IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	) BRIEF ON BEHALF OF) APPELLEE
v.	) USCA Dkt. No. 20-0119/AR
	) Crim. App. No. 20180692
ANTONIO T. MOORE Private (E-1) United States Army Appellant	)

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 TWO SEXUAL ASSAULT SPECIFICATIONS?

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

Pursuant to an authorized rehearing,[1] on October 15-18, 2018, a military judge, sitting as a general court-martial, tried Private (PVT) Antonio T. Moore. Contrary to his pleas, the military judge convicted[2] PVT Moore of two specifications of sexual assault,[3] in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2012).[4] (JA 313). On October 18,

[1] *See United States v. Moore*, 2017 CCA LEXIS 191, at *14 (A. Ct. Crim. App. Mar. 23, 2017), *aff'd*, 77 M.J. 198 (C.A.A.F. 2018).

[2] From his previous court-martial, PVT Moore remained convicted of two specifications of willful disobedience, one specification of sexual assault, and one specification of assault consummated by battery, in violation of Articles 90, 120, and 128, UCMJ, 10 U.S.C. §§ 890, 920, and 928. *See Moore*, 2017 CCA LEXIS 191, at *14.

[3] Specifications 2 and 3 of Additional Charge I.

[4] Before findings and pursuant to defense motion, the military judge dismissed three specifications of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920, for being outside the statute of limitations. (R. at 1068). That ruling is not subject to this appeal.

2018, the military judge sentenced PVT Moore to be confined for thirteen years, and to be discharged from the service with a dishonorable discharge. (JA 314).

On November 11, 2018, the defense filed a post-trial motion to dismiss Specifications 2 and 3 of Additional Charge I for being outside the statute of limitations. (JA 315). The government responded on November 19, 2018, and the defense filed a supplement to its motion on November 21, 2018. (JA 322; JA 335). On November 26, 2018, the military judge dismissed Specification 3 of Additional Charge I in its entirety, and dismissed the portion of the date range alleged in Specification 2 of Additional Charge I that fell outside the five-year statute of limitations. (JA 339).

Pursuant to Rule for Courts-Martial (R.C.M.) 908 and Article 62, UCMJ, the government filed a notice of appeal on November 29, 2018, appealing the military judge's ruling related to Specifications 2 and 3 of Additional Charge I. (JA 344). On July 3, 2019, the Army Court set aside the trial judge's ruling. (JA 221). Appellee requested reconsideration and the Army Court granted reconsideration and reversed its prior ruling; this time agreeing with the trial judge's analysis. (JA 250). The Army's Judge Advocate General certified this case on January 24, 2020.

Statement of Facts

1. Preferral

On December 11, 2013, the government preferred Specifications 1-6 of Additional Charge I against PVT Moore. (JA 280). In all six specifications, the government alleged that PVT Moore sexually assaulted AR by penetrating her vulva with his penis by causing bodily harm, in violation of Article 120, UCMJ, 10 U.S.C. § 920. (JA 280). The specific bodily harm alleged in all six specifications was "removing her underwear, placing his hands on her buttocks, and pressing her down with his hands." (JA 280-81). The Summary Court-Martial Convening Authority (SCMCA) received the six specifications the same day charges were preferred. (JA 282).

2. Article 32, UCMJ, Investigation

On January 6, 2014, the Article 32, UCMJ, Investigating Officer [IO] completed his review and released his report related to the allegations against PVT Moore. (JA 346). Related to Specifications 2 and 3 of Additional Charge I, the IO recommended changing the modality of the charged bodily harm from "removing her underwear, placing his hands on her buttocks, and pressing her down with his hands" to the "non-consensual sexual act." (JA 350-51). The IO recommended the change because he found "no evidence that [PVT Moore] performed these acts." (JA 351). Despite the IO's recommendation, the government elected not to

make the recommended changes and referred Specifications 2 and 3 of Additional Charge I as charged. (JA 279-82).

3. Trial

At trial, PVT Moore was convicted of all six specifications of Additional Charge I. *Moore*, 20171 CCA LEXIS 191, at *2. The court-martial sentenced PVT Moore to forfeit of all pay and allowances, to be reduced to the grade of E-1, to be confined for twenty years, and to be dishonorably discharged from the service. *Id*. The convening authority approved the sentence as adjudged. *Id*.

4. Direct Appeal

On appeal, the Army Court dismissed Specifications 2-6 of Additional Charge I pursuant to *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), and affirmed the remaining findings of guilty. *Moore*, 2017 CCA LEXIS 191, at *13-14. The Army Court authorized a rehearing on Specifications 2-6 of Additional Charge I and ordered a sentence rehearing. *Id*. at *14. The charges were subsequently returned to the convening authority.

5. Rehearing

Despite the previous findings of guilt for Specifications 2-6 of Additional Charge I, the government changed the bodily harm element in all five specifications before re-referring Additional Charge I. (JA 280-81) Specifically, the government changed the bodily harm element from "removing her underwear,

placing his hands on her buttocks, and pressing her down with his hands" to "penetrating her vulva with his penis." (JA 280-81).

At the rehearing, before closing arguments, the defense moved to dismiss Specifications 4-6 of Additional Charge I for being outside the statute of limitations. (JA 290). After conducting two R.C.M. 802 sessions, the parties and the military judge agreed the underlying issue was whether the changes the government made to the specifications were major or minor changes pursuant to R.C.M. 603. (JA 292-95).

After hearing argument from both sides, the military judge held that the government's changes were major. (JA 308). Specifically, the military judge held,

> In this case, the change to the alleged bodily harm not only changed an element of the offense, but it changed the entire manner in which the offense was carried out. Although the change created an additional requirement that the government proved [sic] that the alleged victim did not consent, the fact remains that the manner of the offense was significantly changed.

(JA 308). In reaching his finding, the military judge relied on *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017).

Because the government changes were major, the military judge found that the changed specifications were the equivalent of new specifications and therefore dismissed Specifications 4-6 of Additional Charge I for exceeding the statute of limitations. (JA 309). In dismissing the specifications, the military judge found

that the "major change resulted in the [SCMCA] not receiving those changed specifications within five years of commission of those offenses." (JA 309). The military judge noted the discussion to R.C.M. 907(b)(2)(B), "which permits [only] minor amendments after the statute of limitations has run." (JA 309).

The military judge found the government's changes to Specification 2 and 3 of Additional Charge I were also major. (JA 308). However, the military judge did not dismiss Specifications 2 and 3 of Additional Charge I at the time because he incorrectly analyzed the issue as one of defective referral rather than a violation of the statute of limitations. (JA 309-10). After considering the changes to Specifications 2 and 3 of Additional Charge I through the lens of defective referral, the military judge found the defense waived any issue relating to defective referral. (JA 309-310). At the time, the military judge never analyzed how the statute of limitations impacted the changes to Specifications 2 and 3 of Additional Charge I, and neither party nor the military judge discussed any statute of limitations concerns relating to those two specifications with PVT Moore. (JA 309-310).

The military judge ultimately found PVT Moore guilty of Specifications 2 and 3 of Additional Charge I, and sentenced PVT Moore to be confined for thirteen years and to be dishonorably discharged from the service. (JA 313-14). The court-martial adjourned. (JA 314).

6. Post-trial Article 39(a), UCMJ, Session

Before authentication, on November 11, 2018, the defense filed a post-trial motion to dismiss Specifications 2 and 3 of Additional Charge I. (JA 315). In their motion, the defense argued the government's major changes to Specifications 2 and 3 of Additional Charge I caused the specifications to fall outside of the statute of limitations. (JA 315-20). On November 19, 2018, the government responded, arguing (1) the changes were minor, and (2) the defense waived any objection to the statute of limitations.[5] (JA 322-32). The defense filed a supplement to their motion on November 21, 2018, re-asserting that PVT Moore did not waive an objection for exceeding the statute of limitations because the military judge has an affirmative duty to advise an accused of any statute of limitations concerns pursuant to R.C.M. 907(b)(2)(B). (JA 335).

On November 26, 2018, the military judge granted defense's motion, in part. (JA 342). Specifically, the military judge dismissed Specification 3 of Additional

[5] The government also argued that the government could re-prefer Specifications 2-6 of Additional Charge I pursuant to the savings clause of Article 43(g), UCMJ, because of the Army Court's decision to set aside the findings of guilt was the functional equivalent of dismissing the charges. (JA 331). The military judge correctly disregarded this argument, noting the distinction between findings that are set aside and charges that are dismissed. (JA 341). And, at this point, it doesn't matter. Art. 43(g)(2), UCMJ, only authorizes re-preferral of charges and specifications that "allege the same acts or omissions that were alleged in the dismissed charges or specifications" within 180 days of dismissal. The statute does not contemplate tolling that timeline and 180 days has long passed.

Charge I in its entirety as falling outside the statute of limitations, and dismissed the portion of the date range in Specification 2 of Additional Charge I that fell outside the statute of limitations. (JA 342-43). He also ordered a post-trial Article 39(a), UCMJ, hearing to re-announce findings and hear argument on an appropriate sentence based on the re-announced findings. (JA 343).

In his ruling, the military judge re-affirmed that the government's changes to Specifications 2-6 of Additional Charge I were major. (JA 340-41). Additionally, the military judge found that PVT Moore did not waive a statute of limitations objection because of the R.C.M. 907(b)(2)(B) affirmative duty placed on the military judge to advise an accused of any statute of limitations concerns. (JA 341-42).

Summary of Argument

The military judge has the independent duty to advise an accused when he may assert the statute of limitations bar. R.C.M. 907(b)(2)(B). When the government altered the specifications – completely changing the manner of committing the offense and changing the elements – it functionally created new specifications. Those new specifications, alleging related but different crimes, were not received by the SCMCA as required by Article 43(b), UCMJ, within the statute of limitations until the GCMCA[6] re-referred the case to trial. As this

[6] Also a SCMCA.

occurred more than five years after the alleged assaults, the statute of limitations had run and the military judge did not err in dismissing a portion of Specification 2 and all of Specification 3 of Additional Charge I.

Certified Issue

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

Standard of Review

Issues concerning the statute of limitations are questions of law that are reviewed de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). Whether a change made to a specification is major 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) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

Law

An accused is subject to the statute of limitations in effect at the time of the offense. *United States v. Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018) (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)). Prior to December 26, 2013, the statute of limitations for an allegation of sexual assault was five years. 10 U.S.C. § 843 (2012). For sexual assault offenses committed on or after 26

December 2013, there is no statute of limitations. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1703(c), 127 Stat. 672, 958 (2013). The remedy for a charge or specification falling outside the statute of limitations is dismissal. *See Mangahas*, 77 M.J at 224-25.

Argument

A. Article 34, UCMJ, is not relevant to the statute of limitations.

First, the government never advanced any argument that Article 34 was relevant to the military judge. (JA 322-32). Second, in this case, Appellee does not challenge the government's ability to make pre-referral amendments to a specification that conform to the investigating officer's report. Appellee instead challenges the effect of making major changes to the specifications when the statute of limitations is implicated. When an appellate court sets aside a conviction and "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)." *United States v. McFarlin*, 24 M.J. 631, 634 (A.C.M.R. 1987) (emphasis added). The problem for the government is precisely that it did not again refer "those charges"—it referred different charges that were not timely received by the SCMCA, in accordance with Article 43(b), UCMJ.

The ability to amend specifications pre-referral and whether the statute of limitations has run are separate questions. *United States v. Stout* is a case about

when preferral anew is required. 79 M.J. 50 (C.A.A.F. 2019). It has no mention of the statute of limitations. Neither does *United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2009) nor *United States v. Endsley*, 74 M.J. 216 (C.A.A.F. 2015). At a rehearing the government can amend specifications. It can draft new specifications. But it cannot violate the statute of limitations when it does so. Here, it did.

B. Major/Minor change analysis is appropriate to determine whether a specification is the same or whether it is different.

At trial, both parties agreed that major/minor change analysis was the appropriate vehicle to decide whether the government had referred a different charge that that remanded. (JA 302-04). The discussion to R.C.M. 907(b)(2)(B) concisely lays out how major/minor change analysis affects whether a statute of limitations has run. It notes that if a SCMCA has received the charges within the period of the statute then minor changes may be made after the statute of limitations has run. To the contrary it notes that "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." This accurately reflects the law because the premise underlying major/minor change analysis is asking whether the specification has changed such that it is effectively new.

C. The changes made by the government were major.

Minor changes are any changes "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). Major changes "may not be made over the objection of the accused unless the charge or specification affected is preferred anew." R.C.M. 603(d). As this Court has recognized, the R.C.M. 603(a) discussion clarifies what constitutes a minor change "is 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 (quoting R.C.M. 603(a) discussion); *see also United States v. Longmire*, 39 M.J. 536, 538 (A.C.M.R. 1994) (minor changes are those designed to correct "trivial mistakes").

The government argues that the military judge erred in finding that the government's changes to Specifications 2 and 3 of Additional Charge I were major. (Gov't Br. at 25-26). To support its argument, the government asserts the changes did not alter "the modality by which the sexual assault occurred." (Gov't Br. at 26). This is astonishing; altering the modality of the offense is exactly what the government did.

In *Reese*, the government initially charged the appellant with committing a lewd act by licking the alleged victim's penis with his tongue. 76 M.J. at 299.

Based on issues with the sufficiency of their evidence, the government changed the modality of the lewd act from licking the alleged victim's penis with his tongue to touching the alleged victim's penis with his hand. *Id*. This Court held that the change was major because "it altered the means of committing the offense" and the change "was not fairly included in the original specification." *Id*. at 300. Additionally, this Court noted that the difference between a touch and a lick may lead to a difference in applicable defenses available to the appellant. *Id*. at 301.

In *United States v. English*, this Court reiterated in its variance analysis that a change to the charged "placement of Appellant's hands during the sexual assault was a *substantial* fact." 71 M.J. 116, fn. 6 (C.A.A.F. 2019) (emphasis added). Substantial is synonymous with major. *See* "Substantial" *Merriam-Webster.com Thesaurus*, Merriam-Webster, https://www.merriam-webster.com/thesaurus/substantial. Accessed January 30, 2020. Moreover, the test for material variance is even more demanding than whether a change is minor. *Compare* Rule for Courts-Martial 603(a) and *United States v. Treat*, 73 M.J. 331, 336 (C.A.A.F. 2014) ("The test for whether a variance is material is whether it substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense.").

Here, the government changed the modality of the charged sexual assaults from "removing her underwear, placing his hands on her buttocks, and pressing her

down with his hands" to "penetrating her vulva with his penis." (JA 280-81). In making the changes, the government did not seek to correct slight or trivial errors; it altered the means of committing the offense by changing the bodily harm alleged. In so doing, the government not only changed the bodily harm alleged, but also added consent as an element. *See United States v. McDonald*, 78 M.J. 376 (C.A.A.F. 2019).

A person subject to the UCMJ is guilty of sexual assault if they (1) "commit[] a sexual act upon another person by" (2) "causing bodily harm to that person." *Manual for Courts-Martial, United States* (2012 ed.) [*MCM*], pt. IV, ¶ 45a.(b)(1)(B). Accordingly, the bodily harm must actually *cause* the sexual act to occur. The bodily harm charged can be "any offensive touching . . . including any nonconsensual sexual act." *MCM*, pt. IV, ¶ 45a.(g)(7).

In this case, the government initially alleged that PVT Moore's sexual acts with AR constituted sexual assault because the sexual acts were *caused by* "removing her underwear, placing his hands on her buttocks, and pressing her down with his hands." (JA 280-81). The government then changed the allegations against PVT Moore to allege his sexual acts with AR constituted sexual assault because the sexual acts were *caused by* "penetrating her vulva with his penis" without her consent. (JA 280-81). As noted by the military judge, the government's change "had the effect of transmuting the offense from one of overt

force being applied to the alleged victim, to one of lack of consent and thus constructive force." (JA 341). Additionally, the government's "path to conviction was made easier by the change, not harder, as [it] no longer had to prove that the sexual act was brought about by additional force beyond the penetration." (App. JA 341). Effectively, the government changed its entire theory of criminality when it changed the bodily harm element—i.e. the government changed what made the sexual act criminal.

As in *Reese*, the government's change to Specifications 2 and 3 of Additional Charge I "altered the means of committing the offense" and the change "was not fairly included in the original specification" because the bodily harm alleged to have made the sexual acts criminal changed. *Reese*. 76 M.J. at 300. Furthermore, as in *Reese*, PVT Moore's available defenses changed significantly based on the government's change. In the initial specifications, PVT Moore could have attacked the bodily harm element by offering evidence indicating he did not accomplish the sexual acts by removing her underwear, placing his hands on her buttocks, or pressing her down with his hands in order to negate a finding of guilty. After the government's change, PVT Moore was merely left with the option of offering evidence indicating the sexual acts were consensual, or he reasonably believed them to be. Unquestionably, the overall defense strategy could change based on the substantial change to the bodily harm element.

The government attempts to distinguish *Reese*, in part, by asserting both before and after the change (1) the charged article of the UCMJ remained the same, (2) the date range remained the same, and (3) the punitive exposure remained the same. (Gov't Br. at 26). However, virtually the same argument was raised and explicitly rejected by this Court in *Reese*. 76 M.J. at 300-01. This case is substantially similar to *Reese*, the government's changes altered the way in which the offense was committed, and the government's changes were not designed to correct slight or trivial errors.

There are only two elements to sexual assault: sexual act and bodily harm. If the government is at liberty to change the bodily harm element without changing the offense it is equally free to change the sexual act. Thus, under the government's theory, there is no difference with being charged with penetration of the vulva with the penis and penetration of the mouth with a stethoscope. This absurd result highlights the importance of the elements in determining what charge has actually been received by the SCMCA. Because the amended charges were not timely received by the SCMCA, the military judge did not err in finding the changes to Specifications 2 and 3 of Additional Charge I were major.

D. If major/minor change analysis does not apply, this Court should apply the elements test to determine whether the changes to the specifications resulted in a different charge.

In testing whether two specifications state the same offense, this Court applies the elements test articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). *United States v. Coleman*, 79 M.J. 100, 102 (C.A.A.F. 2019). In *Blockburger*, the Supreme Court held that the test for "whether there are two offenses or only one, is whether each provision requires a proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. Therefore, if this Court elects not to conduct major/minor change analysis in testing whether a specification is received by the SCMCA in a timely manner, this Court should test whether the statute of limitations has run by asking if each provision requires proof of a fact the other does not, and therefore, if all the elements in the specification were charged and received by the SCMCA.

In this case, the military judge correctly found that the change to the specifications changed the elements of the offense. (JA 341). Accordingly, the original offense and the current offense are constitutionally distinct. And being constitutionally distinct makes them different charges. Because of this, the SCMCA did not receive the new offense within five years as was required by the pre-26 December 2013 statute of limitations. If this Court applies the elements test

rather than major/minor change analysis in R.C.M. 603, the charges remain equally outside of the statute of limitations and must be dismissed.

Conclusion

Wherefore, appellant requests this Court grant the relief requested herein.

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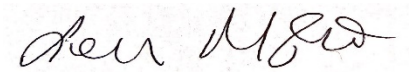

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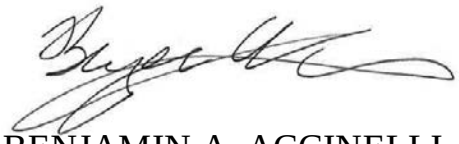
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in *United States v. Moore*, USCA Dkt. No. 20-0119/AR was electronically delivered to the Court and the Government Appellate Division on January 31, 2020.



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