

**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

REPLY BRIEF ON BEHALF OF
APPELLANT

Crim. App. No. 20180692

USCA Dkt. No. 20-0119/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. This Honorable Court has jurisdiction pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

The government incorporates by reference its Statement of the Case in its Brief on Behalf of Appellant filed January 24, 2020.

Statement of Facts

The government incorporates by reference its Statement Facts in its Brief on Behalf of Appellant filed January 24, 2020.

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

This Court should reject Appellee’s assertion that a major/minor change analysis under Rule for Courts-Martial (R.C.M.) 603 or the elements test under *Blockburger v. United States* is appropriate to determine whether the statute of limitations was timely tolled in this case. 284 U.S. 299 (1932). Notably, Appellee largely ignores the controlling statute: Article 43(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 43(b)(1), which provides that the statute of limitations tolls upon receipt of sworn charges by the summary court-martial convening authority (SCMCA). This case contains only one set of sworn charges (Charge Sheet). The SCMCA received these sworn specifications on December 11, 2013. (JA 280-282). Appellee fails to explain why, in the absence of re-sworn specifications, Article 43(b)(1), UCMJ, failed to continue to toll the statute of limitations after the government amended the specifications in accordance with Article 34(b), UCMJ, 10 U.S.C. § 834(b). *See* R.C.M. 403(a) Discussion (“The entry indicating receipt is important because it stops the running of the statute of limitations.”).

Peculiarly, despite asserting “the ability to amend specifications pre-referral and whether the statute of limitations has run are separate questions,” Appellee himself encourages this Court to use the major/minor change analysis in R.C.M. 603 as a basis to allege the statute of limitations was not timely tolled in this case.

(Appellee's Br. at 10). To the extent that this Court finds Article 43(b)(1), UCMJ, and the entry date of the receipt of the charges by the SCMCA on the charge sheet not dispositive in this case, the authority to make the amendments is determinative. In *United States v. Brown*, an appellee challenged his prosecution as barred by the statute of limitations because of amendments made to the charge sheet. 4

U.S.C.M.A. 683, 16 C.M.R. 257 (1954). In discussing the interplay between the amendments and the statute of limitations, the Court of Military Appeals (CMA) noted:

Equally manifest is it that the sworn charges, as originally drafted, were received by appropriate authority in ample time to toll the statute as to the offense both as first alleged *and as amended*. It follows that, if the amendments authorized by the convening authority were permissible, the present prosecution was not barred.

4 U.S.C.M.A. at 685, 16 C.M.R. at 259 (emphasis added). The CMA then found that the amendments were permissible and the *Brown* prosecution was not barred by the statute of limitations. 4 U.S.C.M.A. at 688, 16 C.M.R. at 262.¹ In finding that the amendments were permissible, the CMA noted that Congress intended

¹ The CMA analyzed the authority of the convening authority to make the amendments under both Article 34(b), UCMJ, and the Manual for Courts-Martial, United States, 1951, paragraph 33d. *Id.* at 685-688; 16 C.M.R. at 259-262. As this Court's opinion in *United States v. Stout* clarifies, where the amendment was done to conform the specifications with the evidence adduced at the Article 32, UCMJ, hearing, the amendments are authorized by Article 34(b), UCMJ, without regard to R.C.M. 603. 79 M.J. 168 (C.A.A.F. 2019).

“that the power delegated in [Article 34(b), UCMJ] be as broad as its language indicates.” 4 U.S.C.M.A. at 686, 16 C.M.R. at 260. “In recommending passage of the Uniform Code, the Committee on Armed Services of both branches of the Legislature reported” that Article 34(b), “makes clear that in addition to formal corrections, changes in the charges may be made in order to make them conform to the evidence brought out in the investigation without requiring that new charges be drawn and sworn to.” *Id.* (internal quotations and citations omitted). Despite concerns “that [] additional clarification -- including the imposition of restrictions on permissible changes” should be made to the provision, Congress did not do so and adopted the provision without amendment. *Id.* Therefore, to the extent that pre-referral amendments in this case—which contained only one sworn charge received by the SCMCA in December 2013—raises a question over the tolling of the statute of limitations, this Court should conclude that Article 43, UCMJ, did not bar prosecution of the specifications because the amendments were authorized by Article 34(b), UCMJ.

If this Court finds that a major/minor change analysis is relevant to this case, this Court’s opinion in *United States v. English* does not affect this case. 71 M.J. 116 (C.A.A.F. 2019). *English* addressed whether an appellate court could make a post-trial exception that broadened a specification and its resulting conviction, an issue simply not pertinent to this case. Appellee misplaces his reliance on this

Court's dicta in footnote 6 of *English* stating the placement of the *English* appellee's hands was a substantial fact for purposes of a theoretical variance analysis, and appellee conflates a variance analysis with a pre-referral major/minor change analysis under R.C.M. 603. This is not a fatal variance case or a case concerning the authority of an appellate court to make a post-trial exception. Accordingly, *English* is simply not relevant to this case.

This Court should also reject Appellee's novel, unsupported suggestion that this Court should employ the *Blockburger* elements test to determine whether the amendments implicated the tolling of the statute of limitations if it does not adopt a major/minor analysis. "[F]or more than a quarter century we have used the *Blockburger* test to determine whether specifications are multiplicitious." *United States v. Coleman*, 79 M.J. 100, 102-103 (C.A.A.F. 2019) (citing *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012)). In the "more than a quarter century" this Court has readily relied upon *Blockburger* to analyze successive prosecutions under Double Jeopardy, Appellee points to no case in which this Court has used it to analyze the tolling of the statute of limitations. *Id.* No case exists because Article 43(b)(1), UCMJ, clearly speaks to when the statute of limitations is tolled.

As ambitious as Appellee is by advocating for a new standard for determining the tolling of the statute of limitations, a new standard is not needed. This Court need not look any further than the statute directly on point: Article

43(b)(1), UCMJ. Appellee does not dispute that the amendments were permissible under Article 34(b), UCMJ. (Appellee’s Br. at 10). Despite the clear language of Article 34(b), UCMJ, and Article 43(b)(1), UCMJ, Appellee instead seeks to invoke the major/minor change analysis under R.C.M. 603. Appellee does so without any regard for the statutory intent of Article 34(b), UCMJ, and the mechanics of R.C.M. 603²—that a government may not make a major change over the objection of the accused without preferral anew. R.C.M. 603(d). The government amended the specifications prior to referral. Appellee proceeded to trial *without objection*. Because Appellee did not object, charges were not preferred anew. Accordingly, there was only one set of sworn specifications in this case. Those specifications were received by the SCMCA in December 2013, within the limitations period. There is simply no statute of limitations problem in this case.

In sum, the authorized amendments made after the SCMCA received the sworn specifications in December 2013 simply had no impact on the tolling of the statute of limitations that occurred at that time. In light of the clear language of Article 43(b)(1), UCMJ, Article 34(b), UCMJ, and *Stout*, this Court can summarily conclude that the military judge and the Army Court erred in finding that the

² Assuming, but by no means conceding, that R.C.M. 603 is applicable to this case.

prosecution of Specifications 2 and 3 of Additional Charge I was barred by the statute of limitations.

Conclusion

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



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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February 5, 2020

CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 5th day of February, 2020 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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