendments to Article 43, specifically — is *Lopez de Victoria*, which was correctly decided and which the government has not asked this Court to overrule. *See, e.g.*, *United States* v. *Cain*, 59 M.J. 285, 296 (C.A.A.F. 2004) ("[W]e are bound by our own . . . precedent.").

First, the government conflates silence with ambiguity. As was true with respect to the 2003 amendment to Article 43 at issue in *Lopez de Victoria*, there is no ambiguous term in the 2006 amendment that could reasonably be interpreted to support retroactivity. *See* 66 M.J. at 73 ("Here, however, the text of the statute is not ambiguous; it is silent."); *see also Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1143 (2018). As this Court reiterated last April:

> The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

United States v. *Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992)). As was true in *Lopez de Victoria*, the text of the 2006 amendment to Article 43 is not ambiguous as to whether it applies retroactively. Therefore, the 2006 amendment does not apply retroactively.[2]

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2. As the government concedes, the fact that the 2006 amendment does not have its own effective date provision is also not a basis for finding ambiguity; "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." *Johnson* v. *United States*, 529 U.S. 694, 702 (2000), *cited in* U.S. Br. 6 n.1 (alteration and internal quotation marks omitted).

Second, and in any event, the legislative history of the 2006 amendment does not actually demonstrate congressional intent to have the revisions to Article 43 apply retroactively. Instead, it supports an entirely distinct conclusion — that the 2006 amendment was meant to codify this Court's decisions in *Willenbring* and *Stebbins*, and therefore *continue* the then-extant status quo. As the government puts it, "[t]he 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." U.S. Br. 18.

Such reasoning moves the goalposts, allowing the government to answer a different question than the one specified by this Court. It seems clear that the 2006 amendment was meant to ensure that "the military statute of limitations for rape of an adult female *should continue* to be unlimited." U.S. Br. 23 (quoting *Dep't of Defense, Sex Crimes and the UCMJ: A Report for the Joint Services Committee on Military Justice* (2005), J.A. 125).

But that same evidence says nothing whatsoever about whether Congress intended the amendment to Article 43 to apply *retroactively* to conduct predating its enactment. *See, e.g.*, *United States* v. *Richardson*, 512 F.2d 105, 106 (3d Cir. 1975) (highlighting the distinction between legislative intent to codify a statute of limitations based upon a prior judicial decision and intent to apply that change retroactively). As the government fatally concedes, because *Willenbring* and *Stebbins* were then controlling law, "there simply *was no reason* to do so." U.S. Br. 17 (emphasis added).

Instead, the government's argument appears to be that, had the 109th Congress known that this Court would subsequently overrule *Willenbring* and *Stebbins*, it would have wanted the 2006 amendment to apply retroactively. But the government has exactly zero evidence to support such a counterfactual claim. And it is not at all difficult to imagine that Congress would have viewed the continuation of the then-extent status quo as a materially less controversial policy initiative than the retroactive extension of an unexpired statute of limitations.

Regardless, all of the evidence the government marshals in its brief is beside the point, for it all supports the distinct — and for these

purposes, irrelevant — conclusion that the 2006 amendment was meant to codify by statute what was then this Court's interpretation of Article 43. *See, e.g.*, *id*. at 17 ("Congress should not have been expected to articulate specifically in the 2006 amendment that it applied to crimes committed prior to 2006."). Nothing in the legislative history of the 2006 amendment remotely suggests that Congress intended, or even understood, that any of the revisions to Article 43 would apply to conduct predating their enactment. Thus, although the government is correct that "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," U.S. Br. 20, it does *not*, in fact, "logically follow[] that Congress meant for the 2006 amendment to apply to conduct that preceded its enactment." *Id*. at 26.

B. There is Significant Evidence That the 2006 Amendment Was Not Meant to Apply Retroactively

As the above analysis makes clear, the government's response to the first specified issue rises and falls on its claim that, had Congress known that the 2006 amendment *would* be changing the applicable statute of limitations for rape, it would have wanted that change to apply even to those offenses pre-dating the amendment's enactment.

But as the government itself notes, even at the time it was enacted, at least part of the 2006 amendment to Article 43 *was* making new law — changing (and extending) the statute of limitations for non-capital murder and child abuse offenses. *See* U.S. Br. 26–27 n.10.

For those offenses, even on the government's view, Congress in the 2006 amendment to Article 43 was not merely codifying the then-extant judge-made status quo; it was unambiguously extending existing statutes of limitations. *See id*. at 25. And yet, despite the clear change in existing law, there is nary a word in either the text of the 2006 amendment or in its legislative history as to whether *those* revisions were to apply to conduct predating their enactment. Put another way, we don't have to guess what Congress would have thought about applying the 2006 amendment retroactively. With respect to the statutes of limitations for non-capital murder and child abuse offenses, Congress showed no interest whatsoever in having its changes to Article 43 apply to conduct that predated the 2006 amendment.[3]

3. By contrast, numerous other provisions of the same statute included express retroactivity language. *E.g.*, National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 514(d), 516(d), 609(c), 664(c), 715(b), 743(b), 921(b), 119 Stat. 3136, 3233, 3237,

Whereas Congress expressed no intention to retroactively apply even those parts of the 2006 amendment to Article 43 that *did* change then-extant statutes of limitations, the government insists that Congress would have wanted to retroactively apply that part of the 2006 amendment that did not make new law when it was enacted if it had foreseen *Mangahas*.[4] Congress may have the raw power to draw such an implausible and nonsensical distinction, but the government has absolutely no evidence that the 2006 amendment to Article 43 actually did so.

Under *Lopez de Victoria*, the fact that Congress did not even think about applying the 2006 amendment to Article 43 retroactively to those cases in which it was — at that time — only preserving the status quo is enough on its own to conclude that the amendment has only prospective application. But the fact that Congress said nothing about retroactivity even in those cases in which it was intentionally making

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3290, 3316, 3345, 3360, 3411 (codified as amended in scattered sections of 10 and 50 U.S.C.).

4. Ultimately, the government's true objection appears to be not with Appellant's arguments, but with *Mangahas* itself. *See* U.S. Br. 23–24 n.9. Be that as it may, the time within which the government could have sought review of that decision by certiorari has expired.

new law is conclusive — and unanswerable.[5] Thus, although the government may believe that "Congress undeniably intended the 2006 amendment to Article 43 to apply to rape offenses committed before the amendment's enactment," *id.* at 38, insofar as its brief repeatedly insinuates that it will provide evidence to substantiate that belief, "[t]hat promise is not kept." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 234 (1995).

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5. The government also argues that, because the 2006 amendment to Article 43 was meant to preserve the status quo for rape, it had no "retroactive effect" under *Landgraf* as applied to Appellant. *See, e.g.*, U.S. Br. 28–34. But *Mangahas*, which unquestionably applies here, *see infra* at 22 n.8, compels the opposite conclusion. After (and under) *Mangahas*, there is no question that application of the 2006 amendment produces a "retroactive effect" as applied to Appellant; it is the entire difference between whether his prosecution was timely or time-barred. *See, e.g.*, *Abarca* v. *Little*, 54 F. Supp. 3d 1064 (D. Minn. 2014); *see also Weingarten* v. *United States*, 865 F.3d 48, 54–58 (2d Cir. 2017).

The government attempts to distinguish this case from *Lopez de Victoria*, where it claims this Court implicitly found a retroactive effect because the 2003 amendment to Article 43 "indisputably *changed* the statute of limitations for the appellant's offense." U.S. Br. 13. But because this Court "appl[ies] the clear law at the time of the appeal, not the time of trial," *Mullins*, 69 M.J. at 116, the exact same thing is true of the 2006 amendment at issue here. The government cites numerous cases for the proposition that a statute merely continuing a judge-made status quo does not produce a "retroactive effect," *e.g.*, U.S. Br. at 31–33, but none of those cases involved the circumstance at issue here — where the judge-made status quo had subsequently been invalidated.

II. APPELLANT IS ENTITLED TO RELIEF

Despite the clear and obvious *Mangahas* error, the government asserts that Appellant is not entitled a remedy because relief is somehow foreclosed by the Supreme Court's decision in *Musacchio* — or, in the alternative, because the *Mangahas* error in Appellant's case is not "plain." The government's assertions fail to persuade. *Musacchio* is easily distinguishable from this case; there is a compelling argument that Appellant's *Mangahas* claim should be reviewed de novo; and even under plain error review, Appellant can easily carry his burden.

A. *Musacchio* Does Not Apply

In *Musacchio*, the Supreme Court held that a federal criminal defendant's failure to raise at trial a statute-of-limitations defense under 18 U.S.C. § 3282(a) precluded him from successfully pressing such a claim on appeal. 136 S. Ct. at 718. The government reads this holding as reaching far beyond the specific context in which it arose, insisting that "*Musacchio* applies to military courts-martial," U.S. Br. 9, and that "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

trial." *Id.* at 49. The government offers no authority to support either of these claims, which is not surprising given both what *Musacchio* actually held and the far different structure of statute-of-limitations defenses in the military.

As Justice Thomas wrote for the unanimous Court in *Musacchio*, under 18 U.S.C. § 3282(a),

> a statute-of-limitations defense becomes part of a case only if the defendant puts the defense in issue. When a defendant presses a limitations defense, the Government *then* bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period or by establishing an exception to the limitations period. When a defendant fails to press a limitations defense, *the defense does not become part of the case* and the Government does not otherwise have the burden of proving that it filed a timely indictment. When a defendant does not press the defense, then, there is no error for an appellate court to correct — and certainly no plain error.

136 S. Ct. at 718 (citing *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 179 (1872)) (second emphasis added). As the government had explained, this conclusion followed because "no 'legal rule' exists that a trial court has an obligation to raise an affirmative defense that the defendant has not raised. A court thus commits no error by failing to raise such issues

sua sponte." Brief for the United States at 45, *Musacchio*, 136 S. Ct. 709 (No. 14-1095) [hereinafter "U.S. *Musacchio* Br."].

This case differs from *Musacchio* in two material respects: First, unlike in federal civilian criminal prosecutions, there *is* a "legal rule" pursuant to which a military judge has an affirmative obligation to raise a statute-of-limitations defense — R.C.M. 907(b)(2)(B). *See, e.g.*, *United States* v. *Salter*, 20 M.J. 116, 117 (C.M.A. 1985) ("Almost 28 years ago, we held that it was 'well established in military jurisprudence that whenever it appears that the statute of limitations has run against an offense,' that fact will be brought to the attention of the accused by the court." (quoting *United States* v. *Rodgers*, 24 C.M.R. 36, 38 (C.M.A. 1957))). Although that rule lists a statute-of-limitations defense as a "waivable ground" for seeking dismissal of a charge or specification, it also specifies that, "if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge *shall* inform the accused of this right." R.C.M. 907(b)(2)(B) (emphasis added).

Among other things, R.C.M. 907(b)(2)(B) is relevant here because it places part of the burden on the military judge, and not just the

accused, to introduce a statute-of-limitations defense at a court-martial. As the Air Force Court of Criminal Appeals (CCA) recently explained in a case that also presented a *Mangahas* claim,

> R.C.M. 907(b)(2)(B) required the military judge to inform Appellant at trial of Appellant's apparent right to assert the statute of limitations defense to bar the only charge and specification against him. The military judge's failure to do so, like trial defense counsel's failure to assert the defense, was understandable in light of the CAAF's holding in *Willenbring*. Nevertheless, applying the CAAF's clear holding in *Mangahas* that the five-year statute of limitations had long since run, the military judge's failure to comply with R.C.M. 907(b)(2)(B) was an error . . . .

United States v. *Collins*, 78 M.J. 530, 534 (A.F. Ct. Crim. App. 2018) (citing *Salter*, 20 M.J. at 117).[6]

Thus, whereas a statute-of-limitations defense only arises in a federal civilian criminal trial if a defendant introduces it, that is not true for courts-martial. Not only must the military judge raise the defense when it appears to be at issue, but it is reversible error for him to fail to do so — even if the error only arises from intervening changes in the law while the direct appeal is pending. *See, e.g.*, *Rodgers*, 24

6. Even though it apparently disagrees with the Air Force CCA's analysis in *Collins*, *see* U.S. Br. at 46 n.15, the government has not sought further review of that decision before this Court.

C.M.R. at 38; *Collins*, 78 M.J. at 534. In other words, R.C.M. 907(b)(2)(B) provides the precise affirmative obligation that was lacking in *Musacchio*. *See Collins*, 78 M.J. at 536 ("In light of the military judge's affirmative obligation under R.C.M. 907(b)(2)(B) to raise the statute of limitations issue, Appellant's situation is clearly different [from *Musacchio*]."); *see also Thompson*, 59 M.J. at 439 (noting the implications of a military judge's failure to satisfy R.C.M. 907(b)(2)(B)).

The government's response is that, by dint of *Musacchio*, the judicial-advisement obligation created by R.C.M. 907(b)(2)(B) "is essentially hollow." U.S. Br. 46; *see id.* at 48 n.16 ("This Court's prior case law interpreting R.C.M. 907(b)(2)(B) has therefore become obsolete after *Musacchio*."); *see also Collins*, 78 M.J. at 535 ("The Government appears to essentially argue that *Musacchio* created a new standard of review, or rather a standard of non-review, apparently unique to statute of limitations jurisprudence."). This reasoning has things entirely backwards. The fact that R.C.M. 907(b)(2)(B) creates an affirmative

obligation on the military judge is why *Musacchio*'s analysis doesn't apply to courts-martial in the first place.[7]

Second, it is also possible that a statute-of-limitations error can arise on appeal even when the law at the time of the trial was settled to the contrary. As Justice Thomas explained in his opinion for the *Musacchio* Court, central to the conclusion that there could be no plain error in a case like *Musacchio* was the conclusion that there had been no *error* in the first place. *See* 136 S. Ct. at 718 ("When a defendant does not press the defense, then, *there is no error* for an appellate court to correct . . . ." (emphasis added)).

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7. The government asserts (without citing any authority) that "Congress intended Article 43 to follow Chapter 213 of title 18, which includes § 3282(a), [so] there is no reason to believe that the *Musacchio* analysis would not govern Article 43." U.S. Br. 43; *see also id*. ("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.").

This Court has, in fact, repeatedly reached the exact opposite conclusion — and held that Article 43 should *not* be interpreted by reference to Chapter 213. *See, e.g.*, *Lopez de Victoria*, 66 M.J. at 72 (noting that, as part of the 2003 amendment to Article 43, Congress *rejected* a proposal to conform it to the relevant civilian statutes of limitations); *McElhaney*, 54 M.J. at 124–26; *see also United States* v. *Spann*, 51 M.J. 89, 92–93 (C.A.A.F. 1999). Because Article 43 is not *in pari materia* with Chapter 213, the affirmative obligation imposed by R.C.M. 907(b)(2)(B) does not "contradict the UCMJ." U.S. Br. 44.

In contrast, when an intervening change in governing law renders a previously correct trial-court ruling incorrect while the direct appeal is pending, it is black-letter law that the trial court's ruling becomes "erroneous" because of the intervening development. *See generally* *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").[8] The dispute instead turns, as it does here, on whether the error warrants relief. *See, e.g.*, *Johnson*, 520 U.S. at 467. *Musacchio* is therefore also distinguishable because, under *Mangahas*, there *was* "error" at Appellant's trial — to wit, it should have been time-barred.[9]

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8. The government assumes "*arguendo*" that "*Mangahas* applies retroactively to all cases pending on direct review." U.S. Br. 41. But *Griffith* settles beyond any possible doubt that *Mangahas* applies retroactively to pending direct appeals as a matter of law. The government's citation to the contrary, *id.* at 41 n.14 (citing *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970)), involves a pre-*Griffith* civil suit over a tax lien, not, as here, a post-*Griffith* direct appeal of a criminal conviction.

9. In *Musacchio*, the Solicitor General also suggested that litigation of a forfeited statute-of-limitations defense was more appropriately conducted through a petition for post-conviction relief. U.S. *Musacchio* Br., *supra*, at 34. Of course, collateral review of military convictions is

B. Appellant's *Mangahas* Claim Is Subject to De Novo Review

As the Air Force CCA recently suggested, "[i]t might be argued that the plain error standard applicable to forfeited issues is inapposite, and that de novo is the appropriate standard of review" for statute-of-limitations defenses in cases in which the military judge did not comply with R.C.M. 907(b)(2)(B). *Collins*, 78 M.J. at 534 n.8. After all, unlike in *Musacchio*, such a case "involves the military judge's failure to perform an affirmative duty imposed by R.C.M. 907(b)(2)(B), regardless of Appellant's failure to raise the issue." *Id*.

A defendant cannot usually forfeit a defense that the trial judge has an affirmative obligation to raise.[10] The Air Force and Navy-Marine

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far more circumscribed than collateral review of civilian convictions, and would not ordinarily encompass a valid but forfeited statute-of-limitations defense even if there was good cause to excuse the forfeiture. *See, e.g.*, *Thomas* v. *U.S. Disciplinary Barracks*, 625 F.3d 667, 670–71 (10th Cir. 2010).

10. The government claims that this reasoning cannot be squared with *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Davis*, 76 M.J. 224 (C.A.A.F. 2017). On both counts, the government is mistaken. *Vonn* held that, because Rule 11 of the Federal Rules of Criminal Procedure does *not* override ordinary plain-error rules, "a silent defendant has the burden to satisfy the plain-error rule." 535 U.S. at 59. And in *Davis*, this Court applied plain error review because R.C.M. 920(f) *expressly* calls for plain error review when an accused

Corps CCAs have both made this point expressly: Because of R.C.M. 907(b)(2)(B), "[a] statute of limitation must be knowingly waived, not accidentally forfeited." *United States* v. *McElhaney*, 50 M.J. 819, 823 (A.F. Ct. Crim. App. 1999), *rev'd in part on other grounds*, 54 M.J. 120; *see United States* v. *Moore*, 30 M.J. 962, 964 (N.-M. Ct. Crim. App. 1990) ("The accused was not so advised and, consequently, there was no knowing waiver and the issue was preserved on appeal."). And as this Court's predecessor explained as far back as 1957,

> It is well established in military jurisprudence that whenever it appears the statute of limitations has run against an offense, the court "will bring the matter to the attention of the accused and advise him of his right to assert the statute unless it otherwise affirmatively appears that the accused is aware of his rights in the premises." . . . Service boards of review have consistently applied this well-settled doctrine on numerous occasions and have held it to be reversible error for a law officer to fail to advise an apparently uninformed accused of his right to interpose the statute or to fail to determine if there has been a conscious waiver by him of his right to do so.

Rodgers, 24 C.M.R. at 38 (citation omitted).

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fails "to object to an instruction or to omission of an instruction" under R.C.M. 920(e). *See* 76 M.J. at 229–30. In other words, neither Fed. R. Crim. P. 11 in *Vonn* nor R.C.M. 920(f) in *Davis* imposed a comparable affirmative obligation on the trial judge as that imposed by R.C.M. 907(b)(2)(B).

Even though Appellant's opening brief made this argument and cited these authorities, the government's response ignores this case law, asserting only that R.C.M. 907(b)(2)(B) "does not say that an accused cannot *forfeit* the defense." U.S. Br. 44; *see also id*. at 45 ("[I]t 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.").

It's true that the text of R.C.M. 907(b)(2)(B) says nothing about forfeiture, but as the above citations underscore, this Court's (and the CCAs') case law interpreting R.C.M. 907(b)(2)(B) says plenty — including that it is "reversible error for a law officer to fail to advise an apparently uninformed accused of his right to interpose the statute or to fail to determine if there has been a conscious waiver by him of his right to do so." *Rodgers*, 24 C.M.R. at 38; *see also Salter*, 20 M.J. at 117. Those decisions would make no sense if the government were correct that an accused can still forfeit an otherwise meritorious statute-of-limitations defense of which he was not properly advised.[11]

11. The government suggests that it is "contrary to the plain language of R.C.M. 907(b)(2)(B) and to *Musacchio*'s interpretation of how the defense functions" to conclude that an accused cannot forfeit a

And if a legal claim was not waived and cannot be forfeited as a matter of law, then it necessarily follows that it is subject to de novo review on appeal. *United States* v. *Fitzgerald*, 89 F.3d 218, 221 n.1 (5th Cir. 1996) ("Plain error applies only to forfeited errors." (citing *United States* v. *Olano*, 507 U.S. 725 (1993))); *see also Al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring) ("Rules 905 and 907 of the Rules for Military Commissions require de novo judicial review of the question whether a charged offense may be tried by military commission.").[12] Under de novo review, there is no question that Appellant is entitled to relief under *Mangahas*.

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statute-of-limitations defense. U.S. Br. 46 n.15. Again, this reasoning assumes its argument by asserting that *Musacchio* applies — and that, in the process, it *sub silentio* overruled all of this Court's (and the CCAs') cases interpreting R.C.M. 907(b)(2)(B) to preclude forfeiture.

12. De novo review is also appropriate here because of the unique procedural evolution of Appellant's case. In seeking review of his conviction and sentence before the Air Force CCA, Appellant expressly flagged, as a supplemental Assignment of Error, the very statute-of-limitations argument that this Court embraced in *Mangahas*. Although the Air Force CCA noted that Appellant had failed to raise the matter at trial, it rejected the claim *on the merits*, holding that "*Willenbring* and *Stebbins* are binding on this court." *United States* v. *Briggs*, No. ACM 38730, Order at 2 (A.F. Ct. Crim. App. May 20, 2016), J.A. 26. It makes little sense to apply plain error review on appeal to a trial issue that an intermediate appeals court has already reviewed de novo.

C. Even Under Plain Error Review, Appellant Is Entitled to Relief

Even if Appellant must demonstrate plain error with respect to his *Mangahas* claim, he easily carries that burden. In arguing to the contrary, the government's brief rests on the assertion that "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." U.S. Br. 10. This claim takes far too stilted a view of this Court's plain error jurisprudence.

To show that an error is plain, this Court requires that the error be "clear or obvious." *United States* v. *Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (quoting *United States* v. *Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)); *see also Olano*, 507 U.S. at 734. And "plainness" is assessed "at the time of review." *Henderson*, 568 U.S. at 271. Thus, while the plain error standard is exacting, it necessarily encompasses circumstances in which a trial judge can be said to have clearly erred in applying a (future) precedent to new facts. *See Harcrow*, 66 M.J. at 161 (Ryan, J., concurring) (describing "the curious outcome flowing from the confluence of the retroactivity rule and the plain error doctrine").

For instance, in *United States* v. *Sweeney*, this Court found that a trial judge committed plain error under *Crawford* v. *Washington*, 541 U.S. 36 (2004), when he admitted a certification of laboratory results that was not subject to cross-examination even though it "resemble[d]" some of the records that this Court had previously held to be testimonial. 70 M.J. 296, 304 (C.A.A.F. 2011). Although this Court had not specifically ruled on the type of documents at issue in *Sweeney*, the error was still plain because the case-specific facts did not create a material distinction with respect to application of the governing legal principles. *See id.*

To similar effect, this Court in *Harcrow* held that a trial judge committed error that was "plain and obvious" by failing to correctly hold that *Crawford* applied to forensic laboratory reports — even though this Court had only previously addressed the issue in dicta and other lower courts were sharply divided on the matter. 66 M.J. at 159 & n.2 (citing *United States* v. *Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006)); *see also United States* v. *Jones*, 78 M.J. 37, 44–45 (C.A.A.F. 2018) (holding that a military judge's error was "plain and obvious" based upon the application of two Supreme Court decisions to different facts).

This case is far more straightforward than either *Harcrow* or *Sweeney*. Both *Mangahas* and *Lopez de Victoria* are "clear law at the time of the appeal." *Mullins*, 69 M.J. at 116. Under *Mangahas*, the statute of limitations at the time of Appellant's alleged offense was five years. And under *Lopez de Victoria*, the 2006 amendment to Article 43 could only retroactively apply to Appellant's case if there were clear and unambiguous evidence that Congress intended it to do so. As noted above, the 2006 amendment plainly does not satisfy *Lopez de Victoria*.

The government places significant emphasis on then-Judge Stucky's opinion concurring in the result in *Harcrow*,[13] which argued 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 in the result). But the government neglects the rest of then-Judge Stucky's opinion, which emphasized how "the Supreme Court's decision in *Crawford* has thrown [the law] into doubt rather than either

13. The government incorrectly cites and refers to the opinion as a concurrence, rather than an opinion concurring in the result. *See* U.S. Br. 54.

confirming it or clearly changing it." *Id.*; *see also id.* (noting that it was "undeniable" that "the law on the admissibility of laboratory reports was thrown into flux by *Crawford*"). Thus, as the opinion concluded, "[a]s neither the Supreme Court nor this Court (until today) had resolved the admissibility of such criminal laboratory reports under *Crawford*, *and other courts are split on the issue*, there can be no plain error." *Id.* at 163 (emphasis added).

Here, in contrast, there is no split, and there is no flux. This Court's decisions in *Mangahas* and *Lopez de Victoria* articulate clear, easily applicable rules of law that the government has not directly challenged — and that are not part of a broader pattern of inconsistent lower-court decisions attempting to suss out the implications of a major new Supreme Court ruling. *See Henderson*, 568 U.S. at 278 ("Many such new rules, as we have pointed out, concern matters of degree, not kind."). Even if Appellant must demonstrate plain error, then, he has clearly done so under *Mangahas* and *Lopez de Victoria*. In arguing to the contrary, the government's brief has little more to offer than an ultimately unsuccessful attempt to create the specter of uncertainty where none in fact exists.

* * *

As was true in *Collins*,

> R.C.M. 907(b)(2)(B) required the military judge to inform Appellant at trial of Appellant's apparent right to assert the statute of limitations defense to bar the only charge and specification against him. The military judge's failure to do so, like trial defense counsel's failure to assert the defense, was understandable in light of the CAAF's holding in *Willenbring*. Nevertheless, applying the CAAF's clear holding in *Mangahas* that the five-year statute of limitations had long since run, the military judge's failure to comply with R.C.M. 907(b)(2)(B) was an error that was plain and obvious.

78 M.J. at 534 (citing *Salter*, 20 M.J. at 117). And as in *Collins*, "the error was plainly materially prejudicial to Appellant's substantial rights because the statute of limitations was a complete defense to the only charge and specification in the case."[14] Thus, regardless of whether the appropriate standard of review is de novo or plain error, the Appellant is entitled to dismissal of the sole charge and specification in his case.

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14. The government also appears to dispute whether the plain error in Appellant's case materially prejudiced his substantial rights. *See* U.S. Br. 46 n.15, 56 n.18. As in *Collins*, the fact that Appellant's *Mangahas* claim provides a complete defense to his conviction and sentence necessarily forecloses that contention.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 31, 2018, a copy of the foregoing brief in the case of *United States* v. *Briggs*, A.F. Ct. Crim. App. Dkt. No. 38370, USCA Dkt. No. 16-0711/AF, was electronically filed with the Court (efiling@armfor.uscourts.gov) and contemporaneously served on the Government Appellate Division.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,887 words. This brief complies with the typeface and type-style requirements of Rule 37.

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