IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JERARD SIMMONS,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 21-0069/AF

Crim. App. Dkt. No. ACM 39342

BRIEF ON BEHALF OF APPELLANT

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Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter "Air Force Court") reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016).[1] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On July 10-14, 2017, Appellant was tried before a panel of officer members at a general court-martial at Joint Base Langley-Eustis, Virginia. JA at 46-47. Contrary to his pleas, Appellant was found guilty of six offenses. JA at 193, 199-200. The panel found Appellant guilty of three different specifications of sexual assault of a child (A.S.), in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012), one specification of sexual assault of a child (C.L.), also in violation of Article 120b, UCMJ, one charge and one specification of extortion, in violation of Article 127,

[1] The Air Force Court heard oral argument on November 28, 2018.

UCMJ, 10 U.S.C. § 927 (2012), and one charge and one specification of production of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). JA at 42-43. Approximately five hours after announcing findings, the members sentenced Appellant to confinement for 12 years, reduction to E-1, total forfeitures, and a dishonorable discharge. JA at 209. The convening authority approved the sentence on September 22, 2017, and, except for the dishonorable discharge, ordered the sentence executed. JA at 43.

On April 9, 2019, the Air Force Court set aside the action and remanded the case for new post-trial processing because the Staff Judge Advocate's Recommendation (SJAR) provided clearly erroneous clemency advice to the convening authority. JA at 28. The Air Force Court ordered conflict-free defense counsel to represent Appellant and required return of the record of trial to complete appellate review under Article 66, UCMJ, after new post-trial processing. *Id.* On October 2, 2020—a year and a half later—the Air Force Court completed its review, granted Appellant 10 days of sentence relief for unreasonable post-trial delay, re-assessed the term of confinement to 11 years, 11 months, and 20 days, and otherwise affirmed the findings and sentence. JA at 37.

Statement of Facts

Appellant and C.L. first met each other in September 2012 during their high school Spanish class; Appellant was a senior while C.L. was a freshman. JA at 73. Soon thereafter, their relationship evolved into a sexual one. JA at 74, 77. By early 2013, however, Appellant began to date another individual and his sexual relationship with C.L. came to an end. JA at 81.

After graduating from high school, Appellant enlisted in the United States Air Force and entered active duty on August 20, 2013. JA at 68. A little over two months later, on October 27, 2013, Appellant reached out to C.L. via Facebook's messenger application after he received a "friend request" from C.L. on the social media platform. JA at 102, 210. During this exchange of electronic messages, Appellant sent C.L. a message with an apparent reference to oral sex. JA at 212. However, C.L. responded that she was "over" Appellant, and that she did not "really care about what happened anymore." JA at 214.

Later that same day, Appellant suggested that C.L. might perform oral sex on him again by Christmas if she broke up with her boyfriend, accompanied by a smiling and winking emoji. JA at 222-223. C.L. ultimately replied, "its [*sic*] not a good idea for you." JA at 223. Appellant agreed that it was not a good idea, informing C.L. of the prohibition against sodomy in Article 125, UCMJ. JA at 224. He then informed

C.L. that the age of consent under the UCMJ is 16. JA at 227. These were the last messages exchanged between Appellant and C.L. on Facebook Messenger for a period of seven months. JA at 230 (next message on May 26, 2014).

The Originally Charged Offenses Regarding C.L.

Charges were preferred against Appellant on December 6, 2016. JA at 38. Following an Article 32, UCMJ, preliminary hearing that took place on December 13, 2016, the charges were subsequently referred to a general court-martial on January 26, 2017. JA at 39. Appellant was arraigned on the above-described offenses—as originally preferred and referred—and trial on the merits commenced on July 10, 2017.[2] JA at 53-54.

The first offense involving C.L., which alleged a violation of Article 120b, UCMJ, averred:

> In that SENIOR AIRMAN JERARD SIMMONS, 83d Network Operations Squadron, United States Air Force, did, within the Commonwealth of Virginia, between *on or about 20 August 2013 and on*

[2] The CMO states, "Senior Airman Jerard Simmons . . . was arraigned on the following offenses at a court martial-convened by this headquarters. . . .

> Charge II: Article 127. Plea: NG. Finding: G.
> Specification: Did, within the Commonwealth of Virginia, between on or about 27 October 2013 and on or about 31 December 2014 . . . .

JA at 47. This is incorrect. Appellant was never arraigned on an extortion charge covering the dates between 27 October 2013 and 1 August 2014.

> *or about 30 June 2014*, on divers occasions, commit a sexual act upon Miss [C.L.], a child who had not attained the age of 16 years, by causing penetration of her mouth with his penis.[3]

JA at 40 (emphasis added).

At trial, Appellant's counsel defended against this allegation on the grounds that oral sex never occurred during the charged timeframe; they may have talked about it, but it never actually happened. JA at 64. Defense counsel's theory was that all oral sex between C.L. and Appellant occurred before August 20, 2013, the date Appellant entered active duty. JA at 65. At trial, C.L. admitted she did not perform oral sex on Appellant in September, October, November, or December 2013 (save for New Year's Eve), nor was there sexual contact after the New Year's 2014 holiday. JA at 126. The members ultimately found Appellant guilty of this offense, but on only one occasion: on or about December 31, 2013. JA at 193, 199-200.

The second offense involving C.L.—the subject of the instant appeal—alleging a violation of Article 127, UCMJ, averred:

> In that SENIOR AIRMAN JERARD SIMMONS, 83d Network Operations Squadron, United States Air Force, did, within the Commonwealth of Virginia, *between on or about 2 August 2014 and on or about 31 December 2014*, on divers occasions, with intent unlawfully to obtain an advantage, to wit, the performance of oral sex upon the said SENIOR AIRMAN JERARD SIMMONS, communicate to the said Miss

[3] Charge I, Specification 4.

> [C.L.] a threat to publicize an image of Miss [C.L.] performing oral sex on him.[4]

JA at 40 (emphasis added).

The Government's charging window for the extortion offense began on or about August 2, 2014, 33 days after the sexual assault offense alleged in Specification 4 of Charge I ended on or about June 30, 2014. The weekend before trial, C.L. was able to access 252 pages of Facebook messages between Appellant and herself. JA at 146. The Government then provided those messages to the Defense in discovery the Sunday evening before trial. JA at 65, 114. Trial counsel offered these messages into evidence through C.L.'s direct testimony as Prosecution Exhibit (Pros. Ex.) 3.[5] JA 93-94. The Government contended that these messages served as evidence of extortion occurring on October 27, 2013 and June 14, 2014. JA at 162, 222, 261.

Despite both of these dates occurring well before the Specification of Charge II began (on or about August 2, 2014), the Government did not move to amend the charge sheet before the trial on the merits commenced Monday morning. Instead, trial counsel raised an oral motion days later on Thursday morning, after Pros. Ex. 3 was admitted into evidence, after C.L. testified, and after the Government had rested its case. JA at 146.

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[4] Specification of Charge II.

C.L.'s Age in Relation to the Charged Offenses

C.L. turned 16 on August 2, 2014. *See* JA at 69, 146. The Government would later explain during trial, this was the basis for alleging "2 August 2014" as the start date for Charge II's extortion specification. JA at 146. As originally pled, Charge II and its Specification alleged that Appellant extorted C.L. "on or about" a 151-day span of time. And, unlike Specification 4 of Charge I, where C.L. was a minor during the entire charged timeframe, she was 16 years-old during the designated 151-day range contained within the extortion specification, an age where she could legally consent to sexual activity under the UCMJ.

The "Critical" Nature of Dates During Trial

From the first time they were brought into the panel box, the members were asked questions by both the trial counsel and defense counsel about teenagers' exploration into sexual activity, age, consent, development, and maturity. JA at 56-59. Later, within the first moments of his opening statement, trial counsel stated: "So I want to talk to you about the charges here today and about the victims, but I want to start out and give you a couple of dates, and these dates are very important, I would recommend that you write these down because *this is critical to the case*." JA at 60. (emphasis added). Trial counsel then provided the birthdays of both alleged victims.

Id. Trial counsel also introduced another defining wedge into the calendar—jurisdiction:

> So we're going to be talking about two different periods of Senior Airman Simmons's life. The first period is before he joined the Air Force. Now, the Air Force can't do anything to him for anything that he may have done at that time, the Air Force can't try him in court, they can't punish him for any of that, but he joined the Air Force on August 20, 2013. Now you have the flyer before you, and you're going to see that date in the charges several times, that is when jurisdiction for the Air Force starts, that's when the Air Force can punish him for any wrongdoing.

JA at 60-61. C.L.'s age was then mentioned five more times; Appellant's age was mentioned once; and trial counsel cited August 20, 2013, October of 2013, and the "early part of 2014." JA at 60-62.

Like the Government, the Defense also expressed the importance of dates from the very onset of its opening statement. JA at 63. Providing the members with a glimpse into the Defense's theory of the case, defense counsel stated: "Now, this is a poorly investigated case, and it's even a poorly drafted charge sheet. *You know that just from looking at the dates*, and we'll come back to that." *Id*. (emphasis added). Throughout the course of his opening statement, defense counsel referenced the year 2012 three times, the year 2013 five times, and the year 2014 four times. JA at 63-65. He also referenced specific dates on the calendar—such as August 20, 2013 and March 25, 2014—a total of eight times, and referenced various seasons of the year four different times in his opening statement. *Id*.

Trial counsel began his direct examination of C.L. by saying, "I want to go ahead and pull this up real quick. [The trial counsel displayed Appellate Exhibit XXVII on the monitor.] I want to use this just to talk through some dates here, okay?" JA at 69. He then ascertained how old C.L. was each year from 2017 back until 2012, one year at a time. JA at 69-72. Trial counsel spent the entire direct examination delineating the years, specific dates on the calendar, and various seasons. JA at 72-113. Defense counsel, likewise, spent the bulk of his cross-examination focusing, again, on the years, specific dates on the calendar, and various seasons. *See generally*, JA at 114-132*; see e.g.,* JA at 126 (cross-examining C.L. on the lack of oral sex by going through the calendar month-by-month). Trial counsel then attempted to rebut defense counsel's cross-examination after it became evident oral sex did not occur on multiple occasions over a five-month span from 2013-2014. JA at 138-29.

The Government Motion to Change the Charge Sheet after Resting

Following the conclusion of the Government's case, and after being advised by the Defense that it did not intend to put on a case of its own, the Government moved to amend Charge II and its specification by backdating the charged timeframe to include an *additional* 279 days. JA at 145, 150. Whereas the left bookend of the extortion specification had originally been "on or about 2 August 2014," the Government sought to change it to read: "on or about 27 October 2013." *Id*. As such,

the charging window would change from on or about 151 days to on or about 430 days. Notably, these 279 additional days captured dates when C.L. was 15 years-old and incapable of consenting to sexual relations as a matter of law. *See id*.; *see also* JA at 69.

As justification for making this late change, assistant trial counsel stated, "evidence at trial has reflected that the start date of the timeframe of this offense should date back to 27 October 2013 to encompass the divers language as charged." JA at 146. The Government specifically sought to make this supposedly "minor" change pursuant to Rule for Courts-Martial (R.C.M.) 603(c),[6] but alternatively sought an instruction as to findings by exceptions and substitutions. *Id*.

When the military judge asked the government to explain its charging decision, assistant trial counsel responded: "Ma'am, that was because that was [C.L.'s] birthday, and at the time of charging we did not have the full picture that we do now, as far as the exact dates of the extortion. *In light of the evidence that we've received this past Sunday*, being that these dates actually date back to 27 October 2013." *Id*. (emphasis added). Despite having knowledge of this new evidence prior to trial, assistant trial counsel did not offer an explanation as to why the Government did not

[6] All references to the Rules for Court-Martial are to the *Manual for Court-Martial, United States*, 2016 ed. (*2016 MCM*).

seek to make the change prior to arraignment, voir dire, opening statements, or the completed presentation of its case and instead waited to do so until after the Government rested five days after receiving the evidence which served as the basis for altering the charge sheet. JA at 145.

The Defense objected to the change, and contended that it was major. JA at 148-151. Defense counsel argued that the original charging decision was based on C.L.'s pretrial interview with OSI and was chosen intentionally to conform to that interview. JA at 148. He noted that "during the government's case-in-chief they failed to elicit any testimony that the extortion occurred during that time period" and that the purpose of amending the charge sheet at this stage was "to cure a defect in their presentation of evidence." *Id*. Defense counsel was also concerned with notice and timing. *Id*. ("Dumping 250 pages of [Facebook] messages on me the night before trial, I think hardly constitutes notice."); JA at 150 ("[T]he government is moving to amend the charge sheet, basically the defense has communicated our intent is to rest, and so basically before instructions.")

And while defense counsel recognized that C.L.'s status as a 15 year-old minor was not an element of extortion, he nevertheless insisted that "it makes [the extortion charge] absolutely more serious." JA at 150. Not only that, but defense counsel also argued that the change would necessarily implicate the Article 120b, UCMJ, offense

involving C.L. as well because—whereas before the statutory age limit was the sole basis for making the offense wrongful—now, Appellant was alleged to have extorted her as well for the purposes of obtaining oral sex. JA 150-151. Defense counsel also pointed out that the Government's voir dire honed in "on the members' ability to distinguish between legal and physiological abilities to consent" and that it "even exercised [its] peremptory challenge . . . on the basis of [a member's] response to that question." JA at 151. He argued, "[N]ow they're attempting to amend [the extortion specification] in a manner that makes [the extortion specification] more aggravating, but it also implies that the underlying misconduct in the [Article 120b, UCMJ, specification] is nonconsensual and under the threat." *Id*. He elaborated upon this point by noting, "it's not just otherwise consensual conduct with a minor, but nonconsensual conduct under the threat or fear with a minor, and that is absolutely more serious." *Id*.

The military judge appeared to recognize this potential danger as well, and directed the following commentary to assistant trial counsel:

> No, but it could potentially affect, in the minds of the members, and I'm just spit balling here, I'm saying this is how I'm thinking, but do you think that there's any potential that if you start arguing that this extortion began in October of 2013 when she's much younger than the charged timeframe, that that might change the perspective of the members with respect to how much punishment they want to give him?

JA at 154.

Defense counsel argued the amendment was "highly prejudicial" and should not be allowed. JA at 151. The military judge then focused on prejudice, asking defense counsel to detail for her the substantial rights at issue. JA at 152. She opined that "I think the case law's pretty clear that you can expand these timeframes and really not change the nature of the notice." JA at 152. Defense counsel argued the change could lead to enhanced sentencing, in that it "changes the nature and identity" of the sexual acts under Article 120b. JA at 153. He posited that he would have cross-examined C.L. on the topic of her fear, or lack thereof, had the nature of the Article 120b allegations been originally connected to the Article 127 allegations. *Id*. Defense counsel also said they may have exercised member challenges differently. *Id*.

The Military Judge's Ruling

The military judge did not take a recess to consider the positions and arguments of counsel. JA at 155. But immediately prior to ruling, she noted that during their "RCM 802 one of the first concerns of Defense Counsel was with respect to the time that this is being brought, which is basically at the close of the government's case-in-chief, before the defense goes into their case in chief." *Id*. While she did not "like the timing" the military judge said, "it seems clear that the case law allows for changes to the charge sheet, even up through findings being announced. So even during deliberations there's case law which says that that is an appropriate course of conduct

for the prosecution." *Id*. In reaching this conclusion, the military judge noted that she believed the appropriate legal "test" was:

> Additionally, if we look at the test, which is, does the [change result in] an *additional or different offense*; it doesn't, it doesn't result in an additional or different offense. And *does the change prejudice the substantial rights of the accused* . . .

JA at 155 (emphasis added). She continued:

> . . . while having the Specification 4 of Charge I, and then the Specification of Charge II *intricately linked* makes this a little bit messier, and *I do believe that the government really did have this information in their possession, and this is a poorly charged case, given that we're here where we are now*. I just don't see anything in the case law that would preclude them from actually making this change.

Id. (emphasis added). The military judge also acknowledged that "while backing the date up to October does make her a lot younger with respect to when the extortion occurred, those are facts in evidence that the panel members can consider anyway." JA at 156. Finally, she reasoned, "we've got *Witt* [*sic*],[7] which says that this length of time, which is just under a year that the trial counsel wants to back up this charged timeframe, that's perfectly acceptable under the case law." *Id*. On this basis, the military judged ruled that "this is a minor change and [I] will allow those changes to

[7] The military judge was referring to the Army Court of Military Review's decision in *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985).

the charge sheet . . . ." *Id*. The Defense rested once the members returned to the court-room, without affirmatively presenting a case. JA at 159.

Closing Argument, Member's Question during Deliberations, and Sentencing Argument

As in opening statement, trial counsel began closing argument with a reference to age, "Do you think it's weird that I'm 14? No, the youngest person I would have sex with is 12. That's the accused in this case and the victim tell her--telling him her age was 14." JA at 160. He then went "step by step through the timeline." *Id*. Trial counsel argued Appellant conducted "an incredible emotional manipulation of a 15-year old." JA at 161.

Trial counsel argued the two instances of extortion were October 27, 2013, and June 14, 2014, neither of which were in the originally charged time frame that started on or about August 2, 2014. JA at 162, 222, 261. Trial counsel connected the October 27, 2013, allegation of extortion to the alleged Article 120b oral sex that he argued occurred over Christmas break in 2013, insinuating the oral sex occurred as a result of threat. JA at 162.

Every single transcribed page of trial counsel's closing argument references C.L's age, seasons of the years as reference points (e.g. spring 2014), or specific dates on the calendar. JA at 160-164. The specific dates include, *inter alia*, August 20, 2013 (date of entrance onto active duty); October 27, 2013 (date of first alleged

extortion); December 21, 2013 until January 2, 2014 (leave over holiday break); April 5, 2014 (arrival at Langley Air Force Base); June 14, 2014 (date of second alleged extortion); August 2, 2014 (C.L.'s birthday turning 16 years old); September 18, 2014 (messages end). *Id*.

Defense counsel also began closing argument in the same way he began opening statement, commenting on the sloppily charged case and dates. JA at 166. He argued:

> Okay, Members, I'm tired, I'm mentally exhausted, because the government keeps making mistake, after mistake. It's a sloppily charged charge sheet. And you can look no further than the extortion charge, which they just completely changed the dates on. And why did they charge it as those dates? Because that's what [C.L.] said when she said it happened. And then she came into court and she said something completely different. Not just completely different, but off by an entire year. And she surprised them so much, that they had to go get his leave records mid trial to put those in.

Id. Defense counsel, likewise, spent his entire closing argument arguing about dates and timelines. *See generally* JA at 166-177. As to the extortion, defense counsel was left to argue, "And you know she's an unreliable witness because the government had to come in here and change the charge sheet on Charge II, the extortion charge, by a full year almost. She's literally off by that long. It doesn't happen." JA at 170.

During deliberations, the members proposed questions to the court about dates. JA at 181. Specifically, a member asked, "did Senior Airman Simmons do recruiting duty in the Hampton area between 20 August 2013 and on or about 31 August 2014[?]

Two, if yes, what dates were they[?]" *Id*. The members found Appellant guilty of the extortion specification as modified midtrial. JA at 193, 199-200.

During trial counsel's sentencing argument he stated this case concerned: "A *15 year-old girl* begging an Airman not to post sexual pictures of her on the internet." JA at 202. (emphasis added). He then argued:

> Members, why are we here? These are human beings that have value, and worth and dignity, and they deserve so much better than this. Protect society. Protect society from someone who preys on vulnerable young girls, someone who knows how they tick and will do whatever it takes to gain sexual satisfaction from them. You have the opportunity here today to protect society from someone who does that. And bear in mind, when you're considering protection of society that the accused said, the youngest girl that he would have sex with is 12 years old. Twelve years old. Protect society. Protect society. Confine him for at least 12 years.

JA at 203. Soon afterward, the members adjudged that exact punishment. JA at 209.

The Air Force Court's Opinion

When the Air Force Court considered the granted issue, it "echo[ed] the military judge's opinion that the case was 'poorly charged' . . . and . . . the events at trial betray the Prosecution's lack of familiarity with its case." JA at 19. It likewise "agree[d] the Prosecution could and should have requested the change sooner . . . ." JA at 20. However, because it did not see how "the Defense had been *prejudiced* with regard to the presentation of evidence" or "what the Defense did or failed to do at trial as a result

of being misled by the change" it declined to find a major change had occurred and likewise declined to grant relief as a minor change. JA at 20-21 (emphasis added).

Summary of Argument

The finding of guilt for the Specification of Charge II, and the sentence, should be set aside because this was a major change, over defense objection, and not preferred anew. R.C.M. 603(d). As trial counsel acknowledged during his own opening statement, dates were "critical to this case." JA at 60. Yet, the Government waited until after it had rested to request an additional 279 critical dates be added to the charge sheet. The military judge misread the case law by erroneously requiring the Defense to make a showing of prejudice, in clear contravention of this Court's prior decision in *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017), and erred in concluding this was not a major change.

Instead, the military judge erroneously utilized the test from *United States v. Sullivan*—a case explicitly overruled before Appellant's court-martial in *Reese*—which required a showing of prejudice. *Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995); *Reese*, 76 M.J. at 302. R.C.M. 603(d) and *Reese* demonstrate that prejudice is not required, yet Appellant was held to an elevated standard requiring a showing of prejudice.

Moreover, the change in this case was major. It was not made to "correct

inartfully drafted or redundant specifications[,]" nor was it made "to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors." R.C.M. 603(a), Discussion. On the contrary, the change backdated the charged timeframe by an additional 279 days—almost tripling the charged timeframe—to conform the charge to the evidence adduced at trial *after* the Government had already completed its case. The Government did this despite learning *before trial* that C.L.'s testimony and a 252-page exhibit that would later become Pros. Ex. 3 established two dates of alleged extortion wholly outside of the originally charged 151-day charging window.

While not every change to a charged timeframe will necessarily rise to the level of a major change, the change that occurred in this case was, indeed, major for at least two primary reasons. First, as this Court has made clear, the Defense is "entitled to rely on the charge sheet and the government's decision not to amend the charge sheet *prior to trial*." *Reese*, 76 M.J. at 301 (emphasis added). Yet, despite having evidence in its possession prior to trial which suggested that the charged timeframe was incorrect, the Government made the conscious decision not to seek to amend the charge sheet until after it had rested its case and had been told that the Defense did not intend to put on a case of its own. In so doing, Appellant was deprived of notice as to what he would ultimately be defending against at trial and was misled when the

Government provided him this evidence prior to trial but did not seek to amend the charge sheet until after the Defense had already shown its hand. This, in turn, deprived Appellant of the defense that the evidence simply did not comport with the allegations—a defense which his counsel alluded to in opening statements.

Second, tacking on an additional 279 days to the charged timeframe also included substantial matters not fairly included in those previously preferred. Apart from adding an additional 279 critical dates that Appellant would need to defend against, the charged timeframe now alleged that Appellant extorted a 15 year-old child for oral sex, not a 16 year-old. Given that this change to the specification—in the military judge's words—"intricately linked" it with the Article 120b, UCMJ, specification involving the same named victim, Appellant found himself defending against an implicit allegation that he had not merely engaged in a sexual act with a girl who lacked the legal capacity to consent due to her age, but he had—in fact—overcome her free will as a matter of fact through blackmail. JA at 155. This necessarily increased the egregiousness of the charges as a whole and provided an inherent sentencing aggravator, as trial counsel later argued an October 27, 2013, extortion produced the oral sex with a minor on or about December 31, 2013. JA at 162. The findings reflect the members' concurrence with this argument. JA at 193, 199-200.

Finally, in the alternative, if this Court were to find that the change in this case was only minor, Appellant nevertheless still prevails because—on the facts of this case where dates were of central importance—he was still prejudiced. For the foregoing reasons, and those explored in further detail below, Appellant respectfully asks that this Honorable Court set aside Appellant's conviction as to Charge II and its Specification, as well as the sentence, and order a rehearing on the sentence.

Argument

THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO MAKE A MAJOR CHANGE TO A SPECIFICATION, OVER DEFENSE OBJECTION—ALMOST TRIPLING THE CHARGED TIME FRAME—AFTER THE COMPLAINING WITNESS'S TESTIMONY DID NOT SUPPORT THE OFFENSE AS ORIGINALLY CHARGED AND THE PROSECUTION HAD RESTED ITS CASE.

Standard of Review

"Whether a change made to a specification is minor is a matter of statutory interpretation and is reviewed *de novo*." *Reese*, 76 M.J. at 300 (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

Law

The Charge Sheet and Due Process

"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United*

States, 422 U.S. 100, 106 (1979). Indeed, "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id*. at 107 (*quoting Cole v. Arkansas*, 333 U.S. 196, 201 (1948)). "[T]he Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." *United States v. Girouard*, 60 M.J. 5, 10 (C.A.A.F. 2011). "To prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he *charge sheet* provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (emphasis added) (internal citations omitted).

The Defense is not only entitled to notice by virtue of what is contained on the charge sheet, but is "entitled to rely on . . . the government's decision not to amend the charge sheet *prior to trial*." *Reese*, 76 M.J. at 301 (emphasis added). "There is no dispute that the government controls the charge sheet . . . ." *Id*. In fact, as this Court recently and unanimously observed, the government has "complete discretion" over how to charge an accused and the Government "accept[s] the risk" that an appellant may not be criminally liable based upon how the charging scheme connects with the evidence. *United States v. Mader*, ___ M.J. ___, No. 20-0221, 2021 CAAF LEXIS 353, at *7-8 (C.A.A.F. Apr. 20, 2021); *see also United States v. Turner*, 79 M.J. 401,

410 (C.A.A.F. 2020) (Maggs, J., dissenting) (insisting upon the importance of "those with responsibility for drafting the charge and specification to take the care necessary to avoid errors.").

Major and Minor Changes under R.C.M. 603

"Minor changes in charges and specifications are any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." R.C.M. 603(a). "Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors." R.C.M. 603(a), Discussion.

"After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced." R.C.M. 603(c). "Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew." R.C.M. 603(d).

Four years ago, in *Reese*, this Court evaluated the then-prevailing standard for making a change to a charge sheet, which required a showing of prejudice to be considered "major." *See* 76 M.J. at 301. Applying the ordinary rules of statutory

construction, this Court saw fit to expressly abandon and overrule its prior precedent:

> The plain language of R.C.M. 603(d) does not discuss prejudice. Rather, if a change is "major," it provides that such change cannot be made over defense objection unless the charge is "preferred anew." The practical effect is that if a change is major and the defense objects, the charge has no legal basis and the court-martial may not consider it unless and until it is "preferred anew," and subsequently referred. *See* R.C.M. 201(b)(3). To the extent our precedent has required a separate showing of prejudice under these circumstances, it is overruled: absent "preferr[al] anew" and a second referral there is no charge to which jurisdiction can attach, and Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012), is not, in fact, implicated.

Id. at 301-02.

In that case, the change at issue involved amending a specification of sexual abuse of a child under Article 120b, UCMJ, from one alleging the prohibited act of licking a child to touching that child with a hand. *Id*. at 299. The Government deposed E.V., the child, two days before trial. *Id*. During the deposition, E.V. testified that the accused had not touched his penis with his mouth, but rather, with his hand. *Id*. E.V. testified consistently at trial as he did at the deposition. *Id*. After a weekend recess, the trial counsel moved the court to amend "licking the penis with [Reese's] tongue" to "touching the penis of [E.V.] with [Reese's] hand." *Id*. The military judge permitted the change as minor. *Id*.

This Court rejected the Government's argument on appeal that the accused was on notice of the change because of the deposition. *Id*. at 301. "Despite learning that

its evidence on this change was not legally sufficient two days before trial, for some reason the government chose not to amend the charge." *Id*. As such, the appellant was entitled to rely on that decision. *Id*. This Court further concluded that the change was major as it altered the means of committing the crime and it was not, as the R.C.M. 603(a) Discussion notes, merely a change to "correct small errors such as 'inartfully drafted or redundant specifications . . . misnaming of the accused . . . or to correct other *slight errors*.'" *Id*. at 300-01 (emphasis in original).

Even prior to *Reese*, this Court recognized that "[c]hanging the date or place of the offense may, but does not necessarily, change the nature or identity of the charged offense." *United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003) (internal citations and quotation marks omitted). In *Parker*, the prosecution moved to change the charge sheet to correct an "incorrect date" from "February 1995 to March 1995" to "February 1993 to March 1993." *Id*. at 198. Defense counsel argued this was a major change because "in the context of a relationship involving consensual sexual activity, establishing the date of any alleged non-consensual incident was critical to proper trial preparation by the defense." *Id*. The military judge sustained the objection, saying the "Government . . . can't change the date;" the defense was prepared to defend against a 1995 charge and did not have adequate notice it would be required to defend against a charge of misconduct in 1993. *Id*. The military judge did, however, permit

the testimony about the 1993 sexual activity under Mil. R. Evid. 413 in this pre-*United States v. Hills,* 75 M.J. 350 (C.A.A.F. 2016), case. *Id.*

Defense counsel subsequently moved for a finding of not guilty on the 1995 rape specification under R.C.M. 917 because the Mil. R. Evid. 413 testimony about 1993 presented no evidence reasonably near the charged time window in 1995. *Parker*, 59 M.J. at 200. The military judge denied the motion. *Id*. On review, this Court noted:

> The present appeal involves a closely contested trial, in which the members were required to make careful judgments about whether Appellant crossed the line between permissible and impermissible social and professional interactions in a variety of different circumstances. In the context of this case, evidence concerning the time, place, and nature of the interactions between Appellant and others was a major focus of the litigation. The importance of these factors is reflected in the findings at both the trial and appellate levels.
>
> [T]he military judge rejected the prosecution's motion to modify the charged dates from 1995 to 1993. That decision, based upon the prohibition against major changes in R.C.M. 603, made it clear that the Government was obligated to prove that the offenses took place in 1995, the charged timeframe [. . . .]
>
> Following the military judge's rejection of the motion to change the charged dates, the Government could have addressed the disconnect between pleading and proof through withdrawal of these charges and preferral of new charges for consideration in the present trial or in a separate trial. *See* R.C.M. 603(d). Having chosen not to do so, the Government was required to prove in its case-in-chief that there was improper sexual activity between Appellant and Ms. AL during the charged period in 1995. The Government introduced no evidence of sexual interaction between Appellant and Ms. AL during the charged

time period.

Id. at 200-01.

Exceptions, Substitutions, and "On or About" Language

"[E]xceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it." R.C.M. 918(a). "One or more words or figures may be excepted from a specification and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by the court-martial. Changing the date or place of the offense may, but does not necessarily, change the nature or identity of an offense." R.C.M. 918(a)(1), Discussion. For example, under the particular facts of one case, this Court's predecessor concluded the less than three-week change of date from August 6 to August 25 created a material and fatal variance. *United States v. Wray*, 17 M.J. 375 (C.M.A. 1974).

"On or about" language in a specification can, sometimes, permit a non-fatal variance with respect to the date of the offense charged. "The use of on or about in a military judge's instructions generally connotes any time within a few weeks of the on or about date." *United States v. Hale*, 78 M.J. 268, 277 (C.A.A.F. 2019) (Ohlson, J., dissenting) (internal quotation marks omitted) (quoting *United States v. Brown*, 34

M.J. 105, 110 (C.M.A. 1992)), *overruled on other grounds by Reese*, 76 M.J. at 301-302. "The words 'on or about' in pleadings mean that 'the government is not required to prove the exact date, if a date reasonably near is established.'" *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993) (citing *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987)). This Court's predecessor concluded seven days was reasonably near the charged time frame. *Brown*, 34 M.J. at 110. The next year, in *Hunt*, the Court determined three weeks was not a fatal variance. 37 M.J. at 347.

Analysis

1. ***Appellant is entitled to relief because this was a major change, over defense objection, and not preferred anew. R.C.M. 603(d) and this Court's decision in United States v. Reese clearly demonstrate that prejudice is not required.***

It is uncontested that defense counsel objected to the proposed change and the charge and specification were not preferred anew. Adding an extra 279 days to a 151-day charging window to conform the specification to C.L.'s testimony and Pros. Ex. 3, after the Government had rested and the Defense communicated its intent to not put on a case, was a major change. Because the change was major, no prejudice is required. *Reese*, 76 M.J. at 301-302; R.C.M. 603(d).

a. ***The military judge erred when she utilized the wrong test for a major change.***

The military judge erred when she said the case law did not preclude the Government from making the change. JA at 405 (". . . this is a poorly charged case,

given that we're here where we are now. I just don't see anything in the case law that would preclude them from actually making this change."). The case law clearly precluded the change.

She likewise erred when she analyzed the change under the pre-*Reese* standard.[8] The military judge erroneously stated on the record that the test requires prejudice. JA at 155*; see Reese*, 76 M.J. at 302 ("To the extent our precedent has required a separate showing of prejudice under these circumstances, it is overruled."). In her misplaced reliance on *Sullivan*, the military judge also only recognized the possibility of amending the charge sheet if the change created an "additional or different offense," ignoring the rest of R.C.M. 603, which states minor changes are those except which "add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." R.C.M. 603(a).

At the time of the ruling, this Court had already decided *Reese*. In fact, *Reese* was specifically brought to the court's attention by the prosecution in support of its

[8] It is clear the military judge utilized the test from *Sullivan*, 42 M.J. at 365 ("if no additional or different offense is charged [first prong] and if substantial rights of the defendant are not prejudiced [second prong]") (internal quotation marks and citations omitted). She stated the following, "Additionally, if we look at the test, which is, does the [change result in] an additional or different offense; it doesn't, it doesn't result in an additional or different offense. And does the change prejudice the substantial rights of the accused . . . ?" JA at 155.

argument to amend the charge sheet—but it erroneously interpreted *Reese*. JA at 148. ("And I'd like to specifically contrast that with a case where CAAF just recently decided that this does prejudice the defendant, thus being a major change, that's *U.S. v. Reese*, 2017 CAAF Lexus [sic] 621"). Despite the fact that *Reese* was cited on the record (albeit, incorrectly), there is no indication in the record that the military judge reviewed the case before allowing the Government to make the change.[9] Instead, she relied upon the Army Court of Military Review's non-binding decision in *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985)—a case which applied an outdated legal test under a factually distinguishable set of circumstances where the charge was not "intricately linked" with a statutory rape specification, a crime where dates are essential. Had the military judge relied on the appropriate test set forth in *Reese*, she would have realized no prejudice was required and *Reese* demanded a contrary conclusion.

Reese is abundantly clear what matters is whether the change is more substantial than one offered to "correct small errors such as 'inartfully drafted or redundant

[9] Appellant notes that when he sought review of his case, he asked this Court to grant review to determine whether defense counsel were ineffective when they failed to argue the correct legal standard for a major change under R.C.M. 603. *See* Supplement to the Petition for Grant of Review, dated December 14, 2020, at 36 ("Defense counsel permitted the military judge to apply the wrong test, one that required prejudice for the change to be considered major.").

specifications . . . misnaming of the accused . . . or to correct other *slight errors*.'" 76 M.J. at 300-301 (emphasis in original) (*quoting* R.C.M. 603(a), Discussion).

"The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012). Pursuant to this canon, the meaning of a "catchall phrase" is determined on the basis of the character or nature of the explicitly delineated "specifics." *Id*. Thus, the *ejusdem generis* canon demands the catchall phrase "other slight errors" should be narrowly construed to mean typographical errors on par with "inartful" language, misspellings, or scrivener's errors—not the addition of 279 days based upon how the evidence happened to come out at trial. Under the *ejusdem generis* doctrine, a 279-day addition that "intricately" linked specifications across two charges and now implicitly alleged that oral sex was procured by threat—when that was not what was originally charged—is hardly a minor change fitting within the "other slight errors" catch-all provision of the R.C.M. 603(a) Discussion.

In reality, the Government's allegation about when the extortion occurred was simply wrong. The military judge understood "backing the date up to October does make her a lot younger with respect to when the extortion occurred." JA at 156. The conversation about how the change made C.L. a lot younger when the extortion

allegedly occurred underscores how it is different in kind and scope to, for example, correcting a misnaming of the accused.

b. ***The change was major.***

The amended Specification of Charge II was a major change because: (1) the Defense was not on proper notice of the change; (2) the change surprised and misled the Defense and included substantial matters not necessarily included in the previous preferral in this case where dates were critical; and, (3) the change created criminal liability for a charge after the presentation of the case when the evidence actually presented was fatally deficient and the Government knew it.

i. ***The Defense was not on proper notice of the change and was entitled to rely on the charge sheet upon which Appellant was arraigned.***

The Government obtained the Facebook messages that would later become Pros. Ex. 3 the weekend before trial on the merits commenced. This evidence alerted prosecutors to two instances of extortion that allegedly occurred on October 27, 2013, and June 14, 2014. JA at 222, 261. Neither of these dates are within, or reasonably near, the original charged time frame in the Specification of Charge II. *See Brown*, 34 M.J. at 110; *Hunt*, 37 M.J. at 347; *see also* Section 1(b)(iii), *infra*.

Instead of asking the military judge to amend the charge sheet at the beginning of trial, the trial counsel waited until after voir dire, after exercise of challenges, after opening statements, after examinations of all Government witnesses (including C.L.),

after admission of all Prosecution exhibits (including Pros. Ex. 3), after the Government rested, and after the Defense indicated its intent to not put on a case. JA at 150. There was nothing stopping the Government from seeking to make this change earlier. The military judge said, "I do believe that the government really did have this information in their possession, and this is a poorly charged case . . . ." JA at 155. The Air Force Court likewise recognized "the Prosecution could and should have requested the change sooner . . . ." JA at 20. But, in any event, there is no dispute that when the Government finally did seek to make the change, the Defense lodged a timely objection. JA at 18, 151.

Similar to *Reese*, where the trial counsel learned of the change in E.V.'s allegation in a deposition two days before trial but failed to move to amend the charge sheet until after E.V.'s testimony, here, the Government learned of the Facebook messages the weekend before trial but did not move to amend the charge sheet until after the close of its case. *Reese*, 76 M.J. at 299. As this Court stated in *Reese*, "There is no dispute that the government controls the charge sheet. . . . The defense was entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *Id*. at 301.

In this sense, the case is both analogous to—but more egregious than—*Reese*. There, trial counsel learned of the change in E.V.'s allegation two days prior to trial

and moved to amend the charge sheet after the named victim's testimony. *Id*. at 299. Here, the Government learned of the Facebook messages the weekend before trial but did not move to amend the charge sheet until after the close of its *entire* case. As in *Reese*, after having been provided with the Facebook messages the eve before trial, the Defense realized that the Government was pushing forward with the charges as previously referred and was "entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *Id*. at 301.

Upon such reliance, it is reasonable to assume defense counsel would have argued in closing that the Government failed to prove extortion occurred between on or about August 2, 2014 and on or about December 31, 2014. In fact, he even signaled his intent to do just that with the first words in his opening statement. JA at 63 ("Now this is a poorly investigated case, and it's even a poorly drafted charge sheet. You know that just from looking at the dates, and we'll come back to that."). Defense counsel relied on the poorly drafted charge sheet as part of the defense strategy and was deprived of the ability to later argue to the members that the Government failed to prove the crime within the prescribed timeframe.

"To prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he charge sheet provides the accused" such notice. *Armstrong*, 77 M.J. at 469. The notice on the charge sheet was

that the extortion timing window started on or about August 2, 2014. It offends due process to send Appellant to jail for 12 years, in part, because the Government conformed the charge sheet to the evidence after evidence presentation concluded. *See Dunn*, 442 U.S. at 107. This is especially egregious when the Government knew what the evidence would show as early as the weekend before trial, yet inexplicably waited until the end of its case to ask the military judge to amend the charge sheet.

Similarly, this Court recently recognized in *Mader* that the Government must live with the natural legal consequences of its own charging decisions. In that case, the appellant could have been charged under Article 92, UCMJ, for violation of a hazing regulation, or under Article 128, UCMJ, for assault consummated by a battery. Under the former, consent is not a defense; under the latter, it is. But because the Government charged assault consummated by a battery, it "accepted the risk that Appellant could not be found criminally liable if he reasonably believed—even if that belief was mistaken— that the junior Marines consented." *Mader*, 2021 CAAF LEXIS 353, at *7. Here, the Government accepted the risk through its charging decision to start the Specification of Charge II on or about August 2, 2014, that Appellant could be found not guilty should the evidence demonstrate extortion occurred in October 2013 and June 2014. The Government doubled down on its assumption of that risk when it made a subsequent decision to not amend the charge sheet before trial when

prosecutors learned of the fatal defect. Appellant was entitled to rely on the decisions to charge the case on a certain date and not amend the specification before trial.

ii. ***The change was major because it surprised and misled the Defense, created overlap between the Article 120b, UCMJ, and Article 127, UCMJ, offenses where there was none before, prevented defense counsel from cross-examining C.L. about how a previous strict liability allegation was now accomplished under threat, and greatly aggravated both specifications. The change was not fairly included in the previous preferral.***

Dates Were Critical to the Litigation

"Changing the date or place of the offense may, but does not necessarily, change the nature or identity of the charged offense." *Parker*, 59 M.J. at 197; R.C.M. 918(a)(1) Discussion. This case is certainly one in which changing the dates of the offense changed the nature and identity of the litigation, transforming it into an allegation not fairly included in the previous preferral. From the outset, this case was about dates and timing. Both trial and defense counsel intimately associated every single facet of the case with the calendar.

In voir dire, counsel for both sides brought up age and sexual activity, including the capacity to consent relative to age. JA at 55-59. Trial counsel began opening statement with, "So I want to talk to you about the charges here today and about the victims, but I want to start out and give you a couple of dates, and these dates are very important, I would recommend that you write these down because *this is critical to the*

case." JA at 60 (emphasis added). It was the *Government* that first underscored the critical nature of dates. This is unsurprising, given that at its essence the litigation centered around a strict liability sex crime allegation under Article 120b, UCMJ, because C.L. had not yet attained the age of 16. A date, then, is necessary evidence of the Government's proof a crime occurred. *See United States v. Brown*, 16 C.M.R. 257, 261 (C.M.A. 1954) ("Where time is of the essence of the crime, allegations concerning the date of the offense become matters of substance."). The *Brown* court referenced statutory rape—which was the gravamen of Appellant's court-martial—as a crime where time would be of the essence. *Id*. Trial counsel further drove a wedge in the calendar when he discussed pre-jurisdictional high school behavior for "context," and the bright line on August 20, 2013, where Appellant entered active duty. JA at 60-61.

Defense counsel did much the same. Defense counsel began his opening statement with the theme about the poorly drafted charge sheet and dates right out of the starting blocks. JA at 63. Defense counsel mentioned specific years 12 times, specific dates eight times, and seasons four times. JA 63-65. Defense counsel forecasted a defense to the Article 120b, UCMJ, allegation involving C.L. that Appellant was in training in Mississippi when C.L. alleged the sex acts took place, tying a defense to the calendar. JA at 65.

With C.L. on the stand, trial counsel displayed a slide presentation and began

discussing her age and dates for the first several pages of her transcribed testimony. JA 69-72. Defense counsel cross-examined C.L. about her faulty memory and implausibility of the allegations, specifically as it mapped onto the calendar. JA at 114-132. Trial counsel, then, spent the entire re-direct examination focusing on the calendar. JA at 133-42.

The Change to One Specification "Intricately Linked" and Greatly Aggravated Two Different Charges. This Surprised and Misled the Defense and Was Not Fairly Included in the Prior Preferral.

The original charge sheet had no overlap between Specification 4 of Charge I (Article 120b, UCMJ) and the Specification of Charge II (Article 127, UCMJ). The Article 120b, UCMJ, specification alleged a time period between on or about August 20, 2013, and on or about June 30, 2014. JA at 40. The original Article 127, UCMJ, specification alleged a time period between on or about August 2, 2014, and on or about December 31, 2014. *Id*. The lack of initial overlap matters. If no threat occurred until *after* C.L. turned 16 on August 2, 2014, it necessarily means that any sex act that occurred *before* she turned 16 was not procured under threat, or at least, the Government would not seek to prove that it was. If a sex act occurred consensually between a 19 year-old and a 15 year-old, even if illegal, it is far less aggravating than if the sex act occurred *because of* a threat.

When the Government moved the starting date of the Specification of Charge II

back 279 days to on or about October 27, 2013, it then made possible that the charged oral sex happened under threat. Trial counsel proceeded to argue under this theory:

> That shows his intent to blackmail her. He will get her to perform oral sex. It also shows that she doesn't want to do it, and he'll blackmail her to get her to do it . . . And you heard [C.L.] said that she performed oral sex on him one maybe more times during that break. And here he is saying this is what you're going to be doing during Christmas break. Members, everything matches up.

JA at 162. The Government likewise took further advantage of this new charging theory in its sentencing argument, describing C.L. as "[a] *15 year-old* girl begging an Airman not to post sexual pictures of her on the internet." JA at 202 (emphasis added).

This both surprised and misled the Defense, and increased the seriousness of two offenses at the same time, even if the elements remained the same. It did not just make the extortion more aggravating (in that it procured a sex act), it made the sexual assault of a minor more aggravating (in that it became nonconsensual and occurred as the result of a threat). Had defense counsel known or understood when he cross-examined C.L. that he was really confronting her on nonconsensual sexual activity, as opposed to consensual activity at a time she happened to be 15 years old, it is reasonable to assume he would have and could have approached the confrontation differently. It is hardly fair to insist the Defense was obliged to recall C.L. in its case

to resume examination under the amended theory.[10] It also poses an unfair tactical burden upon the Defense by requiring them to somehow anticipate the need to deploy an amended cross-examination that may or may not be consistent with the previous confrontation as opposed to one coherent confrontation. The damage was already done at that point. That they would even have to do this is evidence the Defense was misled, surprised, not on notice of the change, and that it was not fairly included in the previous preferral.

Not only was this change not fairly included on the preferred charge sheet because the specifications themselves specifically indicated no overlap in timing, the additional 279 days were not fairly included in the evidence associated with the previous preferral. There was no evidence of an extortion on October 27, 2013, or June 14, 2014, until the Sunday night before trial; the Government can hardly argue evidence that came into existence right before trial in July 2017 was fairly included in a December 2016 preferral.

The Military Judge's Rulings Continued to Demonstrate her Unfamiliarity with the Law at Issue

The military judge recognized this new overlap between the offenses but failed to provide the appropriate remedy: denying the motion to amend the charge sheet. She

[10] Indeed, this would raise constitutional burden shifting concerns.

identified, "having Specification 4 of Charge I, and then the Specification of Charge II *intricately linked* makes this a little bit messier. . . ." JA at 155 (emphasis added). Indeed, the change intricately linked extortion to a strict liability offense where time was of the essence. *See Brown*, 16 C.M.R. at 261. Appellant was prepared to defend against an allegation that a consensual sex act occurred when C.L. was 15 years old; he was left with combating a closing argument that insinuated the sex act was procured by threat. And, due to the timing of the change—right before instructions—the case was in an irreversible posture.

Reese provided the military judge ample authority, under the facts of Appellant's case, to say that intricately linking extortion to a child sex offense where time was essential was a major change. Just as in *Reese*, where the change from licking to touching changed the means of committing the offense, here too, changing the date of extortion had a multiplied effect on both the Article 120b, UCMJ, and the Article 127, UCMJ, allegations because now the "means of committing the offense" were altered to sex acts produced under threat as compared to consensual sex acts.

This Court's decision in *Parker* would similarly demonstrate the military judge had authority to conclude this was a major change. In *Parker,* a case where amending a charge sheet by two years was a major change, this Court reinforced the standard that time may change the nature or identity of the charged offense. 59 M.J. 197-198.

In Appellant's case where it was obvious to all—including the trial counsel—that time was "critical" (*see* JA at 60), the military judge erred by failing to conclude that changing time, *on the facts of this case*, would amount to a major change. Instead, the military judge relied on *United States v. Whitt*, a nonbinding Army Court of Military Review case from 1985, for the supposed categorical proposition that a one-year change would not constitute a major change. 21 M.J. 658; JA at 406 ("Also we've got Witt [*sic*], which says that this length of time, which is just under a year that the trial counsel wants to back up this charged timeframe, that's perfectly acceptable under the case law.").

The assistant trial counsel's own proffered rationale for amending the charge sheet was hardly compelling. Her only justification was that the evidence came out differently than expected, and that the Government "did not have the full picture that [it does] now, as far as the exact dates of the extortion." JA at 146. However, even she acknowledged that they had been in possession of this new evidence prior to trial, a point the military judge and the Air Force Court reiterated. JA at 20, 155. The Government should not enjoy the luxury of "getting a full picture" of the evidence at, or right before, trial, then waiting until the case is over to update the charge to reflect that "picture," to an accused's detriment. If the Government only just got the appropriate picture, as far as the exact dates of the extortion, the Defense surely was

not on notice. And as the Supreme Court noted just last month in a case where the federal government failed to abide by its own statutory obligations to provide proper notice: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, No. 19-863, 2021 U.S. LEXIS 2232, at *27 (Apr. 29, 2021).

In total, the change was major because it surprised and misled the Defense causing Appellant to defend against a different case than he was charged with. The extra 279 days were not fairly included in the previous preferral, which specifically and intentionally separated the Article 120b, UCMJ, and the Article 127, UCMJ, specifications. The military judge erred by not recognizing her authority and duty under the R.C.M.'s and case law—most starkly, *Reese*.

iii. ***The change enveloped both instances of alleged extortion. "On or about" pleading could never permit a finding of guilt on October 27, 2013. Even with "on or about" pleading, June 14, 2014, is not reasonably near August 2, 2014. Therefore, the Government created criminal liability where none existed on the evidence presented and Appellant was deprived of a defense.***

Trial counsel argued the two instances of extortion were October 27, 2013, and June 14, 2014, neither of which were inside the original charged time frame starting on or about August 2, 2014. JA at 162, 222, 261. The on or about language in the original pleading did not reach either date. No one can reasonably contend October 27, 2013, is on or about August 2, 2014. But so too, June 14, 2014, is not "reasonably

near" August 2, 2014. *Hunt*, 37 M.J. at 347. As Judge Ohlson recently noted, a "few weeks" is generally acceptable. *Hale*, 78 M.J. at 277 (Ohlson, J., dissenting). This Court's predecessor's case law ratifies seven days and three weeks, respectively, as being permissibly within the on or about language. *Brown,* 34 M.J. at 110; *Hunt*, 37 M.J. at 347. There are exactly *seven* weeks that elapsed between June 14, 2014, and August 2, 2014. Under a quantitative comparison, that is more than double the time endorsed in *Hunt*. Under a qualitative analysis, seven weeks is not what a lay person would consider "reasonably near."

Especially, in this case, where everything was about the calendar, precision on dates and timing was imperative. Starting the extortion on or about August 2, 2014, is a symbolic date: it is the date C.L. turned 16. On its face, the original specification alleged extortion occurred on divers occasions over the first five months C.L. was 16. The Government specifically sought August 2, 2014, as the start date for a reason. JA at 145. Appellant is entitled to rely on a knowing, intelligent, and conscious decision on the Government's part to start a charging window on a day of legal significance. *Reese*, 76 M.J. at 301.

Had there been no motion to amend the charge sheet, Appellant would have prevailed under R.C.M. 917 for a finding of not guilty because the prosecution presented no evidence of extortion within the original charged timeframe. As in

Parker, "the Government could have addressed the disconnect between pleading and proof through withdrawal of these charges and preferral of new charges for consideration in the present trial or in a separate trial. *See* R.C.M. 603(d). Having chosen not to do so, the Government was required to prove in its case-in-chief that there was [. . .]" extortion between on or about August 2, 2014, and December 31, 2014. 59 M.J. at 200-01. The Government offered no such evidence and thus, a motion under R.C.M. 917 would have been granted. Alternatively, if the specification was submitted to the members unchanged, the defense counsel would have been able to argue in closing that the Government failed to prove any act of extortion occurring between on or about August 2, 2014, and on or about December 21, 2014. The last-second change deprived Appellant of this defense—a defense alluded to in opening statement that ultimately fell flat because of the permitted change.

Minor changes are not ones that create a finding of guilty where one did not exist before. Minor changes do not conform specifications to evidence that has already been presented at trial. This cannot be the situation the President contemplated when promulgating R.C.M. 603. The Government does not get to cure a defective case presentation with post-hoc charge sheet amendments. The concept runs contrary to basic notions of constitutional due process. *See Dunn*, 442 U.S. at 107.

2. ***Alternatively, if the change is considered minor, Appellant is entitled to relief because the change to the charge sheet prejudiced his substantial rights.***

Even if this Court determines the proposed change was "minor," Appellant is nevertheless entitled to relief because the change prejudiced his substantial rights. Article 59(a), UCMJ; R.C.M. 603(c). In undertaking this analysis, the Court's pre-*Reese* prejudice jurisprudence is instructive. *See Sullivan*, 42 M.J. at 365, *overruled by Reese*, 76 M.J. at 301-302 ("The second prong is satisfied if the amendment does not cause unfair surprise. The evil to be avoided is denying the defendant notice of the charge against him, thereby hindering his defense preparation.") (internal citations omitted). Appellant was prejudiced for the following reasons.

First, he was denied the ability to present a defense. The right to present a defense is a fundamental, constitutional right rooted in due process of law, afforded to an accused. *See Washington v. Texas*, 388 U.S. 14, 19 (1967). When the Government received permission from the military judge to amend the charge sheet, Appellant was preempted from arguing that he was not guilty of Charge II and its Specification because the Government offered no evidence that any extortion occurred between on or about August 2, 2014, and on or about December 31, 2014, after committing his case to the language in the specification. As noted *supra*, defense counsel forecasted in opening statement that this was a sloppily charged case, specifically related to dates; he suggested that was how he was going to deal with the surprise of the new Facebook

messages the weekend before trial, relying on the initial charge sheet. JA at 63.

Moreover, this Court has found material prejudice on the grounds that "an accused has a right to know what offense and *under what legal theory* he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (emphasis in original). In *Tunstall*, this Court found that the lack of fair notice as to what he would be required to defend against violated his due process rights. *Id*. at 196. Thus—as an error of constitutional dimension—the applicable standard for assessing prejudice in this context is whether the lack of fair notice was harmless beyond a reasonable doubt.[11] Because this change deprived Appellant of notice and foreclosed a viable defense he had already suggested he intended to raise, the Government must meet this exacting standard even if this Court finds the change to be minor.

Second, Appellant was denied the right to meaningfully and accurately confront the witnesses against him. Defense counsel's cross-examination of C.L. did not approach the possibility that the December 31, 2013, alleged oral sex act was accomplished because C.L. had previously been threatened. That is not what the

[11] *See United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020); *see also United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009) ("it is solely the Government's burden to persuade the court that constitutional error is harmless beyond a reasonable doubt"); *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (noting that the harmless beyond a reasonable doubt standard means that a court must be left "confident there was no reasonable possibility that the error might have contributed to" the outcome).

charge sheet alleged. Had Appellant been properly notified that was the Government's case, it is reasonable to assume defense counsel would have amended his cross-examination of C.L. to discuss their relationship in such a manner to demonstrate that she was not under any threat. Because the change came after the Government presented its case and had rested, Appellant was denied the ability to confront his accuser on the charges that had been brought to court. The denial of meaningful confrontation is also prejudice of constitutional proportion. *See In Re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a *right to examine the witnesses against him*, to offer testimony, and to be represented by counsel.") (emphasis added).

Third, as discussed *supra*, the amendment to the Specification of Charge II had an amplified effect on not just the extortion specification, but also Specification 4 of Charge I. The change "intricately linked" the two offenses that were clearly separate, permitting the trial counsel to argue that oral sex was actually obtained under threat. This makes both specifications more aggravating. Although not a legal excuse or justification by any means, it would be a mitigating consideration for the panel in the sentencing phase of the court-martial if the evidence and convictions demonstrated

that this was an entirely consensual act between a 19 year-old and a 15 year-old. However, the case Appellant was prepared to defend against was not the case argued by the trial counsel and sentenced by the members. This too is prejudice of constitutional dimension.

All three of these constitutional prejudices are rooted in unfair surprise. Here, there is at least a reasonable possibility that the change to the charge sheet contributed to the finding of guilty to the extortion allegation because the evidence produced at trial did not prove any extortion occurred during the charged time frame. Moreover, because the convictions were far more aggravating because of the change, the Government cannot now prove beyond a reasonable doubt that it did not contribute to an increase in Appellant's sentence. As there is no way to tell how much the members gave weight to the sex act procured by extortion, the appropriate remedy is to dismiss the finding of guilt to the Specification of Charge II, and the sentence, and authorize a rehearing on the sentence. The military judge's error was not harmless beyond a reasonable doubt.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilt for the Specification of Charge II, and the sentence, and order a rehearing on sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on May 19, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 12,463 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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