IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellant,	)	BRIEF IN SUPPORT OF
	)	THE CERTIFIED ISSUE
v.	)	
	)	Crim. App. Dkt. No. 40455
	)	
Staff Sergeant (E-5)	)	USCA Dkt. No. 25-0177/AF
JOHN D. KERSHAW	)	
United States Air Force	)	26 June 2025
Appellee.	)	

BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

CERTIFIED ISSUE

WHERE TIME WAS NOT AN ESSENTIAL ELEMENT OF THE OFFENSE, DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR BY FINDING FACTUAL INSUFFICIENCY BASED ON A DISCREPANCY BETWEEN THE DATES PLEADED AND THE DATES PROVED, WHEN THE COURT SHOULD HAVE APPLIED A VARIANCE ANALYSIS AND FOUND A NON-FATAL VARIANCE INSTEAD?

RELEVANT AUTHORITIES

In relevant part, 10 U.S.C. § 866(d)(1) (2019) provides that:

> *Cases appealed by accused*. In any case before the Court of Criminal Appeals under subjection(b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty, and the sentence or such part of amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh

> the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

In relevant part, 10 U.S.C. § 920b(a) (2012) provides that:

> Rape of a child. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who—
>
> (1) commits a sexual act upon a child who has not attained the age of 12 years; or
>
> (2) commits a sexual act upon a child who has attained the age of 12 years by—
>
> (A) using force against any person;
>
> (B) threatening or placing that child in fear;
>
> (C) rendering that child unconscious; or
>
> (D) administering to that child a drug, intoxicant, or other similar substance;
>
> is guilty of rape of a child and shall be punished as a court-martial may direct.

In relevant part, 10 U.S.C. § 920b(h)(4) provides:

> *Child*. The term "child" means that any person who has not attained the age of 16 years.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under

Article 67(a)(2), UCMJ.[1]

STATEMENT OF THE CASE

A general court-martial convicted Appellee of one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. (JA at 38–42, 327.) The military judge sentenced Appellee to a dishonorable discharge, confinement for two years, reduction to the grade of E-1, and a reprimand. (JA at 38–42.)

On appeal, Appellee raised six assignments of error before AFCCA, including one challenging the legal and factual sufficiency of his conviction. (JA at 2.) On 27 March 2025, AFCCA found Appellee's conviction under Article 120b, UCMJ,[2] factually insufficient based upon a discrepancy between the dates pleaded and the dates proved. (JA at 3.) AFCCA set aside the finding of guilt and dismissed Appellee's charge and specification with prejudice. (Id.)

On 27 May 2025, the Judge Advocate General of the Air Force certified for review the issue now before this Court.

[1] Unless otherwise noted, all references to the UCMJ, punitive articles, Military Rules of Evidence, and the Manual, are to the Manual for Courts-Martial, United States (2019 ed.).
[2] MCM, pt. IV. para. 45b (2012 ed.).

STATEMENT OF THE FACTS

Appellee's Sexual Abuse of F.A.

Appellee lived with his extended family in his home on Luckey Pine in San Antonio, Texas. (JA at 53, 73). In total, there were upwards of fourteen people living in the home at one time, including his wife's sister, K.S., and K.S.'s four children. (JA at 53, 190, 203.) One day, in or around April 2016, K.S. asked her seven-year-old daughter, F.A., to go upstairs and grab a clean pair of underwear out of their room for her two-year-old sister who had an accident. (JA at 59, 105, 126–27, 182.) At that moment, Appellee followed his niece upstairs and into a second-floor bedroom, closing the door behind him. (JA at 61.) Appellee dropped his pants and underwear to his ankles, exposing his erect penis, and told F.A. that he would get her ice cream if she touched and licked his penis. (JA at 52, 61–64.)

When F.A. seemed to be taking longer to retrieve underwear than expected, her mother, K.S., felt "something was not right" and went upstairs. (JA at 129, 131.) When K.S. reached the second floor, she noticed there was a door closed and began pounding at the door. (JA at 64, 136.) Appellee pulled up his pants and moved out of the way so F.A. could leave the bedroom. (JA at 64.)

Once K.S. could enter the room, she saw Appellee clothed facing the window and F.A. sitting on the bed. (JA at 136–37.) Appellee immediately left the room and once Appellee exited the room, F.A. told her mother that Appellee

showed her his penis. (JA at 64, 66, 154.) K.S. told her mother, J.S. (F.A.'s grandmother), what happened to F.A. that same evening. (JA at 138.)

Direct and Circumstantial Evidence Showed the Abuse Occurred Shortly Before Appellee Moved to the Netherlands While the Victim Was Six or Seven Years Old

Throughout trial, the exact date of the offense was never pinpointed, but direct and circumstantial evidence showed that the offense occurred shortly before Appellee moved to the Netherlands in May 2016. An offense occurring shortly before Appellee's move was within the charged timeline of between on or about 1 April 2016 and on or about 30 April 2016.

F.A., K.S., and J.S. each testified that the abuse occurred at the home in San Antonio, shortly before Appellee moved to the Netherlands in May 2016, while F.A. was six or seven years old. (JA at 105, 140, 186, 192, 227.) In fact, the only window of opportunity in which the crime could occur was between Christmas 2014, when F.A. and her family moved into the home on Luckey Pine, and May 2016, when Appellee moved to the Netherlands. (JA at 148, 339.)

F.A. was consistent regarding the specific facts of the day of the incident, but she did not have a clear memory of the exact date of the offense.[3] F.A. recalled that after the offense occurred, she spent the next few weeks "locked" in her mother's bedroom upstairs away from Appellee, being delivered food by other

[3] The trial occurred six and a half years after the abuse occurred, and F.A. was fourteen years old when she testified. (JA at 50.)

members of the family, until her mom and siblings left to go to Bridge City, another town in Texas. (JA at 87–88, 139.) To her recollection, once Appellee moved to the Netherlands, her family left Bridge City and moved back into Luckey Pine. (JA at 89.)

K.S., an adult at the time of the offense, understandably provided greater clarity of the date of the offense. K.S. noted that she was still living at Luckey Pine when Appellee left for the Netherlands and that his move occurred not "long after [the incident] happened[.]" (JA at 140.) When asked specifically whether there was anything "going on" around the time of the incident which might help determine the date it occurred, K.S. responded, "When [Appellee] left [for the Netherlands], but I don't know when [his family] left." (JA at 139–40.)

After the abuse occurred, K.S. could not leave the home with her children because she didn't "[have] another place to go" and instead actively kept F.A. and her other children away from Appellee while he was still in the home. (JA at 87, 168.) This continued "for weeks" according to K.S. (and F.A.), until Appellee left the home in May 2016 for the Netherlands. (JA at 88–89.)

Circumstantial evidence also supported the charged timeframe. For example, "a month, [or] month and a half" after the incident occurred, K.S. and J.S. recalled an incident where F.A. made a comment about a sausage at the grocery store resembling a "boy's front butt." (JA at 143–44, 183.) They both noted the

remarkability of this statement because F.A. would have no reason to recognize the similarity as she was seven years old at the time she said the statement. (Id.) J.S. recalled a similar incident "a few months after" the abuse where F.A. made another comment about a sausage looking like a "butt." (JA at 183.) She remembered it occurred at her mother-in-law's house in the summertime. (Id.)

F.A. also testified that the reason she went upstairs the day of the incident was to retrieve clean underwear for her younger sister. (JA at 126.) K.S. explained that the sister was potty training and had an accident. (Id.) Defense entered a photograph showing the family together at the home in April 2016 at F.A.'s younger sister's second birthday, which, if the offense occurred near the charged timeline, aligned with a typical potty-training age. (JA at 341.)

Conflicting Testimony Regarding a Move to Bridge City

Testimony from multiple witness demonstrated the time between the assault and Appellee's move to the Netherlands was short. (JA at 139–40, 183.) Nevertheless, during trial, the defense attempted to create a timeline with a lengthy gap of time between the date of the assault and Appellee's move to the Netherlands. (JA at 88, 585.) The Defense theory suggested that F.A. moved to Bridge City between the date of the abuse and Appellee's move to the Netherlands. (Id.) Some testimony suggested that F.A. lived in Bridge City for between six months to a year. (JA at 116, 140, 186.) As a result, under this theory, Defense

suggested the offense had to have occurred in 2015 rather than the charged April 2016. (JA at 88, 585.) Importantly, testimony conflicted regarding when and even how many times F.A. may have moved to or visited Bridge City.

Throughout trial, the timing of the Bridge City move remained unclear. Testimony did reveal that ***at some point*** K.S. and her children moved to Bridge City for six months to a year. (JA at 116, 140, 186.) But Defense's theory required that all references to Bridge City described one individual move.
Instead of one move, testimony revealed that K.S. and her children moved to Bridge City at least twice while living in Texas and potentially visited there temporarily. (JA at 88, 146.) As a result, the evidence regarding a Bridge City timeline was conflicting.

Both the testimony of F.A. and K.S. suggest there were multiple Bridge City moves and/or visits. For example, F.A. remembers that her family moved to Bridge City for up to a year as a result of the abuse. (JA at 88.) Conversely, K.S. recalled moving to Bridge City for six months to a year to spend more time with her youngest daughter's grandmother. (JA at 116.) K.S. also recalled moving back to San Antonio because the grandmother suffered a tragedy and K.S. did not think she could handle having all the children in the house. (JA at 117.)

K.S. also testified that they moved back to Luckey Pine to say goodbye to her sister and nephew (Appellee's family), but it was never clarified whether this

was in relation to Appellee's initial move to the Netherlands or following Appellee's family's visit back to Luckey Pine during Christmas 2017. (JA at 140, 164.)

J.S., too, referenced a time where K.S. and her children "went over" to the house in Bridge City, but also stated that they "came back" shortly before Appellee went to the Netherlands. (JA at 186.) And Appellee's wife, who lived in the home in San Antonio, did not recall K.S. and her family moving out at any period after they moved in to the home in San Antonio. (JA at 227.)

Based on the available evidence, the factfinder had differing theories of when the move to Bridge City for "six months to one year" occurred, each with their own inconsistencies. But, due to consistent testimony that the offense occurred shortly before Appellee moved to the Netherlands and circumstantial evidence supporting this time period, the most reasonable timeline was that K.S. and her children moved to Bridge City for six months to a year after the Appellee moved to the Netherlands.

The Panel Rejected Any Variance

At the close of evidence, defense counsel moved for a finding of not guilty under Rule for Courts-Martial (R.C.M.) 917. (JA at 214.) The defense argued that there were insufficient facts supporting the charged timeframe. (JA at 214, 364.) The court denied the motion, concluding that there was sufficient evidence within

the charged timeframe. (JA at 378.)

While discussing proposed closing instructions, the court sua sponte asked the parties their position on a variance instruction. (JA at 523.) The Government requested a time variance instruction and the defense agreed. (JA at 252.) However, the defense requested a specific instruction which included language to the effect of "on or about" is "days or weeks and not months or years." (Id.) The Government opposed the modified language. (JA at 253.)

The court ultimately gave the following variance instruction without objection:

> Variance. It you have doubt about the timeframe the alleged offenses occurred, but you are satisfied beyond a reasonable doubt that the offenses were committed at a time that differs slightly from the exact time in the specifications, you may make minor modifications in reaching your findings by changing the time described in the specification, provided that you do not change the nature or identify of the offense.

(JA at 257–58.)

The panel found Appellee guilty of Charge I, Specification II, with no modifications. (JA at 39, 327.) The panel found Appellee not guilty of Charge I, Specification I, that was alleged to occur during the same interaction. (Id.)

AFCCA Disagreed With the Panel's Finding and Concluded the Evidence in the Cold Record Supported a Different Timeline

On appeal, AFCCA dismissed Charge I, Specification II, with prejudice,

agreeing with the defense's theory presented at trial that the panel rejected. (JA at 3.) The majority specifically found that the testimony in the record regarding the move to Bridge City aligned with the defense's theory that the move occurred after the abuse but prior to Appellee's move to the Netherlands. (JA at 8.) As a result, the majority concluded "the best estimate as to when the incident occurred [was] sometime between April 2015 and October 2015[.]" (Id.) Because the Government charged the offense as between on or about 1 April 2016 and on or about 30 April 2016, AFCCA found the charged offense occurred six months to a year before the charged timeframe. (JA at 8.) As a result, AFCCA held that the charge was not supported by sufficient evidence. (JA at 9.) The majority further held that because the panel found no variance, there "was no variance issue for [AFCCA] to consider." (JA at 7–8.) (citing United States v. English, 79 M.J. 116, 121 (C.A.A.F. 2019)).

The dissent disagreed on both points. (JA at 9–10.) First, the dissent concluded that based upon the direct and circumstantial evidence, and the age and reliability of each witness, there was sufficient proof that the offense occurred within the charged timeframe. (JA at 24.) The dissenting judge highlighted evidence that the majority left out including the fact that the victim was a seven-years-old at the time of the offense, and despite the trial occurring years later, was still only fourteen years old during her testimony. (Id.)

Additionally, the dissenting judge observed the inconsistencies with the Bridge City move that contributed to the overall confusion of when the move occurred. (JA at 20.) For example, when K.S. and her children moved from North Carolina to Texas, they lived in Bridge City prior to moving into Appellant's house in San Antonio during Christmas of 2014. (JA at 10.) But, the categorization of moves versus visits was unclear throughout testimony, which at times made it uncertain which "move" the question was focused on. (JA at 19.)

The dissent questioned the majority's reliance upon testimony elicited from F.A. in overturning the panel verdict, where she merely agreed to a timeline—not of her memory, but proposed by defense on cross-examination. (JA at 23.) Most importantly, the dissent noted that the most consistent evidence which each witness mentioned was that the offense occurred shortly before Appellee moved to the Netherlands, which occurred in May 2016. (JA at 18–19.) Based upon all of the evidence presented, the dissenting judge was convinced beyond a reasonable doubt that the offense occurred within the charged and convicted timeframe. (JA at 24.)

Second, the dissent also disagreed with the majority that a variance could not occur on appeal. (Id.) The judge explained that variance on appeal has been found by this Court before and exists in situations like Appellee's where the offense occurred outside the charged and convicted timeframe, but was nonetheless not essential to the charged elements. (JA at 24–25.) The dissent argued that the

majority was incorrectly requiring proof beyond a reasonable doubt for facts that were not elements of the offense. (JA at 24.) Ultimately, the dissent argued that if there is a variance between the proof and pleading, the appellant must show the variance prejudiced him to obtain relief. (JA at 34.)

SUMMARY OF THE ARGUMENT

AFCCA erred in conducting its factual sufficiency review by treating a non-essential fact in the specification as an element of the offense required to be proven beyond a reasonable doubt. *See* United States v. Brown, 16 C.M.R. 257, 262 (C.M.A. 1954) ("An erroneous statement of the date of the offense constitutes a matter of mere form."). In setting aside a conviction based upon this fact alone, AFCCA disregarded this Court's express guidance and exceeded their statutory authority in factual sufficiency review. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (superseded by statute on other grounds) (requiring proof of each statutorily required element of the charged crime).

AFCCA further erred by failing to address the discrepancy between the dates alleged and the dates proved under a variance analysis. United States v. Hunt, 37 M.J. 344, 347 (C.M.A. 1993). The lower court's conclusion that a variance can only occur at trial is incorrect as a matter of law and inconsistent with how military courts historically dealt with variance issues on appeal. *See, e.g.*, United States v. Barner, 56 M.J. 131, 132 (C.A.A.F. 2001); United States v. Marrie, 39 M.J. 993,

1002 (A.F. Ct. Crim. App. 1994). Furthermore, AFCCA's claim that variance is not at issue if the panel does not make exceptions and substitutions ignores a subset of variance found on appeal. *See, e.g.*, United States v. Pritchard, 45 M.J. 126, 130 (C.A.A.F. 1996) (examining "technical variance" "for the first time on appeal").

This Court should reconcile the inconsistent interpretations of its precedent and hold that if there are discrepancies between the proof and pleading of non-essential facts, courts conducting factual sufficiency reviews must assess the difference as a variance and analyze whether the variance was (1) material; and (2) if it prejudiced the appellant. United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009). And in analyzing the non-essential fact, only if prejudice occurs should relief be granted and a conviction set aside.

ARGUMENT

BECAUSE TIME WAS NOT AN ESSENTIAL ELEMENT OF THE OFFENSE, THE AIR FORCE COURT ERRED BY FINDING FACTUAL INSUFFICIENCY BASED ON A DISCREPENCY BETWEEN THE DATES PLEADED AND THE DATES PROVED, WHEN IT SHOULD HAVE APPLIED A VARIANCE ANALYSIS AND FOUND NON-FATAL VARIANCE INSTEAD.

Standard of Review

This Court reviews factual sufficiency determinations made by service courts of criminal appeal (CCAs) for "the application of 'correct legal principles,' but only

as to matters of law." United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022) (citing United States v. Clark, 75 M.J. 298, 300 (C.A.A.F. 2016)). However, where, as here, the CCA's conclusion "was reached after an erroneous consideration of the elements of the offense[,]" this Court is "statutorily obligated" to consider the issue and remand for CCA reconsideration. United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005). Additionally, "[t]he scope of an appellate court's authority is a legal question this Court reviews de novo." English, 79 M.J. at 121.

Law & Analysis

A. In its factual sufficiency review, AFCCA mistakenly required proof beyond a reasonable doubt for every fact, rather than only the elements of the offense.

AFCCA incorrectly held that proof beyond a reasonable doubt was needed for every statement alleged in the charged offense. (J.A. at 8.) This conclusion conflates facts alleged for notice purposes and elements required to prove an offense occurred. Because AFCCA's independent factual sufficiency review is limited to only a determination of whether "each required element [was proved] beyond a reasonable doubt," it was error for AFCCA to set aside an otherwise factually sufficient finding because the court believed the offense occurred months before it was charged. Washington, 57 M.J. at 399.

1. Non-essential facts included in a specification are distinct from required elements.

Rule for Courts-Martial 307 describes a proper specification as "a plain, concise, and definite statement of the essential facts constituting the offense charged." This is because the "military is a notice pleading jurisdiction." United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (citations omitted). Providing specific facts along with the charged offense ensures that the accused is put on notice of the charge he needs to defend against. United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010) (explaining the charge sheet provides greater context to the accused). Nevertheless, a specification is "sufficient" so long as it "alleges every element of the charged offense expressly or by necessary implication." *See* R.C.M. 307. And as a result, the government has the burden of proving beyond a reasonable doubt only the "fact[s] necessary to constitute the crime," not every fact alleged. *See* Rose v. Clark, 478 U.S. 570, 580 (1986).

Indeed, the specific date of an offense need not be alleged unless time is an essential element of the offense. United States v. Williams, 40 M.J. 379, 382 (C.A.A.F. 1994) (citing Ledbetter v. United States, 170 U.S. 606, 612 (1898)); *see also* United States v. Jones, 15 C.M.R. 664, 670 (U.S. A.F.B.R. 1954) (citing Weatherby v. United States, 150 F.2d 465, 466–67 (10th Cir. 1945)) ("[D]efects in allegations of time are merely formal except where time is an element of the offense."). "[T]he Government is not required to prove the exact date [of an

offense], if a date *reasonably near* is established." United States v. Simmons, 82 M.J. 134, 139 (C.A.A.F. 2022).

Even when a date is alleged, as it was here, "an erroneous statement of the date of the offense constitutes a matter of mere form[.]" Brown, 4 C.M.A. 687–88. When a date is non-essential, its alteration between proof and pleading is neither fatal nor impactful to the overall elements of the offense. United States v. Gehring, 20 C.M.R. 373, 376 (C.M.A. 1956) ("generally time is not of the essence of an offense").

This differs from facts necessary to constitute the crime, which are essential to the elements needed to be proved. English illustrates this well. 79 M.J. at 116. There, on appeal, the Army Court of Criminal Appeals conducted a factual sufficiency review for a charge that, as alleged in its specification, involved a sexual act committed upon the victim by unlawful force "to wit: grabbing her head with his hands." Id. at 119. The ACCA, however, could not find sufficient evidence that the unlawful force was the Appellant grabbing the victim's head, and instead made exceptions and substitutions that Appellant broadly committed the offense with unlawful force. Id.

This Court rejected the CCA's determination. Id. at 121. By making these exceptions, this Court explained, the ACCA exceeded its authority and "create[ed] a broader or different offense than the offense charged at trial." Id. As a result, the

CCA unconstitutionally revised the convicted offense which now "[swept] more broadly than what was alleged, and what [the] appellant was convicted of[] at trial." Id. at 122 ("Expanding the scope of the specification on appeal beyond that which was presented to the trier of fact is akin to the violation of due process that occurs when an appellate court affirms a conviction based on a different legal theory than was presented at trial."). This was because the method of force was a "substantial fact" of an element. Id. at 122 n.6.

English therefore shows how substantial facts—there, the method of force—are essential to the elements because their alteration changes the "scope of the charge." Id. at 122. But not all facts included by R.C.M. 307, which provide notice to the accused as to the charge he must defend against, are substantial and essential to the elements. That is, not all facts alleged in the specification are required to be proved beyond a reasonable doubt at trial because these facts do not impact the overall scope of the charge. Id. at 121–22; *In re Winship*, 397 U.S. 358, 375 (1970) (requiring proof beyond a reasonable doubt "of every fact *necessary* to constitute the crime with which he is charged") (emphasis added)).

Here, the date range is such a fact. Unlike English, the date here does not change the overall scope of the charge, and *could* have been altered had the panel made exceptions and substitutions in accordance with how AFCCA ultimately ruled had they not rejected them. Id. at 122; (JA at 327.) Appellee's charged offense

involved one interaction that occurred between Appellee and the victim, in one location, between a defined 17-month time period where they both lived in the same house. (JA at 10.) The difference between the date AFCCA found and the date that was charged and convicted on varied by "six months to a year." (JA at 9.) Other than the passage of time, the only impact the discrepancy would have is to the age of the victim, but even so, each witness consistently testified that F.A. was "six or seven years old" at the time of the offense—a fact that remains true under either theory. (JA at 58, 183, 192.)

To be clear, there may be a situation where a date *is* a substantial fact. For example, in an Article 86, UCMJ, 10 U.S.C. § 886, charge for absence without leave, the date the offense occurred is an element of the offense. Therefore, the date and the facts establishing the date must be proven beyond a reasonable doubt as in English. But here, where all that is required to prove is that the child was under 12 at the time of the offense, and F.A. was undeniably under the cutoff age by multiple years, a discrepancy in the proof *even up to a year* is insubstantial to the overall charge and is not required to be proven beyond a reasonable doubt. *See* MCM, pt. IV, para. 45b (2012 ed.).

Distinguishing between substantial and insubstantial facts does not introduce uncertainty into the determination of what the elements of the offense are. *Cf.* Richardson v. United States, 526 U.S. 813, 817 (1999) (noting required elements are

"listed in the statute that defines the crime"). To the contrary, Congress determines the elements of each offense and what is required to be proven beyond a reasonable doubt. Jones, 68 M.J. at 468 ("[I]t is for Congress to define criminal offenses and their constituent parts.").

Here, where the date was neither essential nor impactful to the overall scope of the charge, it was error for AFCCA to base its set-aside on a failure to prove the non-element beyond a reasonable doubt. (JA at 9.) ("[W]e are not convinced the Government proved beyond a reasonable doubt that Appellant committed the convicted offense 'between on or about 1 April 2016 and on or about 30 April 2016[.]'").

2. The CCA has no authority to set aside convictions for failure to find non-elements beyond a reasonable doubt.

The CCA does not have the authority to set aside a conviction for an insubstantial fact and it was legal error to do so here. Leak, 61 M.J. at 241 (discussing review of "an erroneous consideration of the elements of the offense."). The CCA's authority to conduct a factual sufficiency review is an "awesome, plenary, de novo power" that is unique among appellate courts. United States v. Walters, 58 M.J. 391, 395 (C.A.A.F. 2003). "But that authority is not unfettered." United States v. Nerad, 69 M.J. 138, 140 (C.A.A.F. 2010). Because of this unique role and the extreme remedies available, the factual sufficiency analysis understandably has its

limitations. Here, the CCA's action in setting aside a conviction based solely on a non-element fact was ultra vires.

As an Article I court, a CCA's authority to conduct factual sufficiency review is granted by statute. *See* United States v. Williams, 85 M.J. 121, 125 (C.A.A.F. 2024). Article 66, UCMJ, which authorizes the CCAs to conduct factual sufficiency review strictly cabins the CCAs ability to act. United States v. Kelly, 77 M.J. 404, 405 (C.A.A.F. 2018); United States v. Riley, 50 M.J. 410, 415 (C.A.A.F. 1999). The CCAs may "affirm only such findings of guilt . . . as the Court finds correct in . . . fact." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018). Under R.C.M. 918(c), a finding of guilt is reached when the factfinder is satisfied that the "guilt has been proved beyond a reasonable doubt." Only the elements of the offense are required to be proven beyond a reasonable doubt; "[i]t is not necessary that each particular fact advanced by the prosecution which is not an element be proved beyond a reasonable doubt." Id. at Discussion.

It follows then that as discussed above, a disagreement on a non-essential fact does not impact the elements of the charge and the ultimate finding in the case. *See infra* Section A(1). In other words, even if the CCA disagreed on the date of the offense, the elements that make up the offense, and the resulting finding of the specification, remain proven beyond a reasonable doubt. *See* United Sates v. Wheeler, 75 M.J. 564, 568 (C.A.A.F. 2017) (discussing "proof of each *required*

element beyond a reasonable doubt") (emphasis added)). Thus, by the plain language of Article 66, UCMJ, if the CCA believed that there was proof beyond a reasonable doubt for each required element, the CCA may affirm the finding of the specification. Notably, nowhere in the Article exists an ability for CCAs to demand affirmation of every fact provided in the specification.

Indeed, it appears that AFCCA recognized its limited authority of review, stating its determination would be "whether the evidence constituted proof of each required element beyond a reasonable doubt." (J.A. at 6). But, AFCCA incorrectly followed this pronouncement by concluding that "between on or about 1 April 2016 and on or about 30 April 2016" required proof beyond a reasonable doubt—a burden above which the government was held at trial. (Id.); *see also* Ledbetter, 170 U.S. at 612 (noting it is not necessary to prove an offense is committed on the day alleged as "[o]rdinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient").

In so concluding, AFCCA misinterpreted United States v. Parker for the misguided notion that the charged period here was an element. 59 M.J. 195 (C.A.A.F. 2003). But Parker stands only for the unremarkable conclusion that presenting zero evidence of a charged offense is grounds for dismissal under R.C.M. 917. Id. at 200.

In Parker, appellant was charged with multiple counts of sexual offenses with multiple victims over a period of two years. Id. at 197. The specifications at issue involved rape and adultery of A.L. charged between February and March 1995. Id. Prior to trial, A.L. was deposed and revealed that the rape occurred during February or March 1993, and that her and the appellant had consensual sexual activity prior to the incident. Id. at 198. The prosecution moved to amend the rape specification to correct the date to 1993, but the defense objected noting that allegations of rape in the context of a relationship which included consensual sexual activity made the date a critical point of defense preparation. Id. at 200. The trial court agreed and denied the government's request. Id.

As a result of the judge's ruling, the government presented no substantive evidence of the charged offense. Id. Instead, the government introduced the deposition under Military Rule of Evidence 413 as other evidence of sexual misconduct demonstrating the accused's propensity and did not otherwise enter any evidence regarding nonconsensual sexual activity in 1995. Id. The defense made a R.C.M. 917 motion, arguing that there was zero evidence admitted showing a rape occurring in 1995, and the only evidence presented regarding nonconsensual sexual activity with A.L. (the deposition) was propensity evidence relevant to the charges involving the other victims. Id. The court denied the request and the court members

found the appellant guilty of the specifications involving A.L. by exceptions and substitutions, changing the date to "between August 1993 and March 1995." Id.

This Court reversed appellant's convictions and dismissed two specifications based upon the trial court's incorrect R.C.M. 917 motion. Id. at 201. This Court highlighted that after being denied the motion to change the charged dates, the government could have withdrawn and preferred new charges but chose not to. Id. Instead, the government compounded the issue by failing to produce any evidence of improper sexual activity in 1995. Id. This Court noted that the trial involved multiple complex relationships that crossed between consensual and nonconsensual behaviors and thus evidence concerning time, among other factors, was a critical part of trial. Id. As a result, the evidence was legally insufficient under R.C.M. 917. Id.

Parker is inapposite here. It did not, as AFCCA claimed, conclude there was sufficient evidence of every other element except the charged date, requiring dismissal. Id. To the contrary, this Court was specifically grappling with the fact that there was *no evidence* of the offense at all—the government only introduced the deposition as propensity evidence for the other charges. Id. Further, Parker did not determine whether the members' decision to find the exceptions and substitutions was permissible, thus variance was never at issue. Id.

Even if Parker more squarely involved the question of whether the date is an element of the offense, it remains distinguishable because it involved multiple offenses that occurred within a relationship where nonconsensual and consensual sexual acts occurred. Id. at 199. The timing of the offense was directly related to an element of the offense: whether the act was nonconsensual. Id. The irrelevance of Parker is even more apparent when compared to Kershaw where the panel *was* convinced enough evidence was presented on the charged timeframe that they rejected any variance instruction. *Cf.* id.; (JA at 319, 327.) Indeed, the Kershaw trial judge here recognized this distinction in the R.C.M. 917 hearing, contrasting Parker because the government presented *no* evidence that the offense occurred. (JA at 319.)

To be sure, Parker bolsters the dissent's conclusion in Kershaw by showing that the trial court originally conducted a variance-like analysis and concluded that alteration of the charged timeframe would prejudice the accused. Parker, 59 M.J. at 198. This makes sense and is consistent with a proper variance analysis regarding a non-essential fact.

This conclusion is underscored by Hunt, where this Court addressed a similar discrepancy where a rape was alleged on a specific date, but the evidence showed it occurred weeks prior. 37 M.J. at 344. In rejecting appellant's claim that the trial court erred in failing to grant the motion to dismiss, this Court noted that even if

there was a material variance based upon the dates charged, an R.C.M. 917 motion would not be warranted unless the appellant could show that he was prejudiced by the variance. Id. at 347. As is the case in Hunt and urged by the Government here, where the non-essential dates proved were different from the dates charged, the court should conduct a variance analysis to determine whether the variance prejudiced appellant. Id.

At bottom, the CCAs cannot read greater latitude into their factual sufficiency review authority and demand proof beyond a reasonable doubt for insubstantial facts which are not a necessary part of the elements. Setting aside a conviction for a fact that is not an element of the offense has no grounding in statutory authority and should be rejected as an extrajudicial action.

B. When AFCCA found the proof of a non-element fact differed from the panel's findings, it should have conducted a variance analysis.

A discrepancy regarding a nonessential fact involving the date the offense occurred should be considered under a variance analysis. Hunt, 37 M.J. at 347. AFCCA's conclusion that a variance can only occur at trial and is not an issue if the panel does not make exceptions and substitutions is incorrect as a matter of law and ignores a subset of variance found on appeal. *See, e.g.*, Barner, 56 M.J. at 132; Pritchard, 45 M.J. at 130 (observing "technical variance" "for the first time on appeal"). This Court should direct CCAs to conduct a variance analysis when the proof of a non-essential fact differs from its pleading. The CCAs should

accordingly consider whether the variance was (1) material; and (2) if it prejudiced the appellant. Marshall, 67 M.J. at 420. And only if prejudice occurs should relief be granted and a conviction set aside.

1. Variance does not only occur at trial by the factfinder.

Often, variance is addressed at trial through exceptions and substitutions (or, in this case, through a rejection of exceptions and substitutions). *See generally* R.C.M. 918; (JA at 327). But variance does not only happen at trial. In fact, military courts have historically addressed variances on appeal. *See, e.g.*, United States v. Ellsey, 37 C.M.R. 75, 79 (C.M.A. 1966) (addressing variance despite no exceptions and substitutions at trial). For example, in Marrie, 39 M.J. at 993, AFCCA addressed variances in the findings for the first time on appeal. Id. at 1002. Recognizing that variance is primarily concerned with prejudice to the appellant, the court described the nature of the analysis succinctly:

> Where the court in making its findings does not alter the specification by exceptions and substitutions, a variance between pleadings and proof may or may not be fatal to the prosecution. The primary consideration is one of due process. United States v. Wray, 17 M.J. 375 (C.M.A. 1984). A variance is fatal when an accused is so misled as to be unable adequately to prepare for trial or is not fully protected against another prosecution for the same offense. United States v. McCullah, 8 M.J. 697 (A.F.C.M.R. 1980). A variance in date is not fatal when the date established at trial is within the statute of limitations and before the charge filed, but this rule has exceptions. United States v. Gehring, 6 U.S.C.M.A. 657, 20 C.M.R. 373, 376 (1956); United States v. Freeman, 23

> M.J. 531, 538 (A.C.M.R. 1986). One exception is when the accused is charged with "several acts committed under substantially similar circumstances at the same place." Gehring, 20 C.M.R. at 376. Another is when proof of a different time alters the nature of the offense or the maximum punishment. Freeman, 23 M.J. at 538.

Id.

Using this analysis, the court concluded that a discrepancy between a charge alleged on November 1990 that was only supported by evidence showing the offense occurred on 15 February 1991 was not fatal, and the accused was not misled and remained fully protected from double jeopardy concerns. Id.

Similarly, in United States v. Freeman, the Army Court of Military Review repeated the above case law concerning fatal variances in determining whether the evidence adduced at trial fatally varied from that which was alleged. 23 M.J. 531, 537 (A.C.M.R. 1986). There, the court concluded that "[w]hether the act occurred in 1982 or 1983 [did] not change the nature of the offense or the maximum permissible punishment," and as a result, time was not "of the essence" to the specification. Id.

Furthermore, in Barner, 56 M.J. at 137, this Court recognized that the evidence did "not establish with absolute clarity" the timing of two separate offenses. But this Court noted that even without absolute clarity, the appellant "would still be required to show how, if at all, he was prejudiced by this variance."

Id. As a result, the failure to have clear indication of the date of the offenses was not fatal because it was evident "defense was not misled by this variance." Id.

Contrary to the reasoning AFCCA used below, English does not conflict with these precedents. 79 M.J. at 121. As discussed above, in English, ACCA substituted the type of unlawful force used to rape the victim, thereby affirming a broader charge and different theory than the government proceeded with at trial. Id. By doing so, the court called into question due process concerns because the appellant was essentially convicted on a different legal theory than what was presented at trial. Id. (citing Dunn v. United States, 442 U.S. 100, 106 (1979)). This is not the case in a non-essential fact variance where the date is immaterial to the elements of the offense and do not change the nature of the offense or the preparation of the defense.

In a similar vein, this case is also distinguishable from this Court's precedent in United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010). There, appellant was charged with larceny of victim's credit cards. Id. at 262. In conducting a legal sufficiency review, however, this Court recognized that larceny under Article 121, UCMJ, involved a taking from the "person or entity with a superior possessory interest"—for Lubasky, this meant the credit card companies, not the named victim. Id. at 263. The government countered that despite the legally insufficient finding, the court could substitute the victims because ownership was a non-fatal

variance. Id. at 265. This Court disagreed and stated that the CCA's power to "approve or affirm a finding of guilt or . . . approve, instead, so much of the finding as includes a lesser included offense" did not allow swapping larceny from one entity to another entity on appeal. Id.

This conclusion makes sense. First, as this Court pointed out, the crime of larceny against the victim for the credit card transactions was not actually a crime—it was only a crime against the credit card companies. Id. at 262. Second, the difference between the victims would likely prejudice the appellant as he prepared for a defense against one victim, and was changed on appeal to another. Id. at 265. By virtue of the modification, appellant was now convicted of a different offense in nature, which could be accompanied by other changes that he would not discover until appeal, e.g., restitution to a different entity. Id. In other words, had a variance been alleged at trial, it would likely have been fatal. Lubasky, however, is far different than the case at hand, where the date was non-essential and had no impact on the overall nature of the charge.

In Lubasky, this Court also noted that R.C.M. 918 did not grant the authority to make substitutions and exceptions to a specification on appeal because the Rule is directed at the factfinder. Id. at 265. While it is true that the CCAs cannot make exceptions and substitutions under R.C.M. 918, English, 79 M.J. at 119, as described above, CCAs may approve the sentence irrespective of exceptions and

substitutions so long as the variance of the non-essential fact is not fatal. *See, e.g.*, Freeman, 23 M.J. at 538; Marrie, 39 M.J. at 1002. After all, "[a] variance between pleadings and proof *exists* when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999) (emphasis added).

At bottom, regardless of whether exceptions and substitutions were made at the trial level, variance may still be considered where a CCA finds a discrepancy between the pleadings and the proof on appeal.

2. AFCCA should have conducted a variance analysis.

This Court should direct CCAs to conduct a variance analysis when the proof of a non-essential fact differs from its pleading. This result ensures that due process concerns are protected, that the CCA is not exceeding its review authority, and that otherwise factually sufficient convictions are not overturned for insubstantial facts.

This guidance also aligns with federal practice. United States v. Nivens, 21 C.M.A. 420, 423 (C.M.A. 1972) ("Federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment."). And although federal civilian courts do not conduct factual sufficiency reviews in the same manner as CCAs' Article 66, UCMJ, review, the legal sufficiency review they conduct likewise requires them to consider

"[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Unless the date of an offense is a material element, federal courts analyze discrepancies as variance rather than a failure of proof and require a showing of prejudice to the defendant's substantive rights before awarding relief for a date discrepancy. *See* United States v. Antonelli, 439 F.2d 1068, 1070 (1st Cir. 1971); United States v. Nersesian, 824 F.2d 1294, 1323 (2d Cir. 1987); United States v. Somers, 496 F.2d 723, 745 (3d Cir. 1974); United States v. Barsanti, 943 F.2d 428, 438 (4th Cir. 1991); United States v. Girod, 646 F.3d 304, 316–17 (5th Cir. 2011); United States v. Haas, 35 F. App'x 149, 153–54 (6th Cir. 2002); United States v. Krilich, 159 F.3d 1020, 1027 (7th Cir. 1998); United States v. Stuckey, 220 F.3d 976, 982 (8th Cir. 2000); United States v. Laykin, 886 F.2d 1534, 1542–43 (9th Cir. 1989); United States v. Nunez, 668 F.2d 1116, 1127 (10th Cir. 1981); United States v. Roberts, 308 F.3d 1147, 1156 (11th Cir. 2002); United States v. Barry, 938 F.2d 1327, 1329 (D.C. Cir. 1991).

C. The variance here was not material and did not prejudice Appellee.

AFCCA's conclusion that the charged offense occurred months prior to the date alleged was a variance. As a result, the court should have conducted a variance

analysis to determine if the variance was material and if Appellee was prejudiced by the variance. Conducting a variance analysis here establishes that any discrepancy in the date did not prejudice Appellee.

1. The variance was immaterial.

A variance is material if it "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." United States v. Finch, 64 M.J. 118, 121 (C.A.A.F. 2006). Here, none of these conditions are met.

A potential variance that alters the charged timeframe, without more, does not change the nature of the offense. "Minor variances, such as the location of the offense or the date upon which an offense is allegedly committed, do not necessarily change the nature of the offense and in turn are not necessarily fatal." United States v. Teffeau, 58 M.J. 62, 66 (C.A.A.F. 2003); *see also* United States v. Lovett, 59 M.J. 230, 235 (C.A.A.F. 2004).

AFCCA determined that the offense occurred sometime between April 2015 and October 2015, which placed the offense six months to a year before the charged timeframe in the specification. Taken as true, this change in date had no impact on the nature of the offense. Cf. Finch, 64 M.J. at 121 (describing materiality). Article 120b, UCMJ, required proof that the accused committed a sexual act upon a child who had not attained the age of 12 years. Even extending

the variance to its outer limit of one year does not impact the nature of the offense. The offense occurred on a singular date, in a singular location, with one victim. (JA at 36.)

Nothing about this alteration impacts the seriousness of the offense either. *Cf.* Simmons, 82 M.J. at 137 (concluding variance altered the chronology of the offenses, thereby allowing the prosecution to allege that the accused extorted the victim while she was a minor, which made the offense "absolutely more serious"). There is no difference in severity of the offense or language in the specification if the timeframe charged was October 2015 rather than April 2016. F.A. remained well under twelve years old, the age cutoff of "minor" as defined in Article 120b, UCMJ, in both 2015 and 2016.

Relatedly, the variance also did not change the maximum authorized punishment for the offense. *See* MCM, part IV, para. 45b.e(3) (2012 ed.). Based on the above, the variance was immaterial and non-fatal, and the analysis may end there.

2. The variance did not prejudice Appellee.

Even if the variance was material, the Appellee would still be unable to establish prejudice. United States v. Lee, 50 C.M.R. 161, 162 (C.M.A. 1975) ("[E]ven where there is a variance in fact, the critical question is one of prejudice."). To show prejudice, appellant must show both that (1) he was misled

by the language of the charge such that he was unable to adequately prepare for trial and (2) that the variance puts him at risk of another prosecution for the same offense. Allen, 50 M.J. at 86 (citing Lee, 50 C.M.R. at 1); *see also* United States v. Hopf, 5 C.M.R. 12, 14 (C.M.A. 1952) (explaining variance is not fatal "unless it operates to *substantially* prejudice the rights of the accused") (emphasis added).

There was no possibility that Appellee was misled about which charge to prepare a defense. Direct, uncontradicted evidence from three witnesses, including F.A., provided that F.A. was "six or seven years old" at the time of the offense, which still aligns with AFCCA's conclusion here. (JA at 58, 105, 181, 183, 192.) There was also no dispute that the offense occurred at Appellee's home on Luckey Pine in San Antonio, Texas, prior to Appellant's move to the Netherlands in May 2016. (JA at 54–55, 128.) As a result, the offense had to occur, based upon the occupants living in the home, between Christmas 2014, when F.A.'s family moved into the home, and May 2016, when Appellee had a PCS to the Netherlands. (JA at 147, 188, 222.) Most of all, there was only one interaction that the charged offenses stemmed from.

The definitive timeline of approximately seventeen months of opportunity, the certain location on Luckey Pine, and the participants in his extended family who were involved, made it abundantly clear which offense the charge addressed. (JA at 147–148, 155.) There was no resulting confusion. Importantly, too,

Appellee did not claim on appeal, nor did he at trial, allege any confusion regarding which offense he was defending against. *Cf.* United States v. Gilliam, 2020 CCA LEXIS 236, *9 (A. Ct. Crim. App. 15 July 2020) (unpub. op.) (finding uncertainty in charged timeframe and noting appellant requested a bill of particulars prior to trial).

Nor could Appellee claim that he was "surprised at trial by the purported discrepancy in proof." Lee, 50 C.M.R. at 162. To the contrary, Appellee agreed to the variance instruction and argued extensively in closing that Appellee did not commit the offense on either charging timeframe and that the substitutions and exceptions should not be made. (JA at 304–09.)

For similar reasons, there is also no risk of another prosecution. "[P]rotection against double jeopardy can be predicated upon the evidence in the record of the prior prosecution." Lee, 50 C.M.R. at 162–63. The record clearly indicates an offense against F.A. in the upstairs bedroom at Luckey Pine in San Antonio before Appellant's PCS to the Netherlands such that Appellee cannot show that he was prejudiced by the variance. *See* Hopf, 5 C.M.R. at 14 (noting "[t]he law is not so much concerned with the words used as with the elemental concepts of justice"). Because Appellee could not demonstrate either materiality or prejudice, any potential fatal-variance claim would fail, and the factual sufficiency of the charge should be upheld.

CONCLUSION

AFCCA erred in conducting its factual sufficiency review by treating a non-essential fact in the specification as an element of the offense required to be proven beyond a reasonable doubt. The Court set aside an otherwise sufficient conviction because their own review of a cold record provided a "best estimate" that the offense occurred months before it was alleged. This occurred despite the panel rejecting the proposed variance instruction.

Without this Court's intervention, CCAs will continue to exceed their authority and undermine panel determinations by incorrectly requiring proof beyond a reasonable doubt of every fact alleged. Instead, this Court should direct CCAs to conduct a variance analysis when they are confronted with a discrepancy between the proof and pleading of a nonessential fact and analyze whether the variance was (1) material; and (2) if it prejudiced the appellant.

The Government therefore respectfully requests this Court find that AFCCA erred as a matter of law in its factual sufficiency review and exercise its authority under Article 67(e), UCMJ, to direct the Judge Advocate General to return the record in this case to AFCCA for further review in accordance with this Court's decision.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court, the Air Force Appellate Defense Division, and amicus curiae counsel for the victim on 26 June 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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

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Dated: 26 June 2025