IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellant,	)	UNITED STATES'
	)	REPLY BRIEF
v.	)	
	)	Crim. App. Dkt. No. 40455
	)	
Staff Sergeant (E-5)	)	USCA Dkt. No. 25-0177/AF
JOHN D. KERSHAW	)	
United States Air Force	)	7 August 2025
Appellee.	)	

UNITED STATES' REPLY BRIEF

ASHLEY T. LEVINE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate
Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 38186

MARY ELLEN PAYNE
Associate Chief
Government Trial & Appellate
Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial & Appellate
Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35837

MATTHEW D. TALCOTT, Col, USAF
Chief
Government Trial & Appellate
Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

INDEX OF BRIEF

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

SERVICE COURTS OF CRIMINAL APPEALS

FEDERAL COURTS

CONSTITUTIONAL PROVISION

STATUTES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*	)	UNITED STATES' REPLY BRIEF
v.	)	
	)	Crim. App. Dkt. No. 40455
Staff Sergeant (E-5) **JOHN D. KERSHAW**, United States Air Force *Appellee*.	)	USCA Dkt. No. 25-0177/AF
	)	7 August 2025

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

Pursuant to Rule 22(b)(3) of this Court's Rules of Practice and Procedure, the United States hereby replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issue (Gov. Br.), filed on 24 July 2025.

ARGUMENT

The court below erred as a matter of law when it reasoned that a variance review could not be conducted on appeal. The court compounded its error by becoming a super-fact-finder, elevating the burden of proof for a non-element fact based upon a misapplication of this Court's precedent. In setting aside a conviction based solely on a non-element fact where the court was otherwise seemingly convinced of the proof of the elements of the crime beyond a reasonable doubt, the CCA exceeded its statutory authority.

Appellee's brief relies almost entirely on this Court's recent decision in United States v. Patterson, __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 548 (C.A.A.F. July 14, 2025) to justify AFCCA's conclusions below.[1] (Ans. Br. at 10.) But Patterson is factually distinguishable from this case because, unlike in Patterson, the CCA here expressly disclaimed discretion to conduct a variance analysis. The Patterson decision thus leaves serious legal questions outstanding such that this Court cannot rely solely on its decision to answer the certified question here. This Could should correct the CCA's error of law and confirm that factual sufficiency review involves no greater burden than that which is required at trial.

A. Kershaw is factually distinguishable from Patterson such that this Court must reach an independent decision.

In relying solely on Patterson in his Answer Brief, Appellee underestimates the import of the distinctions between Patterson and Kershaw, primarily how AFCCA addressed (or did not address) the issue of variance in each of its opinions.

[1] On 28 July 2025, the Government filed a Petition for Reconsideration in Patterson, arguing, *inter alia*, that Patterson conflicts with 1) precedent regarding factual sufficiency, 2) the UCMJ and Rules for Courts-Martial surrounding conviction requirements, and 3) federal practice analyzing discrepancies between pleadings and proof. *See* Petition for Reconsideration, Patterson, 2025 CAAF LEXIS 548. The Government here maintains the position that Patterson should be reconsidered and that the issue of whether a CCA can conduct a variance review on appeal was squarely before this Court in that case. But this Reply will assess the Patterson opinion as it stands.

In Patterson, no party at trial raised the date discrepancy between pleadings and proof, so the members were not instructed on variance. Patterson, 2025 CAAF LEXIS 548, at *13. In Patterson on appeal, AFCCA merely stated that it could not except or substitute language on appeal; it did not discuss whether it could analyze the findings for a variance between proof and pleadings for a non-element of the offense and affirm the conviction if the variance was nonfatal. United States v. Patterson, 2024 CCA LEXIS 399, at *45 (A.F. Ct. Crim. App. Sep. 27, 2024) [AFCCA Patterson]. Seemingly as a result, this Court believed that whether AFCCA "might have affirmed the finding of guilty notwithstanding the discrepancy between the facts alleged and the facts proved" was not before the Court. Patterson, 2025 CAAF LEXIS 548, at *12.

By contrast, in Kershaw, the government recognized the potential variance that developed at trial, agreed to instruct the panel on the variance, and the panel was accordingly instructed (and rejected) any alteration in the dates. (JA at 39, 214, 252–53, 257–58, 364, 378.) The Kershaw panel's rejection of any variance is an important differentiating factor from Patterson because it led the CCA to expressly disclaim an ability to consider a "variance standard of review." (JA at 7–8); (Ans. Br. at 9.) The CCA reasoned that because the members were given a variance instruction and declined to make changes to the charged timeframe, "there [was] no variance issue for [the] court to consider" on appeal. (JA at 7–8); *see also* (JA at

24–25) (Kearley, J., dissenting) (stating "majority felt constrained in their analysis" and incorrectly "recognize[d] only variance by the factfinder").

In other words, in Kershaw, the CCA addressed its authority to conduct a variance analysis head-on and erroneously concluded it could not. As a result, the question of whether a CCA can consider variance on appeal is squarely before this Court now.

The distinction between Patterson and Kershaw is further underscored by this Court's final paragraph in Patterson:

> [W]e note that potential problems concerning dates alleged in a specification often can be addressed and avoided before a case reaches appellate review. As an initial matter, specifications of course should be carefully drafted so that they conform to the anticipated evidence. And if the government's understanding of the evidence changes after a specification has been drafted, the government might seek to change the specification under R.C.M. 603 or withdraw the specification under R.C.M. 604 and then replace it. The government also could ask the military judge to instruct the panel members on findings by exceptions and substitutions as is permitted under R.C.M. 918.

Patterson, 2025 CAAF LEXIS 548, at *12–13.

If Patterson controls here, these guidelines are no longer effectual, and they provide little solace for the child victim in this case and society at large. Applying Patterson to Kershaw would mean that even if the government:

(a) proves every statutory element of the offense beyond a reasonable doubt;

> (b) presents substantial evidence that the offense occurred within the charged timeframe—enough that a panel rejects any proposed exceptions or substitutions; and
>
> (c) takes reparative steps to instruct the panel members under R.C.M. 918 on a potential variance;

a CCA can still set aside a child sexual abuse conviction based solely upon when the offense occurred. And the court can do so even though the date is not an element of the offense per statute and even though the government was not required to prove its precision beyond a reasonable doubt at trial. *Compare* (Gov. Br. at 5–7), *with* Patterson, 2025 CAAF LEXIS 548, at *3 (stating that the government presented "no evidence" within the charged timeframe).

The CCA could set aside the conviction even if, as it is here, the Appellee was aware of the competing timelines throughout trial, defended against them, presented closing arguments according to the variance instruction and therefore cannot argue that he was surprised by the variance or by a potential variance found on appeal. (JA at 304–09); *cf.* United States v. Freeman, 23 M.J. 531, 538 (A.C.M.R. 1986) (addressing variance for the first time on appeal and highlighting trial defense counsel's arguments on variance to show it was "readily apparent that appellant was well aware of the discrepancy and was not misled in his defense of the charge").

Overturning a case based on a discrepancy in a non-element that did not prejudice the accused is incompatible with the fair administration of justice. As the Supreme Court has recognized "[r]eversal for error, regardless of its effect on the

judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Johnson v. United States, 520 U.S. 461, 470 (1997) (internal citation omitted).

Indeed, this incongruous result not only elevates the burden of proof of a non-element but also provides perverse incentives for the defense to avoid raising the issue where it can be addressed at trial and instead maintain a hole card of requesting set-aside on appeal. *Cf.* United States v. Causey, 37 M.J. 308, 311 (C.M.A. 1993) ("It is important to encourage all trial participants to seek a fair and accurate trial the first time around.") (cleaned up).

The date of the offense is doubtless important from a notice perspective, but it does not, by precedent, by statute, or by constitution, become a fact that the conviction lives or dies from. Alleyne v. United States, 570 U.S. 99, 107 (2013) ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense.") (citing cases); Patterson v. New York, 432 U.S. 197, 211 n.12 (1977) ("The applicability of the reasonable-doubt standard . . . has always been dependent on how the State defines the offense that is charged in any given case[.]"); Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (explaining a defendant is entitled to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt") (cleaned up); Article 120b(c), UCMJ, 10

U.S.C. § 920b(c) (absence of date from elements of the offense). In fact, its inclusion in the specification is optional, and the ability to conduct a variance analysis on appeal wholly covers any due process concerns that could stem from differing evidence regarding the charged date that develops. *See* United States v. Teffeau, 58 M.J. 62, 67 (C.A.A.F. 2003) (discussing fundamental due process as basis for variance analysis); *cf.* Patterson, 432 U.S. at 210 ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged.") (emphasis added). And even when the date is alleged in the specification, it does not mutate into an element of the offense requiring proof beyond a reasonable doubt. *See* Alleyne, 570 U.S. at 105 (discussing scope of due process "depend[s] upon the proper designation of the facts that are elements of the crime).

Instead, this Court should correct the CCA and affirm that variance can occur on appeal. *See, e.g.*, United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001) (noting on appeal that appellant would have to show how any variance prejudiced him); United States v. Rodriquez, 66 M.J. 201 (C.A.A.F. 2008) (rejecting an argument that the "charge cannot be changed into a single act on appeal when the general verdict was reached without exception by the factfinder"); United States v. Marrie, 39 M.J. 993, 1003 (A.F. Ct. Crim. App. 1994) (addressing variance on appeal); United States v. Taylor, 82 M.J. 614, 625–26 (N-M Ct. Crim. App. 2002)

(recognizing and analyzing variance on appeal within factual sufficiency review); Freeman, 23 M.J. at 538 (analyzing variance for the first time on appeal). Clarifying whether and when a CCA can implement a variance analysis will provide helpful guidance to CCAs and litigants on an issue that this Court declined to address in Patterson. *See* 2025 CAAF LEXIS 548, at * 12.

At bottom, because Kershaw is factually distinguishable from Patterson and announces errors of law this Court must correct, this Court should not rely solely on Patterson in coming to its decision here. This Court should instead conclude that in Kershaw, AFCCA erred by treating the date as an element instead of conducting a variance analysis.

B. This Court is authorized to remand this case for a new factual sufficiency review.

In Patterson, this Court reasoned that it was not authorized to remand when the CCA has held the evidence is factually insufficient to prove the factual allegations of the specification. Id. at *11. Although it is true that this Court does not have jurisdiction to second-guess the ultimate conclusion of whether there was factual sufficiency for the conviction, that is not what the certified question here asks. To the contrary, the certified question surrounds *how* the CCA got to its decision and whether that process conformed with the CCA's own discretion. (Gov. Br. at 1.) This question is entirely a question of law, squarely within this Court's province. *See* United States v. Harrington, 83 M.J. 408, 418 n.10 (C.A.A.F. 2023)

(finding error of law where military judge erroneously confined his discretion); United States v. Riley, 50 M.J. 410, 411 (C.A.A.F. 1999) (noting "correctness of the lower court's decision" requires an analysis of "the application of the law to the facts found by the court below").

In Patterson, this Court noted that "AFCCA simply found that the Government had not proved the facts alleged" beyond a reasonable doubt. 2025 CAAF LEXIS 548, at *11. Applying that reasoning here would distort the certified question particularly because the CCA in Kershaw found that it *must* apply proof beyond a reasonable doubt standard to a fact *because* it could not conduct a variance analysis. (JA at 7–8.) Instead, the question in Kershaw when read in context with the factual circumstances is whether the court erred in requiring the non-element fact to be proven beyond a reasonable doubt rather than conducting a variance analysis. (Gov. Br. at 1.) This is a purely legal question that this Court must review. United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010) (explaining this Court will review the CCA's action if the CCA "acted without regard to a legal standard or otherwise abused its discretion"). And if the "Court is in doubt whether the court below properly determined factual sufficiency of the evidence, the remedy is to remand the case for a proper factual review of the findings of guilty." United States v. McAllister, 55 M.J. 270, 277 (C.A.A.F. 2001); *cf.* United States v. Beatty, 64 M.J. 456, 459 (C.A.A.F. 2007) (remanding to the CCA because this Court questioned

whether the factual sufficiency review involved consideration of something improper).

Here, the case must be remanded because the CCA made an *error of law*, not because its factual finding was deficient. Errors of law, even in a factual sufficiency review, are precisely within this Court's review authority and require correction when made. United States v. Weatherspoon, 49 M.J. 209, 212 (C.A.A.F. 1998) ("Although a Court of Criminal Appeals has broad fact-finding power, its application of the law to the facts must [still] be based on a correct view of the law.").

C. Kershaw has outstanding legal questions unresolved by Patterson that necessitate independent review.

Even if this Court finds that Kershaw is not substantially factually distinguishable from Patterson, it should still avoid relying solely on Patterson to answer the certified question because AFCCA's erroneous interpretation of its discretion in Kershaw left outstanding legal questions unresolved by the Patterson decision.

1. AFCCA incorrectly required, as a matter of law, a non-element to be proven beyond a reasonable doubt.

In Patterson, this Court did not address whether factual sufficiency review requires proof beyond a reasonable doubt of facts that are not elements of the offense. This question of law is squarely before this Court in the certified question and falls within the ambit of this Court's review authority. As a result, this Court

should remand to the CCA, correcting the error of law and instructing the CCA that factual sufficiency review concerns no greater standard of proof than that required at trial.

Only the elements of the offense are required to be proven beyond a reasonable doubt. *See* R.C.M. 918(c) (2019 ed.); United States v. Gaudin, 515 U.S. 506, 510 (1995) (noting "criminal convictions [must] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"). "It is not necessary that each particular fact advanced by the prosecution which is not an element be proved beyond a reasonable doubt." *See* R.C.M. 918(c) (2019 ed.) Discussion. As Kershaw demonstrates, non-essential facts, like the date here, which may be excepted and/or substituted from a specification as a non-fatal variance are not critical in stating the offense. *See* R.C.M. 918(a)(1) (2019 ed.) Discussion ("One or more words or figures may be excepted from a specification, and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by court-martial."); *see also* United States v. Treat, 73 M.J. 331, 336 (C.A.A.F. 2014) (Baker, J., concurring) (differentiating between exceptions and substitutions that "merely clarify and correct and those that change the nature of the offense"). Because only those elements critical to state an offense carry the burden of being proven beyond a reasonable

doubt, elevating non-element facts to this burden on appellate review is an error of law.

Indeed, requiring every word in a specification to be proven beyond a reasonable doubt conflates facts alleged for notice purposes and elements required to prove an offense occurred. Alleyne, 570 U.S. at 107 (only facts that constitute elements must be proven beyond a reasonable doubt); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (superseded by statute on other grounds) (noting factual sufficiency review is "whether each required element [was proved] beyond a reasonable doubt"); *see* AFCCA Patterson, 2024 CCA LEXIS 399 at *63 (Warren, J., concurring) (encouraging this Court to correct confusion caused by Parker, English, and Simmons) ("'factual sufficiency' is supposed to be about failures of proof as to required statutory elements and 'fatal variances' are supposed to be about deficiencies in pleading that deprive an appellant of due process by depriving him of reasonable notice and opportunity to formulate a defense"); United States v. Mendoza, 18 M.J. 576, 579 (A.F.C.M.R. 1984) (explaining that a discrepancy between pleadings and proof is not a problem of sufficiency of the evidence, but of variance); *see also* United States v. Dotson, 17 U.S.C.M.A. 352, 355 (1968) ("In all matters which constitute the essence of the crime, strictness of proof is required," but "strict proof is not required as to immaterial averments . . . and a variance in respect of such matters is not fatal.")

This confusion is displayed in Kershaw where AFCCA treated the date like an element of the offense based upon a misinterpretation of this Court's precedent in Parker. The court below characterized Parker as holding that "the Government's failure to prove the charged offense occurred during the charged timeframe rendered the evidence legally insufficient to support the conviction[.]" (JA at 9.) And as a result, AFCCA held, that fact *alone* must also require proof beyond a reasonable doubt. (Id.)

But as explained at length in the opening brief, AFCCA misunderstands Parker. (Gov. Br. at 22–25.) Parker stands only for the unremarkable conclusion that presenting zero evidence of a crime is grounds for dismissal under R.C.M. 917. *See* United States v. Parker, 59 M.J. 195, 201 (C.A.A.F. 2003). It does not announce a new burden of proof for the charged timeframe—or any other non-essential fact—as proof beyond a reasonable doubt. Id.

Nor could it. The United States Supreme Court has already explained over a century ago that ordinarily the date of an offense need not be proved beyond a reasonable doubt. Ledbetter v. United States, 170 U.S. 606, 612 (1898). There, the Court reasoned "proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient" unless the date is "made material by the statute creating the offense." Id. This proposition has been repeated by military and federal courts alike for over one hundred years. *See, e.g.*, United States v. Gehring,

6 U.S.C.M.A. 657, 660 (1956) ("Ordinarily, a difference between the date alleged and the date established by the evidence is not fatal to a conviction if the latter is within the period of limitation and before the filing of the charge."); Marrie, 39 M.J. at 1002 (same); United States v. McIntosh, 580 F.3d 1222, 1227 (11th Cir. 2009) (noting "proof of any day before the finding of the indictment, and within the statute of limitations period[] will be sufficient"); United States v. Synowiec, 333 F.3d 786, 791 (7th Cir. 2003) (same); United States v. Wells, 646 F.3d 1097, 1103–04 (8th Cir. 2011) (same). There is no unique facet of the military justice system that would support deviating from this accepted federal practice.

The conclusion that a non-element must be found beyond a reasonable doubt to support a conviction is a legal conclusion that this Court can and must correct. Without addressing this question, the precedent this Court will set is that either 1) non-essential facts, such as dates, *are* elements of the offense, or 2) CCAs may demand proof beyond a reasonable doubt for any fact, even those that are not required to be proved beyond a reasonable doubt by the government at trial. Both of these conclusions are incorrect as a matter of law. Because the CCA incorrectly applied the law to the facts at hand, remand is necessary.

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

Not only is the elevation of the burden of proof for a non-element fact an error of law, but a CCA exceeds its statutory authority in doing so. "The scope of an

appellate court's authority is a legal question this Court reviews de novo." United States v. English, 79 M.J. 116 (C.A.A.F. 2019). Because this question was also left unresolved by Patterson, this Court should address it here.

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). This authority is strictly cabined to "affirm only such findings of guilt . . . as the Court finds correct in . . . fact[.]" Article 66(d)(1), UCMJ. As previously stated, the government maintains the burden to prove only the essential elements of the offense beyond a reasonable doubt. And those elements are set by Congress. *See* United States v. O'Brien, 560 U.S. 218, 225 (2010) ("[W]hether a given fact is an element of the crime itself . . . is a question for Congress."); United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010) ("Determinations as to what constitutes a federal crime, and the delineation of the elements of such criminal offenses—including those found in the UCMJ—are entrusted to Congress.").

Congress, then, has laid out the CCA's authority in conducting factual sufficiency review as an independent review of whether the court can find the required elements beyond a reasonable doubt. This makes sense considering the greater context of factual sufficiency review including a CCA's authority to affirm lesser included offenses. *See* Article 66(f)(A)(i). The CCA can do so because "[a]n offense is a lesser included offense of the charged offense if each of its *elements* is

necessarily also an element of the charged offense." United States v. Armstrong, 77 M.J. 465, 468 (C.A.A.F. 2018) (emphasis added). Factual sufficiency review is thus concerned with the elements required to convict.

Applied here, Article 120b(c), UCMJ, provides that any person who commits a lewd act upon a child who is under 12 years old "*is guilty* of sexual abuse of a child and shall be punished as a court-martial may direct." (emphasis added). The article does not include any reference to date as a prerequisite for guilt. Accordingly, the date is not part of a finding of guilt for the offense of sexual abuse of a child. When a CCA conducts Article 66(d)(1), UCMJ, review, it may "affirm only such findings of guilt . . . as the Court finds correct in . . . fact." The date therefore could not cause a finding of guilty to be incorrect *in fact*; the appellant is still guilty *in fact* if the CCA is convinced beyond a reasonable doubt that he committed the offense as articulated by Congress in the Code. As the Supreme Court has recognized, Due Process "requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* with which the defendant is charged." Patterson, 421 U.S. at 210. That requirement was met in Appellee's case, since the date is not included in the definition of the offense. And there is no "military due process right" that gives servicemembers "due process protections above and beyond the panoply of rights provided to them by the plain text of the

Constitution, the UCMJ, and the MCM." United States v. Vasquez, 72 M.J. 13, 19 (C.A.A.F. 2013).

Consequently, when a CCA goes beyond its authority and adds the date as a required element that must be proved beyond a reasonable doubt as it did in Kershaw, the court is acting ultra vires. No provision of Article 66, UCMJ, allows a CCA such sweeping authority to demand more than is required in any trial court in the country. Indeed, in the Patterson opinion, this Court did not identify what, if any, legal authority allows the CCA to treat a date in a specification as an element and overturn a conviction because the government failed to prove the date beyond a reasonable doubt.

The CCA cannot create new standards beyond that which Congress requires and doing so risks contravening the separation of powers by invading the legislature's role of defining the elements of the crime. U.S. Const. art. I, § 8, cl. 14 (granting Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces"); *see also* United States v. McCormick, 30 C.M.R. 26, 28 (1960) (noting the executive cannot "embody legislative authority to provide crimes and offenses [under the Code]" as that power was vested solely in the legislature). The CCAs may not assume a role of super-fact-finders; they must remain within the confines of their authority granted by statute.

The bounds of a CCA's authority to conduct factual sufficiency review is a legal question that remains unresolved by Patterson. Because the CCA exceeded its authority here, this Court should remand for a new factual sufficiency review.

CONCLUSION

The court below overturned the conviction, not because it was not convinced beyond a reasonable doubt that SSgt Kershaw sexually abused the child victim, but because the court could only glean from its second-hand reading of the trial a "best estimate" that the crime occurred a few months earlier than charged. This is not a matter of factual sufficiency; this is a matter of variance on appeal.

The CCA erred as a matter of law when it concluded that it was unable to conduct a variance analysis on appeal and instead elevated the burden of proof for a non-element fact. The CCA's action conflicted with this Court's precedent and exceeded its statutory authority. This Could should correct this error of law and confirm that factual sufficiency review involves no greater burden than that which is required at trial.

ASHLEY TORKELSON LEVINE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
United States Air Force
500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 38186

MARY ELLEN PAYNE
Associate Chief
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35837

MATTHEW D. TALCOTT, Col, USAF
Director
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

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 7 August 2025.

ASHLEY TORKELSON LEVINE, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 38186

CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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

This brief contains 4,565 words.

This brief complies with the typeface and type style requirements of Rule 37.

/s/ Ashley Torkelson Levine, Maj, USAF

Attorney for the United States (Appellant)

Dated: 7 August 2025