

July 24, 2025

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,

Appellant,

v.

JOHN D. KERSHAW,
Staff Sergeant (E-5),
United States Air Force,

Appellee.

USCA Dkt. No. 25-0177/AF

Crim. App. Dkt. No. ACM 40455

BRIEF ON BEHALF OF APPELLEE

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Index of Brief

Index of Brief	ii
Table of Authorities	iii
Certified Issue.....	1
Statement of Statutory Jurisdiction	1
Relevant Authorities.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Summary of the Argument.....	5
Argument	6
The Air Force Court of Criminal Appeals did not err by finding factual insufficiency where the Government failed to prove the dates alleged because that decision was within that court’s discretion.	6
Standard of Review	6
Law and Analysis	6
Conclusion.....	10

Table of Authorities

Statutes

10 U.S.C. § 866(d).....	1
10 U.S.C. § 866(d)(1)	5, 7
10 U.S.C. § 867(a)(2)	1
10 U.S.C. § 920b	2
William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388	7

Court of Appeals for the Armed Forces and Court of Military Appeals Cases

<i>United States v. English</i> , 79 M.J. 116 (C.A.A.F. 2019).....	9
<i>United States v. Leak</i> , 61 M.J. 234 (C.A.A.F. 2005)	6
<i>United States v. Nerad</i> , 69 M.J. 138 (C.A.A.F. 2010)	6
<i>United States v. Patterson</i> , __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 548 (C.A.A.F. July 14, 2025)	<i>passim</i>
<i>United States v. Quiroz</i> , 55 M.J. 334 (C.A.A.F. 2001)	10
<i>United States v. Simmons</i> , 82 M.J. 134 (C.A.A.F. 2022)	9
<i>United States v. Walters</i> , 58 M.J. 391 (C.A.A.F. 2003)	10

Service Courts of Criminal Appeals Cases

<i>United States v. Gilliam</i> , No. ARMY 20180209, 2020 CCA LEXIS 236 (A. Ct. Crim. App. July 15, 2020)	9
<i>United States v. Patterson</i> , No. ACM 40426, 2024 CCA LEXIS 399 (A.F. Ct. Crim. App. Sep. 27, 2024)	7

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?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).¹ This Court has jurisdiction to review this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Relevant Authorities

Article 66(d), UCMJ, 10 U.S.C. § 866(d)(1) (2018), states:

(1) CASES APPEALED BY ACCUSED.—In any case before the Court of Criminal Appeals under subsection (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 or 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

¹ Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

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

Statement of the Case

On April 25 and December 12–16, 2022, Appellee, Staff Sergeant (SSgt) John D. Kershaw, was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Contrary to his pleas, a panel of officer and enlisted members convicted him of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. Joint Appendix (JA) at 327. The panel acquitted him of one specification of sexual assault of a child. *Id.* The military judge sentenced SSgt Kershaw to a reprimand, reduction to the grade of E-1, two years of confinement, and a dishonorable discharge. JA at 039–40.

The AFCCA reviewed this case, issuing an opinion on March 27, 2025. JA at 001. The AFCCA set aside the findings of guilty as factually insufficient, set aside the sentence, and dismissed the Charge and Specification with prejudice. JA at 009. The officer Performing the Duties of the Judge Advocate General of the Air Force certified the issue before this Court on May 27, 2025. Docketing Notice, May 27, 2025.

Statement of Facts

SSgt Kershaw's niece, F.A., accused him of exposing himself to her in a bedroom in the house they shared with many other members of their extended family. JA at 003–04. The specification of which SSgt Kershaw was convicted alleged that he committed this offense “between on or about 1 April 2016 and on or about 30 April 2016.” JA at 036. SSgt Kershaw moved to the Netherlands with his wife and son pursuant to a permanent change of station (PCS) at the beginning of May 2016, checking into temporary lodging at Joint Base San Antonio-Lackland on April 26, 2016, and departing the country on May 1, 2016. JA at 339, 346, 353.

When testifying about the alleged incident, none of the Government's witnesses could recall a specific date or date range. *E.g.*, JA at 053 (F.A. does not remember when she lived with SSgt Kershaw), 140 (F.A.'s mother, K.S., cannot remember the date when the incident occurred). Even though none of them could identify an exact timeframe, several witnesses remembered subsequent contextual events that informed the timing of the charged conduct.

F.A. testified that after the incident, she stayed mostly in her mom's room for about two weeks and then moved with her mom and siblings to Bridge City, which is near Houston, Texas, where they stayed for close to a year. JA at 087–89, 116. She also stated that they returned to SSgt Kershaw's house when he and his family left to go to the Netherlands. JA at 089. Similarly, K.S. testified they left for Bridge City within a week of the incident and stayed there for six months to a year with her youngest daughter's grandmother before returning around the time SSgt Kershaw and his family left for the Netherlands. JA at 116, 139–40. K.S.'s mother, J.S., also testified that F.A., K.S., and K.S.'s other children went to K.S.'s youngest daughter's grandmother's house shortly after the incident and returned shortly before SSgt Kershaw and his family left for the Netherlands. JA at 186.

Based on the witnesses' testimony, the AFCCA determined that the charged incident occurred six months to one year before the charged timeframe. JA at 008. This difference was too great to be "on or about" the charged timeframe. JA at 007–09. The AFCCA also rejected the Government's argument that this should be analyzed as a variance because the members made no changes to the charged timeframe despite

receiving a variance instruction. JA at 007–08. As a result of its analysis, the AFCCA held that the Government failed to prove beyond a reasonable doubt that the offense occurred during the charged timeframe, and the findings of guilty were therefore factually insufficient. JA at 008–09.

Summary of the Argument

The AFCCA properly exercised its factual sufficiency review authority under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018) when it found that the Government failed to prove the charged timeframe. The evidence indicated the incident at issue occurred between six months and one year before the beginning of the charged timeframe, meaning it was too far removed to be “on or about” that date. Moreover, the AFCCA acted within its discretion when it declined to analyze the discrepancy in proof as a variance. Setting aside the findings of guilty and dismissing the Charge and Specification for factual insufficiency was a correct application of legal principles. Thus, the AFCCA did not err in its analysis, and this Court should affirm its decision.

Argument

The Air Force Court of Criminal Appeals did not err by finding factual insufficiency where the Government failed to prove the dates alleged because that decision was within that court’s discretion.

Standard of Review

This Court reviews factual sufficiency determinations of lower courts “for application of correct legal principles,” but “this authority is limited to matters of law.” *United States v. Patterson*, __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 548, at *5–6 (C.A.A.F. July 14, 2025) (quoting *United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005)). When a court of criminal appeals (CCA) disapproves findings as factually insufficient, this Court “accept[s] the CCA’s action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion.” *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010).

Law and Analysis

As the AFCCA concluded, the evidence in this case is factually insufficient to prove that SSgt Kershaw committed the alleged offense within or reasonably near the charged timeframe. JA at 007–09. This holding is within the AFCCA’s discretion and constitutes a proper

exercise of its factual sufficiency review authority under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018).² *Patterson*, 2025 CAAF LEXIS 548, at *11.

This Court recently affirmed the AFCCA’s set aside of findings for factual insufficiency under strikingly similar circumstances. *Id.* at *13. In *Patterson*, the AFCCA found that the charged incident occurred at least three months before the charged timeframe. *Id.* at *4–5 (quoting *United States v. Patterson*, No. ACM 40426, 2024 CCA LEXIS 399, at *44 (A.F. Ct. Crim. App. Sep. 27, 2024)). This difference led the AFCCA to hold that the findings were factually insufficient “because it was not convinced ‘beyond a reasonable doubt’ that the ‘facts alleged in the specification were true.’” *Id.* at *11 (quoting *Patterson*, 2024 CCA LEXIS 399, at *44). This court affirmed this finding, holding that it “was within

² As this Court noted in *Patterson*, Congress significantly amended the factual sufficiency review standards in Article 66, UCMJ. 2025 CAAF LEXIS 548, at *4 n.2. However, “the amendments apply only in cases ‘in which every finding of guilty . . . is for an offense that occurred on or after’ the effective date of the amendment.” *Id.* (quoting William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611). Since the charged incident here occurred in 2016 or earlier—years before the effective date—the amendment does not apply. The version of Article 66, UCMJ, that applied in *Patterson* also applies here.

the AFCCA’s discretion” and that this Court “lack[s] authority to review the AFCCA’s determination that the evidence was factually insufficient to prove the facts alleged in the specification at issue.” *Id.* at *11–12.

This case parallels *Patterson* in almost every way. As in *Patterson*, the AFCCA here set aside findings for factual insufficiency because it was not convinced beyond a reasonable doubt that the evidence proved that the offense occurred in the timeframe alleged. *Compare id.* at *11, *with* JA at 007–09. The certified issues are nearly identical and present exactly the same question. *Compare Patterson*, 2025 CAAF LEXIS 548, at *2, *with* Br. in Supp. of the Certified Issue, 1, June 26, 2025. Likewise, the result should be the same, and this Court should affirm the AFCCA’s holding as a proper exercise of its factual sufficiency review authority. *Patterson*, 2025 CAAF LEXIS 548, at *11.

The notable differences between the case at bar and *Patterson* favor affirming the AFCCA’s decision. Although this Court held that it cannot review “the AFCCA’s determination that that the evidence was factually insufficient to prove the facts alleged in the specification,” *id.* at *12, it is worth noting that the difference between the dates in the evidence and the findings is greater here. *Contrast id.* at *4–5 (describing difference of

at least three months), *with* JA at 008 (describing difference of six months to one year). Thus, the evidence in SSgt Kershaw’s case places the incident even further outside the “range of days to weeks” connoted by the phrase “on or about.” JA at 009 (quoting *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022)).

Additionally, unlike *Patterson*, the members in this case received a variance instruction, but they still did not alter the charged timeframe. *Contrast Patterson*, 2025 CAAF LEXIS 548, at *3, *with* JA at 007–08. This led the AFCCA to conclude that “there is no variance issue for [the AFCCA] to consider.” JA at 008 (citing *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019)). Instead, the AFCCA analyzed the matter under factual sufficiency standards. *Id.* (citing *United States v. Gilliam*, No. ARMY 20180209, 2020 CCA LEXIS 236, at *10–11 (A. Ct. Crim. App. July 15, 2020)). The AFCCA’s rejection of the Government’s call for a variance analysis is, if anything, more warranted here because the members declined to change the charged timeframe after receiving a variance instruction. JA at 007–08.

The AFCCA appropriately exercised its factual sufficiency review authority, an “awesome, plenary, de novo power.” *United States v.*

Walters, 58 M.J. 391, 395 (C.A.A.F. 2003) (quoting *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)). In so doing, it applied the same legal principles as it did in *Patterson*. Compare *Patterson*, 2025 CAAF LEXIS 548, at *4 (describing legal principles asserted by AFCCA), with JA at 007–09. Just as it affirmed the AFCCA’s decision in *Patterson*, this Court should conclude that the AFCCA applied correct legal principles when conducting its factual sufficiency review here and affirm its decision. 2025 CAAF LEXIS 548, at *11–13.

Conclusion

The AFCCA acted within its discretion when it held that the evidence in SSgt Kershaw’s case was factually insufficient to support the findings. Consequently, this Court should answer the certified question in the negative and affirm the AFCCA’s decision.

Respectfully Submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 2,053 words.
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Respectfully submitted,

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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and electronically served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on July 24, 2025.

Respectfully submitted,

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