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

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jerard Simmons, the Appellant, hereby replies to the Government's Answer (Govt. Ans.) concerning the granted issue, filed on June 21, 2021.

ARGUMENT

1. Contrary to the Government's argument, it was not "reasonable to wait until CL testified before deciding whether the dates of the charged offenses needed to be corrected based upon the evidence adduced at trial."

The Government highlights CL's pretrial inconsistencies, wherein on some occasions she tied the extortionate conduct to the fall of 2013 when she was still under the age of consent, and on other times she referred to a timeframe after her 16th birthday on August 2, 2014. Govt. Ans. at 39-40. According to the Government, "[t]his alone justified the government waiting to modify the dates on the charge sheet until after she testified." Govt. Ans. At 40. The Government continues, "It is true 'that the government controls the charge sheet,' *Reese*, 76 M.J. at 301,[1] but it does not control the testimony of a teenage victim. It was therefore reasonable for the government to wait until CL testified before deciding whether the dates of the charged offense needed to be corrected based upon the evidence adduced at trial." *Id*. In other words, the Government essentially argues that instead of having to maintain the

[1] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

onerous burden of presenting evidence to substantiate the allegation as charged, it can simply wait to see what the evidence will actually be and then create a new allegation *post hoc* so that the two are in conformity.

This argument is flawed in many respects. First, the Government appears to create a "child-victim" type exception or explanation for its supposed reasonableness in waiting to amend the charge sheet. *See* Govt. Ans. at 39 (citing *United States v. Wilson*, No. 201800022, 2019 CCA LEXIS 276, at *56 (N-M Ct. Crim. App. Jul. 1, 2019) (unpub. op.) (discussing the limitations of children's memory, stating "[i]t is difficult for young children to accurately recount dates or the number of times an event took place.")). That young children have difficulty accurately recounting dates or frequency of an event taking place is of little consequence in this case; the citation in *Wilson* fails for at least two reasons. First, the Navy-Marine CCA's decision in *Wilson* did not involve a "major/minor change" question; it was a case in which the CCA overturned a child sex offense conviction for factual and legal insufficiency, based in large part on the unreliability of the testimonial evidence of a child. *Wilson*, unpub. op. at *89. Second, the children at issue in that case were ten, six, and six, respectively. *Id*. at *5. In this case, CL was 15-16 years-old across the charged timeframes and was almost 19 years-old at the time of trial. She was not a young child. Her memory would not be circumspect as it would be for a six year-old victim. CL's inconsistency should

not get converted from an asset to the defense's case into the basis for a "reasonable" (Govt. Ans. at 40) change to the charge sheet after resting the case.

And although the Government "does not control the testimony of a teenage victim" (*id*.), it certainly does control the charge sheet. *Reese*, 76 M.J. at 301. The Government could have—and in all reality should have—charged Appellant's extortion from on or about October 27, 2013, until on or about December 31, 2014, to encompass all pretrial statements in its possession. But instead, it tied its case to one thread of potential testimony. Neither the testimony at trial nor the documentary evidence supported the charge and specification as originally drafted and the Government should not be able to fix its mistake after the fact.

Second, the Government does not enjoy the luxury of seeing what evidence surfaces at trial to justify an amendment to the charge sheet, increasing the likelihood of a conviction. In this case, the Government already possessed these pretrial statements and, with its charging decision, specifically tied its case to the theory that the extortionate conduct occurred after August 2, 2014, because that was CL's birthday. JA at 146. The natural consequence of the Government's proposed rule or theory is that the more inconsistent the evidence is before trial, the more flexibility it retains to update the charge sheet after evidence presentation or, as here, after resting. This disrupts defense preparation; counsel may reasonably see multiple pretrial statements, compare them to the charge sheet, and rely on the specifications not being

charged correctly to prepare the defense. It simply cannot be the case where the Government has license to do this to a criminal defendant, whose life, liberty, and property are tied to the outcome of the court-martial.

Third, the Government in this case did not just wait until after the evidence was presented, they waited *until after it rested its case*. Even if this Court could, *arguendo*, envision a hypothetical scenario where it may find good cause to wait until after evidence presentation to decide if a charge sheet must be amended, this is surely not that case. As both the military judge and the Air Force Court noted, the Government could have and should have requested the change sooner. *See* JA at 20, 155. The Government made a deliberate decision to charge the case the way it did and made a subsequent deliberate decision to not change the charge sheet after receiving discovery the weekend before trial, same as in *Reese*. *Id*. The Government had pretrial notice of a need to change the dates on the charge sheet and decided not to do so. Therefore, the prosecution must live with the natural and foreseeable consequences of its charging decision. *See United States v. Mader*, __ M.J. __, No. 20-0221, 2021 CAAF LEXIS 353, at *7-8 (C.A.A.F. Apr. 20, 2021). Here, that meant Appellant did not commit the alleged acts within or reasonably near[2] the timeframe the Government itself picked.

[2] *See United States v. Gilliam*, No. 20180209, 2020 CCA LEXIS 236, at *10 (A. Ct. Crim. App. Jul. 15, 2020) (unpub. op.) (Setting aside findings of guilty to rape of a child and sexual assault of a child specifications as factually insufficient when the

2. <u>Notice comes from the charge sheet.</u>

"To prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty. The *charge sheet provides the accused notice* that he or she will have to defend against any charged offense and specification." *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (emphasis added). However, in portions of its Answer captioned "Pretrial Notice" and "Other Notice," the Government implies that notice comes from anywhere other than the charge sheet, including pretrial statements to AFOSI, Article 32 reports, Appellant's "own personal knowledge," opening statements at trial, witness trial testimony, and prosecution exhibits. *See* Govt. Ans. at 8-16, 36. These categories are insufficient to establish the notice requirement.

In *Reese*, this Court rejected an argument that the appellant was on sufficient notice from the victim's testimony at a pretrial deposition. *Reese*, 76 M.J. at 301. If a statement made under oath at a deposition is insufficient notice, surely unsworn statements made to law enforcement and a preliminary hearing summary of those statements are insufficient.[3] Neither should any component of the trial itself be the

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testimony established the sexual acts may have occurred eleven months outside the charged time frame, which was not reasonably near the charging window).

[3] The Government conflates awareness with notice. Merely because Appellant was, or could have been, *aware* of CL's pretrial statements, does not mean he was *notified* that the Government intended to prove an extortion specification different than the one on the charge sheet. This distinction holds true from *Reese*, where clearly the defense

source of notice—such a rule would surely offend due process. The law does not require a criminal defendant to wait until opening statement, witness testimony, and evidence presentation to learn what must be defended against. Finally, a criminal defendant's "own personal knowledge" (Govt. Ans. at 36) is never the source of his own notice.

Because the proper notice comes from the Government's charge sheet and not these other sources, Appellant was on notice that he was to defend against an extortion allegation *only after* CL turned 16 on August 2, 2014. The original charge sheet that Appellant was entitled to rely upon specifically and intentionally separated the two offenses on the calendar. JA at 40 (Specification 4 of Charge I ending on or about June 30, 2014; Specification of Charge II starting on or about August 2, 2014). But the change to the charge sheet, in the words of the military judge, "intricately linked" the two offenses. JA at 155. This "intricate link" caused the sexual assault of a child allegation to become intimately bound up with, and now implicitly caused by, the extortion allegation—the military judge well-recognized this. Indeed, trial counsel

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counsel was *aware* of the victim's shifting pretrial statement from the deposition, but Reese was not on *notice* that the Government sought to prove a case consistent with the new statement. Reese was "entitled 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. The same is true for Appellant. In fact, that he was or may have been *aware* of information that *was not* in conformity with the actual notice from the charge sheet, is one reason, *inter alia*, that Appellant was surprised and misled by the change, making it major.

argued in closing that the October 27, 2013, extortion caused the sexual act on December 31, 2013. JA at 162.

Both the law and society recognize the inherent difference between "statutory rape" involving two former high school classmates reuniting at Christmas for the first time since one of them graduated and "rape of a child" procured by threat. There is a reason the UCMJ criminalizes these offenses separately and authorizes far more severe punishment for the latter. *See generally* Article 120b, UCMJ, *2016 Manual for Courts-Martial*, *United States*, 2016 ed. (*2016 MCM*), Part IV, para. 45b.a.[4] When the Government declined to amend the charge sheet prior to trial, Appellant and his defense counsel could justifiably rely upon the Government's affirmative decision not to make an amendment, which is to say that the extortion was still alleged to have come after the charged sexual acts. But because the Government was permitted to make this late change, it effectively increased the seriousness of two offenses, even if Appellant's punitive exposure was not literally increased. To be sure, Appellant recognizes that he was not convicted of rape of a child as that offense is understood within the legal parameters of the UCMJ. But that is altogether different than a panel

[4] Rape of a child carries a maximum term of confinement of life in confinement without eligibility of parole, whereas sexual assault of a child carries a maximum term of confinement of thirty years confinement. *Compare 2016 MCM*, Part IV, para. 45b.e.(1) *with id*. at para. 45b.e.(2).

of lay members recognizing that extortion causing a sexual act is more aggravating than the same act in absence of the extortion. Given the severe 12-year sentence the Government asked for and Appellant received, the members synced with trial counsel's underlying arguments and the sentence was inflated as a result of this inherent sentencing aggravator the Government was allowed to slip in after it had already rested its case. JA at 205, 209.

3. The military judge clearly used an abandoned test from *United States v. Sullivan.*

The Government argues, "Appellant assumes she relied on *Sullivan*[5] (and nothing else) due to similarities between the test articulated in that case and the language used by the military judge." Govt. Ans. at 31. However, there is more than mere similarity; the military judge lifted the exact language from *Sullivan*. *Compare 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) *with* JA at 155 ("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** . . . ?") (emphasis added).

[5] *United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995) *overruled by Reese*, 76 M.J. 301-02.

Rather than recognizing the clear similarities between the language employed by the military judge and *Sullivan*, the Government claims the military judge was simply using R.C.M. 603.[6] Govt. Ans. at 31. However, the Government injects the Latin phrase *inter alia* into its argument. *Id*. ("Subparagraph (a) explains that a change will be minor unless, *inter alia*, it adds an offense."). *Inter alia*, of course, means "among other things." But the "other things" the Government omits are very important parts of R.C.M. 603 that could convert a change from minor to major. The rule, in full, states "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) (emphasis added). That was not the test articulated by the military judge, either explicitly or by implicit reference.

The Government argues that military judges are presumed to know the law and follow it absent clear evidence to the contrary. Govt. Ans. at 33 (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). In this case, there is clear evidence to the contrary. In her ruling, the military judge never cited R.C.M. 603. JA at 155-56.

[6] The Government argues that because the military judge did not cite to *Sullivan*, it is not clear she used the abandoned test from *Sullivan*, while at the same time arguing the military judge utilized the test from R.C.M. 603, which she also did not cite. Her lack of citations to law cannot be dispositive; a review of her word choice is the best available recourse. Upon review, this Court can see she tracked the language from *Sullivan* and not R.C.M. 603.

She also never cited *Reese*, which considering its applicability and recent publication at the time of trial, is a case this Court should expect military judges know and utilize.[7] *Id*. Because the military judge never plainly articulated what law she was applying, the best evidence there is comes from her borrowing of *Sullivan*'s language. Unpacking her analysis demonstrates she used the pre-*Reese* standard and the military judge erred by putting the cart before the horse. *See* JA at 155-56 (discussing prejudice *before* concluding the change was minor). The Government's position would result in this Court making the same error.

4. *United States v. Stout.*

a. The divergent opinions in *Stout.*

In *United States v. Stout*, a majority of this Court determined that *pre-referral* amendments to dates on the charge sheet varying from 264-300 days were permissible because "[p]rior to referral, Article 34, UCMJ, specifically permits changes to conform the charges and specifications to the substance of the evidence in the report prepared by the investigating officer under Article 32, UCMJ[.]" __ M.J. __, No. 18-0273, 2019 CAAF LEXIS 648, at *2 (C.A.A.F. Aug. 22, 2019). Judge Ryan, joining the Court's opinion in full, separately concurred to express her view that R.C.M. 603 "applies only

[7] The military judge also did not correct trial counsel's inaccurate recitation of the rule and holding from *Reese*. JA at 148. This is more evidence that the military judge likely never read the case, did not know the law, and no longer should benefit from a presumption that she knew the law and applied it correctly.

to post-referral changes to charges and specifications and is thus inapplicable to this case." *Id*. at *6 (Ryan, J., concurring).

Judge Maggs, writing separately, expressed that, in his view, "the changes were minor" under R.C.M. 603 and would have affirmed the Army CCA's decision on that basis. *Stout*, 2019 CAAF LEXIS 648, at *11 (Maggs, J., concurring in the judgment). He wrote, "the changes merely altered the alleged dates of the offenses, and did not affect the nature or identity of the offenses against which Appellant had to defend himself." *Id*. at *13. But, as Judge Maggs also noted, the appellant did "not contend that the changes in dates were likely to mislead him." *Id*. at *14.

Judge Ohlson came to an opposite conclusion under R.C.M. 603. *Stout*, 2019 CAAF LEXIS 648, at *15 (Ohlson, J., dissenting). In his dissent, Judge Ohlson expressed his view that R.C.M. 603, "prescribes *how* changes may be made to a charge sheet" and that the Government failed to follow those procedures in this case. *Id*. at *15-16 (emphasis in original). He then went on to explain that "the Government wished to change the dates when it alleged that Appellant committed the charged offenses. But the change in dates was not a day or two, or a week or two, or even a month or two in length." *Id*. at *17. Instead, like Appellant's case, "the Government decided that it wanted to change the dates of the charged offenses by approximately *300 days*." *Id*. (emphasis in original). "Common sense compels the conclusion that a change of that magnitude is not 'minor.'" *Id*.

b. The particular facts of Appellant's case allow for a harmonization of opinion.

While Judge Maggs and Judge Ohlson arrived at different conclusions applying R.C.M. 603 in *Stout*, Appellant contends that the facts of this case breed harmonization. Like *Stout*, the Government was on notice of a potential issue with its charged timeframe from the Preliminary Hearing Officer (PHO) report following the Article 32, UCMJ, hearing. JA at 277, 279, 281. But unlike *Stout*, the Government did not amend the charge sheet prior to referral. And even after receiving confirmation of its erroneous timeframe the weekend before trial, the Government still did not seek to amend the charge sheet. Indeed, it waited not only until CL testified, but until the Government had already rested its case—a fact pattern more egregious than even what happened in *Reese,* when prosecutors moved to amend the charge sheet after the trial testimony did not match the specification as charged. 76 M.J. at 299. To reiterate the point Judge Maggs made in a different case:

> [An offense's] seriousness, however, does not change the test for assessing whether the Government has properly charged this offense under R.C.M. 307(c)(3). Perhaps, though, the seriousness of the allegations in this case should have prompted those with responsibility for drafting the charge and specification to take the care necessary to avoid errors. This is a matter to which lawyers must attend and in which judges have no authority for interfering when the accused makes a timely challenge at trial.

United States v. Turner, 79 M.J. 401, 410-11 (C.A.A.F. 2020) (Maggs, J., dissenting).

And in yet further dissemblance from *Stout*, Appellant *does* contend that this late change both: (1) affected the nature and identity of the offenses against which Appellant had to defend himself; and, (2) was likely to mislead him. *See* Brief on Behalf of Appellant, dated May 19, 2021 (App. Br.) at 36-40. The fact that, even on appeal, the Government devoted two pages of its Answer to include a detailed table (Govt. Ans. at 19-20) setting forth the timeline of events in this case underscores the same point that the parties at trial recognized from the very onset: dates were "critical to the case." JA at 60. Any change in these dates—especially a change that, in the military judge's own words, "intricately linked" an extortion specification with a sexual assault of a child specification when no such "link" was previously present—fundamentally reshaped the underlying nature of what Appellant would have to defend against both at findings *and* sentencing. Even if the Government technically did not have to prove Appellant threatened a minor into oral sex in order to secure a conviction, the change permitted trial to argue as such—an undoubted boon to its sentencing case especially given that the members returned the exact term of confinement the Government asked for. JA at 162, 205, 209.

5. <u>The Government's late change to the charge sheet prevented defense counsel from arguing Appellant was "not guilty as charged" to the extortion charge and specification.</u>

Contrary to the Government's argument, Appellant *was* deprived of a defense; specifically, that the charged conduct did not occur within, or reasonably near, the

charged time frame. Put plainly, "not guilty *as charged*" is—in and of itself—a defense. Even if a date is not an element of the *crime*, a date is part of the *criminal allegation* in notice pleading, and as discussed *supra*, an accused receives his or her notice from the charge sheet. Indeed, in every court-martial, the panel members are instructed that they must find—as a fundamental component of that offense—that the accused did something on or about the alleged date. Defense counsel, simply, was unable to walk before the members and argue in closing that Appellant was not guilty to extortion, as charged, because the Government pulled that rug out from under him with the change to the charge sheet.

On appeal, the Government follows the military judge's erroneous lead by weaving prejudice into the threshold question: whether the change was major. The Government misreads Appellant's position to be that any motion to correct the dates of the offense is *per se* prejudicial whenever the evidence shows the charged offense actually took place outside of the original charging window. Govt. Ans. at 52. It is not. The primary argument in this case, on these facts, is that the change was major, made over defense objection, and not preferred anew. App. Br. at 28. Changing the date by 279 days to conform the charge sheet to the evidence produced at trial, even though the Government possessed the evidence before trial, is a major change—especially when the Defense forecasted in opening statement that he intended to attack

the dates at issue in this "poorly drafted charge sheet." JA at 63. Prejudice is inconsequential to this initial major change determination.

Appellant's alternative argument is that, should this Court conclude the change was minor, the military judge—on these facts where everything in the case turned on dates—erred when she concluded the change was not prejudicial to Appellant's substantial rights. The Defense's closing argument on the topic, hamstrung as it was, is all that remained after the major change altered the litigation. JA at 166. Counsel can hardly be blamed for making whatever he could from the Government-created situation at that point.

6. <u>Motivations of the Government.</u>

The Government suggests that Appellant's brief attacks the motivations of the trial counsel's decision to amend the charge sheet after resting its case. Govt. Ans. at 38. This misconstrues Appellant's position. Appellant is not suggesting that trial counsel acted with any nefarious intent in this case, nor must he in order to prevail.

The timing is relevant to the major change analysis. As Judge Ohlson's dissent in *Stout* observed, "it can be surmised" that a trial counsel's decision to make changes to the charge sheet reflects the Government's recognition of a "significant risk that the trier of fact would either (a) acquit the accused of the changes because the original dates on the charge sheet did not come close to matching the dates that would be elicited at trial, or (b) make a change to the dates though exceptions and substitutions

that would on appeal be deemed a fatal variance under our case law." *Stout*, 2019 CAAF LEXIS 648, at *18 n.4 (Ohlson, J., dissenting). While the motivations of trial counsel are generally irrelevant[8] in assessing whether a change is major or minor, the timing of the Government's decision to amend the charge sheet is itself an indication that "even the Government likely recognized that the alterations to the charged time frame were not 'minor' changes of little import to the successful prosecution of the case." *Id*. If they believed otherwise, counsel would never have asked for the change.

Whereas, in *Stout*, Judge Ohlson noted that this could be "surmised" from the surrounding circumstances, here trial counsel plainly stated that is precisely what she was doing in seeking to amend the charge at the time she did: "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 (emphasis added). Trial counsel then explained that—despite the fact an Article 32, UCMJ, preliminary hearing had already been held to examine the form of the charges—"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." *Id*. And, irrespective of the PHO report, there can be no

[8] If the Government were to purposefully charge one timeframe with the intent to change that timeframe later, gaining a strategic advantage by locking an accused into a defense and then undermining it, this would be a *de facto* major change because it would reflect an attempt "to mislead the accused as to the offenses charged." R.C.M. 603(a). Under those circumstances, motivations would be highly relevant.

question that the Government was aware of its deficient charging scheme prior to trial taking place because trial counsel affirmatively and specifically said this was the case on the record: "In light of the evidence that we've received this *past Sunday*, being that these dates actually date back to 27 October 2013." JA at 146 (emphasis added).

The Government's election to delay making a change until it had the opportunity to see how the Defense would attack its case, and after resting—whatever the motivation for doing so may have been—was likely to, and in fact did, mislead Appellant. From his opening statement, defense counsel forecasted his intent to attack the Government on its "poorly drafted charge sheet" and specifically "the dates" it alleged. JA at 63. The Government was only then able to circumvent this defense by moving the goal posts.

7. *Ejusdem Generis.*

Appellant does not attempt to "restrict the plain language of R.C.M. 603(a) by applying principals [sic] of statutory construction" to a Discussion section. Gov. Ans. at 34. Appellant recognizes the difference between the text contained within any given R.C.M. and the Discussion section which may follow. The Government summarily claims it is "inappropriate" to apply the *ejusdem generis* canon to a Discussion section, but offers no logical reason why this interpretive tool is inapposite in such circumstances other than to say that Discussion sections "do not constitute rules" under the *MCM*. Govt. Ans. at 34. For as much as the Government asks this Court to apply

a plain language interpretation of R.C.M. 603(a), it never attempts to explain what it is about the Discussion section it believes is in conflict with the text of that rule. *See* Govt. Ans. at 34-35.

The underpinnings of this Court's decision in *Reese* are grounded—in significant part—upon the very same Discussion section. *See Reese*, 76 M.J. at 300 ("The R.C.M. 603(a) Discussion clarifies what constitutes a minor change . . . ."); *see also id*. at 300-01 ("As noted earlier, the R.C.M. 603(a) Discussion indicates that a minor change is merely intended to allow the government the freedom to correct small errors such as 'inartfully drafted or redundant specifications…misnaming the accused…or to correct other *slight* errors.'") (emphasis in original). And, as Judge Ohlson more recently reiterated in *Stout*, the "Discussion section accompanying R.C.M. 603 provides clear and helpful guidance" in distinguishing between major and minor changes. *Stout*, 2019 CAAF LEXIS 648, at *17 (Ohlson, J., dissenting). The change to the charge sheet in this case is not akin to correcting small errors such as inartful drafting, a typo in the accused's name, or alleging the correct punitive article. The dates went to the heart of the case and constituted a major change.

8. <u>The Government's reliance upon federal practice is misplaced.</u>

The Government says this "Court should begin (and end) with the plain language of R.C.M. 603(a)." Govt. Ans. at 35. Despite this claim, the Government devotes an entire section of its brief to addressing Fed. R. Crim. P. 7(e)—an entirely

different rule of criminal procedure utilized in an entirely different system of criminal justice. Govt. Ans. at 26-29; *see also id*. at 21, 36-37, and 52. Such reliance is unnecessary if the plain text of R.C.M. 603(a) resolves the granted issue and is not helpful to the Government's cause.

For one, that rule of federal practice may share similarities with R.C.M. 603(c), but it is hardly helpful in interpreting R.C.M. 603(a) or R.C.M. 603(d). The threshold question in this case is whether the change is major within the meaning of R.C.M. 603(a); R.C.M. 603(c) only becomes relevant if this Court answers that question in the negative. Thus, the rule—and cases which have interpreted it—offer little in terms of ascertaining whether this change was major. Indeed, the Court's opinion in *Sullivan*—the case that *Reese* expressly overruled—repeatedly cited to and relied upon Fed. R. Crim. P. 7(e). *See* 42 M.J. at 364-65. Consistent with *Reese*, and contrary to what is required under Fed. R. Crim. P. 7(e), prejudice does not factor into a major change analysis. If, and only if, the change is deemed minor does prejudice then enter into the equation.[9]

The federal cases the Government relies upon in its Answer are similarly unhelpful. For example, the Government cites the Third Circuit's decision in

[9] The Government never responds to, or contests, Appellant's assertion that, should this Court determine the change was minor, the correct prejudice analysis requires whether Government has met its burden to prove the change was harmless beyond a reasonable doubt. *See* App. Br. at 47.

Goldstein and suggests that case only came out the way it did because the charged timeframe was offense defining. Govt. Ans. at 28, *citing United States v. Goldstein*, 502 F.2d 526, 527-528 (3d Cir. 1974). That analysis is not persuasive. That court also stated, "By way of contrast, a bank robbery is a criminal offense at all times, regardless of the date on which it takes place. In that instance a variance *of a few days* between the dates established by the indictment and proof would be a matter of form and not of substance. *Id*. at 528 (emphasis added). As Appellant has stressed throughout his briefing, the change in this case did not concern merely "a few days"—it was one of 279 additional days, almost tripling the charged timeframe.

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 June 30, 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 5,241 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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