IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant v. Private (E-1) **ANTONIO D. MOORE,** United States Army, Appellee	BRIEF ON BEHALF OF APPELLANT Crim. App. No. ARMY MISC 20180692 USCA Dkt. No. _____/AR

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

Issue Presented

DID THE ARMY COURT ERR WHEN, UPON RECONSIDERATION, IT DETERMINED THAT THE 5-YEAR STATUTE OF LIMITATIONS BARRED THE REHEARING OF THE TWO SEXUAL ASSAULT SPECIFICATIONS?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2016). This Honorable Court has jurisdiction pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2016), which mandates review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces (C.A.A.F.) for review."

Statement of the Case

On October 17, 2018, at Appellee's rehearing authorized by the Army Court, a military judge, sitting as a general court-martial, convicted Appellee, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Specifications 2 and 3 of Additional Charge I). (JA 313). The military judge sentenced Appellee to 13 years of confinement and a dishonorable discharge. (JA 314). On November 11, 2018, Appellee requested a post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing and moved to dismiss

Specifications 2 and 3 of Additional Charge I as barred by the statute of limitations because of amendments the government made prior to the convening authority's referral of the specifications to the rehearing. (JA 315-321). On November 26, 2018, the military judge dismissed Specification 3 of Additional Charge I and partially dismissed Specification 2 of Additional Charge I. (JA 339-343). The government timely appealed the military judge's ruling pursuant to Article 62, UCMJ. (JA 344).

On July 3, 2019, the Army Court set aside the military judge's ruling after finding that the statute of limitations was not implicated because the pre-referral changes were minor. *United States v. Moore*, ARMY MISC 20180692, 2019 CCA LEXIS 290 (A. Ct. Crim. App. Jul. 3, 2019) (mem. op.) (*Moore I*). Appellee requested the Army Court reconsider its opinion on August 1, 2019. On October 2, 2019, the Army Court reversed itself and found that the statute of limitations barred the prosecution of the specifications at issue because the amendments were major. *United States v. Moore*, ARMY MISC 20180692, 2019 CCA LEXIS 388 (A. Ct. Crim. App. Oct. 2, 2019) (mem. op.) (*Moore II*). The government timely requested reconsideration en banc on October 31, 2019. The Army Court denied the government's request on November 26, 2019.

Statement of Facts

A. Appellee's initial trial and appellate review.

The government preferred Specifications 2 through 6 of Additional Charge I against Appellee on December 11, 2013. (JA 280-282). The specifications alleged that between differing times and dates, Appellee sexually assaulted AR on divers occasions by penetrating her vulva with his penis "by causing bodily harm to her, to wit: removing her underwear, placing his hands on her buttocks, and pressing her down with his hands." (JA 280-282). Specification 2 alleged divers sexual assaults between on or about November 6, 2012, and on or about July 3, 2013. (JA 280). Specifications 3 alleged divers sexual assaults between on or about June 28, 2012, and on or about November 5, 2012. (JA 280). The Summary Court-Martial Convening Authority (SCMCA) received the specifications of Additional Charge I on December 11, 2013, within the applicable five-year statute of limitations pursuant to Article 43(b)(1), UCMJ, 10 U.S.C. § 843(b)(1) (2012).[1] (JA 280-282).

Specifications 2 through 6 of Additional Charge I were investigated in accordance with Article 32, 10 U.S.C. § 832 (2012), and the investigating officer (Article 32 IO) released his report on January 6, 2014. (JA 346-353). The Article

[1] The five-year statute of limitations for sexual offenses under Article 120(b), UCMJ, was not eliminated until December 26, 2013, pursuant to the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No.113-66, § 541, 127 Stat. 672 (2013). Accordingly, the statute of limitations for the specifications at issue remained five years.

32 IO found that Specifications 2 and 3 of Additional Charge I were reasonably supported by the evidence and recommended a general court-martial. (JA 348). However, the Article 32 IO found that the specifications were not in proper form. (JA 347). Specifically, the Article 32 IO recommended the government amend the specifications to allege the bodily harm was the non-consensual sexual act itself, i.e., Appellee's penetration of AR's vulva with his penis, rather than the bodily harm of "removing her underwear, placing his hands on her buttocks, and pressing her down with his hands." (JA 348, 350-351). The Article 32 IO reasoned the change was necessary because there was no evidence presented that Appellee removed AR's underwear, placed his hands on her buttocks, or pressed her down with his hands. (JA 350-351). Furthermore, the Article 32 IO found that AR's Article 32 testimony "reasonably support[ed] a claim of [a] non-consensual sexual act" for Specifications 2 and 3 of Additional Charge I. (JA 350-351). The government did not amend Specifications 2 and 3 of Additional Charge I as recommended by the Article 32 IO prior to the convening authority's referral of Specifications 2 through 6 of Additional Charge I, along with other charges and specifications, to a general court-martial in January 2014.[2]

[2] There is no indication in the record as to why the government did not make the amendments recommended by the Article 32 IO prior to this referral.

On November 14, 2014, a panel of officers sitting as a general court-martial convicted Appellee, contrary to his pleas, of two specifications of violating a no contact order given by a superior commissioned officer, six specifications of sexual assault of AR (Specifications 1 through 6 of Additional Charge I), and one specification of assault consummated by a battery against AR in violation of Articles 90, 120, and 128, UCMJ, 10 U.S.C. §§ 890, 920, 928 (2006 & Supp. V 2012, 2012). *United States v. Moore*, ARMY 20140875, 2017 CCA LEXIS 191, at *2 (A. Ct. Crim. App. Mar. 23, 2017) (mem. op.). The panel sentenced Appellee to a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and a reduction to the grade of E-1. *Id*. at *2-3. The convening authority approved the sentence as adjudged. *Id*. at *3.

In March 2017, the Army Court dismissed Specifications 2 through 6 of Additional Charge I because the military judge erred under *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), by giving a Mil. R. Evid. 413 propensity instruction during Appellee's trial. *Id*. at *13-14. The Army Court authorized a rehearing on Specifications 2 through 6 of Additional Charge I and ordered a sentence rehearing. *Id*. at *14. In January 2018, this Court affirmed the Army Court's judgment. *United States v. Moore*, 77 M.J. 198 (C.A.A.F. 2018).

B. Appellee's rehearing.

On March 28, 2018, the convening authority referred Specifications 2 through 6 of Additional Charge I to the authorized rehearing. (JA 280-282). Prior to this referral, on March 16, 2018, the government amended Specifications 2 through 6 of Additional Charge I in accordance with the Article 32 IO's recommendation by crossing out "removing her underwear, placing his hands on her buttocks, and pressing her down with his hands" and replacing it with "by penetrating her vulva with his penis." (JA 280-281). Specifications 2 and 3 of Additional Charge I now fully read:

Specification 2: In that Staff Sergeant Antonio T. Moore, U.S. Army, did at or near Schofield Barracks, Hawaii, on divers occasions betwen on or about 6 November 2012 and on or about 3 July 2013, commit sexual acts upon Ms. A[redacted]R[redacted] to wit: by causing penetration of Ms. A[redacted]R[redacted] vulva with Staff Sergeant Antonio T. Moore's penis, by causing bodily harm to her, to wit: ~~removing her underwear, placing his hands on her buttocks, and pressing her down with his hands.~~ by penetrating her vulva with his penis. ZR20180316

Specification 3: In that Staff Sergeant Antonio T. Moore, U.S. Army, did at or near Fort Benning, Georgia, on divers occasions between on or about 28 June 2012 and on or about 5 November ~~2013~~ 2012 MS 3JAN2013, commit sexual acts upon Ms. A[redacted]R[redacted] to wit: by causing penetration of Ms. A[redacted]R[redacted] vulva with Staff Sergeant Antonio T. Moore's penis, by causing bodily harm to her, to wit: ~~removing her underwear, placing his hands on her buttocks, and pressing her down with his hands.~~ by penetrating her vulva with his penis. ZR20180316

Appellee did not raise an objection to the amendment, did not demand that the specifications be preferred anew, and did not demand a new Article 32, UCMJ, investigation. The specifications were not preferred anew and a new Article 32, UCMJ, investigation was not conducted.

The military judge arraigned Appellee on April 4, 2018. (R. at 1-3). At a Rule for Courts-Martial (R.C.M.) 802 conference held that day, Appellee's counsel

indicated a "possible issue with the Article 32 Preliminary Hearing." (JA 288, 292-293). Specifically, the defense noted that based upon the changes made to the specifications, it might file a motion for a new Article 32, UCMJ, investigation. (JA 354). During Appellee's arraignment, the defense stated that it had no objection to the jurisdiction of the rehearing. (JA 289, 321).

Appellee's rehearing before a military judge alone began in October 2018, approximately six months after his arraignment. On October 17, 2018, after the close of Appellee's case on the merits but prior to closing argument, Appellee moved to dismiss Specifications 4 through 6 of Additional Charge I for violating the statute of limitations. (JA 290). Appellee alleged that the statute of limitations barred the prosecution of those specifications because "those specific charges were not referred to the [SCMCA] within five years, as they were clearly changed . . . ." (JA 290). The military judge then held two R.C.M. 802 sessions. (JA 292-293). After the first R.C.M. 802 session, the military judge, defense, and government agreed that the underlying issue raised by the defense was whether the change was major or minor. (JA 292).

During argument on Appellee's motion to dismiss, the military judge asked the defense to address the issue of potential waiver of a motion for defective referral. (JA 305). Appellee's counsel responded that they believed the issue was "jurisdictional" because "[t]hey changed these things, he objects, and it is a brand

new offense. The government has lost jurisdiction over that" because "it has been more than five years since the offense . . . ." (JA 305). The government responded that, to the extent the statute of limitations had not run, the issue at hand was defective referral, which defense waived. (JA 306).

The military judge ruled that the "the change to the method of bodily harm in Specifications 2 through 6 of [A]dditional Charge I" was major because it "changed an element of the offense [and] . . . the entire manner in which the offense was carried out." (JA 308). For Specifications 4 through 6 of Additional Charge I, the military judge also found that the "major change resulted in the [SCMCA] not receiving those changed specifications within five years of commission of those offenses" and dismissed those specifications as barred by the statute of limitations. (JA 309). In coming to this conclusion, the military judge relied on the discussion to R.C.M. 907(a)(2)(b), "which permits minor amendments after the statute of limitations has run." (JA 309).

As to Specifications 2 and 3 of Additional Charge I, the military judge found that the major change required a new Article 32, UCMJ, investigation. (JA 309). The military judge further found that because the government did not afford Appellee a new Article 32, UCMJ, investigation after it amended the specifications, the referral in the case was defective. (JA 309). However, the military judge found that "defense waived both an objection to the major change,

and a motion for defective referral" because Appellee did not object to the major change and "failed to make a motion for defective referral prior to the entry of pleas, as required by R.C.M. 905(b)(1)." (JA 309-310). The military judge reasoned that because defense counsel raised a possibility of a motion for a new Article 32, UCMJ, investigation in April 2018, "they were clearly aware of the issue and chose not to file a motion." (JA 310).

After the military judge dismissed Specifications 4 through 6 of Additional Charge I, the military judge found Appellee guilty of Specifications 2 and 3 of Additional Charge I. (JA 313). At the combined sentence rehearing, the military judge sentenced Appellee to 13 years of confinement and a dishonorable discharge. (JA 314). The court-martial adjourned on October 18, 2018. (JA 314).

C. Appellee's post-trial motion to dismiss Specifications 2 and 3 of Additional Charge I.

Weeks later, on November 11, 2018, Appellee filed a request for a post-trial Article 39(a) hearing and a motion to reverse the findings of guilty and dismiss Specifications 2 and 3 of Additional Charge I as being barred by the statute of limitations. (JA 315-321). Appellee alleged that like Specifications 4 through 6 of Additional Charge I, the amended versions of Specifications 2 and 3 of Additional Charge I were not presented to the SCMCA within the five-year statute of limitations. (JA 317, 319). The defense alleged that the military judge should have advised Appellee that he could assert the statute of limitations as a bar to trial,

that Appellee was previously unaware of his right to assert the statute of limitations as to these specifications, and that Appellee did not knowingly and voluntarily waive his right to assert the statute of limitations. (JA 319). The government filed a response in opposition to the defense motion on November 19, 2018. (JA 322-333). The government renewed its argument that the change to Specifications 2 through 6 of Additional Charge I was a minor change. (JA 324-327). The government also argued that Appellee waived his right to object to the change and to any defective referral because he failed to do so prior to the entry of pleas. (JA 327-331). The government further argued that even if the change was major, the statute of limitations did not bar the government from prosecuting Appellee on Additional Charge I because of the savings clause of Article 43(g), UCMJ. (JA 330-332). The defense filed a supplement to its motion on November 21, 2018. (JA 335-338).

On November 26, 2018, the military judge re-affirmed his ruling that the amendments were major and dismissed Specification 3 of Additional Charge I and a portion of Specification 2 of Additional Charge I as barred by the statute of limitations. (JA 339-343). The military judge found that the statute of limitations for the offenses was five years because "the effective date of the elimination of the statute of limitations for the 'new' Article 120 was 26 December 2013." (JA 341). The military judge found that the rehearing referral date of March 28, 2018, was

the date that qualified as receipt of the amended specifications by the SCMCA because the GCMCA was also a SCMCA. (JA 340). Accordingly, the military judge found that the statute of limitations completely barred prosecution of Specification 3 of Additional Charge I because the sexual assault occurred between June 28, 2012, and November 5, 2012, and the GCMCA, acting as SCMCA at the referral to the rehearing in March 2018, received the specification after the five-year statute of limitations had run. (JA 340-341). As to Specification 2 of Additional Charge I, the military judge found that the statute of limitations only barred prosecution of conduct occurring between November 6, 2012, and March 28, 2013. (JA 341). The military judge reasoned that this period fell outside of the five-year statute of limitations allegedly tolled by the GCMCA, as SCMCA, when he received the specification in order to refer it to the authorized rehearing on March 28, 2018. (JA 341). The military judge sustained his finding of Appellee's guilt for the period of March 29, 2013, to July 3, 2013, of Specification 2 of Additional Charge I because the GCMCA, as SCMCA, received this portion of the amended specification within the five-year limitations period. (JA 341). The military judge ordered a post-trial Article 39(a), UCMJ, hearing to re-announce findings on that specification and hear argument on "sentence reassessment." (JA 341-342). The military judge also found that the defense did not waive an objection to the statute of limitations. (JA 341-342).

D. The government's appeal pursuant to Article 62, UCMJ.

The government timely appealed the military judge's ruling to dismiss Specification 3 and a portion of Specification 2 of Additional Charge I pursuant to Article 62, UCMJ. (JA 344). The government also petitioned the Army Court for a writ of prohibition to prevent the military judge from re-opening sentencing proceedings. (JA 131-142). The Army Court heard oral argument on March 28, 2019, on whether it had jurisdiction over the partial dismissal of Specification 2 and whether the government's change to the specifications was a major change. (JA 216-217). On July 3, 2019, in a memorandum opinion authored by Judge Hagler and joined by Senior Judge Burton, the Army Court set aside the military judge's ruling. *Moore I*, 2019 CCA LEXIS 290. The Army Court concluded that it had jurisdiction to review the dismissal of both specifications and that the statute of limitations was not implicated by the government's pre-referral amendments because the amendments were minor. *Id*. at *10, 15-16. The Army Court noted it was "[k]eenly aware" that this Court was "analyzing a related issue" in *United States v. Stout*, 79 M.J. 168 (C.A.A.F. 2019), and that it "st[ood] ready to re-examine [its] analysis" to the extent this Court "provides clarifying guidance." *Id*. at 19 n.7. *Id*. at *19 n.7. Judge Fleming concurred with the Army Court's finding of jurisdiction but dissented as to the merits of the appeal, finding that the change

was major and therefore the statute of limitations barred the prosecution of the amended specifications. *Id*. at *20-26.

In July 2019, following the Army Court's initial opinion, the composition of the panel assigned to this case changed; Judge Rodriguez joined the panel and Judge Hagler departed. Senior Judge Burton and Judge Fleming remained. On August 1, 2019, Appellee requested the Army Court reconsider its opinion in light of this Court's intervening decision in *United States v. English*, 79 M.J. 116 (C.A.A.F. 2019). The government responded in opposition on August 7, 2019. This Court issued its opinion in *Stout* on August 22, 2019. 79 M.J. at 168. On October 2, 2019, the reconstituted panel of the Army Court reversed the decision of the original panel and found that the statute of limitations barred the prosecution of the amended specifications because the amendments were major. *Moore II*, 2019 CCA LEXIS 388, at *4-6. The original dissenter, Judge Fleming, authored the opinion, now joined by Judge Rodriguez, but with Senior Judge Burton now in dissent.

In its opinion on reconsideration, the reconstituted panel of the Army Court found that neither *English* nor *Stout* were applicable or relevant to the instant case. *Id*. at *2.[3] Relying on the discussion to R.C.M. 907, the Army Court concluded

[3] The Army Rules of Court in effect for this appeal pertaining to reconsideration stated:

that it must conduct a major/minor change analysis to determine whether the statute of limitations barred prosecution of the specifications. *Id*. at *6. The Army Court then found that the amendments were major and therefore the statute of

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> Ordinarily, reconsideration will not be without a showing that one of the following grounds exists:
>
> (1) A material legal or factual matter [that] was overlooked or misapplied in the decision;
>
> (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court.
>
> (3) The decision conflicts with a decision of the Supreme Court of the United States, the CAAF, or another service court of criminal appeals, or this Court; or
>
> (4) New information is received that raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused's mental capacity to stand trial.

United States Army Court of Criminal Appeals, Rules of Practice and Procedure (effective June 1, 2018), Rule 19.2. Given the reconstituted court's distinction between this case and this Court's decision in *English* and *Stout*, it is unclear what principle, if any, the Army Court relied on in reversing its original opinion apart from the change in panel composition. *See Franchise Tax Bd. v. Hyatt*, 587 U.S. __, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (explaining that it is "dangerous to overrule a decision only because [a majority] of a later Court come to agree with the earlier dissenters on a difficult legal question"). The reconstituted panel's action on reconsideration is particularly troubling in light of the court's acknowledgment in its original opinion that *Stout* did in fact involve a related issue—pre-referral amendments and the applicability of R.C.M. 603. *Moore I*, 2019 CCA LEXIS 90, at *19 n.7. The opinion on reconsideration authored by Judge Fleming is nearly verbatim to her dissent in the court's original opinion.

limitations barred the prosecution of the amended specifications. *Id*. at *7-9. Senior Judge Burton dissented, again concluding that the amendments were minor. *Id*. at *13-16.

The government requested reconsideration en banc on October 31, 2019, based on *Stout*, and Article 34, UCMJ. Without any rationale, the Army Court denied the government's request for reconsideration and suggestion the case be reviewed en banc on November 26, 2019.

Summary of Argument

This case presents the issue of whether an amendment to specifications prior to referral to an authorized rehearing, and not objected to by the accused prior to trial, implicates the tolling of the statute of limitations under Article 43, UCMJ. In light of the procedural posture of the case when the amendments were made, this Court's opinion in *Stout*, Article 34(c), UCMJ, and Appellee's failure to object to the amendment prior to trial, this Court should find that the pre-referral amendments had no impact on the tolling of the statute of limitations in December 2013. The military judge and Army Court erred by finding that statute of limitations barred the specifications at issue.

Standard of Review

Whether the statute of limitations has run is a question of law that is reviewed de novo. *United States v. McElhaney*, 54 M.J. 120, 125 (C.A.A.F. 2000).

Argument

A. The statute of limitations remained tolled by the receipt of the preferred specifications by the SCMCA on December 11, 2014, because the government did not prefer the specifications anew nor was it required to do so pursuant to *Stout* and Article 34, UCMJ.

The amendment to Specifications 2 and 3 of Additional Charge I prior to referral to Appellee's rehearing had no effect on the tolling of the statute of limitations that occurred when the SCMCA received the sworn specifications on December 11, 2013. Article 43(b)(1), UCMJ, provides that the statute of limitations is tolled by receipt of the sworn specifications by the SCMCA. Accordingly, the receipt of the preferred specifications by the SCMCA in December 2013 tolled the statute of limitations. The statute of limitations remained tolled when the government amended the specifications because the government did not re-prefer to specifications of Additional Charge I. Significantly, the government was not required to re-prefer the specifications since the amendments were made in accordance with Article 34(c), UCMJ.[4] Accordingly, there was but one receipt of the sworn specifications under Article

[4] Article 34(c), UCMJ, specifically provides that "[i]f the charges . . . do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections," the government may make "such changes in the charges and specifications as are needed to make them conform to the evidence."

43(b)(1), UCMJ—the receipt of the specifications by the SCMCA after preferral in December 2013, within the five-year limitations period.

The Army Court originally set aside the specifications at issue and returned them to the convening authority for a rehearing. *Moore*, 2017 CCA LEXIS 191, at *13-14. When an appellate authority sets aside a specification, the original preferral date survives.[5] *See United States v. McFarlin*, 24 M.J. 631, 634 (A.C.M.R. 1987) (noting that if an appellate court does "not dismiss charges in an order or opinion setting aside a conviction, but rather authorize[s] a rehearing on those charges, *the original preferral date survives and governs*, and there is no need to again 'prefer' charges under UCMJ art. 30 and R.C.M. 307(b)") (emphasis added). The Army Court of Military Review in *United States v. McFarlin* noted that the effect of this was to maintain the tolling of the statute of limitations:

> Were we to hold that appellate reversal of a conviction results in an automatic dismissal of charges, requiring "preferral" of the charges before any rehearing, we could create a statute of limitation problem under UCMJ art. 43 in a particular case. Except for soldiers charged with desertion or absence without leave in time of war, aiding the enemy, mutiny, or murder, UCMJ art. 43(a), soldiers are, in general, UCMJ art. 43(d), (e), and (f), not liable to be tried by court-martial if the offense was committed

[5] Because the specifications at issue in this case were set aside rather than dismissed, Article 43(g)(1), UCMJ, is not the proper lens by which to view the tolling of the statute of limitations with regard to the effect of the Army Court's decision to set aside and authorize a rehearing on the specifications. Because the original preferral date survives after specifications have been set aside, Article 43(b)(1), UCMJ, remains the relevant tolling provision.

> more than two years, UCMJ art. 43(c), or three years, UCMJ art. 43(b), before the receipt of sworn [preferred] charges and specifications by the summary courts-martial convening authority. One need look no further than the Military Justice Reporter to determine that opinions are sometimes rendered by this court and our higher court more than two or three years after commission of an offense.

Id. at n.8.[6] Furthermore, "'[T]he effect of ordering a rehearing is . . . to place the United States and the accused in the same position as they were at the beginning of the original trial.'" *United States v. Von Bergen*, 67 M.J. 290, 294 (C.A.A.F. 2009) (quoting *United States v. Staten*, 21 U.S.C.M.A. 493, 495, 45 C.M.R. 267 (1972)); *see also Howell v. United States*, 75 M.J. 386, 392 (C.A.A.F. 2016) (holding that, in the context of the rehearing, an accused returns to the same status "as if he never had been tried in the first instance."); R.C.M. 810(a)(1) (the procedure in a rehearing "shall be the same as the original trial"). Therefore, the government retains the ability to amend the returned specification as appropriate before proceeding with a referral to the rehearing. *See Adams v. Cook*, ARMY MISC

[6] Congress revised Article 43, UCMJ, in the National Defense Authorization Act for Fiscal Year 1987, 99 Pub. L. No. 661 § 805, 100 Stat. 3816 (1986), by adding Article 43(g)(1). This provision allows the government to re-prefer charges that have been "dismissed as defective or insufficient for any cause" when the statute of limitations has expired or will expire within 180 days, so long as the SCMCA received the re-preferred charge within 180 days of the dismissal and the charges "allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege the acts or omissions that were included in the dismissed charges or specifications)." Article 43(g)(1), UCMJ.

20170581, 2018 CCA LEXIS 30, at *11-12 (A. Ct. Crim. App. Jan. 23, 2018) (mem. op.) (noting that a rehearing "does not make the charges immutable or cause [the court] to construe them as having been carved into granite") (citing *Von Bergen*, 67 M.J. at 291) (internal quotations omitted). In some cases, the very act of setting aside of charges and remanding for a rehearing by an appellate court presumes that the convening authority will amend specifications in light of the error found in the original trial. *See, e.g.*, *Von Bergen*, 67 M.J. 290, 294 (C.A.A.F. 2009); *Adams*, 2018 CCA LEXIS 30, at *9 (noting that it is not an appellate court's "practice to specifically authorize the modification of charges" pending a rehearing, as this matter is "clearly" one "of prosecutorial discretion"); *United States v. Endsley*, 74 M.J. 216 (C.A.A.F. 2015) (setting aside a finding of guilty to a larceny specification where the government failed to charge the proper victim, and authorizing the Army Court to order a rehearing on the affected specification).[7]

[7] In *Von Bergen*, an appellant was originally charged in 2001 with a violation of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2252A (2000), under clause 3 of Article 134, UCMJ. *Von Bergen*, 67 M.J. at 291-292. This Court set aside the conviction in 2005 after finding that the CPPA does not have exterritorial application. *Id*. at 292. Prior to the rehearing in 2006, the convening authority amended the original specification to allege a violation of clauses 1 or 2 of Article 134, UCMJ, and referred this new specification to a general court-martial. *Id*. This Court addressed whether the amendment required a new Article 32, UCMJ, proceeding. *Id*. at 293-294. The *Von Bergen* appellant and this Court did not see the issue as one involving whether a new preferral was required or whether the amendment violated the statute of limitations.

Here, after the Army Court set aside and returned the specifications to the convening authority for an authorized rehearing—with the original preferral date intact—the government was permitted to amend the specifications within the parameters of Article 34(c), UCMJ, just as it would have been authorized to do so prior to the convening authority's original referral. The Article 32 IO explicitly indicated in his report that it was advisable to amend the portion of the instant specifications that read, "'causing bodily harm to her, to wit: removing her underwear, placing his hands on her buttocks, and pressing her down with his hands'" to reflect that the bodily harm was caused by the non-consensual sexual act itself. (JA 350-351). The government amended the specifications prior to the referral to the rehearing precisely in accordance with the Article 32 IO's recommendation.

Recently, in *Stout*, this Court held that when amendments are made to bring specifications "into alignment with the evidence adduced by the pretrial [Article 32, UCMJ] investigation," such amendments are permissible under Article 34(c), UCMJ. *Stout*, 79 M.J. at 170. Given the granted issue in *Stout*,[8] a common-sense reading of this Court's opinion provides that R.C.M. 603 is simply not applicable when amendments are made pursuant to Article 34(c), UCMJ. Accordingly,

[8] This Court granted review in *Stout* on the issue of whether pre-referral amendments were "'major,' requiring preferral anew in accordance with [R.C.M.] 603." *Stout*, 79 M.J. at 169.

R.C.M. 603(d) does not provide a basis for preferral anew when an accused objects in a case where Article 34(c), UCMJ, provides affirmative authority for the amendments.

Like this case, *Stout* involved amendments made prior to a referral to a rehearing to conform specifications with the evidence adduced at an Article 32, UCMJ, investigation held prior to the original trial. *Id*. at 168-170. Here, just as in *Stout*, Article 34(c), UCMJ, specifically authorized the amendments and did not require a new preferral. Therefore, because the government neither preferred anew nor had an obligation to do so, Article 43(b)(1), UCMJ, dictates that the statute of limitations remained tolled by the receipt of the preferred specifications by the SCMCA on December 11, 2013. Accordingly, this Court should find that the amendments to the specifications at issue did not affect in any way the tolling of the statute of limitations in December 2013.

B. The military judge and the reconstituted panel of Army Court erred by conducting a major/minor change analysis to determine whether the statute of limitations barred the prosecution of the specifications.

Contrary to the plain language of Article 43(b)(1) and Article 34(c), UCMJ, the military judge and the reconstituted panel Army Court erroneously relied on the non-binding discussion to R.C.M. 907(b)(2), to conclude that a major/minor change analysis under R.C.M. 603 was necessary to determine the tolling of the statute of limitations in this case. *Moore II*, 2019 CCA LEXIS 338, at *6. This

discussion suggests that government cannot prosecute a specification if it makes a major change to the specification pursuant to R.C.M. 603(d) beyond the statute of limitations:

> If sworn charges have been received by an officer exercising summary court-martial jurisdiction over the command within the period of the statute, minor amendments (see R.C.M. 603(a)) may be made in the specification after the statute of limitations has run. However, if new charges are drafted or a major amendment made (see R.C.M. 603(d)) after the statute of limitations has run, prosecution is barred.

Rule for Courts-Martial 907(b)(2) discussion. (JA 357).

The military judge and Army Court erred on relying on this provision for two reasons. First, as this Court made clear in *Stout*, R.C.M. 603 is of no consequence to this case because the government made the amendments pursuant to Article 34(c), UCMJ. The Army Court on reconsideration seemingly interpreted this Court's note in *Stout* that it did not need to "resolve the question of whether the changes" were major as an indication that this Court did not foreclose the need to use R.C.M. 603 to analyze such a question in other contexts, such as the tolling of the statute of limitations. *Moore II*, 2019 CCA LEXIS 338, at *6; *Stout*, 79 M.J. at 169 n.2. In doing so, the Army Court overlooked the essential import of that statement: that this Court's finding that Article 34(c), UCMJ, controlled and

authorized the amendments obviated the need to look to R.C.M. 603 at all.[9] This is demonstrated by the fact this Court then subsequently noted that the current version of the R.C.M. 603, *Manual for Courts-Martial, United States* (2019 ed.), "permits changes to charges and specifications prior to referral regardless of whether they are major or minor." *Stout*, 79 M.J. at 168 n.2. The discussion to R.C.M. 907(b)(2) relied upon by the Army Court as license to refer to R.C.M. 603 in order to analyze the amendments in this case also remains in the current version of the *MCM*. When the question of whether the amendments impacted the tolling of statute of limitations under Article 43, UCMJ, hinges on the very authority to make the amendment and the effect thereof—R.C.M. 603 or Article 34(c), UCMJ—this Court's opinion in *Stout* is dispositive. Because R.C.M. 603 is irrelevant to the amendments here, the Army Court erred on the non-binding discussion to R.C.M. 907(b)(2) as the basis for its statute of limitations analysis.

Second, the plain language of Article 34(c) and Article 43(g)(1), UCMJ, indicates that amendments made pursuant to Article 34(c), UCMJ, have no impact on the tolling of the statute of limitations that already occurred years ago when the SCMCA received the sworn specifications after preferral. "This Court typically

[9] This Court's opinion in *Stout* may have left open the question of whether R.C.M. 603 applies to pre-referral amendments made outside of the bounds authorized by Article 34(c), UCMJ, but it left no question as to whether it applies to those amendments falling within the bounds of Article 34(c), UCMJ, such as those made in this case.

seeks to harmonize independent provisions of a statute." *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006). "The plain language will control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). Taken together, the plain language of Article 43(b)(1) and Article 34, UCMJ, indicates that when the government amends a specification to conform it with the evidence adduced at the Article 32, UCMJ, investigation, prior to referral, the statute of limitations remains tolled by the receipt of the un-amended specifications by the SCMCA pursuant to Article 43(b), UCMJ.

The plain language of Article 43(b)(1), UCMJ, commands that the statute of limitations is tolled by receipt of the sworn charges and specifications by the SCMCA. As for Article 34, UCMJ, "the words . . . are clear and unambiguous: before referral, changes may be made to conform the specifications to the evidence contained in the report of the Article 32 investigating officer." *Stout*, 79 M.J. at 171. "Congress contemplated that Article 34, among other things, would provide authority to make changes in charges and specifications '*without requiring that the new charge be drawn and sworn to*.'" *United States v. Brown*, 21 M.J. 995, 997 (A.C.M.R. 1986) (citing Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1006 (1949)) (emphasis added). Because the government is not required to re-

prefer or re-swear the specification after amending it in accordance with Article 34, UCMJ, it logically follows that the amendment has no effect on the tolling of the statute of limitations that already occurred when the SCMCA received the sworn specification after preferral in accordance with Article 43(b)(1), UCMJ.

The military judge and Army Court's imposition of an R.C.M. 603 analysis in this case renders this Court's opinion in *Stout* void of meaning and ignores Congress' purpose in enacting Article 34, UCMJ. Accordingly, the Army Court and military judge erred in concluding that an R.C.M. 603 analysis was controlling in this case. The statute of limitations in this case remained tolled by the receipt of the sworn specifications by the SCMCA on December 11, 2013.

C. Even if R.C.M. 603, rather than Article 34, UCMJ, applies to the amendments in this case, the military judge and Army Court erred by finding that the change was major and that the amendments precluded prosecution because of the statute of limitations.

If this Court concludes that *Stout* is irrelevant and that R.C.M. 603 is applicable to this case, the military judge and Army Court erred in finding that the amendment to Specifications 2 and 3 of Additional Charge I constituted a major change. Rule for Courts-Martial 603(a) provides that "[m]inor 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." Major changes are "[c]hanges or amendments to charges or specifications other than minor changes[,] [and] may not

be made *over the objection of the accused* unless the charge or specification affected is preferred anew." R.C.M. 603(d) (emphasis added). Whether a change is major or minor is a matter of statutory interpretation that is reviewed de novo. *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017).

In *Reese*, this Court noted that a change in "the means by which a crime is accomplished may constitute a slight error [constituting a minor change] under the appropriate circumstances . . . ." *Id*. at 301. To the extent that this Court finds that amendment changed the "means by which [the] crime [wa]s accomplished" given that it did not change the overt sexual act or the modality by which the sexual assault occurred, this case presents the "appropriate circumstances" in which the error was slight. The amendment did not "add a party, offenses, or substantial matter not fairly included" in the previously preferred specification. R.C.M. 603(a). The victim, AR, and the dates of the charged offenses remained the same. The amendment did not aggravate the seriousness of the offense or subject Appellee to greater punishment. *See United States v. Krutsinger*, 15 U.S.C.M.A. 235, 238, 35 C.M.R. 207 (1965); *United States v. Smith*, 49 M.J. 269, 271 (C.A.A.F. 1998) (finding that a post-Article 32, pre-referral amendment adding "military property" to a larceny specification was a "substantial matter not fairly included" within the meaning of R.C.M. 603(a), because it was a sentence escalator that doubled the maximum punishment).

Furthermore, the specification—both before and after the amendment—alleged sexual assault by Appellee penetrating AR's vulva with his penis by bodily harm. As amended, the bodily harm reflected Appellee's penetration of AR's vulva with his penis—*language that was already included in the specification*. As the Army Court noted in its original decision, the amended specifications did not foreclose Appellant from "intending to offer that the penetration did not occur, or that the acts were consensual" and "the government would still have to prove penetration and the lack of consent beyond a reasonable doubt, just as if the defense had offered these theories on the initial specifications." *Moore I*, 2019 CCA LEXIS 290, at *18.

The amendments made months before trial did not mislead or deprive Appellee of a reasonable opportunity to defend against the amended specification. This case is the antithesis of *Reese*, where this Court found that an amendment to a specification alleging a lewd act upon a child, EV, under the age of twelve "by licking the penis of [EV] with [Reese's] tongue" to instead allege the "touching the penis of [EV] with [Reese's] hand" made during trial after EV testified was a major change. *Id.* at 299-301. This Court reasoned that change in *Reese* was major because the allegation of a sexual touching with a hand was not fairly included in an offense "akin to oral sodomy of a child" and the change could have altered the defense pursued at trial. *Id*. "The evil to be avoided is denying the

defendant notice of the charge against him, thereby hindering his defense preparation." *Id*. at 300 (quoting *United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995)). The government itself "styled the change as a 'new charge that came up.'" *Id*. at 301.

In contrast to *Reese*, in this case, the Article 32 IO specifically recommended the amendment in January 2014 based upon AR's Article 32, UCMJ, testimony. (JA 350-351). The government amended the specifications days before referral, weeks before Appellee' arraignment, and seven months before Appellee's rehearing. R.C.M. 603(d) states that a major amendment may not be made over the objection of the accused absent preferral anew. Here, Appellee proceeded with arraignment and to trial without any objection to the amendment. At most, prior to arraignment and trial, defense counsel contemplated requesting a new Article 32, UCMJ, investigation based upon the amendments. (JA 354). Appellee never submitted the motion that he contemplated. Furthermore, Appellee failed to object to the alleged major change prior to the entry of pleas as required by R.C.M. 905(b)(1). *See United States v. Smith*, 8 U.S.C.M.A. 178, 183, 23 C.M.R. 402 (1957) (finding that where a "case proceeded to trial without the amended charges having been sworn to" and "[t]he accused and his counsel were fully cognizant of the amendments and proceeded to trial without objections[,]" an appellant waived the error); *United States v. Marsden*, 1994 CMR LEXIS 274

(A.F. Ct. Crim. App. Aug. 23, 1994) (finding that even if pre-trial amendment was a major change requiring preferral anew, appellant waived any objection to proceeding by failing to object prior to the entry of pleas as required under R.C.M. 905(e)). Having notice of the amendments for months, Appellee defended against the amended specifications at trial without objection and chose only to claim that the amendments were major after the close of evidence and after jeopardy attached. The timing of Appellee's objection strongly suggests mere gamesmanship rather than a genuine belief that he was not fairly on notice of or misled by the amendments.

Furthermore, Appellee's failure to timely object to the government's alleged major change foreclosed a finding that the statute of limitations was not timely tolled or that the tolling that already occurred in December 2013 was eviscerated. The finding that the statute of limitations barred the prosecution of the amended specifications is based upon the premise that the GCMCA, as a SCMCA, received the amended, yet not re-preferred, specifications outside of the statute of limitations. (JA 341). There is nothing to support this fictional "receipt" of the amended specification by the SCMCA under R.C.M. 603(d) or Article 43, UCMJ. Rather, under the plain language of R.C.M. 603(d), the government may not make a major change over *an objection* without *re-preferring* the specifications. Here—presuming R.C.M. 603(d) applies—because Appellee failed to object to the alleged

major change prior to trial, the government did not have the specifications re-preferred or re-sworn. Therefore, the statute of limitations remained tolled by the receipt of the sworn specifications by the SCMCA on December 11, 2013. Once Appellee objected to the major change—again, presuming the timing of the objection was permissible—the military judge did not need to reach the issue of the statute of limitations because the effect of an objection under R.C.M. 603(d) is dismissal and preferral anew. Appellee's gamesmanship and the military judge's ruling on the basis of the statute of limitations, rather than dismissal pursuant to R.C.M. 603(d), deprived the government of a reasonable opportunity to argue after re-preferral that the specifications were not time-barred.[10]

Accordingly, the military judge and Army Court erred in determining that the amendment to Specifications 2 and 3 of Additional Charge I constituted a major change that prohibited the government from prosecuting Appellee.

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[10] At this opportunity, the government could prove that the statute of limitations for the re-preferred specifications remained tolled under the savings clause of Article 43(g)(1), UCMJ, which expressly authorizes the government to charge an accused with substantially the same acts from a prior trial when the prior charges were dismissed as "defective or insufficient for any cause." *See Frage v. Moriarty*, 27 M.J. 341, 343, n.5 (C.M.A. 1988) (noting that Article 43(g)(1), UCMJ, not yet in effect at the time, would have tolled the statute of limitations where charges were dismissed for defective referral where the accuser preferred charges before an individual who was not authorized to administer oaths). Case law also suggests that absent Article 43(g)(1), UCMJ, the prior receipt of properly sworn charges by the SCMCA within the statute of limitations continues to tolls the statute of limitations even though amendments are made and a new and untimely charge sheet is prepared. *United States v. Miller*, 38 M.J. 121 (C.M.A. 1993).

Conclusion

The United States respectfully requests that this Honorable Court reverse the judgment of the Army Court and ruling of the military judge.

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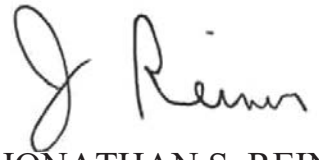

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