IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	
NORMAN R. STOUT Staff Sergeant (E-6) United States Army, 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:

TIMOTHY G. BURROUGHS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 36756

JACK D. EINHORN
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 35432

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 34640

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

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.

REPLY

This Court has already recognized that when pleadings and findings vary significantly over the date of the offense, that variance can be fatal. *United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003). The natural corollary to this is that when the government similarly changes the dates of charged offenses, those changes are "major" under Rule for Courts-Martial [hereinafter R.C.M.] 603. The government's changes to the timings of Specifications 1 and 6 of Charge I and the

Specification of Charge II were major, just as they would have been fatal if presented as variances later in trial. Staff Sergeant Stout rightly objected to these changes, and the government should have either preferred the charges anew or adhered to what it had originally preferred. R.C.M. 603(d).

The government responds to this by seemingly disputing *Parker*, and then accepting tacitly that what is "fatal" is perforce "major." The government's effort to recast *Parker* is unavailing, and its subsequent silence effectively concedes that variances big enough to be fatal mirror changes big enough to be major. This Court has already highlighted the interrelated and complementary protections that the rules against fatal variances and major changes afford, and Staff Sergeant Stout simply asks the Court to apply them here. The government gives no durable reason not to.

1. The date of an allegation may certainly affect its substance and the defense thereof; the government's effort to deny this is untenable.

This Court has already established that "[c]hanging the date or place of the offense may . . . change the nature or identity of the offense." *United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003). The government appears to contest this, however, asserting that *no* change to the date ranges of Specifications 1 and 6 of Charge I or the Specification of Charge II could have been major because the "date ranges are not the essence of the charge, but a definition of a time period

when the offenses occurred." (Gov't Br. 10). Such a position fights against *Parker*, and the common experience of trial practitioners and laymen alike, which all recognize that the timing of an alleged crime certainly matters. It matters in every court-martial, and that it is why trial counsel must plead it in every court-martial. R.C.M. 307, Discussion (D). And while it may matter more in some cases and less in others, a description of when and where the charged conduct occurred is essential to the factual fabric of the case, and thus, essential to fair notice and due process. There is no such thing as a court-martial for allegations that may have occurred "sometime."

The timeframe of an allegation matters, and it may matter substantially. It is critical to jurisdiction and notice, and important if not vital to the defenses and trial strategies available. Changes to the charged timeframe can certainly be "major" for purposes of R.C.M. 603, and they are in this case. The government fails to offer a single case where it successfully added 300 days to the date range of a specification, or shielded a similar variance from reversal. It is hard to imagine circumstances that would make such fluidity with the facts fair or reasonable.

The government then suggests that the "amended specifications contained 'on or about' language," which "put appellant on notice of a wide range of time against which he must defend." (Gov't Br. 12). That would grant those three words a reach they have never had before; the term "on or about" has never

stretched beyond a few weeks, and it has certainly never meant "within a year or so of," "at some time to be proved at trial," or just "whenever."[1] The major changes at bar were not "fairly included in the previously preferred charges and specifications." (Gov't Br. 12). That is precisely why the government tried to change them, as its expected proof would not conform to its charging.

2. The government misses the impact of *Parker* on this case.

Parker bears heavily on this case, despite the government's efforts to brush it aside. (Gov't Br. 14). When the government prosecuted Sergeant Parker, it foresaw its proof failing to match its pleadings, so it attempted to change the charged timeframe before trial. *Parker*, 59 M.J. at 198. The defense objected, identifying this as a major change under R.C.M. 603(a) and (d), and the military judge agreed. *Id*. Thwarted, the government did not withdraw and prefer the specifications anew; instead it doubled down and proceeded to trial, marching headfirst into an inevitable, and ultimately, fatal variance. *Id*. This Court dismissed the affected specifications and held that:

[1] "The words 'on or about' in pleadings mean that the government is not required to prove the exact date, if a date reasonably near is established." *United States v. Hunt*, 37 M.J. 344, 347 (C.A.A.F. 1993). They "are words of art in pleading which generally connote any time within a few weeks of the 'on or about' date." *United States v. Bennitt*, 74 M.J. 125, 131 (C.A.A.F. 2015) (J. Baker, dissenting) (citing to *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992).

> Following the military judge's rejection of the motion to change the charged dates, the Government could have addressed the disconnect between pleading and proof through withdrawal of these charges and preferral of new charges for consideration in the present trial or in a separate trial. See R.C.M. 603(d). Having chosen not to do so, the Government was required to prove in its case-in-chief that there was improper sexual activity between Appellant and Ms. AL during the charged period in 1995.

Parker, 59 M.J. at 201. In other words, the government must prove what it alleges. It does not get to benefit from the confusion it may sow with inadequate investigations, inaccurate pleadings, or unclear allegations. This rule applies to the timeframe of the allegations as well as the elements; while perfunctorily intoning "on or about" gives the prosecution needed flexibility, the phrase is still not a panacea for pleadings that are several months or more off the mark. When such divergence of pleadings and proof arises, the government should amend when able or prefer anew when the defense objects. *Id*.

Nevertheless, the government maintains *Parker* is not a case about major changes or fatal variances at all, but merely "legal insufficiency." (Gov't Br. 14). It is alone in that view, however. All three service courts to consider *Parker*—the Army, Navy and Marine Corps, and Air Force Courts of Criminal Appeals—have each cited it for the specific proposition that "a variance as to date can result in a material and prejudicial fatal variance."[2] They all agree because *Parker* clearly

[2] *United States v. Sellers*, No. ARMY 20150045, 2017 CCA LEXIS 271, at *12 (A. Ct. Crim. App. Apr. 20, 2017); *see also United States v. Lister*, No. ACM

involves a fatal variance: the charge sheet said 1995, whereas the substituted findings said 1993.[3] 59 M.J. at 198, 200. If such wild divergences between proof and pleading were not fatal, this Court would have affirmed the panel's exceptions and substitutions and upheld Sergeant Parker's conviction. *Id*. at 197. But it did not, because this Court recognized that the "Government was obligated to prove that the offenses took place in 1995, the charged timeframe." *Id*. at 201. A specification must actually specify, and the government must actually prove what it set out to prove.

38543, 2015 CCA LEXIS 246, at *10-11 (A.F. Ct. Crim. App. June 17, 2015); *United States v. Cepeda*, No. NMCCA 200400992, 2006 CCA LEXIS 83, at *8 (N-M Ct. Crim. App. Apr. 19, 2006) (citing Parker for the proposition that a "two year change in date was [a] fatal variance when the victim and accused engaged in a consensual relationship during the later time period").

[3] The Federal Courts treat similar discrepancies between the indictment and proof at trial as "extreme" and thus fatal. *See United States v. Antonakeas*, 255 F.3d 714, 722 (9th Cir. 2001); *United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997) (finding that appellant was deprived of his Constitutional rights where "the charge and evidence are two years apart," since he "was not indicted for the crime proved, had no fair notice, and would lack double jeopardy protection"); *Rocha v. Dir., Tex. Dep't of Crim. Justice-Corr. Insts. Div.*, No. 4:15cv119, 2017 U.S. Dist. LEXIS 218564, at *25-26 (E.D. Tex. Sep. 25, 2017) ("the Constitution requires the State to prove that the date of the alleged offense is reasonably near the date alleged in the indictment.").

3. The prohibitions on major changes and fatal variances are complementary protections.

Parker underscores the common cause between the prohibitions on major changes and fatal variances. Major changes and fatal variances are different sides of the same coin, each ensuring that an accused knows the allegations against him or her, that he or she can defend against them, and that he or she receives protection against future jeopardy.[4]

The prohibition on major changes further ensures that the accused receives the protections that preferral of charges provides, namely a guarantee that "the charges were not frivolous, unfounded, or malicious, but are founded in good faith." *United States v. Miller*, 33 M.J. 235, 237 (C.A.A.F. 1991) (citations omitted). To that end, Congress enacted Article 30, UCMJ to require that allegations "be signed by a person subject to this chapter under oath," who has "personal knowledge of, or has investigated, the matters set forth therein," and that "they are true in fact to the best of his knowledge and belief." 10 U.S.C. §830. The President expounded on this in R.C.M. 307, and further empowered military

[4] "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *United States v. Craig*, 24 C.M.R. 28, 29-30 (C.M.A. 1957).

accused with a means of enforcing these rights in R.C.M. 603. When government counsel significantly change the charges preferred, they circumvent what was reviewed and vetted in the preferral process. A major change from the charge preferred is thus a major deviation from the preferral process, its concomitant protections, and the demands of Article 30. That is why the President provided military accused with a clear enforcement mechanism that requires no showing of prejudice. *See United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017).

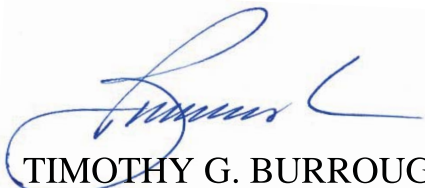
The prohibitions against major changes and fatal variances are allied efforts serving the same ultimate ends. A variance between the pleadings and findings great enough to be "fatal" should also be "major," as either one undercuts the protections of Article 30, R.C.M. 307, and basic due process. Moreover, the raw meanings of the words "fatal" and "major" are clear enough to make the point; "fatal" events are never minor, they are always "major," and the law should reflect this common sense understanding.

The government does not demur or challenge this. It gives this Court no reason to disjoin the closely-related and mutually-aligned protections against major changes and fatal variances. It gives no reason to embrace the incongruity it now invites, for there simply is no good reason—consistency and coherence serve the law well. Widening the timeframes of a specification by as much as 300 days would certainly be a fatal variance and a substantial matter if performed by the

trier of fact; the government's effort to make the same changes beforehand makes it no less substantial and no less major. Staff Sergeant Stout rightly protested the government's major changes, and the military judge wrongly dismissed his objections. This Court should rectify that error and dismiss Specifications 1 and 6 of Charge I, and the Specification of Charge II.

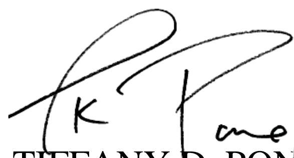
CONCLUSION

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.



TIMOTHY G. BURROUGHS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 36756

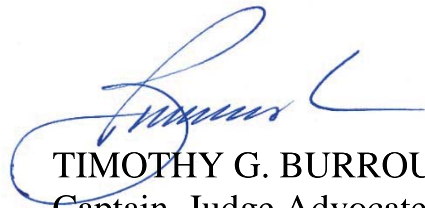
JACK D. EINHORN
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 35432



TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 34640

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 November 5, 2018.



TIMOTHY G. BURROUGHS
Captain, Judge Advocate
Appellate Defense Attorney
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 36756