IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. NORMAN R. STOUT Staff Sergeant (E-6) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20120592 USCA Dkt. No. 18-0273 / AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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ISSUE PRESENTED

WHETHER THE GOVERNMENT MADE MAJOR CHANGES TO THE TIMEFRAME OF THREE OFFENSES, OVER DEFENSE OBJECTION, AND FAILED TO PREFER THEM ANEW IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 603.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

On June 14, 2012, a military judge, sitting as a general court-martial, convicted Staff Sergeant (SSG) Norman R. Stout, in accordance with his pleas, of abusive sexual contact with a child, indecent liberties with a child, and possession of child pornography, in violation of Articles 120 and 134, UCMJ. The military judge sentenced SSG Stout to be reduced to the grade of E-1, to be confined for eight years, and to be discharged from the service with a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On July 25, 2014, the Army Court reviewed the foregoing under Article 66, UCMJ. The court found SSG Stout's pleas improvident, set aside the findings of guilty and sentence, and authorized a rehearing. *United States v. Stout*, No. ARMY 20120592, 2014 CCA LEXIS 469 (Army Ct. Crim. App. 25 July 2014) (mem. op.).

On September 16, 2015, a military judge, sitting as a general court-martial, convicted SSG Stout, contrary to his pleas, of three specifications of abusive sexual contact with a child, two specifications of indecent liberties with a child, sodomy with a child, and assault with intent to commit rape, in violation of Articles 120, 125, and 134, UCMJ. The military judge sentenced SSG Stout to be reduced to the grade of E-1, to be confined for eighteen years, and to be dishonorably discharged from the service. The convening authority approved the

sentence as adjudged, and credited the accused with 779 days against the adjudged term of confinement. (Action).

On April 9, 2018, the Army Court amended Specification 5 of Charge I, and otherwise affirmed the findings and sentence. (JA 16-17). This Court granted SSG Stout's petition for review on August 6, 2018.

STATEMENT OF FACTS

Staff Sergeant Stout married MG in 1997, and together they had one child, TJS. (JA 96). MG also had two children prior to their marriage: a son, JB, and a daughter, NL. (JA 96). The family initially lived near Fort Drum, New York, but moved frequently over the years as the Army reassigned and deployed SSG Stout. (R. at 261).

In 2005, SSG Stout conducted a permanent change of station move to Korea, while MG and all three children left Fort Polk, Louisiana and moved to Vanderbilt, Michigan. (R. at 261). From Korea, SSG Stout returned to Fort Drum, only to leave for a second deployment to Iraq, a few months later. (Pros. Ex. 19). Staff Sergeant Stout redeployed in February 2008, and in August 2008, MG, NL, and TJS moved back to Watertown, New York. (Pros. Ex. 19; R. at 262, 264). In July 2009, SSG Stout deployed a third time to Iraq, while MG, NL, and TJS returned to Vanderbilt, Michigan. (Pros. Ex. 19; R. at 268).

Around May 2009, NL told MG that SSG Stout "had done things to her that was [sic] inappropriate." (R. at 280). MG then informed local police of NL's allegations, and the matter was ultimately referred to the Army's Criminal Investigation Command (CID). (R. at 280). On June 18, 2010, SSG Stout spoke with a CID agent in Iraq, and gave a statement in which he denied sexually abusing NL. (Pros. Ex. 1).

Staff Sergeant Stout redeployed less than a month later to Fort Drum, and charges were preferred against him some nine months later. (Pros. Ex. 19; JA 22). Staff Sergeant Stout agreed to plead guilty to three offenses in exchange for the convening authority's promise to dismiss the remaining nine. On June 14, 2012, SSG Stout pled guilty in accordance with the agreement. The Army Court later found those pleas improvident, however, and authorized a rehearing. *United States v. Stout*, ARMY 20120592, 2014 CCA LEXIS 469 (Army Ct. Crim. App. 25 July 2014) (mem. op.).

On November 3, 2014, the government made dozens of amendments to the charge sheet. (JA 22). Many of the changes corrected misspellings, while others changed the alleged location of an offense or removed conduct not essential to the offenses charged. (JA 22-25). Three of these changes, however, expanded the timeframes of Specifications 1 and 6 of Charge I, and the Specification of Charge II. (JA 22-24).

Specifically, the original six-day timeframe of Specification 1 of Charge I ran from August 1, 2008 to August 6, 2008. (JA 22). The government extended the end of this range to June 3, 2009, enlarging it by 300 days or exactly 50 times over. (JA 22). The original fourteen-day timeframe of Specification 6 of Charge I ran from January 14, 2009 to January 28, 2009.[1] (JA 23). The government enlarged this timeframe to run from August 7, 2008 to June 3, 2009, extending the window of prosecution by 286 days, or more than 20 times over. (JA 23). Finally, the original thirty-six-day timeframe of Charge II ran from February 14, 2009 to March 22, 2009. (JA 24). The government also enlarged this timeframe to run from August 7, 2008 to June 3, 2009 as well, extending the window of prosecution by 264 days, or more than seven times over. (JA 24).

The government referred the newly changed charge sheet to general court-martial on November 17, 2014 without preferring the allegations anew. (JA 25). Staff Sergeant Stout was arraigned on December 18, 2014, and on January 21, 2015, his defense counsel filed a motion challenging the major changes to the charge sheet. (JA 97-115). After receiving the government's response and conducting a motions hearing on the nature of these changes, the military judge

[1] Originally Specification 7 of Charge I, later renumbered to become Specification 6 of Charge I. (JA 20).

concluded that "the changes were not major in that they did not add a party, change an offense, or add a substantial matter." (JA 127).

SUMMARY OF THE ARGUMENT

The government made major changes to three specifications and failed to prefer those specifications anew, despite the defense's objections and the demands of Rule for Courts-Martial [hereinafter R.C.M.] 603(d). The government's failure rendered those specifications defective, reducing them to the equivalent of unsigned and unpreferred allegations. The court-martial therefore lacked jurisdiction over the allegations, and SSG Stout's convictions for these offenses are nullities. This Court, in conducting its de novo review of this issue, should reverse the contrary decisions of the military judge and the Army Court.

STANDARD OF REVIEW

Whether a change made to a specification is a minor or major change "is a matter of statutory interpretation and is reviewed de novo." *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017); *see also United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014)(whether an amended specification materially deviates from a charged specification is a question of law this court reviews de novo).

ARGUMENT

1. These newly expanded timeframes constituted major changes that required the government to prefer the specifications anew.

The changes to Specifications 1 and 6 of Charge I, and the Specification of Charge II were not minor, they were major, and they required the government to prefer the allegations anew.

Prior to arraignment, the government can make minor changes to charges and specifications as it sees fit. R.C.M. 603(b). Such minor changes are "merely intended to allow the government the freedom to correct small errors such as inartfully drafted or redundant specifications . . . misnaming of the accused . . . or to correct other *slight* errors." *Reese*, 76 M.J. at 300-01 (emphasis in original) (citations omitted).

By contrast, the government cannot make major changes "over the objection of the accused unless the charge or specification affected is preferred anew." R.C.M. 603(d). A change is major if, for example, it adds a "substantial matter not fairly included in those previously preferred." R.C.M. 603(a), (d). A "substantial matter" is one affecting the substance, i.e. the "essence" or "essential quality," of an allegation. *See Substance*, BLACK'S LAW DICTIONARY (9th ed. 2009). This Court has held a major change includes adding a "sentence escalator that doubled the punishment." *United States v. Smith*, 49 M.J. 269, 270-71 (C.A.A.F. 1998), *overruled on other grounds by Reese*, 76 M.J. 297. A major change may also

include "changing the means by which a crime is accomplished." *Reese*, 76 M.J. at 301.

A "substantial matter" should also include significant changes to the timeframe of an allegation, as "[c]hanging the date or place of the offense may, but does not necessarily, change the nature or identity of the offense." *United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003). Naturally, small variations in dates, on the order of a week or so, do not amount to major changes. *See United States v. Brown*, 34 M.J. 105, 110 (C.A.A.F. 1992), *overruled by Reese,* 76 M.J. 297*; see also United States v. Brown*, 16 C.M.R. 257, 261-62 (C.M.A. 1954). But large variations do. This Court has already recognized as much in the context of fatal variances, where it has found that significantly expanding the timeframe of an allegation may constitute grounds for reversal. *See, e.g.*, *United States v. Parker*, 59 M.J. 195, 201 (C.A.A.F. 2003) (finding a two year variance fatal). Indeed, this Court has not tolerated variances in time greater than a few weeks. *See United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999); *United States v. Hunt*, 37 M.J. 344, 347-48 (C.M.A. 1993). If a disparity between the charge and the findings would deserve reversal, then it naturally presents a "substantial matter" within the meaning of R.C.M. 603.

The government added anywhere from 264 to 300 days to the timeframes alleged in Specifications 1 and 6 of Charge I, and to the Specification of Charge II.

Variances that far-reaching are fatal, and so changes of that magnitude must be major too. Such changes not only alter the setting of the allegations, they also preclude defenses the accused may have otherwise raised. When the window for prosecuting an offense consists of a few days, the accused may be able put forward an alibi, uncover exculpatory circumstances, or otherwise demonstrate the implausibility of the allegation. But when the window of prosecution extends for ten months, such defenses become practically impossible; no accused could reasonably account for 300 days' worth of whereabouts. The effect of the government's changes in this case were substantial, effectively depriving SSG Stout of a defense he may have otherwise raised. Such changes are certainly not "minor," and they cannot persist over the accused's objection. *Reese*, 76 M.J. at 302.

2. The government's failure to prefer the specifications and charges anew means they were defective and void.

The changes to Specifications 1 and 6 of Charge I, and the Specification of Charge II, were major. Staff Sergeant Stout objected to them, but the government failed to comply with R.C.M. 603(d), and the military judge failed to enforce it. As this Court observed in *Reese*, the "practical effect is that if a change is major and the defense objects, the charge has no legal basis and the court-martial may not consider it unless and until it is 'preferred anew,' and subsequently referred." 76 M.J. at 301. This means Specifications 1 and 6 of Charge I and the Specification

of Charge II were never subject to court-martial jurisdiction. *Id*. They must be set aside and dismissed regardless of whether the changes prejudiced SSG Stout or not. *Id*.

3. The Army Court's attempt to distinguish this case from *Reese* is unavailing.

Nevertheless, the Army Court tries to sidestep this outcome by limiting *Reese*. (JA 8-9). But that effort falls flat. The fact that the major changes in *Reese* occurred after referral, while the major changes in this case occurred prior to referral (JA 8-9), is an entirely specious distinction. The plain text of R.C.M. 603(d) does not entertain such a difference: major changes "may not be made over the objection of the accused unless the charge or specification affected is preferred anew." The plain text of the rule says nothing, and implies nothing, about referral, and its context gives no reason to doubt the plain text either; there is no need to go further.[2] The non-binding discussion of the rule addresses referral, but only insofar as a new preferral necessitates a new referral. R.C.M. 603(d), Discussion. This Court clearly dispensed with any prejudice requirement, regardless of when the major changes were made:

[2] "The Supreme Court has stated time and again courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Reese*, 76 M.J. at 301 (citing *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017)).

> To the extent our precedent has required a separate showing of prejudice under these circumstances, it is overruled: absent "preferr[al] anew" and a second referral there is no charge to which jurisdiction can attach, and Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012), is not, in fact, implicated.

Reese, 76 M.J. at 302. The Army Court wholly misreads *Reese*. No prejudice is required when the government makes major changes to allegations and fails to prefer and refer them anew. *Id*. The Army Court's analysis is wrong and so is its conclusion. This Court should reverse it, set aside and dismiss the findings and sentence, and order a rehearing on SSG Stout's sentence.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss Specifications 1 and 6 of Charge I, and the Specification of Charge II, and remand this case for a resentencing hearing.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Stout*, Crim. App. Dkt. No. 20120592, USCA Dkt. No. 18-0273 / AR, was delivered to the Court and Government Appellate Division on September 5, 2018.

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