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. 40426
	)	
Staff Sergeant (E-5)	)	USCA Dkt. No. 25-0073/AF
JOSHUA A. PATTERSON	)	
United States Air Force	)	5 February 2025
Appellee.	)	

BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

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UNITED STATES, *Appellant*	)	BRIEF IN SUPPORT OF THE CERTIFIED ISSUE
v.	)	Crim. App. No. 40426
Staff Sergeant (E-5) **JOSHUA A. PATTERSON** United States Air Force *Appellee.*	)	USCA Dkt. No. 25-0073/AF

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 IT 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 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 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 USCS §§ 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 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 three charges consisting of five specifications for violations of Article 120, 120b, and 128, UCMJ. (JA at 58-60.) The court-martial sentenced Appellee to a dishonorable discharge, confinement for 17 years, reduction to the grade of E-1, forfeiture of all pay and allowances, and a reprimand. (Id.)

On appeal, Appellee raised five assignments of error before AFCCA, including one challenging the legal and factual sufficiency of two of his convictions. (JA at 2.) On 27 September 2024, AFCCA found Appellee's conviction for rape of child in violation of Article 120b, UCMJ,[2] factually insufficient based on a discrepancy between the dates pleaded and the dates proved. (JA at 20-23.) AFCCA set aside the finding of guilty and dismissed the charge and specification with prejudice. (Id.)

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[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] *See* MCM, pt. IV, para. 45b (2012 ed.).

On 28 October 2024, the United States moved AFCCA to reconsider. (JA at 36-47.) On 6 November 2024, AFCCA denied the United States' motion. (JA at 54.) On 5 January 2025, the Judge Advocate General of the Air Force certified for review the issue now before this Court.

STATEMENT OF THE FACTS

Appellee Rapes His Twelve-Year-Old Stepdaughter CH

One night in 2015, while CH was twelve years old, she and Appellee—her stepfather—were in the garage listening to music and working on their go kart. (JA at 84.) At some point, Appellee offered CH alcohol. (JA at 84.) After having a few drinks, CH felt dizzy, nauseous, and hot. (JA at 84-85.) CH, whose head was spinning, laid down on a futon that was against the wall and closed her eyes. (Id.) Appellee then turned off the lights and the music. (JA at 85.)

As CH laid on the futon, Appellee slowly got on top of her and stuck his hand under her clothing. (Id.) CH, who felt "stuck," kept her eyes closed as if she was asleep. (Id.) Appellee then removed CH's shorts and penetrated her vagina with his fingers. (JA at 85-86.) CH was scared. (JA at 87.) This was her first sexual encounter of any kind. (Id.) As Appellee penetrated her with his fingers, CH felt pressure and pain. (Id.) All CH could think about was when it would stop. (JA at 86-87.)

Then, CH heard someone approaching—the air conditioning unit in the garage was not on, so she could hear the outside environment "very clear." (JA at 86.) It was her mother. (Id.)

As soon as CH's mother knocked on the garage door, Appellee threw a blanket over CH—who was unclothed from the waist down—and got up "really fast" to answer the door. (JA at 86.) Appellee told CH's mother that CH was laying down because she was not feeling well. (Id.) CH's mother suggested waking CH up and taking her inside, to which Appellee said, "No, I'll pick her up and carry her in." (Id.) Appellee then carried CH—still wrapped in the blanket—to her room. (Id.) At first, CH—who had "never had a father"—thought that Appellee's actions might be "an act of love," or his waying of showing "affection." (JA at 87.) Although a part of her "knew it was wrong," another part of her thought, "maybe this is how it's supposed to be." (JA at 87.)

CH Testifies the Rape Occurred in Spring or Summer 2015

For his 2015 rape of CH, Appellee was charged with violating Article 120b, UCMJ.[3] The specification alleged that Appellee:

> [D]id, within the state of South Carolina, between *on or about 1 October 2015 and on or about 30 November 2015*, commit a sexual act upon [CH], a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the vulva of [CH] with his finger, by using

[3] *See* MCM, pt. IV, para. 45b (2012 ed.).

> force against [CH], with an intent to gratify [his] sexual desire.

(JA at 55) (emphasis added).

At trial, CH testified that the rape occurred after her twelfth birthday in January 2015 but before her brother's birth at the end of September 2015. (JA at 83.) In explaining how she placed the incident in that timeframe, CH recalled learning about her mother's pregnancy on her birthday in January, and that "[n]othing happened before then." (Id.) CH further explained that the weather at the time was "good for T-shirts and basketball shorts," and her mother was five or six months pregnant. (Id.) CH also recalled that at the time of the incident, she was still using the bedroom that would later become her brother's nursery, and "that was the room [she] had when [she] was carried in from the garage." (Id.) Based on this, CH estimated that the rape occurred sometime in the spring or summer. (JA at 84-86.) During their cross-examination of CH, Appellee's trial defense did not challenge this timeline. (*See generally* JA at 143-158.)

Neither Party Raises a Variance Concern

During the prosecution's closing argument, trial counsel addressed the discrepancy between the charged timeframe and CH's testimony by noting the language "on or about," in the specification, which he explained was used "because it's not always perfectly clear, especially in the situation of a child to remember something that happened seven years ago." (JA at 177.) The defense

neither objected nor leveraged the discrepancy during its closing argument. (*See generally* JA at 199-219.) Neither the prosecution nor the defense requested an instruction on variance. (*See* JA at 235-246.) The members found Appellee guilty as charged. (JA at 225, 247.)

AFCCA Sets Aside Appellee's Conviction Based on the Discrepancy

On appeal, Appellee raised several assignments of error, including one challenging the factual sufficiency of his child rape conviction. (JA at 20-23.) In asserting that his conviction was factually insufficient, Appellee did not allege that proof of a statutory element was lacking. Instead, Appellee asserted—for the first time—that the evidence was insufficient because the prosecution had failed to prove the offense occurred during the charged time—"between on or about 1 October 2015 and on or about 30 November 2015." (JA at 21.)

Citing United States v. Parker, 59 M.J. 195 (C.A.A.F. 2003), AFCCA agreed with Appellee and held that the prosecution "was required to prove the specification—including the alleged dates of the offense—true beyond a reasonable doubt." (JA at 23.) Without using the term "variance," the majority opinion appeared to discount the idea that a variance analysis could apply, citing United States v. English, 79 M.J. 116 (C.A.A.F. 2019), for the proposition that the CCAs could not make exceptions and substitutions. (Id.)

In setting Appellee's conviction aside as factually insufficient, AFCCA based its decision entirely on the discrepancy between the dates charged (fall 2015) and the dates proved (summer 2015). (*See generally* JA at 20-23.) The court did not cite any deficiency of proof with respect to the statutory elements of child rape. (Id.)

In a concurring opinion, one of the judges observed as much: "Today we reverse a conviction not because of a failure of the Government's proof as to an essential element, but because of the inaccuracy of the Government's pleading as to an ancillary fact." (JA at 26.) Citing the same cases as the majority, the judge noted that he concurred in the judgment only because he was "bound by precedent" to do so, and explained his belief that "the current state of the law is that the date of an offense is accorded the status of an element." (JA at 26, 29.) The judge then invited this Court to re-examine its precedent, which he described as "produc[ing] the anomalous result in this case (and perhaps future cases) of reversing a conviction where the Government's proof satisfies every statutory element of the offense." (JA at 35.)

> I am essentially inviting our superior court to return to its prior precedent which held that when divergences between the dates charged and the dates proved at trial do not change the fundamental nature of the charge … such divergences should be reviewed for what they are— "variances," not failures of "proof."

(JA at 30.)

SUMMARY OF THE ARGUMENT

"The law is not so much concerned with the words used as with elemental concepts of justice." United States v. Craig, 24 C.M.R. 28, 30 (C.M.A. 1957). Thus, those portions of a specification that are "unnecessary" to proving the charged offense "may normally be treated as 'a useless averment' that 'may be ignored.'" United States v. Miller, 471 U.S. 130, 136 (1985). Because "time is [generally] not of the essence of an offense," United States v. Gehring, 20 C.M.R. 373, 376 (C.M.A. 1956), the dates alleged in a specification often fall into this category of "useless averment[s]" that need not be proved exactly as alleged. Ledbetter v. United States, 170 U.S. 606, 612 (1898).

By nevertheless treating the charged timeframe like an essential element of the offense of child rape—even though Article 120b, UCMJ, does not make the precise date a material element—AFCCA elevated form over substance. *See* United States v. Brown, 16 C.M.R. 257, 262 (C.M.A. 1954) ("[A]n erroneous statement of the date of the offense constitutes a matter of mere form."). In other words, its resultant determination that Appellee's conviction was factually insufficient—based solely on the discrepancy between the dates pleaded versus proved—was premised on an "erroneous consideration of the elements of the offense," and therefore cannot stand. United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005).

What AFCCA should have done is analyzed the discrepancy as variance—a proposition that is supported by this Court's own precedent in United States v. Hunt, 37 M.J. 344 (C.M.A. 1993), as well as prevailing federal practice. *See, e.g.*, United States v. Nersesian, 824 F.2d 1294, 1323 (2d Cir. 1987). The lower court's refusal to do so constitutes a failure to apply the "correct legal principles," United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022), and produced the "anomalous result…of reversing a conviction where the Government's proof satisfies every statutory element of the offense." (JA at 35.)

Had AFCCA properly analyzed the issue as variance, it would have found that the variance was (1) immaterial, and (2) did not prejudice Appellee. *See* United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009). The variance in this case—a difference of several months—did not change the nature, seriousness, or available punishment of the offense, since Appellee was charged with raping his 12-year-old stepdaughter and that is exactly what the evidence showed (albeit with a difference of several months). United States v. Finch, 64 M.J. 118, 121 (C.A.A.F. 2006). Thus, the variance was immaterial. Id. Moreover, on the "critical question" of prejudice, there was no evidence whatsoever that Appellee was misled, denied the opportunity to defend against the charge, or at risk of another prosecution for the same misconduct. United States v. Lee, 50 C.M.R. 161, 162 (C.M.A. 1975).

Considering the above, this Court should find that AFCCA erred by treating the charged timeframe like a required element for factual sufficiency review when it should have analyzed it as variance instead. Further, this Court should exercise its authority under Article 67(e), UCMJ, to remand this case to AFCCA for a new factual sufficiency review.

ARGUMENT

BECAUSE TIME WAS NOT AN ESSENTIAL ELEMENT OF THE OFFENSE, THE AIR FORCE COURT ERRED 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.

Standard of Review

This Court reviews a CCA's factual sufficiency determination for "the application of 'correct legal principles,' but only as to matters of law." Thompson, 83 M.J. at 4 (citing United States v. Clark, 75 M.J. 298, 300 (C.A.A.F. 2016)). While this Court will not review a factual sufficiency determination if it is "based solely on an appraisal of the evidence," United States v. Thompson, 9 C.M.R. 90, 92 (C.M.A. 1953), it is "statutorily obligated" to do so if the CCA's determination "was reached after an erroneous consideration of the elements of the offense." Leak, 61 M.J. at 241. Such is the case here.

Law & Analysis

Article 66(d)(1), UCMJ, vests the Courts of Criminal Appeal (CCA) with the power to review the factual sufficiency of court-martial convictions and to "affirm only such findings of guilty … as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1). The critical question in factual sufficiency review is whether there is proof of each statutorily required element of the charged crime. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Here, AFCCA set aside Appellee's conviction for child rape as factually insufficient—even though the evidence established each statutory element of the crime—based on a discrepancy between the timeframe charged and the timeframe proved. (JA at 23.) AFCCA reached this "anomalous result," (JA at 35), based on a mistaken belief that it was required treat the charged timeframe like an essential element (despite its nonessential nature), when it should have been analyzed as variance instead. This elevation of form over substance constitutes both an "erroneous consideration of the elements of the offense," and a failure to apply the "correct legal principles." Leak, 61 M.J. at 241. Accordingly, this Court should find that AFCCA erred and remand for a new factual sufficiency review.

A. AFCCA erred by treating the charged timeframe like a required element of the offense for factual sufficiency review.

A CCA's factual sufficiency review considers whether there is "proof of each required element [of the offense] beyond a reasonable doubt"—*not* proof of every single word in a specification. Washington, 57 M.J. at 399. By finding Appellee's conviction for rape of a child factually insufficient based *solely* on the fact that the timeframe proved was several months earlier than the timeframe charged, AFCCA effectively took the latter approach and "accorded [the charged timeframe] the status of an element." (JA at 29.) This was error because it (1) ignored decades' worth of jurisprudence about pleading, and (2) was predicated on a misinterpretation of United States v. Parker, 59 M.J. 195 (C.A.A.F. 2003).

1. Unless it is made essential by statute, the date of a crime need not be proved exactly as alleged.

In reviewing for factual sufficiency, a Court of Criminal Appeals (CCA) "must make its own independent determination as to whether the evidence constitutes proof of each *required element* beyond a reasonable doubt." Washington, 57 M.J. at 399 (emphasis added). Required elements are those that are "listed in the statute that defines the crime." Richardson v. United States, 526 U.S. 813, 817 (1999); *see, e.g.,* United States v. Debrow, 346 U.S. 374, 376 (1953) (citing 18 U.S.C. § 1621 in defining the "essential elements" of the crime of perjury).

While strict proof is required for such elements—which "constitute the essence of the crime"—the same rigor does not apply to "immaterial averments" within a specification, such as those which are "not descriptive of the offense." United States v. Dotson, 38 C.M.R. 150, 153 (C.M.A. 1968) (citation omitted); Miller, 471 U.S. at 136.

For example, in two soldiers' joint trial for rape, it was "immaterial that the identity of [a] third soldier was not established as named in the specification," for the evidence showed that both accused actively participated in the rape, which rendered the crime complete. United States v. Marshall, 6 C.M.R. 54, 57 (C.M.A. 1952). Under these circumstances, the third soldier's name "was, at most, surplusage." Id.; *see also* United States v. Duke, 37 C.M.R. 80, 84 (C.M.A. 1966) ("An allegation in the specification which is unnecessary to prove the offense and does not contradict any material allegation can generally be disregarded as surplusage.")

Like the third soldier's name in Marshall, the date alleged in a specification often constitutes an "ancillary fact," (JA at 26), since "generally[,] time is not of the essence of an offense." Gehring, 20 C.M.R. at 376. Thus, "unless a particular day be made material by the statute creating the offence," Ledbetter, 170 U.S. at 612, the prosecution need not allege an exact date. United States v. Williams, 40 M.J. 379, 382 (C.M.A. 1994); *but see* United States v. Simmons, 82 M.J. 134, 141

(C.A.A.F. 2022) ("Stating on a charge sheet the date of an alleged offense with a certain degree of specificity and accuracy is required."). Even if a date *is* alleged, the prosecution is not required to prove that the offense was committed on the specific date alleged. Ledbetter, 170 U.S. at 612; *see also* United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999) (noting that the prosecution need not prove the specific date alleged if the charge uses "on or about"). In most cases—both in the military and civilian systems—"proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient." Ledbetter, 170 U.S. at 612; Gehring, 20 C.M.R. at 376. Put simply, time is not an essential element unless the statute says it is. And when time is inessential, "an erroneous statement of the date of the offense constitutes a matter of mere form." Brown, 16 C.M.R. at 262.

The charge at issue in this case—rape of a child in violation of Article 120b(a)(2)—is no exception. While the elements of the crime are not entirely devoid of a temporal component given that the prosecution must prove that the victim was over the age of 12 but under the age of 16, the statute does not make the precise date of the rape a material element. *See* 10 U.S.C. § 920b(a)(2), (h)(4) (2012 ed.). In a prosecution under this section, it makes no difference whether the child was raped right after she turned 12 or right before she turned 16—proof that a rape occurred "anywhere in that age range" should be sufficient to sustain a

conviction under Article 120b(a)(2). (JA at 27); *see* United States v. Mathis, 31 M.J. 726, 728 (A.F.C.M.R. 1990), *rev. denied*, 32 M.J. 465 (C.M.A. 1991) (sustaining child rape conviction where evidence established that incident occurred while victim was under the age of 16, even though "a specific date was not able to be determined.").

Under this framework, AFCCA's error becomes apparent. Despite the absence of any statutory provision suggesting that the precise season of a child rape is "of the essence of the offense," Gehring, 20 C.M.R. at 376, AFCCA treated the charged timeframe like a required element. Then, when faced with a discrepancy between the dates charged versus the dates proved, AFCCA treated it like a fatal deficiency of proof instead of the "matter of mere form" that it was. Brown, 16 C.M.R. at 262. The resultant absurdity was the set aside of a conviction—which was supported by evidence establishing the actual statutory elements of the offense—based *solely* on the fact that the proven timeframe preceded the charged timeframe by a few months.

Put differently, AFCCA's factual sufficiency determination turned not on a failure of proof of the "*required* element[s]," Washington, 57 M.J. at 399, but on a minor discrepancy regarding a nonessential, non-elemental date range that could be

considered mere surplusage.[4] *See* United States v. Samaniego-Lara, 371 F. App'x 776, 777-78 (9th Cir. 2010) (where appellant was tried for being "found in" the United States after illegal re-entry, indictment language regarding his date of entry was surplusage). This elevation of form over substance constitutes both an "erroneous consideration of the elements of the offense," Leak, 61 M.J. at 241, and a failure to apply the "correct legal principles." Thompson, 83 M.J. at 4.

The lower court, for its part, cites this Court's decision in Parker, 59 M.J. at 195, as necessitating this outcome. (JA at 21, 29-32.) In AFCCA's view, Parker requires CCAs to treat the charged date like an essential element of the offense. (Id.) This interpretation, however, is based on an imprecise reading of Parker that further highlights why AFCCA erred.

2. United States v. Parker does not suggest that the charged timeframe should be treated like an element of the offense.

In interpreting Parker as suggesting that the dates alleged in a specification must be proved with the same exactitude as an essential element, AFCCA appears to believe that this Court found convictions legally insufficient based simply on a discrepancy between the dates pleaded and the dates proved. (JA at 21, 32.) This misapprehends the reasoning in Parker, in which this Court set aside the

[4] Even without the language "between on or about 1 October 2015 and on or about 30 November 2015," the specification at issue would allege all the elements of the offense of child rape; thus, the date range would be surplusage.

convictions not because the evidence proved dates different from those charged, but because the court-martial never received any evidence *on the merits* of that charge. 59 M.J. at 198-99.

At issue in Parker were allegations that the appellant raped the victim, AL, and engaged in adultery with her both in early 1995. Id. at 197. After a videotaped deposition of AL—conducted a week before trial[5]—in which she described the rape as occurring in 1993 instead of 1995, the prosecution moved to amend the charge to match the timeframe described in the deposition. Id. at 198. The military judge denied the motion on the basis that the defense did not have adequate notice that it needed to defend against a charge of misconduct in 1993 instead of 1995. Id.

Upon losing the motion to amend, the prosecution switched course and moved to introduce AL's deposition through Mil. R. Evid. 413—which "permits the prosecution 'to use evidence of the accused's *uncharged past sexual assaults* for the purpose of demonstrating his propensity to commit the charged offenses'"—under the theory that the 1993 sexual misconduct described therein was relevant to rape charges involving two other victims. Id. at 198-99 (emphasis added). The military judge admitted the deposition on this basis, noting that "[an]

[5] Per the Army CCA's description of the case history, the deposition occurred on 22 April 1996, one week before the 29 April 1996 trial date. United States v. Parker, 54 M.J. 700, 709-712 (A. Ct. Crim. App. 2001).

allegation of a *prior rape* is very relevant to charged offenses of a similar nature." Id. at 199 (emphasis added).

Ultimately, the deposition ended up being the singular mention of AL in the prosecution's entire case-in-chief—AL did not testify, and the prosecution presented no other evidence related to either of the 1995 offenses involving AL. Id. In other words, the only evidence related to AL was her deposition testimony about a 1993 rape, which—by virtue of its admission under Mil. R. Evid. 413—was considered evidence of uncharged sexual misconduct. Id. at 198-99.

This is why the prosecution's case was legally insufficient—not because it proved a different timeframe from what was charged, but because it contained nothing that could be considered substantive evidence of the 1995 offenses involving AL. Id. at 200-201. The lower court's interpretation of Parker failed to appreciate this nuance. (*See generally* JA at 21, 29-32.) It was the utter absence of proof—rather than a discrepancy therein—that made it error for the military judge to deny the motion for findings of not guilty under R.C.M. 917. 59 M.J. at 200-201. Because by finding that the prosecution had made a "prima facie case" about the misconduct involving AL, the military judge failed to recognize that the deposition he had admitted as evidence of uncharged sexual misconduct could not logically constitute evidence of the charged 1995 offenses. Id.

The question in Parker was whether there was *any* evidence of the offense at all, *not* whether the evidence proved that the offense occurred in a timeframe different from that which was charged. Id. Given that this case is concerned with the latter, Parker's logic—that evidence admitted as uncharged misconduct cannot serve as "prima facie" evidence of a charged offense—is entirely inapplicable. Id. Accordingly, AFCCA was wrong to make it the cornerstone of its analysis regarding the date discrepancy. Indeed, AFCCA's error with respect to Parker is twofold: (1) first, the court misread Parker and failed to recognize the above distinction; then (2) the court failed to reconsider its application of the case, even after this nuance was identified to the court. (JA at 21, 29-32, 40-42, 54.)

Ultimately, contrary to AFCCA's belief, Parker does not stand for the idea that CCAs should treat the charged dates like an essential element of the offense. Id. If anything, Parker's underlying facts support the opposite proposition—specifically, that a variance analysis would be appropriate when there is a divergence between dates pleaded versus dates proved. In denying the prosecution's motion to amend the charges, the military judge employed the two components of a variance analysis by (1) considering a discrepancy, and (2) the potential prejudice to the accused. Parker, 59 M.J. at 198. This Court did not take issue with this part of the judge's analysis—likely because it was consistent with

this Court's precedent from Hunt, which treats such discrepancies as variance. 37 M.J. at 344.

B. When the charged timeframe is not "of the essence," a discrepancy between pleadings and proof should be analyzed as variance.

"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." Allen, 50 M.J. at 86. Such is the case here, where the timeframe proved (summer 2015) did not match the timeframe charged (fall 2015). But as this Court's predecessor said, "where time is *not* of the essence, it is the general rule that an erroneous statement of the date of the offense constitutes a matter of mere form." Brown, 16 C.M.R. at 262. Thus, instead of being analyzed as a failure of substantive proof, such a discrepancy should be reviewed as variance, regardless of whether it was the subject of exceptions and/or substitutions at the trial level.

1. *Variance may be analyzed and affirmed at the appellate level irrespective of exceptions and substitutions.*

Ordinarily, a variance in proof may be addressed through exceptions and substitutions at the trial level which may, in turn, spawn fatal variance claims at the appellate level. *See* R.C.M. 918. This does not, however, mean that appellate review of variance is limited only to cases where such modifications were made. *See* United States v. Ellsey, 37 C.M.R. 75, 79 (C.M.A. 1966) (analyzing variance

even though there were no exceptions and substitutions at trial); *but see* United States v. Lubasky, 68 M.J. 260, 264 (C.A.A.F. 2010) (suggesting that court only considers question of variance if the factfinder made findings by exceptions and substitutions).

Irrespective of whether a variance was identified, objected to, or addressed at the trial level, appellate courts may review the issue if an appellant raises it in some form or fashion. *See* United States v. Collier, 14 M.J. 377, 379 (C.M.A. 1983) (where appellant asserted a factual deficiency that amounted to variance for the first time on appeal). Alternatively, the appellate courts may identify the issue themselves. *See* United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001) (identifying variance where testimony suggested criminal exchange occurred several days after charged date)*;* United States v. Pritchard, 45 M.J. 126, 130 (C.A.A.F. 1996) (noting a "technical variance problem" for the first time on appeal).

In cases where nonconformity between pleadings and proof is first raised at the appellate level, the variance cannot be corrected through exceptions and substitutions. English, 79 M.J. at 119. This proscription not only reflects compliance with procedural rules, *see* R.C.M. 918, but also guards against the danger of a CCA "chang[ing] the scope of the offense … to a generic, and thus broader, charge that was not presented at trial," as was the case in English. 79 M.J.

at 120. At issue in English was the factual sufficiency of a charge alleging that the appellant sexually assaulted a victim by "penetrating her mouth with his penis, by unlawful force to wit: grabbing her head with his hands." Id. at 119. After concluding that there "sufficient evidence to prove appellant committed the sexual act by unlawful force," but "*no evidence* that he did so by 'grabbing her head with his hands,'" the Army CCA affirmed the conviction by excepting the language "to wit: grabbing her head with his hands." Id. at 120 (emphasis added). This was error, for it allowed the CCA to affirm on "a more generalized and generic theory of force not submitted to the trier of fact." Id. at 122.

But the prohibition on exceptions and substitutions by the CCAs does not mean the courts are powerless to affirm cases exhibiting uncorrected variance that does *not* change or broaden the theory of liability. Consider Collier, where the appellant alleged "for the first time" on appeal that his conviction for conspiracy to commit larceny was deficient based on the prosecution's perceived failure to prove the overt act alleged in the specification. 14 M.J. at 379. Notwithstanding the fact that the issue was presented as a failure of proof, the Court analyzed the discrepancy between the overt act alleged (departure from the company barracks) and the act proved (leaving the squad bay) as a variance; determined it was non-fatal; and affirmed the findings in their original form. Id.

The Collier decision demonstrates that if AFCCA had analyzed the discrepancy between the timeframes pleaded and proved as variance and found it non-fatal, it likely could have affirmed the child rape conviction even without exceptions or substitutions. *See* United States v. Teffeau, 58 M.J. 62, 66 (C.A.A.F. 2003) ("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."). Unlike in English, the variance in this case—a difference of several months— neither changed the nature of the offense nor broadened the theory of liability. *Cf.* 79 M.J. at 122 (where CCA's exception of language regarding a particular type of force allowed it to affirm sexual assault conviction on a "broader factual basis"). The charge alleged that Appellee raped his stepdaughter, CH, via digital penetration while she was twelve years old in 2015. (JA at 57.) The evidence—which showed that the rape occurred during a finite timeframe in 2015 after CH's twelfth birthday—did not enlarge the "factual basis" for Appellee's conviction. Thus, affirming Appellee's conviction would not have been error. *See* Collier, 14 M.J. at 379.

In other words, AFCCA would not have had to set aside a conviction that was otherwise supported by evidence of all the *statutory* elements, which is precisely why a discrepancy between nonessential dates should be analyzed as variance and not a failure of proof.

2. United States v. Hunt demonstrates that temporal discrepancies should be treated as variance.

To understand why AFCCA erred in treating the date discrepancies as a failure of proof instead of variance, this Court need look no further than its own decision in Hunt, which demonstrates that even in the context of evidentiary sufficiency, military courts should be analyzing date discrepancies as variance. 37 M.J. at 344.

At issue in Hunt was a rape offense that suffered from a three-week discrepancy between the date charged ("on or about October 20, 1989") and the date proved ("any date from around the 30th of September through the 20th of October"). Id. at 346-47. Based on this discrepancy, trial defense counsel moved for a finding of not guilty under R.C.M. 917, which required the military judge to determine whether the "evidence [was] insufficient to sustain a conviction."[6] The military judge denied the motion—meaning he believed there was "some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish *every essential element"* of the rape charge at issue.

[6] "The military judge, on motion by the accused or sua sponte, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected." MCM, pt. II-132 (1984 ed.).

R.C.M. 917(d).[7] Put another way, the military judge's ruling indicated that he did not believe the discrepancy between dates affected any essential elements.

By later upholding the military judge's ruling on appeal and concluding that there was "no improper material variance," this Court effectively endorsed the notion that (1) the charged date does not constitute an essential element of rape, therefore (2) an inconsistency between the dates charged versus proved should analyzed be analyzed as variance—which requires a showing of prejudice—rather than as a substantive defect in proof. Id. at 347.

3. Treating temporal discrepancies as variance aligns with federal practice.

That inconsistencies related to nonessential dates should be treated as variance is further reinforced by the fact that this is the prevailing practice in other federal circuits, to whose decisions this Court often "give[s] persuasive weight." United States v. Tovarchavez, 78 M.J. 458, 466 (C.A.A.F. 2019).

This Court has long held that "[f]ederal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment." United States v. Nivens, 21 C.M.A. 420, 423 (C.M.A. 1972). Consistent with this principle, the military justice system has embraced various aspects of federal criminal practice over the years, including but not limited to: the

[7] *See* MCM, pt. II-132 (1984 ed.).

rule that, "in accordance with established federal practice," the military judge must exercise discretion in determining whether to allow the impeachment of an accused by previous convictions, United States v. Weaver, 50 C.M.R. 464, 470 (C.M.A. 1975); the bilateral theory of conspiracy "consistently followed" by federal courts, United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000); and the idea that evidence of an act occurring after the charged crime may be admissible to prove motive, intent, etc., "consistent with prevailing federal practice." United States v. Young, 55 M.J. 193, 196 (C.A.A.F. 2001).

In keeping with this practice, this military appellate courts should follow federal practice in analyzing inconsistencies between dates pleaded and proved. Unless the date of an offense is a material element, federal courts (1) analyze such discrepancies as variance rather than a failure of proof; (2) afford the Government wide latitude when "on or about" is used; and (3) require a showing of prejudice to the defendant's substantial rights before awarding relief for a date discrepancy. *See* United States v. Morris, 700 F.2d 427, 429-30 (1st Cir. 1983); 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. Simms, 351 F. App'x 64, 67 (6th Cir. 2009); 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).

Since military jurisprudence is supposed to align with "well-established" federal jurisprudence "concerning the same subject," military appellate courts would do well to follow suit. Valigura, 54 M.J. at 191. Far from being "incompatible with military law," Nivens, 21 C.M.A. at 423, the federal courts' approach is consistent with extant military precedent, as evidenced by this Court's decision in Hunt, where it employed the very same methodology used by the federal courts. 37 M.J. at 347-48. In Hunt, this Court (1) evaluated a three-week discrepancy between the date charged and the date proved as variance; (2) found "no improper material variance," because the charge used the language "on or about"; and (3) opined that the appellant would be unentitled to relief even if there was variance, because he had not demonstrated any prejudice to his rights. Id.

Considering the above, AFCCA should have reviewed the discrepancy in this case as variance. Had it done so, it would have realized that the variance was non-fatal and did not warrant relief, which would have prevented the "anomalous result…of reversing a conviction where the Government's proof satisfies every statutory element of the offense." (JA at 35.)

C. AFCCA should have found non-fatal variance and denied relief.

For a CCA to grant relief for variance, an appellant must show "both that the variance was material and that he was substantially prejudiced thereby." United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009). Here, by awarding Appellee relief on what amount to a fatal variance claim despite no showing of materiality or prejudice, AFCCA failed to apply the "correct legal principles." Thompson, 83 M.J. at 4. Had the lower court properly analyzed the discrepancy between the dates as variance, it would have found that the variance was immaterial and non-prejudicial, and therefore undeserving of relief.

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." Finch, 64 M.J. at 121. Here, none of those conditions are met.

To start, "[m]inor 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." Teffeau, 58 M.J. at 66; *see also* United States v. Lovett, 59 M.J. 230, 235 (C.A.A.F. 2004). Here, the temporal variance between the pleadings and proof did not change the nature of Appellee's offense—he was charged with raping CH while she was 12 years old, and the evidence showed exactly that.

Although temporal variance in a child rape charge could potentially change the seriousness of the offense—based on the child's age—that is not the case here. CH's testimony established that she was 12 years old for the entirety of the relevant period—she was unequivocal that "nothing happened" before her twelfth birthday in January 2015, and certain that the rape occurred before her brother's birth later the same year. (JA at 83.) In other words, the temporal variance did not expose Appellee to a potential charge of raping a child *under* the age of 12. *Cf.* Simmons, 82 M.J. at 137 (where the defense argued that enlarging the charged timeframe by 279 days meant the prosecution was now alleging that the accused extorted the victim while she was a minor, which made the offense "absolutely more serious.")

Finally, the variance did not change the maximum authorized punishment for Appellee's offense. *See* MCM, part IV, para. 45b.e(1) (2012 ed.). Considering the foregoing, the variance was immaterial and therefore not a basis for relief. But even assuming for the sake of argument that the variance was material, granting relief would nevertheless be error since Appellee did not demonstrate prejudice.

2. The variance did not prejudice Appellee.

Even if when there is a variance, "the critical question is one of prejudice." Lee, 50 C.M.R. at 162. To establish prejudice, an accused must show that the variance (1) put him at risk of another prosecution for the same conduct, (2) misled

him such that he was unable to adequately prepare for trial, or (3) denied him the opportunity to defend against the charge. United States v. Treat, 73 M.J. 331, 336 (C.A.A.F. 2014) (citations omitted). As set forth below, Appellee made no such showing at the lower court. Accordingly, AFCCA should have found non-fatal variance and denied relief.

To start, Appellee cannot demonstrate that the variance puts him at risk of another prosecution for the same conduct. "[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. Here, the evidence of record establishes that Appellee abused CH for the first time by raping her via digital penetration when she was twelve and waiting for her brother to be born. This is sufficiently definite to diffuse any ambiguity that could lead to a second prosecution—there can only be one "first time," and CH only has one brother. Moreover, the "on or about" language in the charge enables Appellee to "rely on the record of trial and conviction[] in this case to establish a former jeopardy defense to any subsequent criminal proceeding based on the same conduct." *See* Allen, 50 M.J. at 86.

Next, there is no evidence Appellee was misled by the temporal variance. Given that Appellee never raised an objection at trial, "it is apparent the defense was not misled by this variance." Barner, 56 M.J. at 137. This makes Appellee's case a far cry from Simmons. In Simmons, the prosecution amended the charge

sheet during the middle of trial—after it rested its case—to expand the timeframe for an extortion charge by 279 days. 82 M.J. at 137. Trial defense counsel "vigorously objected," citing lack of notice and the possibility that they might have cross-examined the victim differently. Id. In finding prejudice, this Court noted that the change "made it so that the charged extortion dates preceded the charged sexual assault dates, thereby enabling the Government to argue that the sexual assault was accomplished via extortion." Simmons, 82 M.J. at 140. This Court concluded that "this change in the Government's theory of the case, which was directly predicated on—and inextricably linked with—the amended dates in the charge sheet likely misled the accused as to the offenses which he needed to defend against." Id. at 140-41. That is not the case here. The date variance did not change the prosecution's theory of the case. From open to close, the prosecution's theory remained the same—Appellee raped CH via digital penetration while she was twelve years old in 2015. That Appellee was not misled is evident from: (1) CH's testimony about the 2015 rape being her first sexual experience; (2) trial defense counsel's acknowledgment that "the first [offense involving CH] is in 2015"; and (3) the absence of any objection related to fair notice, either at the trial or appellate level. (*See* JA at 20-23, 87, 203, 206.)

Finally, there is no evidence that the variance "denied [Appellee] the opportunity to defend against a charge." Treat, 73 M.J. at 336. AFCCA did not

analyze whether the variance affected "how the defense channeled its efforts and what defense counsel focused on or highlighted," id.—quite possibly because Appellee "[never] explained on appeal how, *if at all*, this preparation or presentation of his defense was affected." Finch, 64 M.J. at 123. But even if he had, any suggestion that the date discrepancy sidelined his defense would have been unconvincing given the facts of this case.

To understand why, it is instructive to consider the Fourth Circuit's analysis in Barsanti. 943 F.2d at 438-39. The defendant in Barsanti—convicted of making false statements to federal agencies in connection with real estate fraud—challenged his conviction on a count involving the sale of "Unit 316" based on a four-month variance between the date on the indictment and the date proved by the evidence. Id. In finding the variance nonfatal, the Fourth Circuit observed that: (a) the indictment was "sufficiently clear" because it informed the defendant that he was being charged with false statements in connection with the sale of Unit 316; (b) there was only one transaction involving Unit 316; therefore (c) the defendant was "sufficiently informed about the charge relating to Unit 316 that he could prepare a defense without being surprised," the four-month discrepancy notwithstanding. Id.

This case is analogous to Barsanti. The child rape specification in this case was "sufficiently clear" because it informed Appellee that he was being charged

with raping his 12-year-old stepdaughter in 2015. There was only one sexual offense involving CH in 2015—a rape that occurred on a futon in the garage, via digital penetration, while CH was awaiting the birth of her brother. (JA at 83-88.) Considering these facts, Appellee would have been "sufficiently informed" that he could prepare a defense related to the 2015 rape without being surprised, even though the timeframe was several months off.

"It is universally held that a variance is not fatal unless it operates to substantially prejudice the rights of the accused." United States v. Hopf, 5 C.M.R. 12, 14 (C.M.A. 1952). Where, as here, there is no evidence that the variance misled Appellee, affected his defense, or put him at risk of a second prosecution, there can be no prejudice. By nevertheless granting Appellee relief, AFCCA erred.

CONCLUSION

By setting aside a conviction based on a discrepancy related to the charged timeframe—a nonessential part of the specification—even though all the statutory elements of the offense were present, AFCCA "concerned [itself] with the words used" at the expense of "elemental concepts of justice." Craig, 24 C.M.R. at 30. This is reversible error.

If the practice of treating charged dates like an essential element is permitted to stand, 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. United States v. Wolfe, 24 C.M.R. 57, 60 (C.M.A. 1957). But as this Court has recognized, "[a]n accused, alike with the Government, must deal fairly with the court." Id. This Court can ensure that all future accused do so by making it clear that (1) only the statutory elements are considered essential for purposes of factual sufficiency review, and (2) discrepancies related to other ancillary facts alleged in the specification should be analyzed as variance.

For these reasons, the United States respectfully requests that this Honorable Court find that AFCCA erred by treating the charged timeframe like a required element for factual sufficiency review when it should have analyzed it as variance

instead, 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 and the Air Force Appellate Defense Division on 5 February 2025.

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