IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF THE UNITED STATES**
v.	)	USCA Dkt. No. 21-0069/AF
Senior Airman (E-4) **JERARD SIMMONS**, USAF *Appellant.*	)	Crim. App. No. 39342
	)	Date: 21 June 2021

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE GRANTED

WHETHER 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.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016). (JA at 1-28.) This Court has jurisdiction to review the above-captioned case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Appellant was convicted, contrary to his pleas, of four specifications of sexual assault of a minor in violation of Article 120b, UCMJ. (JA at 42.) AS was the named victim for Specifications 1-3 of Charge I and CL was the named victim for Specification 4 of Charge I. (Id.) Each statutory sexual assault offense required proof that, during the charged timeframe, the named victim was under the age 16 years. MCM, Part IV, para. 45b.a(b).[1] AS and CL were 15 years old when Appellant committed these offenses. (JA at 60.)

Appellant was also convicted of extortion in violation of Article 127, UCMJ, and production of child pornography in violation of Article 134, UCMJ. (JA at 43.) The extortion charge is the subject of this appeal, and CL was the named victim for that charge. (Id.) CL's age was not an element of the charged Article 127 offense. *See* MCM, Part IV, para. 53.b. Nor did it affect the authorized punishment. *See* MCM, Part IV, para. 53.e.

Appellant was sentenced to a dishonorable discharge, 12 years confinement, reduction to E-1, and total forfeitures. (JA at 43.) The convening authority approved the adjudged sentence. (Id.) The lower court, after finding error in the

[1] Unless stated otherwise, references to the UCMJ are to the statutes contained in the 2012 Manual for Courts-Martial, United States (MCM). References to the Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial (R.C.M.) are to the versions in the 2016 MCM.

staff judge advocate's recommendation (SJAR) and unreasonable post-trial delay, reduced Appellant's term of confinement by 10 days. (JA at 36-37.)

STATEMENT OF FACTS

Guilty Finding for Extortion and Sexual Assault of CL

Appellant and CL met in a high-school Spanish class sometime in September 2012. (JA at 72-3.) Appellant was an 18-year-old senior. (JA at 73; Pros. Ex. 11.) CL was a 14-year-old freshman. (JA at 72.) The sexual relationship that followed was limited to "making out" and CL performing oral sex on Appellant. (JA at 77, 80-81.) Oral sex occurred approximately 15 to 20 times during her freshman year. (JA at 80.) During one of those encounters, Appellant used his cell phone to take an illicit photograph of CL. (JA at 83.) CL was initially unaware that the photograph existed. (JA at 84.) That changed when Appellant texted CL the photograph, which showed Appellant's penis in her mouth. (Id.) Appellant then pressured CL into performing oral sex by threatening to publish the photograph online unless she complied. (JA at 85, 127.) Appellant first made these threats, and coerced CL into performing oral sex, prior to entering active duty in August 2013. (JA at 81, 82, 85.)

The sexual activity ceased in the spring of 2013 when Appellant started dating another girl. (JA at 81.) By the summer of 2013, Appellant and CL communicated infrequently. (Id.) They resumed talking in October 2013 because

Appellant believed CL sent him a friend request on Facebook. (JA at 82.) CL recalled that Appellant resumed his threats to publish the photograph after joining the Air Force. (JA at 111-12.) CL then "had to start giving [Appellant] oral again during New Year's" of 2013. (JA at 82.)

Appellant communicated with CL through text message, Facebook, and Xbox. (JA at 75.) CL testified there were "a lot more text messages" compared to Facebook messages. (JA at 97.) However, CL no longer had access to the text messages. (Id.) CL did recover a Facebook message thread between Appellant and herself, and provided it to the parties the weekend before trial. (JA at 92, 282.) Those messages were admitted into evidence as Prosecution Exhibit 3. (JA at 94.) On 27 October 2013, Appellant sent CL a message on Facebook:

(JA at 214-15.)

After an extended back-and-forth, Appellant messaged:

(JA at 222.)

Appellant returned to Norfolk on leave between 21 December 2013 and 2 January 2014. (JA 161.) During that visit, on or about 31 December 2013, CL performed oral sex on Appellant in a public park near her home. (JA at 127, 139, 193.) This sexual act with CL was the basis for Appellant's sexual assault of a

child conviction, after the members found Appellant guilty by exceptions and substitutions. (JA at 189.)

On 26 May 2014, Appellant and CL had the following exchange

(JA at 232.)

On 14 June 2014, in one of their last conversations on Facebook, Appellant messaged CL:

(JA at 254, 261-62.)

CL testified that after Appellant joined the Air Force he would "ask for blowjobs and if [she] said no he would bring up the picture" and threaten to "post" it. (JA at 85.) CL thought Appellant would "post the picture" and agreed that she believed Appellant was "serious" about the threat. (Id.) CL further agreed "every time that [she] gave [Appellant] a blowjob after he got back from the Air Force . . . he use[d] the picture every time [sic] to sort of make [her] do it again." (Id.)

When Appellant was arraigned on the extortion specification, the Specification of Charge II, it read:

> In that [Appellant] . . . 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 to unlawfully obtain an advantage, to wit, the performance of oral sex upon [Appellant], communicate to [CL] a threat to publicize an image of [CL] performing oral sex on him.

(JA at 40.)

Appellant was also arraigned on Specification 4 of Charge I, a sexual assault of a child specification, which alleged he penetrated CL's mouth with his penis on divers occasions between on or about 20 August 2013 and on or about 30 June 2014. (Id.)

Pretrial Notice

Approximately seven months prior to Appellant's court-martial, on 13 December 2016, a preliminary hearing was held under Article 32, UCMJ. (JA at 284, 287.) The government submitted as evidence, *inter alia*, the Air Force Office of Special Investigations (OSI) Report of Investigation (ROI), OSI agent notes of CL's pretrial interview, and paralegal notes from another pretrial interview of CL. (JA at 286-87.) According to the summary in the ROI, CL alleged that Appellant:

> then joined the Air Force and left the Norfolk, [Virginia,] area. In approximately Sep[tember 20]14, [Appellant] returned to the Norfolk area and told [CL] he was stationed at "Langley" . . . . [Appellant] then requested [CL] perform oral sex on him with the threat if she did not, he

> would post naked photos of her online. This happened approximately five times and each time [CL] performed oral sex upon [Appellant] under the threat of posting her naked photos online if she did not comply . . . . [CL] could not remember the exact sequence of events but the forced oral sex after [Appellant] joined the Air Force took place approximately five times.

(JA at 275.)

The ROI included statements from several individuals, including Appellant, that oriented the defense to the dates of the alleged extortion. First, the ROI contained a summary of JA's interview. (JA at 289.) JA, who was a former high school friend of Appellant's, asserted that sometime in January 2014 he "heard [that Appellant] black mailed [CL] into performing oral sex on him by threating to post naked pictures of [CL] online if she didn't perform oral sex on him." (Id.) Second, Appellant provided a statement to OSI. (JA at 290.) Appellant told law enforcement he and CL "talked via text messages and [Appellant] continued to joke about having naked pictures of [CL]. At one point in 2014, [CL] gave [Appellant] a partial 'blow job' in the park near a wooded area . . . " (Id.) Third, the agent notes from CL's first OSI interview were submitted into evidence at the hearing. (Id.) CL stated she performed oral sex on Appellant from the "fall 2013 through mid[-]2014" because she was "under the impression" Appellant "would release [the] photos." (JA at 277.) CL also stated she performed oral sex on Appellant approximately five times while he was stationed at Langley AFB,

Virginia.[2] (Id.) Fourth, a second OSI interview was conducted with CL "to confirm the date when [Appellant] contacted her after joining the Air Force . . . " (JA at 291.) CL explained "she was unsure of the precise date, but believed the oral sex occurred after her 16th birthday" on 2 August 2014. (Id.)

Finally, notes from a third pretrial interview of CL were submitted to the PHO. (JA at 281.) According to those notes, CL alleged "that around September after [Appellant] returned from boot camp, he started texting [CL] and threatening her with the pictures he had taken of her performing oral sex on him." (Id.) CL also "stated that she met up with [Appellant] after he was in the Air Force and she was still a child . . . a lot after he returned form [sic] boot camp in the winter when he got back." (Id.)

The preliminary hearing officer (PHO) summarized the evidence in his report. (JA at 279.) Discussing the extortion threats, the PHO noted that it began "around September when [Appellant] returned from 'boot camp.' This would ostensibly be September 2013." (Id.) But the PHO did not recommend a change to the charged timeframe for the extortion charge. (JA at 288.)

On 6 March 2017, Appellant received notice under Mil. R. Evid. 404(b) and 412 of the government's intent to introduce evidence of Appellant's preservice

[2] Defense counsel asserted that Appellant was at technical school and did not report to Langley AFB "until roughly March 25, 2014." (JA at 149.)

behavior towards CL.[3] (JA at 293-96.) This evidence included, *inter alia*, that Appellant "threatened to post a photograph of [CL] performing oral sex on him unless she relented and performed more sex acts on him. With some breaks in time, [Appellant] continued this course of conduct . . . after joining the United States Air Force in August 2013." (JA at 294.) The "government intended to introduce the "evidence under Mil. R. Evid. 404(b) to demonstrate Appellant's motive, intent, knowledge, and absence of mistake as to the victim's ages, and preparation by grooming CL . . . for further sexual activity." (JA at 295.) Appellant did not submit a written response to the motion. (JA at 283.)

The weekend before trial, Appellant received the aforementioned Facebook messages between himself and CL that documented conversations on that platform between 13 April 2013 and 18 September 2014. *See* (JA at 282.) Appellant did not request a continuance or object "to the information that [t]rial [c]ounsel wants to admit[.]" (JA at 283.) Appellant did however ask to "defer [pleas] until we've reviewed [the messages] for potential 404(b) related stuff, or reserve any motions

[3] By order dated 29 November 2018, the lower court ordered pages 18-105, 254-65, and Appellate Exhibits III, IV, V, VI, VII, and VIII be sealed. However, pages 11-14, and Appellate Exhibits I and II, which were the government's motion under Mil. R. Evid. 412, and the response from a special victims' counsel (SVC), were ordered to remain unsealed. The information contained therein was admitted during findings, and referenced by the lower court in its opinion.

related to the new discovery." (Id.) Appellant did not object when the government later offered these messages into evidence as Prosecution Exhibit 3. (JA at 94.)

Other Notice

During opening statement, trial counsel began by saying "[w]e are here today because [Appellant] sexually assaulted two 15 year olds, he took a picture of one of them performing oral sex on him to blackmail her into performing more oral sex, and he video'd sexual activity with the other victim." (JA at 60.) Trial counsel asked the members to write down certain dates "because this is critical to this case. Because when you join the Air Force you cannot have sexual activity of any kind with someone under the age of 16." (Id.) Trial counsel then told the members the birthdays of CL and AS. (Id.)

Trial counsel explained that Appellant's actions prior to joining the Air Force were "only to provide context" and "only so you understand the bigger picture." (JA at 61.) After explaining the nature of Appellant and CL's sexual relationship while in high school, trial counsel described when Appellant first extorted CL for oral sex. (Id.) Trial counsel stated Appellant "sent [CL] a picture of her performing oral sex on him and said, if you don't perform oral sex on me, I am going to post this online for everybody to see." (Id.) Trial counsel told the members that this happened when CL was "14" and that Appellant joined the Air Force on 20 August 2013. (Id.) Appellant went "to basic training, but then he

reinitiates contact and he brings up the pictures again, and he tells her exactly as before." (Id.) Trial counsel asserted they were "going to hear [CL] come talk to you about that, about the oral sex when she was 15 years old, in the summer and the early part of 2014." (Id.) Trial counsel then specifically quoted the Facebook message from 27 October 2013. (JA at 61-2.)

Defense counsel opened by commenting that "this is a poorly investigated case, and it's even a poorly drafted charge sheet. You know that just from looking at the dates . . . " (JA at 63.) Discussing the alleged sexual assault of a child under Article 120b, where CL was the named victim, defense counsel asserted there was "no sexual contact in the charged time period with [CL]. That is going to be my defense." (JA at 64.) He went on to reference the Facebook messages, and how they did not include "any evidence that a blowjob — any sort of sexual act of any kind happens with [CL], okay." (Id.)

Turning to the extortion charge under Article 127, defense counsel conceded that there was a photograph of CL performing sex on Appellant. (Id.) But his "defense" was that: (1) "the only identifiable feature of [CL] was . . . the top of her head[;]" (2) "[t]he picture was never sent" to CL; (3) Appellant deleted the picture; and (4) neither Appellant nor CL was "serious about" the alleged threats. (Id.)

On direct examination, CL testified that she met Appellant in Spanish class when she was a freshman. (JA at 73.) She explained how the relationship

progressed from "September 2012 through the fall and into the spring of 2013" to where she performed oral sex on Appellant. (JA at 77.) Oral sex occurred approximately 15 to 20 times. (JA at 80.) CL testified Appellant "had his phone out sometimes" and she "would try to take it away or move it away" from her. (JA at 83.) CL did not initially believe Appellant took a photo of her performing oral sex, but then Appellant texted the picture to her. (JA at 84.) CL could see her head and Appellant's penis in her mouth. (Id.) She testified the picture made her "[s]cared, nervous." (JA at 85.) And she stated that threats like this occurred before and after Appellant left for the Air Force. (Id.)

CL explained that Appellant wasn't "joking" when he made these threats because "he would ask for blowjobs and if I said no he would bring up the picture." (Id.) CL thought Appellant was "serious" and these threats made her feel "scared . . . that [Appellant] would actually post it, because I knew the type of person he was." (Id.) After Appellant joined the Air Force, CL testified she "had to start giving him oral again during New Year's." (JA at 82.) She estimated that this happened "about five" times and took place "[i]n the park mostly." (JA at 83.) She also agreed that, after Appellant joined the Air Force, "every time" she performed oral sex on him was because he used the illicit picture. (JA at 85.) When asked "[w]hen did all this kind of stop[,]" CL replied "[a]fter New Year's we just sort of stopped talking, he stopped messaging me." (JA at 86.) CL

clarified that it was New Year's, meaning around 1 January 2014, and during the fall semester of her sophomore year.[4] (Id.)

After the Facebook messages were admitted, without objection, as Prosecution Exhibit 3, CL began testifying about the contents of the messages. (JA at 94.) CL testified there were "a lot more text messages" compared to Facebook messages. (JA at 97.) She explained that Appellant began to "blackmail" her around the time that she messaged "I'm done with you and your dick" in the summer of 2013. (JA at 98-99.) Regarding Facebook messages exchanged on 27 October 2013, CL testified she was upset at Appellant for several things, including "blackmailing" her with the illicit photograph. (JA at 102-5.) CL was "scared" Appellant was going to use the photograph again when he messaged "Nah[.] I can get you to do it when I get back in VA[. Lol] trust me on that." (JA at 105.) CL eventually "blocked" Appellant on Facebook. (JA at 109.) But she unblocked him after receiving a message that Appellant was "just about to post pics to Facebook." (Id.) CL then discussed the 14 June 2014 message from Appellant where he mentioned "[t]he pictures on my laptop" as the reason why CL would give him oral sex. (JA at 110.) CL's response was "[d]on't you dare start this shit again" and that she "had to deal with that shit last year because of you." (Id.)

[4] The fall of CL's sophomore year was in 2013. (JA at 111.)

Defense counsel's cross-examination of CL was consistent with the defense articulated in his opening statement. In particular, defense counsel elicited testimony that only the top of CL's head was visible in the illicit photograph (JA at 122); attacked the timeline for the oral sex, and the extortion for oral sex, by eliciting testimony from CL that both occurred in the fall of 2014 (JA at 126-28); and attempted to show CL told Appellant "no," refused to perform oral sex despite the threats, or otherwise took Appellant's comments to be in jest. (JA at 131-32.)

Motion to Amend

On 13 July 2017, after an extended recess of nearly 24 hours, and excusal of the senior trial counsel due to "a family emergency," the government raised an oral motion to amend the extortion charge. (JA at 144-45.) This motion came after the government rested, but before the defense began its case-in-chief. (Id.) A new assistant trial counsel was detailed to the case and, pointing to the "evidence at trial," moved to amend the start date of the charged timeframe from 2 August 2014 to 27 October 2013. (JA at 145-46.) As amended, the charged timeframe would extend from 27 October 2013 to 31 December 2014.

Defense counsel objected and argued that "the notice in this case" was that the alleged extortion occurred in September 2014. (JA at 147.) Defense counsel relied upon CL's summarized statement to OSI to support this assertion, but made no reference to CL's other pretrial statements, the government's opening

statement, or CL's testimony at trial. (Id.) Defense counsel then claimed that, contrary to the government's argument, CL never "expressed any uncertainty [about the dates] at that time to OSI." (Id.) In response to the fact that the government provided Appellant with the Facebook messages the weekend before trial, defense counsel argued "the dumping [of] 250 pages of text messages on [the defense] the night before trial . . . hardly constitutes notice." (JA at 148.)

Defense counsel expressed concern that the proposed change came after "the defense has communicated our intent to rest, and so basically before instructions." (JA at 150.) He emphasized the original specification alleged extortion when CL was 16 years old, and that the expanded timeframe included times when she was 15 years old. (Id.) Defense counsel contended that this was "an aggravating factor" as it alleged "extortion on a minor." (Id.)

Defense counsel also argued the amended timeframe for the extortion charge implicated the alleged sexual assault of a minor charge where CL was the victim. (Id.) He averred that the alleged sexual act in Specification 4 of Charge I was "otherwise consensual" but was now "more aggravating" in that it could be viewed as "nonconsensual and under the threat." (JA at 151.)

The military judge asked defense counsel to "just detail for me, one or two words for each one of these areas, what are the substantial rights of the accused" that would be prejudiced by the motion to amend. (JA at 152.) Defense counsel

responded with "notice, pleading of course . . . " (Id.) The military judge observed that Appellant was "put on proper notice for the conduct," then asked "[s]o what else?" (Id.) Defense counsel responded that the change in CL's age was "aggravating and could lead to enhanced sentencing." (Id.) He continued that it was "highly prejudicial" because "theoretically" the defense "could have conducted more cross-examination on the alleged victim based on sort of the nature of that fear and that threat at those particular times . . . " (JA at 153.) However, defense counsel foreclosed the idea of calling CL during the defense case-in-chief. (Id.) (stating "I certainly would never call an alleged victim during the defense case-in-chief, which is where we are now . . . ")

The military judge expressed that she didn't "like the timing" of the requested correction, but permitted it as a "minor change" after placing her reasoning on the record. (JA at 155-56.) She observed that, contrary to the defense argument, the sexual assault of a child offense was not made more serious because "the theory under Article 120b is essentially open to the government when we come to trial." (JA at 156.) She also concluded that evidence of extortion when CL was "a lot younger" was already admitted and there was "nothing that isn't already out there and fair for both parties to argue in whatever light they see fit." (Id.)

Appellant did not request a continuance, or any other relief, as a result of the ruling. (Id.) The defense case-in-chief was limited to publishing four defense exhibits to the members, then resting. (JA at 159.)

Timeline of Events

The original charged timeframe was on or about 2 August 2014 through on or about 31 December 2014. (JA at 40.) The corrected charged timeframe was on or about 27 October 2013 through 31 December 2014. (JA at 43.)

A. Trial Evidence

Appellant first extorts CL for oral sex.	Sometime between September 2012 – June 2013 (JA at 215.)
Appellant enters active duty.	20 August 2013 (JA. at 63.)
Appellant and CL resume talking through Facebook, text, and Xbox.	27 October 2013 (JA at 75, 210.)
First Facebook message showing extortionate threat.	27 October 2013 (JA at 222.)
Appellant returns to Norfolk on leave.	21 December 2013 – 2 January 2014 (JA at 161.)
CL testified she had no doubt Appellant extorted her after returning from the Air Force her sophomore year.	Fall 2013 (JA at 111.)
CL had to give Appellant oral sex again.	December 2013 (JA at 82.)
CL performed oral sex on Appellant.	31 December 2013 (JA at 189.) *basis for Article 120b conviction.
Second Facebook message showing extortionate threat.	26 May 2014. (JA at 232.)
Third Facebook message showing extortionate threat.	14 June 2014 (JA at 254, 261-62.)

B. Pretrial Evidence

First OSI interview: CL stated that Appellant asked for oral sex "15-20 times" and threatened to post illicit picture online if she "did not comply." CL performed oral sex on Appellant "each time."	September 2012 – June 2013 (JA at 274.)
Third pretrial interview: CL stated that Appellant resumed threats to post illicit picture "a lot" after returning from boot camp. CL stated this happened while she was still "a child."	21 December 2013 – 2 January 2014 (JA at 281.)
JA recalled hearing about blackmail for oral sex.	January 2014 (JA at 289.)
First OSI interview: CL stated Appellant returned to Norfolk and resumed extortion. CL stated the threats happened "approximately five times and each time" she gave Appellant "forced" oral sex.	Approximately September 2014. (JA at 274-75.)
Appellant tells OSI that after returning "from tech school," he "continued to joke about having naked photos of [CL]. At one point in 2014," CL gave "a partial 'blow job'" in park.	Sometime in 2014. (JA at 290.)
Second OSI interview: CL stated that she is unsure about exact dates, but thinks that forced oral sex occurred after her 16th birthday	2 August 2014 (JA at 291.)

SUMMARY OF THE ARGUMENT

The plain language of R.C.M. 603(c) permits a minor change at any time prior to announcement of findings. The sole caveat to this permissive rule is that the minor change cannot prejudice an appellant's substantial rights. Federal courts have generally regarded amendments to the charged timeframe as a matter of form rather than substance. The seminal military case on this issue states that amendments like this are "considered minor" unless the dates are "offense-defining." United States v. Brown, 34 M.J. 105, 110 (C.A.A.F. 1992), *overruled on other grounds by* United States v. Reese, 76 M.J. 302 (C.A.A.F. 2017). In this case, Appellant repeatedly threatened to publish an illicit photograph of CL unless she gave him oral sex. The nature and criminality of these extortionate threats were not defined by when they were uttered. And because CL's age had no effect on whether the elements of the offense had been met, or the punishment that could be imposed, the dates were not "offense-defining."

The military judge applied the correct standard when she determined that the proposed correction to the timeframe for the extortion charge was minor. She then properly tested the minor change for prejudice to Appellant's substantial rights. That ruling was consistent with the plain language of R.C.M. 603(a) and (c), as well as this Court's precedent. Furthermore, R.C.M. 603(c) permits a minor change at any time prior to announcement of findings. Appellant's focus on the

timing of, and motivations behind, the minor change is misplaced because of the unambiguous language of the rule and the lack of prejudice to his substantial rights.

Appellant also contends that correcting the charged timeframe surprised and misled the defense because: (1) the defense was "entitled to rely upon the government's decision not to amend the charge sheet prior to trial," Reese, 76 M.J. at 301; and (2) backdating the charged timeframe by 279 days meant CL was 15 years old (rather than 16 years old) when Appellant made the extortionate threats. The newfound overlap between the Articles 120b and 127 charges, in Appellant's telling, transformed an otherwise consensual sexual act with CL (i.e. oral sex) into the product of coercion. Appellant alleges these facts aggravate the offenses.

Appellant's reliance on Reese is misplaced. The amendment at issue in Reese altered the means of committing the charged offense and the defenses available for the charged conduct. This, coupled with critical concessions from the government, constituted a major change. Here, correction of the commencement date for the extortionate threats did not alter the means of committing the offense or implicate defenses available to Appellant. Appellant received appropriate notice about the nature of the crime, his victim, and the location.

Correcting the charged timeframe did not misled Appellant in any way. While CL was a teenager when Appellant made the extortionate threats, her age

was irrelevant. It was not an element of the offense. It did not alter the punishment that could be imposed, and it did not implicate the statute of limitations. Additionally, as early as the preliminary hearing, the defense was placed on notice that the extortion for oral sex began while Appellant and CL were still in high school. Any oral sex that took place after Appellant entered active duty was the continuation of that prior extortion. Evidence to this effect was admitted at trial, without objection, independent of the motion to correct the commencement date of the extortion. Simply put, correcting the commencement date for the extortion charge did not affect the manner in which the defense litigated the Article 120b offense.

The correction did not create any additional offenses. While CL struggled to remember the exact dates for Appellant's crimes, she was clear that Appellant repeatedly extorted her in the same manner — without meaningful distinction — and that these threats began prior to Appellant entering active duty in August 2013. CL's allegation of repeated extortion, in the same manner, demonstrates the lack of distinction between any of the divers occasions that was somehow dependent on a particular date. Correcting the dates did not add another offense, it merely corrected a minor error in the pleading.

The plain language of R.C.M. 603(a) and (c), coupled with this Court's precedent, leads to one conclusion: correcting the dates of the extortion charge

was a minor change and Appellant was not prejudiced. Accordingly, this Court should affirm the lower court's decision and uphold Appellant's conviction for extortion.

ARGUMENT

THE CHANGE WAS MINOR. IT DID NOT ADD A SUBSTANTIAL MATTER NOT FAIRLY INCLUDED IN THE ORIGINAL CHARGE, NOR DID IT MISLEAD APPELLANT, OR PREJUDICE HIS SUBSTANTIAL RIGHTS.

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

R.C.M. 603 and Military Practice

"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). Some examples of 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.

Once an accused has been arraigned on a charge, a military judge may "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) (emphasis added). A major change "may not be made over the objection of the accused unless the charge or specification affected is preferred anew." R.C.M. 603(d). No "separate showing of prejudice" is required when a change to the charge or specification is major. Reese, 76 M.J. at 302.

Unless the dates are "offense-defining," amending the charged timeframe is a minor change within the meaning of R.C.M. 603(a). *See* Brown, 34 M.J. at 110, *overruled on other grounds by* Reese, 76 M.J. at 302 (citing United States v. Brown, 16 C.M.R. 257, 261-62 (CMA 1954)). "[W]here time is not of the essence, it is the general rule that an erroneous statement of the date of the offense constitutes a matter of mere form, and amendments are freely permitted where they do not operate to change the nature of the crime charged, and there is no showing that the defendant has been misled or prejudiced in his defense on the merits." Brown, 16 C.M.R. at 261-62 (citations omitted).

The dates may be "offense-defining" when they either create an offense or implicate the statute of limitations. Brown, 34 M.J. at 110. Absent such issues, the change is considered minor because "no new offense [is] created by the challenged amendment." Id. Additionally, "amendments are freely permitted where they do

not operate to change the nature of the crime charged, and there is no showing that the defendant has been misled or prejudiced in his defense on the merits." Brown, 16 C.M.R. at 688 (citing Rogers v. State, 226 Ind. 539 (1948), *cert. denied*, 336 U.S. 940; Commonwealth v. Ashe, 367 Pa. 234 (1951)).

In United States v. Wray, the appellant was charged with larceny by taking on 6 August 1980. 17 M.J. 375 (C.M.A. 1984). The court-martial found the appellant guilty of larceny by withholding on a different date that was inconsistent with the evidence and prosecution's theory. Id. at 375-76. In that case, the appellant "was charged with one larceny but convicted of another," so the conviction was reversed. Id. at 376. This Court explained that changes to the specification are permissible "provided the facts . . . constitute an offense by the accused" and the amendment "does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense." Id. Changing the date of the offense "may, but does not necessarily, change the identity of an offense." Id.

Fed. R. Crim. P. 7(e) and Federal Practice

The analysis to R.C.M. 603(c) states "[t]his provision is based on Fed. R. Crim. P. 7(e), which is generally consistent with military practice." MCM, A21-30. Fed. R. Crim. P. 7(e) provides that "[u]nless an additional or different offense

is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding."

The Supreme Court recognized "the settled rule in the federal courts that an indictment may not be amended . . . unless the change is merely a matter of form." Russell v. United States, 369 U.S. 749, 770 (1962). Federal courts observed that "[w]here time is not an essential element of the offense, a defect in the allegation of time is one of form only." United States v. Arge, 418 F.2d 721, 724 (10th Cir. 1969) (citing Butler v. United States, 197 F.2d 561, 562 (10th Cir. 1952); Weatherby v. United States, 150 F.2d 465, 467 (10th Cir. 1945)) ("Where time is not an essential ingredient of the offense, and the indictment charges facts showing the offense was committed within the statutory period of limitations, a defect in the allegation of time is one of form only.")

"The [date of the] allegation is not regarded as going to an essential element of the crime, and, within reasonable limits, proof of any date before the return of the indictment and within the statute of limitations is sufficient." Arge, 418 F.2d at 724 (citing Wright, Fed. Prac. & Proc. § 125, p. 247 (1969)); Stewart v. United States, 395 F.2d 484 (8th Cir. 1968); Jacobs v. United States, 395 F.2d 469 (8th Cir. 1986); Butler, 197 F.2d at 562; Weatherby, 150 F.2d at 467; *see also* United States v. Goldstein, 502 F.2d 526, 528 (3d Cir. 1974) ("Ordinarily, a mere change in dates is not considered a substantial variation . . . but an exception exists when a

particular day may be made material by the statute creating the offense"); Berg v. United States, 176 F.2d 122, 126 (9th Cir. 1949) (reasoning the "change of a date of an indictment is not a material allegation which must be proved as laid"); Hale v. United States, 149 F.2d 401, 403 (5th Cir. 1945) (finding "the time alleged in an indictment is not descriptive of the offense, and need not be precisely proven").

In United States v. Gammill, the indictment failed to allege the year in which the appellant sold narcotics, but "[a]t the close of its case the government moved to amend the indictment to conform to the proof that the offense occurred on November 9, 1968." 421 F.2d 185, 186 (10th Cir. 1970). The court concluded that "the omission of the year prevents the indictment from charging an offense within the statute of limitations." Id. Because "[t]he defect was not one of form," amendment of the date on the indictment was improper. Id.

Similarly, in Goldstein, the indictment alleged the appellant failed to file his tax return by 15 April, but the evidence at trial established that the return was due on 7 May, and the judge "in effect allow[ed] an amendment to the indictment" by submitting the case to the jury with the modified date. 502 F.2d at 527-28. The court observed that, for this crime, "[c]onduct and time" were "inextricably intertwined" because the date of 15 April was "designated a criminal offense . . . [and] only on that date does the crime occur." Id. at 528 (citing United States v. Figurell, 462 F.2d 1080 (3rd Cir. 1974)).

Conversely, in United States v. Cina, the Seventh Circuit upheld amendment of the indictment to allege the commencement of the conspiracy two years earlier than indicated on the initial pleading. 699 F.2d 853, 860 (7th Cir. 1983). The court observed that an "'essential' or 'material' element of a crime is one whose specification with precise accuracy is necessary to establish the very illegality of the behavior and thus the court's jurisdiction." Id. at 859. The court went on to say that "[o]nly in rare cases is time a material element of the offense charged, even where continuing offenses such as conspiracy are alleged." Id. (citing Wharton's Criminal Procedure, § 511 (12th Ed. 1975)). Correcting the commencement date was thus "a 'clerical' amendment of the dates within which a conspiracy was alleged to have occurred" and permissible. Id.

Argument

Appellant repeatedly threatened to publish an illicit photograph unless CL performed oral sex on him. This was the essential "nature and identity" of the extortion charge. *See* Brown, 16 C.M.R. at 262. Correcting the approximate start date for this crime did "not change the nature or identity of the offense," nor did it "increase the amount of punishment that might be imposed for any such offense." *See* Wray, 17 M.J. at 376. CL was a teenager when Appellant committed these crimes; but whether she was 15 or 16 years old when Appellant threatened her did not matter. This is because CL's age was not an element of the extortion charge,

nor did it affect the permissible punishment in sentencing under Article 127, UCMJ. Given these essential facts, correcting the date of the extortion charge was a "matter of mere form" and "freely permitted" under R.C.M. 603(a) and (c) at any time prior to announcement of findings. *See* Brown, 16 C.M.R. at 261-62.

Appellant obfuscates this straightforward analysis in several ways. First, Appellant suggests that the military judge applied the incorrect standard when she determined that correcting the charged timeframe was a minor change. (App. Br. at 28.) Second, he claims the defense "was not on proper notice of the change and was entitled to rely on the charge sheet" at arraignment. (Id. at 32.) Third, Appellant insists the change was major because the dates were critical to the *litigation* rather than just the extortion charge. (Id. at 36.) And fourth, Appellant alleges he was deprived of a defense at trial. (Id. at 43.) These arguments lack support in the record, are inconsistent with this Court's precedent and the plain language of R.C.M. 603, and should be rejected.

A. The military judge applied the correct standard and reached the correct result.

After hearing argument on the motion to amend, the military judge placed her ruling on the record. (JA at 155.) She observed that "if we look at the test, which is, does the changes [sic] on [sic] 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 . . . " (Id.) Appellant insists that,

based upon the language used by the military judge, "[i]t is clear the military judge utilized the test from [United States v. Sullivan, 42 M.J. 360 (C.M.A. 1995), *overruled on other grounds by* Reese, 76 M.J. at 302]" when analyzing this issue.[5] (App. Br. at 29, n.8.) To the extent that this matters, the record is not so clear.

The military judge never mentioned Sullivan during the motion hearing. Appellant assumes she relied on Sullivan (and nothing else) due to similarities between the test articulated in that case and the language used by the military judge. But Appellant overlooks the fact that the military judge's language followed the plain language of R.C.M. 603(a) and (c). Subparagraph (a) explains that a change will be minor unless, *inter alia*, it adds an offense. If a military judge concludes that the change is minor, subparagraph (c) then requires her to consider whether a "substantial right of the accused is prejudiced" by the proposed change. The language used by the military judge therefore closely tracked the "test" required by the plain language of R.C.M. 603. So Appellant's contention that the

[5] In Sullivan, this Court opined that, when considering whether amendment of "an information is permissible, federal Courts of Appeals use a two-pronged test based upon a literal reading of the rule. They say that an amendment is permissible 'if no additional or different offense is charged [first prong] and if substantial rights of the defendant are not prejudiced [second prong]." 42 M.J. at 365.

military judge "analyzed the change under the pre-[Reese] standard" lacks support in the record.[6] (App. Br. at 30.)

Moreover, Appellant incorrectly suggests that the military judge erred by "stat[ing] on the record that the test requires prejudice." (Id.) The military judge was required to first consider whether the change was minor or major. *See* R.C.M. 603(a). Then, even if the change was minor, the military judge was required to deny the motion if a "substantial right of the accused [was] prejudiced." *See* R.C.M. 603(c). Appellant is correct insofar as a *major* change was impermissible over defense objection, regardless of whether an accused demonstrated prejudice. Reese, 76 M.J. at 301 ("if a change is 'major,' [R.C.M. 603(d)] provides that such change cannot be made over defense objection unless the charge is 'preferred anew.'") That opinion overruled a line of cases that held that *major* changes were still subject to a separate prejudice analysis. Id. at 302. However, prejudice is still an important part of the analysis as to whether a *minor* change should be permitted "at any time before findings are announced . . . " *See* R.C.M. 603(c); *see also* (App. Br. at 46) (when analyzing a minor change "the Court's pre-[Reese] prejudice analysis is instructive.") The military judge properly concluded that the

[6] Even if this Court disagrees, for the reasons stated below, any "error was harmless because the military judge reached the correct result . . . " *See* United States v. Robinson, 58 M.J. 429, 433 (C.A.A.F. 2003)

change was minor and conducted the requisite prejudice analysis under R.C.M. 603(c).

Appellant's argument that "the military judge only recognized the possibility of amending the charge sheet if the change created an "additional or different offense" while "ignoring the rest of R.C.M. 603" is similarly unavailing. (App. Br. at 29.) "Military judges are presumed to know the law and follow it absent *clear evidence* to the contrary." United States v. Erickson, 65 M.J.. 221, 225 (C.A.A.F. 2007) (citation omitted) (emphasis added). In this case the military judge's analysis was tied to the arguments that preceded it. Defense counsel, when given the opportunity to articulate his position, argued that the change was "highly prejudicial" based upon a short list of reasons.[7] (JA at 151.) He did not expressly argue that any of the other considerations enumerated in R.C.M. 603(a). *See* (JA at

[7] Defense counsel argued that backdating the extortion charge made CL "under the age of 16" and it was now "extortion on a minor." (JA at 162.) This is inaccurate. Article 127, UCMJ, does not define "minor" because it is not an element of the offense or an aggravating factor that results in enhanced sentencing. *See generally*, MCM, Part IV, para. 53. Furthermore, the definitions of "minor" or "child" depend upon which statute is at issue. For example, in charges under Article 120b, UCMJ, a "child" is defined as someone under the age of 16 years old. MCM, Part IV, para. 45b.a(h)(4). Whereas, in a prosecution related to child pornography under Article 134, UCMJ, a "minor" is "any person under the age of 18 years." MCM, Part IV, para. 68b(c)(4). Of note, these varying definitions were "critical" to Appellant's court-martial *only* because he sexually assaulted two children and produced child pornography.

148-55.) The military judge therefore properly focused her analysis on prejudice, consistent with R.C.M. 603(c).

Appellant also contends the military judge erred because "[t]he case law clearly precluded the change." (App. Br. at 28-9.) That is incorrect. While the military judge never mentioned Sullivan, she did expressly reference United States v. Whitt, 21 M.J. 658, 661(A.C.M.R. 1985), *rev. denied*, 22 M.J. 357 (C.M.A. 1986). (JA at 156.) (alluding to the holding in Whitt "that the change of the date by one year is not a major change resulting in a new offense.") The Army Court of Military Review did not make this decision in a vacuum; rather, it relied upon this Court's opinion in Brown, 16 C.M.R. 257. *See* Whitt, 21 M.J. at 661. Rather than clearly precluding the change, this Court's precedent shows that correcting the date for the charged offense will be a minor change unless that date is "offense-defining." Brown, 34 M.J. at 110; *see also* Brown, 16 C.M.R. at 261-62; Wray, 17 M.J. at 376. Based on the foregoing, there is a dearth of any evidence, let alone "clear evidence," the military judge misunderstood and/or misapplied the law on this issue. *See* Erickson, 65 M.J. at 225.

Appellant next attempts to restrict the plain language of R.C.M. 603(a) by applying principals of statutory construction to the discussion section for that Rule. (App. Br. at 31.) This is inappropriate given the fact that supplementary materials, such as the discussion section, "do not constitute rules" and cannot supplant the

plain language of R.C.M. 603(a). *See* MCM, Part I, para. 4, Discussion. To that end, this Court has carefully delineated between "the binding portion of the Manual" and the "non-binding Discussion section." *See* United States v. Bigelow, 57 M.J. 64, 67 (C.A.A.F. 2002.) These facts notwithstanding, according to Appellant, "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" rather than an amendment to the beginning date of the charged offense. (App. Br. at 31.)

But this Court should begin (and end) with the plain language of R.C.M. 603(a). *See* United States v. Stout, No. 18-0273, 2019 CAAF LEXIS 648, at *6 (C.A.AF. 22 Aug. 2019) (This Court "appl[ies] ordinary principles of statutory construction to the Rules for Courts-Martial."). R.C.M. 603(a) unambiguously states that minor charges "are any except" those specifically enumerated. That language, and the case law interpreting this language, evinces a permissive rule for correcting defects not excised from the definition of "minor change" in R.C.M. 603(a). "'[C]ourts must give effect to the clear meaning of statutes as written' and questions of statutory interpretation should 'begin and end . . . with [statutory] text, giving each word its ordinary, contemporary, and common meaning.'" United States v. Andrews, 77 M.J. 393, 400 (C.A.A.F. 2018). The language of R.C.M.

603(a) is unambiguous and points to one conclusion: correcting the start date for the extortion charge was a minor change.

B. The change was minor.

i. Appellant received proper notice.

Turning to the issue of notice, Appellant received ample notice about "the nature and identity" of the charged offense. *See* Wray, 17 M.J. at 376. Based upon pretrial discovery, the charge sheet, and his own personal knowledge, Appellant was informed of the victim, the offense, the location, and the substance of the specification. Appellant was also informed that these extortionate threats began in high school and were repeated in the same manner "each time" Appellant requested oral sex from CL after entering active duty. (JA at 274.) Nothing about the corrected timeframe changed this essential notice or altered the criminality of Appellant's conduct. Stated another way, no matter when the act was committed, provided Appellant was on active duty, it would have been criminal under the UCMJ. This was not a charge where the dates were "offense-defining" to the offense. *See* Brown, 34 M.J. at 110.

This conclusion is consistent with the weight of federal authority addressing the issue. Unlike Goldstein, where the precise date that the tax return was due "designated a criminal offense" and "only on that date does a crime occur," the dates of Appellant's extortionate threats did not affect the criminality of his

conduct. *See* F.2d at 528. Appellant's threats to CL did not become somehow innocent merely because they occurred earlier than initially alleged. Instead, Appellant's case is like Cina, where the dates of the conspiracy were not an "'essential' or 'material' element of [the] crime" because "precise accuracy is [not] necessary to establish the very illegality of the behavior and thus the court's jurisdiction." 699 F.2d at 859.

Extending this further, the extortion charge was not one where "time was of the essence . . . " Brown, 16 C.M.R. at 261-62. CL's age was not an element of the extortion charge. *See* MCM, Part IV, para. 53.b. CL's age did not affect the authorized punishment for that offense. *See* MCM, Part IV, para. 53.e. Nor did it implicate the statute of limitations. *See* Article 43, UCMJ. Appellant therefore received proper notice for the extortion charge as "time [was] not an essential element of the offense" so the change "of time [was] one of form only." Arge, 418 F.2d at 724 (citation omitted).

Appellant also received proper notice with regard to the sexual assault of a child offense. While CL's age was an essential element for this offense, whether the charged sexual act was consensual (or nonconsensual) was not, because a minor under the age of 16 cannot consent. *See* MCM, Part IV, para. 45b.a(b). The government provided notice that, while CL was under the age of 16, Appellant penetrated her mouth with his penis. Appellant was also provided notice through

extensive pretrial discovery, including the Mil. R. Evid. 404(b) and 412 notice, that CL would testify that "each time" she gave Appellant oral sex after he left for active duty it was under threat. (JA at 274.) This evidence was admitted, without objection, and before the factfinder days before the motion to correct the commencement date of the extortion. So, contrary to Appellant's assertions, nothing about correcting the date of the extortion on the charge sheet "increased the seriousness of two offenses at the same time . . . " (App. Br. at 39.)

Government's Timing and Motivation

As a preliminary matter, Appellant focuses on the timing of the motion to amend, and insinuates that this reflects a strategic decision on the part of the prosecution. *See e.g.* (App. Br. at 32) ("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 [CL]).") Defense counsel adopted a similar tactic at trial. *See* (JA at 150.) These facts do not alter the analysis required by R.C.M. 603, which expressly authorizes minor changes up until announcement of findings, and therefore contemplates corrections to the charge sheet after evidence has been introduced.

Provided that the motion was made before announcement findings, the timing of the motion is irrelevant unless it adds a matter not fairly included,

misleads the accused, or results in substantial prejudice to his rights. *See* R.C.M. 603(a) and (c). Additionally, the "motivation of the government is not relevant to a determination of whether a change is minor or major . . . " Stout, 2019 CAAF LEXIS at *17 n.4 (Ohlson, J., dissenting). Appellant's focus on the timing of, and alleged motivation behind, the motion is therefore misguided.

The Alleged Decision Not to Amend

Appellant maintains that the government — after receiving Facebook messages from CL the weekend before trial and realizing that they documented extortion outside the charged timeframe — was required to amend the charge sheet. (App. Br. at 32-33.) As a legal matter, his argument conflicts with the plain language of R.C.M. 603(c), which expressly authorizes minor changes any time prior to announcement of findings. As a factual matter, Appellant ignores the fact that CL was a teenage victim who repeatedly expressed her inability to "remember the exact sequence of events" once Appellant joined the Air Force and began extorting her again. (JA at 275); *see also* United States v. Wilson, 2019 CCA LEXIS 276, at *56 (N-M Ct. Crim. App. 1 Jul. 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.").

This uncertainty was apparent from CL's three pretrial statements as she alternated between tying the extortion to Appellant's return from boot camp in the

fall of 2013 when "she was still a child" (JA at 281) and after her 16th birthday on 2 August 2014. (JA at 291.) This alone justified the government waiting to modify the dates on the charge sheet until after she testified. Additionally, the Facebook messages were not the sole evidence of extortion. The government argued that CL's testimony was "consistent, it's credible, and it's corroborated by the evidence that we have." (JA at 162.) It is true "that the government controls the charge sheet," Reese, 76 M.J. at 301, 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.

In an attempt to bolster his argument about an alleged lack of notice, Appellant points to a series of inapposite cases. First and foremost, Appellant relies upon Reese for the proposition that "[t]he defense was entitled to rely on the charge sheet at the government's decision not to amend the charge sheet prior to trial." (Id at 33.) This case presents a fundamentally different issue from Reese, where the amendment to the charge sheet "altered the means of committing the offense" and added something "not fairly included in the original specification." 76 M.J. at 300. Moreover, in Reese, the government conceded that "the difference between the charges when they styled the change as a 'new charge that came up.'" Id. at 301.

Changing the *actus reus* (touching the victim's penis by tongue versus hand) in Reese resulted in a "different nature of the two offenses and the dissimilar defenses available for each." Id. This Court therefore determined that the change was major, and that the appellant was "entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." Id. But in this case, the same circumstances are not present because the change was not based upon a "new charge that came up." Id. Rather, the nature and identity of the extortion specification remained the same—it was the same offense, committed repeatedly in the same way, with no meaningful distinction between the manner in which Appellant committed it that would make the dates an essential element of the offense. For those same reasons, merely correcting the commencement date did not raise "dissimilar defenses" to the act of extorting someone for oral sex. Id.

Appellant also argues that "[i]t offends due process to send Appellant to jail for 12 years, in part, because the [g]overnment conformed the charge sheet to the evidence after evidence presentation concluded." (App. Br. at 35.) Notably, Appellant does not challenge the constitutional viability of R.C.M. 603(c), which expressly authorizes minor amendments at any point prior to announcement of findings. Instead, Appellant cites to Dunn v. United States, 442 U.S. 100, 107 (1979), to support this claim despite its distinguishable facts. (Id.)

In Dunn, the appellant was charged with making a false declaration "in any proceeding before or ancillary to any court or grand jury of the United States." Id. The charge and conviction were based upon a statement made in September. Id. at 102-03. The intermediate appellate court determined that the September statement "was not an ancillary proceeding" to a grand jury investigation, but upheld the conviction because Dunn later adopted that statement in uncharged testimony in October that *was* ancillary to said grand jury investigation. Id. at 104-6. The Supreme Court found the lower court's resolution of the issue to be error, because upholding "a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial" was what "offend[ed] the most basic notions of due process." Id. at 106. But that is not what happened in Appellant's case. Appellant's extortionate threats were alleged on the charge sheet, presented to members, and upheld by the lower court. And unlike the cognizable differences between the circumstances of Dunn's September and October statements, here there was no material, identifiable distinction between any of Appellant's extortionate threats.

Appellant then pivots to this Court's recent decision in Mader, 2021 CAAF LEXIS 353 (C.A.A.F. 20 Apr. 2021), for the proposition "that the [g]overnment must live with the natural legal consequences of its own charging decision. (App. Br. at 35.) This too has little bearing on Appellant's case. In Mader, the service

court "erred when it concluded that 'no person in any similar circumstance could ever lawfully consent' to being burned by a cigarette." *See* Mader, 2021 CAAF LEXIS 353 at *2. The government, in that case, chose to charge the appellant with assault consummated by a battery, despite the fact that consent and mistake of fact as to consent were legal defenses. Id. at *7. When the evidence suggested that some victims consented, or that the appellant had a mistake of fact as to consent, the government was required to live with that charging decision. Id. at *7-8. Here, the amendment did not foreclose any legal defenses to the extortion charge. As explained in detail below, it did not deprive Appellant of his chosen defense at trial. In sum, Appellant was provided proper notice about the nature and identity of the charged offense.

ii. Appellant was neither surprised or mislead.

Appellant nevertheless claims that "[t]his case is certainly one in which changing the dates of the offense changed the nature and identity of the *litigation*" and that the dates were "[c]ritical to the *[l]itigation.*" (App. Br. at 36.) (emphasis added). It is true that Appellant was charged with numerous offenses against teenage victims, including allegations of statutory sexual assault and production of child pornography. Additionally, significant evidence of his preservice misconduct against those teenage victims, for which Appellant could not be punished, was admitted without objection at trial. Counsel therefore explored topics such as

capacity to consent in *voir dire*, drew bright lines about how the members could use Appellant's preservice misconduct, and highlighted the birthdays of each teenage victim during their cases-in-chief.

But the dates were not "critical" to the extortion charge. Appellant attempts to side-step this fact by arguing that the extortion charge and the statutory sexual assault charge were "intricately linked" and that the amendment to the extortion charge greatly aggravated both offenses. (App. Br. at 38.) In particular, Appellant suggests that the lack of initial overlap between the two offenses meant that any sexual acts that occurred between himself and CL were consensual and that was "far less aggravating than if the sex[ual] act occurred *because of* a threat." (Id.) If this were an accurate statement of the record, there may be some credence to this argument. However, as discussed above, the record is devoid of evidence that CL performed oral sex upon Appellant after he entered active duty in the absence of extortionate threats. *See e.g.* (JA at 85) (CL testified "Yes, sir" when asked whether Appellant used threats about the illicit photograph "every time that you gave him a blowjob after he got back from the Air Force . . . "); *see also* (JA at 274) (CL told OSI that oral sex "happened approximately five times and each time [CL] performed oral sex on [Appellant] under the threat of posting her naked photos online if she did not comply.")

Evidence that Appellant extorted CL, beginning in high school, was admitted without objection and independent of the motion to correct the dates of the extortion charge. The motion was raised after the government rested its case-in-chief, and well after this evidence was presented to the factfinder. This evidence, therefore, had no effect on how the defense litigated the Article 120b charge, or whether the members would perceive the underlying sexual act as being the product of coercion. The military judge recognized this fact when she observed that Appellant's preservice extortion, and threats from the fall of 2013 and spring of 2014, were already admitted and there was "nothing that isn't already out there and fair for both parties to argue in whatever light they see fit." (JA at 156.)

Unlike United States v. Parker, where the appellant was charged with rape and adultery with the same adult, and the "date of any alleged non-consensual incident was critical to proper trial preparation" for the defense, there was no evidence of consensual oral sex between Appellant and CL once he entered the Air Force. *See* 59 M.J. 195, 198 (C.A.A.F. 2003).

Even so, evidence that Appellant coerced CL into providing oral sex was not a "new charging theory," as Appellant suggests. (App. Br. at 39.) Appellant was not charged with rape of a child under Article 120b, which would have required proof that the child was threatened or placed in fear. *See* MCM, Part IV, para.

45b.a(a)(2)(B). Instead, Appellant was charged with sexual assault of a child under Article 120b. The government was therefore only required to prove that a sexual act occurred with a child, and the issue of consent or coercion was irrelevant to his guilt or innocence. *See* MCM, Part IV, para. 45b.a(b) and (g).

Again, the military judge recognized this fact when she observed that the government was not required to forward "a stated theory" when the allegation was sexual assault of a child under Article 120b, UCMJ, and that notice for the charged offense is limited to "just the fact that sex occurred under the age of 16.". (JA at 155.) In this case, Appellant would have been guilty of the Article 120b offense whether or not Appellant had coerced CL into the sexual act. Furthermore, Appellant was neither "surprised" nor "misled" in preparing his defense against the charges in this case. (App. Br. at 39) CL's pretrial statements, which were provided to the defense as early as the preliminary hearing, documented the coercive dynamic of her relationship with Appellant. This included CL's first statement to OSI, which said, in relevant part:

> [Appellant] then joined the Air Force and left the Norfolk, [Virginia,] area. In approximately Sep[tember 20]14, [Appellant] returned to the Norfolk area and told [CL] he was stationed at "Langley" . . . . [Appellant] then requested [CL] perform oral sex on him with the threat if she did not, he would post naked photos of her online. This happened approximately five times *and each time [CL] performed oral sex upon [Appellant] under the threat of posting her naked photos online if she did not comply* . . . . [CL] could not remember the exact sequence

> of events but the forced oral sex after [Appellant] joined the Air Force took place approximately five times.

(JA at 275) (emphasis added).

Her statement to base legal office personnel, which was also provided during the preliminary hearing, documented the same coercive dynamic after Appellant entered active duty. (JA at 281.) The notion that Appellant was somehow surprised or misled into believing that the government sought to prove "otherwise consensual" oral sex at trial has no support in the record — especially when the government provided notice under Mil. R. Evid. 404(b) and 412 of its intent to introduce Appellant's preservice misconduct to demonstrate his "continued this course of conduct . . . after joining the United States Air Force in August 2013." (App. Ex. I at 2.) Appellant was therefore aware of the nature and identity of the charges, and the creation of "overlap" between the charges did not mislead Appellant or otherwise hinder his preparation for trial.

Additionally, Appellant speculates that "it is reasonable to assume [that defense counsel] would have and could have approached confrontation [of CL] differently" in light of the fact that the statutory sexual assault was nonconsensual in fact, as well as nonconsensual as a matter of law. (App. Br. at 39.) As stated above, this argument has no support in the record. Trial defense counsel had every reason to cross-examine CL on her subjective reaction to Appellant's threats based upon pretrial discovery, the government's opening statement, and CL's testimony

on direct examination. Indeed, defense counsel did cross-examine CL about how she told Appellant "no" and refused to perform oral sex on him. (JA at 131.) And they cross-examined her about how Appellant used smiling emojis which suggest that he was joking about his threats to publish the illicit photograph. (JA at 132.)

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." United States v. McGrath, 39 M.J. 158, 162 (C.M.A. 1994) (citing Delaware v. Fensterer, 474 U.S. 15, 19 (1985)). "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish . . . " Id. That is what happened in this case. Appellant's speculation that some unspecified additional cross-examination would have taken place is insufficient to demonstrate that correcting the dates of the extortion charge surprised or misled Appellant in preparing a defense at trial.

iii. The amendment did not create additional criminal liability.

Appellant avers that "[t]rial 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." (App. Br. at 43.) Using standards applicable to variance, Appellant suggests that, because extortionate threats took place outside of the original charged timeframe, that the

government created additional criminal liability. *See* (App. Br. at 43-45.) This argument ignores the plain language of R.C.M. 603 and the body of law applicable to the granted issue.

First, Appellant contends that "[h]ad 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." (App. Br. at 44.) The problem with Appellant's argument is that the government did raise a timely oral motion to amend the charged timeframe. (JA at 156.) Based upon the standards applicable to R.C.M. 603 motions, the motion was granted as a minor change by the military judge. (JA at 156.)

Second, Appellant avers that the "on or about" language on the charge sheet "could never permit a finding of guilty" and, as a result, amending the charged timeframe somehow created new offenses. *See* (App. Br. at 45.) With this loose foundation in place, Appellant, without citation to authority, broadly asserts that "[m]inor changes are not ones that create a finding of guilty where one did not exist before." (Id.) That is not the standard. And that is not what happened in this case. Certainly, R.C.M. 603(a) prohibits a change that "add[s] an offense" to the original charge; however, the mere fact that some of Appellant's threats fell

outside the charged timeframe, does not *ipso facto* mean that new offenses were created.

As discussed above, the dates of the extortionate threats were not offense-defining. The date change did not add another offense because CL alleged she was repeatedly extorted by Appellant in the same manner — threatening to publish an illicit photograph if she did not give him oral sex — after he joined the Air Force in August 2013. There was no meaningful distinction between any of the divers occasions that was dependent on a particular date. The record therefore shows that the motion to amend simply cured a minor defect in the pleading as to the dates of the offenses.

Of note, defense counsel did not argue at trial that the proposed amendment added additional offenses to the original specification. But the lower court nevertheless considered whether charging "'on divers occasions' gave the expansion of the date range the effect of adding 'offenses' to the specification." (JA at 20.) The court concluded that the amendment did not add an offense because, *inter alia*, "the charging of an offense on divers occasions over a number of months is inherently facially ambiguous as to the exact number and dates of the criminal acts." (Id.) The court also observed that "it was the same alleged offense applied to a different time period." (Id.)

This conclusion finds ample support in the record. Despite being unsure of the exact dates, CL testified that after Appellant joined the Air Force he would "ask for blowjobs and if [she] said no he would bring up the picture" and threaten to "post" the same. (JA at 85.) CL thought that Appellant would "post the picture" and agreed that she believed that he was "serious" about the threat. (Id.) CL further testified that "every time that [she] gave [Appellant] a blowjob after he got back from the Air Force . . . he use[d] the picture every time [sic] to sort of make [her] do it again." (Id.) This testimony confirms that there was no meaningful distinction between any of the instances of extortion.

Moreover, during his argument on findings, trial counsel did discuss the 27 October 2013 and 14 June 2014 Facebook messages that Appellant claims constituted the only evidence of extortion. (JA at 162.) But Appellant disregards CL's testimony, and trial counsel's comment on how the members should use the Facebook messages admitted as Prosecution Exhibit 3: "What [CL] told you is consistent, it's credible, *and it's corroborated* by the evidence that we have." (Id.) (emphasis added). Enlarging the timeframe did not create an additional offense, it just corrected the dates to conform to the substance of CL's testimony at trial, which included repeated threats (primarily via text message rather than Facebook message) to publish an illicit photograph unless she performed oral sex upon Appellant. *See* (JA at 97.)

C. Appellant was not deprived of a defense or otherwise prejudiced.

Appellant recognizes that if this change was minor, then this "Court's pre-[Reese] prejudice jurisprudence is instructive." (App. Br. at 46.) (citing Sullivan, 42 M.J. at 365, *overruled by* Reese, 76 M.J. at 301-302). Apart from undermining his previous assertion that the military judge erred by considering prejudice as part of her analysis, the arguments advanced by Appellant demonstrate that he was not deprived of his chosen defense or otherwise prejudiced.

Appellant once again argues that he "was denied the ability to present a defense" because the amendment allegedly "preempted" him from arguing that "the [g]overnment offered no evidence that any extortion occurred" during the original charged timeframe. (App. Br. at 46.) The logical conclusion to this argument is 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. That conflicts with the plain language of R.C.M. 603(a) and the near-universal view in federal practice that amending the date of an offense is generally a matter of form rather than substance. And merely to suggest that the offenses did not occur within the charged timeframe is not a defense to crime itself. Dates are not an element of the offense of extortion.

The fact that "defense counsel forecasted in opening statement that this was a sloppily charged case" does not suggest "that was how [the defense] was going to

deal with the surprise of the new Facebook messages" at trial. (App. Br. at 46-47.) We know this because, when given an opportunity to articulate prejudice based upon the change in dates, defense counsel did not reference his supposed reliance on a successful R.C.M. 917 motion. Furthermore, this Court can readily identify the defense pursued at trial because defense counsel stated it on the record in his opening statement. The defense pursued, before and after the correction at issue, was that only "the top of [CL's] head" was visible in the photograph, the photograph was deleted, and that neither Appellant nor CL took the comments seriously. (JA at 64.)

Amending the beginning date of the extortion charge did nothing to undermine this defense. In fact, it provided defense counsel with additional grounds to attack CL's credibility. (JA at 166.) Defense counsel argued:

> 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 [CL] 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.)

Far from abandoning the defense that was previewed in opening statements, defense counsel also argued "to the extent there's any allegation of an extortion that it was never taken as a threat." (JA at 168.) And he proceeded to argue facts

suggesting that both Appellant and CL took the comments in jest. (Id.) The minor change also did not affect Appellant's defense to the sexual assault of a child specification, which was that "no sexual contact in the charged time period" occurred with CL. (JA at 64, 169-70.) Appellant contested that any sexual acts occurred, not whether they were "otherwise consensual." (JA at 151.) In sum, correcting the timeframe for the extortion did not deprive Appellant of a legal or factual defense to either charge.

Appellant next contends that the correction at issue created "an error of constitutional dimension" in that it allegedly modified the legal theory of his conviction. (App. Br. at 47.) This argument is without merit. To the extent that there are alternative theories to prove the offense of extortion under Article 127, UCMJ, none are implicated by correcting the date of the offenses. The second element requires proof "[t]hat the accused intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity." MCM, Part IV, para 53.b. Appellant was placed on notice of the "advantage" sought through his extortionate threats: CL's "performance of oral sex upon" Appellant. (JA at 40.) It should be obvious that the dates of the charged offenses are not a legal theory and, therefore, modification of said dates did not change the legal theory for the extortion charge.

Appellant's remaining arguments are that he: (1) "was denied the right to meaningfully and accurately confront the witnesses against him" (App. Br. at 47);

and (2) that the extortion charge "intricately linked" to the sexual assault of a child specification because it "permit[ed] the trial counsel to argue that oral sex was actually obtained under threat." (App. Br. at 48.) These arguments have been discussed at length elsewhere in this brief, are without merit, and should be rejected by this Court.

CONCLUSION

The military judge and lower court correctly determined that correcting the beginning date of the charged offense was a minor change within the meaning of R.C.M. 603(a). The offense did not add a party or an offense. Nor did it mislead Appellant or otherwise prejudice his substantial rights. And the motion was timely pursuant to R.C.M. 603(c) because it was raised before announcement of findings. For these reasons, the United States respectfully requests that this Honorable Court should affirm the lower court's decision and uphold Appellant's conviction for extortion.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian counsel, and the Air Force Appellate Defense Division on 21 June 2021 via electronic filing.

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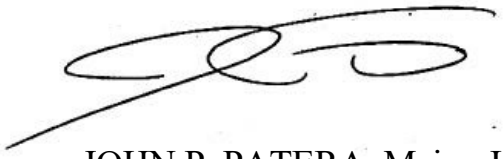

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