March 5, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellant,

v.

JOSHUA A. PATTERSON,
Staff Sergeant (E-5),
United States Air Force,

Appellee.

USCA Dkt. No. 25-0073/AF

Crim. App. Dkt. No. ACM 40426

BRIEF ON BEHALF OF APPELLEE

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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 it 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), 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 credibility of witness, and determine controverted questions

[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*).

of fact, recognizing that the trial court saw and heard the witnesses.

(2) ERROR OR EXCESSIVE DELAY.—In any case before the Court of Criminal Appeals under subsection (b), the Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c).

R.C.M. 918(a)(1) states:

As to a specification. General findings as to a specification may be:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any;

(D) not guilty only by reason of lack of mental responsibility; or

(E) not guilty.

Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

Statement of the Case

On December 7, 2022, a general court-martial consisting of officer and enlisted members at Hill Air Force Base, Utah, found Appellee, Staff Sergeant (SSgt) Joshua Patterson, guilty, contrary to his pleas, of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. Joint Appendix (JA) at 225. The panel acquitted SSgt Patterson of one specification of sexual assault of a child. *Id.* The same panel sentenced SSgt Patterson to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17 years of confinement, and a dishonorable discharge. JA at 058–59. The convening authority took no action on the findings and approved the sentence in its entirety. JA at 002.

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case, issuing an opinion on September 27, 2024. JA at 001. The AFCCA

set aside the finding of guilty for the specification of rape of a child as factually insufficient and dismissed that specification and the charge with prejudice. JA at 023, 026. The AFCCA also authorized a rehearing as to the sentence. JA at 026. The Government moved for reconsideration of that decision, and SSgt Patterson opposed that motion. JA at 036, 048. The AFCCA denied the reconsideration motion on November 6, 2024. JA at 054. The Judge Advocate General of the Air Force certified the issue before this Court on January 5, 2025. Br. in Support of the Certified Issue (Gov. Br.), February 5, 2025, at 4.

Statement of Facts

SSgt Patterson's stepdaughter, C.H., accused him of assaulting her in 2015 by penetrating her vulva with his fingers in the garage behind their South Carolina house. JA at 083, 086. Specification 1 of Charge II alleged SSgt Patterson committed this offense "between on or about 1 October 2015 and on or about 30 November 2015" and "within the state of South Carolina." JA at 057. For all but five days of this charged timeframe, SSgt Patterson was in neither South Carolina nor even the United States. Instead, from 6 October 2015 to 17 April 2016, he was deployed outside the continental United States (OCONUS). JA at 234.

In her trial testimony, C.H. could not specify when SSgt Patterson allegedly assaulted her, but she was confident it was before the charged timeframe. JA at 083, 086. C.H. testified that she believed the assault occurred before her brother was born on September 28, 2015. JA at 083. She remembered being carried to her room which, after her brother was born, became his nursery. JA at 083, 086. She further testified that the alleged incident took place after she found out her mother was pregnant with her brother in January 2015. JA at 083. According to C.H., the assault occurred in the spring or early summer and during warmer weather, which she described as being "good for T-shirts and basketball shorts." *Id.* She was not able to indicate when the incident occurred with any more specificity than that. *See id.* Ultimately, the court-martial convicted SSgt Patterson of this offense as charged. JA at 225.

On appeal, the AFCCA stated that "all of the evidence indicates the offense occurred before 1 October 2015." JA at 022. Further, it found the evidence did not show that the charged misconduct occurred reasonably near, or "within a range of days to weeks" of, the charged timeframe. JA at 022–23 (quoting *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022)). The best estimate that the AFCCA could make as to the date of

the incident was June 2015, but it also noted that it could have occurred earlier. JA at 022–23. As a result, it held that the Government failed to prove beyond a reasonable doubt that the offense occurred on the dates alleged in the specification, and the finding of guilty was therefore factually insufficient. JA at 023.

Summary of the Argument

As the AFCCA found, the Government failed to prove the charged timeframe it chose to allege in Specification 1 of Charge II. The evidence indicated the incident at issue occurred at least three months, and possibly longer, before the beginning of the charged timeframe, meaning it was too far removed to be "on or about" that date. Consequently, the AFCCA set aside the findings of guilty and dismissed this charge and specification for factual insufficiency. This was a correct application of this Court's precedents that state the Government must prove facts it chooses to allege in a specification, even if those facts were not required to establish a statutory element of the charged offense.

Further, variance is not the proper analysis for this failure of proof, contrary to the Government's assertion. There was no variance at trial because there were no findings by exceptions or substitutions. This Court

has held that appellate courts cannot alter findings using exceptions or substitutions on appeal, meaning an appellate court cannot employ variance to affirm a conviction on a different basis than the findings at trial. Two distinct elements of the military justice system—the powerful factual sufficiency review employed by service Courts of Criminal Appeals (CCAs) under Article 66(d), UCMJ, 10 U.S.C. § 866(d), and the authority for the factfinder to make findings by exceptions and substitutions at trial—make it inappropriate to adopt the practice of civilian appellate courts. 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 the Government is required to prove the facts alleged in the specification beyond a reasonable doubt.

Standard of Review

This Court reviews factual sufficiency determinations of the 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) (quoting *United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016)).

Law and Analysis

As the AFCCA concluded, the evidence in this case failed to demonstrate that SSgt Patterson committed the alleged offense in Specification 1 of Charge II within or reasonably near the charged timeframe. JA at 023. Applying this Court's precedents, the AFCCA conducted a factual sufficiency analysis based on this deficiency of proof and set aside the finding of guilty as to this specification. JA at 021–23. The Government does not ask this Court to overrule its precedents, but it now claims that this was an incorrect holding and that variance should apply. Gov. Br. at 9–28. The Government's arguments are wrong. The AFCCA properly held the Government to its burden of proving the facts it alleged beyond a reasonable doubt, and it did not err in its decision.

A. This Court's precedents require the Government to prove all the facts alleged in a specification, including the dates.

The Government controls the charge sheet, and when it chooses to narrow the scope of a charged offense by alleging particular facts, "it [is] required to prove the facts as alleged." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citing *United States v. Reese*, 76 M.J. 297, 300–01 (C.A.A.F. 2017)). This is true even if the Government was not required to allege the fact at issue. *Id.*

In *English*, for example, the Government was not required to allege a particular type of force when drafting a rape specification. *Id.* But it did, alleging the appellant employed unlawful force by "grabbing [the victim's] head with his hands." *Id.* at 119–20. Since the evidence did not prove this fact, this Court set aside the finding of guilty and dismissed the specification. *Id.* at 120, 122–23.

Similarly, in a rape prosecution where the Government alleged that the appellant penetrated the victim with his penis, it was required to prove that fact as alleged. *United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021). This Court held that the Government had to prove the alleged facts even though the applicable version of Article 120, UCMJ, did not require proof of specific penetration. *Id.*

The requirement to prove the facts as alleged, even when they were not required when drafting the specification, extends to the charged timeframe. *United States v. Parker*, 59 M.J. 195, 201 (C.A.A.F. 2003). In *Parker*, the Government charged the appellant with committing rape and adultery in February or March 1995. *Id.* at 197. The Government attempted to modify the charged dates to 1993 before trial, but the military judge denied this motion, meaning "the Government was

obligated to prove that the offenses took place in 1995, the charged timeframe." *Id.* at 201. "The Government introduced no evidence of sexual interaction between Appellant and [the victim] during the charged time period," but it did introduce evidence of "concerning sexual activity in 1993." *Id.* at 201. The members found the appellant guilty, by exceptions and substitutions, of committing these offenses between August 1993 and March 1995. *Id.* at 200.

This Court set aside those findings and dismissed the specifications because "the Government's case was legally insufficient under R.CM. 917." *Id.* at 201. In reaching this holding, this Court noted that the Government could have addressed the disconnect between the specifications and its evidence by withdrawing the charges and preferring new ones. *Id.* Since the Government chose not to do so, this Court unequivocally stated that "the Government was required to prove in its case-in-chief that there was improper sexual activity between Appellant and [the victim] *during the charged period in 1995*." *Id.* (emphasis added).

The AFCCA properly applied *Parker* in reaching its conclusion that SSgt Patterson's conviction was factually insufficient because the

evidence failed to prove the charged timeframe. JA at 021–23. However, the Government now claims that the AFCCA misread *Parker*. Gov. Br. at 17–21. The Government suggests that the real reason the evidence was insufficient in *Parker* is because it was admitted as evidence of uncharged misconduct under Mil. R. Evid. 413 and could therefore only be used to show the appellant's propensity to commit sexual offenses. Gov. Br. at 18–19. The Government's interpretation identifies a potential additional problem with the evidence in *Parker*, but it misses the point of this Court's holding. As this Court clearly stated, "[P]roof of improper sexual activity in 1993, without more, did not demonstrate directly or by reasonable inference that Appellant engaged in sexual activity with [the victim] *in 1995*." *Parker*, 59 M.J. at 201 (emphasis added). This Court's opinion unambiguously says that the Government had to prove the charged offense occurred during the charged timeframe. *Id.* Its failure to prove that fact is why the evidence was insufficient.

Faced with these clear and consistent precedents, the Government does not argue that they were wrongly decided, instead inviting this Court to look past them—and the unequivocal language the Government chose to put on the charge sheet—to focus on only a subset of the

allegation. The Government contends that the charged timeframe did not need to be proven because it is not an "essential element." Gov. Br. at 13–17. According to the Government, only those facts related to elements listed in the statute need to be proven to meet its burden; other facts alleged in a specification are "ancillary" or "surplusage" and need not be proven. Gov. Br. at 13–14. This argument directly contradicts this Court's precedent that the Government is "required to prove the facts as alleged" when it chooses to narrow the scope of a charged offense by alleging particular facts. *English*, 79 M.J. at 120.

The Government claims support for its view from Supreme Court opinions, but its argument misstates and exaggerates the meaning of those opinions. Gov. Br. at 13 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999); *United States v. Debrow*, 346 U.S. 374, 376 (1953)). *Richardson* was a case about jury unanimity for particular elements. 526 U.S. at 817. The Court merely observed that crimes consist of elements that are listed in the statute and, while a jury must unanimously find the Government proved each element to convict, the jurors need not decide unanimously what underlying facts proved a particular element. *Id.* In fact, the Supreme Court's opinion in *Richardson* suggests that proving

the charged timeframe *is* required. *Id.* at 823–24. The Court wrote, "It would be enough to present testimony . . . showing that the defendant supplied a runner in his organization with large quantities of drugs *on or about particular dates as alleged in an indictment*." *Id.* (emphasis added).

In *Debrow*, the Court considered the sufficiency of an indictment and indicated that it must allege facts constituting the essential elements of the charged offense. 346 U.S. at 376. While the Court noted that an indictment need not include other matters that are unnecessary for establishing essential elements, it said nothing about what would happen if one did. *Id. Debrow* does not address a situation where the Government chooses to allege specific facts even though they are not required. *See id.* But this Court's precedent plainly addresses this scenario and states that the Government must prove such facts. *English*, 79 M.J. at 120.

In addition to being unsupported by precedent, the Government's desired approach would effectively create different classes of facts in a specification: some that must be proven as alleged and others that could be altered on appeal. SSgt Patterson's case highlights a particular problem with this approach. The Government's brief, like the concurrence from the AFCCA, acknowledges that the date is necessary

to prove a statutory element of the offense at issue because the Government "must prove that the victim was over the age of 12 but under the age of 16." Gov. Br. at 15; *see also* JA at 027. The Government and the concurrence both go on to say that this element is met as long as the evidence establishes a date when the victim was within the specified age range. Gov. Br. at 15; JA at 027. Considering this, the date of the offense is an "essential element" here by the Government's definition, but the Government believes it could satisfy that element by establishing facts that are different than those alleged in the specification. Gov. Br. at 15. So even though the date here is an "essential element," the Government would have appellate courts treat it as if it is not merely because it wants to use differing evidence to sustain the conviction.

Whether an alleged fact is an "essential element," and how it is reviewed on appeal, cannot change based upon the evidence the Government produced. Such a system would invite uncertainty about what the Government must actually prove to sustain a conviction. This Court did not note any temporal component to the statutory elements of the offenses in *Parker*, but it still reversed the convictions because the Government failed to prove the charged timeframe. 59 M.J. at 197, 201.

This Court should reject the Government's moving-target approach to its evidentiary burden and reinforce its previous holding that the Government must prove the facts it chooses to allege. *English*, 79 M.J. at 120.

The AFCCA's application of *Parker* and other precedents led it to the correct conclusion that the Government's evidence was factually insufficient to sustain the conviction on this specification. JA at 021–23. Having alleged the incident occurred in a timeframe beginning "on or about" October 1, 2015, the Government was required to prove this fact beyond a reasonable doubt. JA at 022, 057. The evidence showed the incident occurred well before October 1, 2015. JA at 022, 083, 086, 234. Moreover, the testimony of C.H., the only witness to provide evidence as to this specification, indicated it took place in spring or early summer. JA at 021, 083. This meant it was at least three months, possibly more, before the charged timeframe.[2] JA at 022–23; *see also* Gov. Br. at 10, 13, 16, 24, 34 (noting that the difference was several months).

[2] These factual determinations by the AFCCA are not before this Court for review because this Court reviews factual sufficiency determinations for correct legal principles only as to matters of law. *Thompson*, 83 M.J. at 4.

As a result of its factual findings, the AFCCA concluded that the evidence did not show that the incident occurred within "a range of days to weeks" of the beginning of the charged timeframe, so it was not "on or about" that date. *Id.* (quoting *Simmons*, 82 M.J. at 139). Based on these facts, the AFCCA held that the finding of guilty on this specification was factually insufficient because the Government failed to prove a fact that it chose to charge. JA at 023. This was a correct application of the law to the facts, and the AFCCA did not err in its finding.

B. Variance is not the correct standard to apply when assessing a failure to prove the charged timeframe, especially when the factfinder did not include a variance in the findings.

When the Government fails to prove the charged timeframe, the insufficiency should not automatically be reviewed on appeal as a variance, as the Government suggests. Gov. Br. at 21–28. A variance arises when the evidence at trial "does not conform strictly with the offense alleged in the charge." *English*, 79 M.J. at 121 (quoting *United States v. Lubasky*, 68 M.J. 260, 264 (C.A.A.F. 2010)). "Where a variance exists, R.C.M. 918(a)(1) permits a factfinder to enter findings of guilty with exceptions and substitutions, so long as the '[e]xceptions and substitutions [are] not . . . used to substantially change the nature of the

offense.'" *Id.* (alterations in original) (quoting R.C.M. 918(a)(1)). Crucially, there was no variance at trial here; the panel found SSgt Patterson guilty of the specification as charged. JA at 225, 247. The findings instructions did not even include an instruction about findings by exceptions and substitutions. JA at 235–246.

Despite the absence of a variance at trial, the Government now urges this Court to find that the lack of proof of the charged timeframe can be analyzed as variance on appeal. Gov. Br. at 21–23. This flies in the face of this Court's precedents that variance cannot be made on appeal because "exceptions and substitutions pursuant to R.C.M. 918 may *only* 'be made by the factfinder at the findings portion of the trial.'" *English*, 79 M.J. at 121 (quoting *Lubasky*, 68 M.J. at 265). In *English*, the Army Court of Criminal Appeals altered the findings by excepting the type of force alleged in the specification. *Id.* at 119. This Court reversed that decision, explaining that the Army Court could not "strike the charged language regarding specific unlawful force" and affirm the conviction. *Id.* at 121–22. This was so even though there was evidence of some unlawful force. *Id.*

Similarly, in *Lubasky*, this Court declined to consider a variance because there were no exceptions and substitutions by the factfinder. 68 M.J. at 264–65. As here, the findings in *Lubasky* were based on the specification "as drafted," and this Court held that it did not have the authority to alter the findings by substituting a new victim's name for the one in the specification. *Id.* at 265. It also declined to answer the question of whether there was a fatal variance because there were no exceptions or substitutions. *Id.* at 264–65. This Court should apply the same reasoning here and conclude that it cannot analyze findings for variance on appeal when there was no variance at trial.

One of the problems with finding a variance for the first time on appeal is that the appellate court would be affirming a conviction on a different basis than that on which the factfinder reached a guilty finding. Yet that is exactly what the Government asks this Court to do here. In support of this proposition, the Government relies heavily on *United States v. Hunt*, 37 M.J. 344 (C.M.A. 1993). Gov. Br. at 25–28. It claims this case "demonstrates that even in the context of evidentiary sufficiency, military courts should be analyzing date discrepancies as variance." Gov. Br. at 25. However, the Government is misreading *Hunt*,

a case in which the evidence was sufficient to prove the charged timeframe. 37 M.J. at 347.

In *Hunt*, the appellant made a fatal-variance claim on appeal. *Id.* But this Court's predecessor found that there was no material variance because the evidence showed the offense occurred within three weeks of the charged date, which meant it was "on or about" or "reasonably near" that date as charged. *Id.* (quoting *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987)). In short, the Government in *Hunt* proved the charged timeframe, and that is why the appellant's variance claim failed. *Id. Hunt* provides no basis for analyzing the instant case for variance because the Government here failed to prove the charged timeframe, making the findings factually insufficient. JA at 021–23.

SSgt Patterson's case is also distinct from those in which a discrepancy in proof only narrowed the scope of liability. The Government attempts to frame his case in that manner, pointing to *United States v. Collier*, 14 M.J. 377 (C.M.A. 1983), and asserting that variance is the appropriate analysis, despite the absence of exceptions or substitutions, because its failure of proof did not broaden the theory of liability. Gov. Br. at 23. *Collier* involved a conspiracy allegation in which

the charged overt act was leaving the company barracks. 14 M.J. at 379. The evidence only proved that the appellant left the squad bay after conspiring with others to rob other Marines. *Id.* at 377–78. This Court's predecessor held that proof of the overt act (i.e., leaving the squad bay) was sufficient to support the conspiracy conviction because there was a "substantial similarity" between the charged overt act and the proven overt act. *Id.* at 377–78, 380. This stands to reason, as the appellant would have necessarily had to leave the squad bay, which is one section in the overall barracks, in order to leave the company barracks as charged. This change did not broaden the scope of liability from the specification as the Government claims; if anything, it narrowed it to a more specific overt act. In contrast here, the potential date range in the evidence would broaden SSgt Paterson's scope of liability by significantly extending the timeframe in which he is alleged to have committed the offense, and the timeframe for which he would need to defend himself.

The difficulties inherent in trying to defend oneself against a potential future substitution of facts by an appellate court underscores a fundamental problem of affirming a conviction on a different basis than the basis stated in the findings. If appellate courts could do this, then an

accused would have to defend against not only the facts alleged in the specification, but also any other facts brought out in the course of litigation. Even on appeal, an appellant could not rely on a court-martial's findings to know what facts to defend against.

The Government attempts to flip this problem on its head by claiming that affirming the AFCCA's reasoning would mean that "accused servicemembers will be disincentivized from timely raising objections to variance at the trial level, 'on the chance that [it] may have a favorable effect' and later become a landmine that blows a hole in the Government's case on appeal." Gov. Br. at 35 (alteration in original) (quoting *United States v. Wolfe*, 24 C.M.R. 57, 60 (C.M.A. 1957)). By this argument, the Government seems to suggest that SSgt Patterson should have objected to variance at trial even though none occurred at trial. JA at 225, 247. Indeed, the Government is seemingly advocating for future accuseds to object *at trial* for *potential*, *future* variances by appellate courts. An accused cannot be expected to raise an objection to something that has not yet happened, and it is unreasonable to expect an accused to anticipate and challenge possible changes, such as exceptions or substitutions, by an appellate court. *See United States v. Mooney*, 77 M.J.

252, 255 (C.A.A.F. 2018) ("Additionally, because this issue did not arise until post-trial, there was no motion to be made during the court-martial."). The Government's preferred approach would create new and far-reaching problems, and this Court should reject that approach in favor of affirming its previous holding that there can be no exceptions and substitutions, and thus no variance, on appeal. *English*, 79 M.J. at 121.

The Government also cites a number of cases from federal circuit courts of appeals and argues that this Court should adopt the practice in those courts of analyzing failures to prove the charged timeframe for variance and prejudice. Gov. Br. at 26–28 (citing *United States v. Girod*, 646 F.3d 304, 316–17 (5th Cir. 2011); *United States v. Simms*, 351 F. App'x 64, 67 (6th Cir. 2009); *United States v. Roberts*, 308 F.3d 1147, 1156 (11th Cir. 2002); *United States v. Stuckey*, 220 F.3d 976, 982 (8th Cir. 2000); *United States v. Krilich*, 159 F.3d 1020, 1027 (7th Cir. 1998); *United States v. Barsanti*, 943 F.2d 428, 438 (4th Cir. 1991); *United States v. Laykin*, 886 F.2d 1534, 1542–43 (9th Cir. 1989); *Nersesian*, 824 F.2d at 1323; *United States v. Morris*, 700 F.2d 427, 429–30 (1st Cir. 1983); *United States v. Nunez*, 668 F.2d 1116, 1127 (10th Cir. 1981);

United States v. Somers, 496 F.2d 723, 745 (3d Cir. 1974)). There are two reasons why this Court should not adopt the practice of its civilian counterparts.

First, the AFCCA set aside the finding on this specification after conducting a factual sufficiency review. JA at 020–23. Factual sufficiency review is a "unique statutory function" that the CCAs perform under Article 66(d), UCMJ, 10 U.S.C. § 866(d). *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).[3] It gives these courts "awesome, plenary, de novo power" to determine whether "the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Id.* (quoting *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "As a general rule, civilian appellate courts do not possess the authority to conduct this type of factual sufficiency review." *Id.* Without this authority, civilian appellate courts must assess a failure to prove a charged timeframe for

[3] *Walters* cites Article 66(c), but the relevant text later moved to Article 66(d). 58 M.J. at 395; *MCM*, Appendix 2, § 866(d). Since the charged date of the offense was in 2015, and the charged date of the earliest convicted offense was in 2010, the factual sufficiency review standards in effect before 1 January 2021 apply here. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (e)(2), 134 Stat. 3388, 3612–13 (2021).

something other than factual insufficiency: an error of law. *See Barsanti*, 943 F.2d at 438 (citing Fed. R. Crim. Pro. 52(a)); *accord* Article 59(a), UCMJ, 10 U.S.C. § 859(a) (requiring material prejudice to a substantial right as a predicate for correcting an error of law). When civilian appellate courts conduct variance analyses, they are looking for an impact to a substantial right of the defendant, such as due process. *E.g.*, *Simms*, 351 F. App'x at 67; *Laykin*, 886 F.2d at 1542–43; *Morris*, 700 F.2d at 429–30. In contrast, here, the AFCCA only had to determine whether its members were convinced that SSgt Patterson was guilty beyond a reasonable doubt. *Walters*, 58 M.J. at 395. It answered this question in the negative because it concluded that the Government failed to prove all of the facts that it alleged in the specification. JA at 023. This Court should not impose a review methodology from civilian courts applicable to an error of *law* on the *factual* sufficiency assessment that is unique, powerful, and unknown to those civilian courts.

The second distinction comes from the ability of a court-martial, including a panel, to make findings by exceptions and substitutions. *See* R.C.M. 918(a)(1). As this Court indicated in *Lubasky*, a variance in the military justice system arises when a factfinder makes findings by

exceptions and substitutions at trial. 68 M.J. at 264–65; *see also English*, 79 M.J. at 121. Juries in civilian courts do not generally have the same authority to make findings by exceptions and substitutions. *See Stirone v. United States*, 361 U.S. 212, 215–19 (1960) (reversing a conviction for interfering with the interstate movement of steel where the defendant was indicted for interfering with the interstate movement of sand because the trial court could not change the indicted charge). This difference is seemingly a by-product of the development of courts-martial in the United States, which consisted solely of panels for almost 200 years. *United States v. Wheeler*, 85 M.J. 70, 75–76 (C.A.A.F. 2024). The panel was the court-martial until 1968, when Congress created military judges. *Id.* In the years since, panels have perhaps come to be seen as more akin to civilian juries. *See Ortiz v. United States*, 585 U.S. 427, 438 (2018) (noting that the structure of courts-martial resembles that of other courts). Nevertheless, they maintain a distinct role with some distinct authority, like the authority to make findings by exceptions and substitutions.

Here, the panel had this authority, but it chose not to exercise it, instead finding SSgt Patterson guilty of the specification as drafted. JA

at 225, 247. It stands to reason why civilian appellate courts would conduct a variance analysis despite the absence of exceptions and substitutions at trial; a civilian factfinder cannot indicate a variance with exceptions and substitutions. In contrast, a court-martial panel can indicate variance in its findings using exceptions and substitutions. When, as here, it does not do so, it would be inappropriate for service CCAs, or this Court, to nevertheless undertake a variance analysis. *Lubasky*, 68 M.J. at 264–65. For these reasons, the variance analysis used by federal civilian appellate courts is "incompatible with military law" under these circumstances, and this Court should decline to adopt it here. *United States v. Nivens*, 21 C.M.A. 420, 423 (C.M.A. 1972).

Finally, even if the Government is correct that the AFCCA should have used variance to analyze the findings, this Court should not assess whether any potential variance is fatal. Gov. Br. at 29–34. If this Court determines that a variance analysis is necessary, then the proper remedy would be to remand the case for such an analysis. *See, e.g., United States v. Harvey*, ___ M.J. ___, 2024 CAAF LEXIS 502, at *12–13 (C.A.A.F. Sept. 6, 2024) (remanding case for CCA to conduct a new factual sufficiency review in accordance with this Court's interpretation of the review

standards). However, for the reasons explained herein, variance is not the proper analysis because the Government failed to prove the charged timeframe, and the court-martial included no exceptions or substitutions in its findings.

Conclusion

The Government chose to charge a specific timeframe, chose not to withdraw and dismiss the specification to adjust the timeframe, and did not ask for a variance instruction to address the gap in proof. Instead, the Government now asks this Court to sidestep its precedents and carve an exception out of Article 66's unique statutory review to give it a variance first sought on appeal. This Court should reject that request. The AFCCA found that the evidence failed to prove the charged timeframe and, in accordance with this Court's precedents, set aside the findings of guilty in a proper exercise of its factual sufficiency review authority. Moreover, since there were no findings by exceptions and substitutions, there was no variance at trial, meaning there cannot be a variance analysis on appeal. This Court should answer the certified question in the negative, find that the AFCCA did not err in its factual sufficiency analysis, and affirm the decision of the AFCCA.

Respectfully Submitted,

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