IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellant,	)	UNITED STATES'
	)	REPLY BRIEF
v.	)	
	)	Crim. App. Dkt. No. 40426
	)	
Staff Sergeant (E-5)	)	USCA Dkt. No. 25-0073/AF
JOSHUA A. PATTERSON	)	
United States Air Force	)	19 March 2025
Appellee.	)	

UNITED STATES' REPLY BRIEF

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

Pursuant to Rule 22(b)(3) of this Court's Rules of Practice and Procedure, the United States hereby replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issue (Gov. Br.), filed on 5 March 2025.

ARGUMENT

Appellee said it himself: "[C]rimes consist of elements that are listed in the statute." (Ans. Br. at 12) (citing Richardson v. United States, 526 U.S. 813, 817 (1999)). This is precisely the Government's point, and what AFCCA failed to understand. In treating the charged timeframe like an element of the offense—even though the statute did not require it—AFCCA became so "concerned with the words used" that it lost sight of "elemental concepts of justice." United States v. Craig, 24 C.M.R. 28, 30 (C.M.A. 1957). Appellee's defense of the lower court is no different. As set forth below, Appellee—like AFCCA—misunderstands both

this Court's precedents and the concept of variance. Accordingly, this Court should reject Appellee's arguments and conclude that AFCCA erred.

A. This Court's precedents are being misapplied and do not support the propositions for which AFCCA and Appellee cite them.

In defending AFCCA's erroneous factual sufficiency determination, Appellee falls victim to the same trap as the lower court—pulling language from this Court's decisions in United States v. English, 79 M.J. 116 (C.A.A.F. 2019), and United States v. Parker, 59 M.J. 195 (C.A.A.F. 2003), without understanding the context in which the commentary was made. (Ans. Br. at 8-14.) As set forth below, neither case stands for what AFCCA and Appellee think they stand for.

1. English does not suggest anything and everything in a specification must be proved exactly as alleged.

Contrary to Appellee's reading of the case, English does not stand for the proposition that every word alleged in a specification must be proved "as alleged." (*See* Ans. Br. at 8-13.) Rather, it provides that when the prosecution "narrow[s] the scope of the offense" by alleging an elemental fact with more particularity than is required by statute, the conviction may only be sustained on the basis alleged. English, 79 M.J. at 120.

At issue in English was a rape offense charged as a violation of Article 120(a)(1), UCMJ, which required proof of the following elements: (1) that the accused "commit[ted] a sexual act upon another person," and (2) that he did so

"using unlawful force against that other person." 10 U.S.C. § 920(a)(1) (2012). In charging the offense, the prosecution alleged the second element with extra specificity—"by unlawful force to wit: *grabbing her head with his hands*"—instead of simply alleging "unlawful force" generally, which was all that was required by statute. English, 79 M.J. at 119-120. This charging decision "narrowed the scope of the offense" because it limited the type of *conduct* the accused needed to defend against. Id. And as the Court observed, it was evident the accused relied on this narrower scope, as the "fulcrum of the defense theory with respect to this offense was that the Government failed to prove the unlawful force alleged." Id. at 121. These nuances are why it was error for the Army CCA to except the charged language ("grabbing her head with his hands") and sustain the conviction on the broader theory of "by unlawful force" generally. Id.

With this framework in mind, any suggestion that English always requires the prosecution to prove the charged timeframe "as alleged"—simply because it is part of the specification—is unavailing. (*See* Ans. Br. at 12-13.) The key inquiry under English is whether the specification's language "narrow[s] the scope of the offense." Id. And here, the charged timeframe does nothing of the sort.[1]

[1] Notably, Appellee argues in generalities and never explicitly asserts that alleging a timeframe somehow narrowed the scope of the child rape—perhaps because he also recognizes that such a claim would fall flat.

Unlike in English, the language at issue in this case—"between on or about 1 October 2015 and on or about 30 November 2015"—did not limit how the prosecution could prove the elements of child rape, which are: (a) Appellee committed a sexual act with an intent to gratify his sexual desire, (b) upon a child who had attained the age of 12 years but not 16 years, and (c) that he did so using force. *See* 10 U.S.C. §§ 920b(a), (h)(4) (2012). The prosecution alleged these elemental facts in the specification as follows:

> In that [Appellee]… did, 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 force against CH, with an intent to gratify the sexual desire of [Appellee]*.

(JA at 55) (emphasis added)

Had the specification alleged a specific type of force, or a specific age—e.g., "12 years and 9 months old," instead of the generic "a child who had attained the age of 12 years but had not attained the age of 16 years"—the scope of the offense would be narrower within the meaning of English. 79 M.J. at 120. But that is not the case. Other than specifying the sexual act, the specification used generic language from the statute to allege the necessary elements, and the inclusion of the charged timeframe did nothing to limit how those elemental facts could be proved.

That the charged timeframe in this case did not "narrow" the scope of the offense in any meaningful substantive way is further evidenced by the trial defense's strategy at trial. In contrast to English—where the defense theory focused on the Government's failure to prove the additional language alleging the "particular force used," 79 M.J. at 121—Appellee's trial defense did *not* argue that the Government had failed to prove the particular timeframe alleged. (*See* JA at 199-220.)

Taken altogether, the above establishes that the language "between on or about 1 October 2015 and on or about 30 November 2015" did not narrow the scope of the child rape offense in such a way that proof of the alleged timeframe was required to sustain the conviction as factually sufficient. *Cf.* English, 79 M.J. at 119. That this application of English would "effectively create different classes of facts in a specification" does necessarily not make it wrong—after all, this sort of differentiation *already* exists. "Minor variances, such as the location of the offense or the date upon which an offense is allegedly committed, *do not necessarily change the nature of the offense* and in turn are not necessarily fatal." United States v. Teffeau, 58 M.J. 62, 66 (C.A.A.F. 2003) (emphasis added). Thus, the charged timeframe could have—and should have—been "disregarded as surplusage," United States v. Duke, 37 C.M.R. 80, 84 (C.M.A. 1966). This is true even considering this Court's decision in United States v. Parker, 59 M.J. 195

(C.A.A.F. 2003), for nothing in Parker suggests the charged timeframe should be treated with the same rigor as a statutory element.

2. *Parker does not stand for the proposition that the charged timeframe must be treated like an essential element of the offense.*

Like AFCCA, Appellee cites this Court's decision in Parker for the proposition that the timeframe alleged in a specification must always be proven beyond a reasonable doubt, as though it is an essential element. (*See* Ans. Br. at 9, 11.) In asserting that Parker "unambiguously" requires the Government to prove the charged timeframe, Appellee—like AFCCA—cites the Court's conclusion that "proof 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." (Ans. Br. at 11) (citing Parker, 59 M.J. at 201); *see also* (JA at 21.) But what both AFCCA and Appellee fail to appreciate is the context in which this commentary arose—that is, *why* this Court said what it said.

As set forth in the Government's initial brief, a close reading of Parker reveals that this Court's holding was not about the importance of the charged timeframe, but about the requirement that convictions be based on evidence properly introduced as substantive proof of the charged offense. (*See* Gov. Br. at 17-20); Parker, 59 M.J. at 200-201. In Parker, the evidence was insufficient not because it proved a different timeframe than what was charged, but because the prosecution introduced *no evidence on the merits* regarding the charged sexual

offense. Id. In a case where the accused was charged with raping the victim in 1995, the only evidence of sexual interaction between the two was deposition testimony about a 1993 sexual assault, which was introduced as uncharged misconduct under Mil. R. Evid. 413 and therefore logically could not be proof of the charged 1995 rape. Id.

Appellee dismisses this as a "potential additional problem" and maintains that it was not the primary basis of the Parker holding. (Ans. Br. at 11.) He could not be more mistaken. The issue was not, as Appellee describes it, a "potential additional problem"—on the contrary, it was the actual, main problem in Parker. (Id.) Appellee's failure to recognize this demonstrates that it is not the Government that "miss[ed] the point of this Court's holding"—it is AFCCA and Appellee. (Ans. Br. at 11.)

3. *The statute—not English or Parker—dictates the elements required to make a conviction factually sufficient; the charged timeframe is not one of them.*

As a result of its misreading of this Court's precedent, AFCCA reached a factual sufficiency determination that was based on an "erroneous consideration of the elements of the offense." United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005). As Appellee put it: "[AFCCA] concluded that the Government failed to prove *all the facts that it alleged in the specification*." (Ans. Br. at 24) (emphasis added). This is error, because the test for factual sufficiency is not whether the CCA is convinced that there is sufficient proof of *anything* "alleged in the

specification"—it is "whether the evidence constitute[d] proof of each *required element* beyond a reasonable doubt." United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (emphasis added). Here, the charged timeframe was not a required element and therefore should not have been a basis for finding Appellee's child rape conviction factually insufficient. *See* 10 U.S.C. § 920b.

To understand why the charged timeframe should not have been treated like a "required element," it is useful to consider how courts test specifications for legal sufficiency. To be sufficient, a specification must allege "*every element* of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3) (emphasis added). In this case, even if the charged timeframe was excised, the specification would pass muster:

> In that [Appellee], United States Air Force, 75th Logistics Readiness Squadron, Hill Air Force Base, Utah,[2] did, 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,[3] by penetrating the vulva of CH with his finger,[4] by using

[2] Alleges that Appellee is a "person subject to this chapter," as required by 10 U.S.C. § 920b(a) (2012).

[3] Alleges that Appellee "commit[ted] a sexual act upon a child who has attained the age of 12 years," as required by 10 U.S.C. § 920b(a)(2).

[4] Alleges the sexual act of "intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years," as defined by 10 U.S.C. § 920b(h)(1).

> force against CH,[5] with an intent to gratify the sexual desire of [Appellee].[6]

(JA at 55); *cf.* 10 U.S.C. § 920b.

This straightforward exercise proves that the charged timeframe is an "immaterial averment[]," *not* an element. United States v. Dotson, 38 C.M.R. 150, 153 (C.M.A. 1968). Accordingly, "strict proof is not required." Id.

Appellee, for his part, contends that "the date is necessary to prove a statutory element." (Ans. Br. at 13-14.)[7] This betrays his failure to recognize that it is not the precise date of the rape, but the age of the child that matters. While a date must be *alleged* "with a certain degree of specificity" as a means of providing "adequate and proper notice," United States v. Simmons, 82 M.J. 134, 141 (C.A.A.F. 2022), the prosecution does not necessarily have to *prove* the offense was committed on the day alleged "unless a particular day be made material by the statute creating the offence." Ledbetter v. United States, 170 U.S. 606, 612 (1898).

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[5] Alleges that Appellee "use[d] force against any person," as required by 10 U.S.C. § 920b(a)(2)(A).

[6] Alleged that Appellee had an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire," as required by 10 U.S.C. § 920b(h)(1).

[7] Appellee asserts that the Government "acknowledge[d] that the date is necessary to prove a statutory element." (Ans. Br. at 14.) This is a misstatement. Although the Government acknowledged that the "elements of the crime are not entirely devoid of a temporal component," it did *not* concede that the precise date is "necessary" to prove one of those elements. (Gov. Br. at 15.)

Here, the statute in question does not make "a particular day" a material fact. Ledbetter, 170 U.S. at 612; *see also* 10 U.S.C. § 920b. While the child victim's age range is listed as an element of child rape under Article 120b, UCMJ, the season of the rape is not. *See* 10 U.S.C. § 920b. Thus, when determining "whether the evidence constitute[d] proof of each *required element* beyond a reasonable doubt," Washington, 57 M.J. at 399 (emphasis added), AFCCA should have focused on whether the evidence proved that CH was raped while she was over 12 but under 16 years of age—not simply whether the rape occurred "between on or about 1 October 2015 and on or about 30 November 2015."

To be sure, proving a precise date would also go towards proving CH's age. But proving that CH "had attained the age of 12 years had not attained the age of 16 years" does not necessarily require proof that the rape occurred "between on or about 1 October 2015 and on or about 30 November 2015," at which point CH would have been 12 years and 10-11 months old. It could be proved by showing that the rape occurred while CH was 12 and 6-7 months old, which was supported by CH's testimony. CH unequivocally testified that Appellee raped her during a finite timeframe in 2015—after her twelfth birthday in January 2015, but before her brother's birth at the end of September 2015—while her mother was five or six months pregnant. (JA at 83.) This proved that CH had attained the age of 12 at the time of the rape, as charged in the specification. Since the minor discrepancy

between the dates pled and the dates proved had no bearing on the element of CH's age, the date discrepancy is not an issue of factual insufficiency—it is variance.

4. *If Parker requires that the charged timeframe be treated like a required element, this Court should overrule it*.

As Appellee points out, the Government is not asking this Court to overrule its precedents. (*See* Ans. Br. at 8, 11.) That is because the problem lies not in how this Court decided those cases, but in how AFCCA applied them. But if the Government is mistaken, and this Court's decision in Parker *does* stand for the idea that the charged timeframe should be treated like a required element, it should overrule its decision because all four *stare decisis* factors weigh in favor of doing so. United States v. Cardenas, 80 M.J. 420, 423 (C.A.A.F. 2021).

First, the decision is unworkable, since it requires the CCAs to treat a non-element like a statutory element for purposes of factual sufficiency review—this is an impermissible encroachment into the legislature's territory, which this Court has warned against. United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010) ("[I]t is for Congress to define criminal offenses and their constituent parts.").

Second, in the two decades since Parker was decided in 2003, Congress has amended the Code multiple times—not once did it amend the punitive articles to require proof of the charged timeframe as a statutory element, such that the CCAs would be justified in setting aside convictions based on a temporal discrepancy like the one in this case. In fact, Congress's most recent amendments—which cabin the

CCAs' discretion to review for factual sufficiency to only those cases where an appellant has made a "specific showing of a deficiency in proof"—reflect a desire to limit, rather than expand, the CCAs' ability to overturn convictions. 10 U.S.C. § 866(d)(1)(B)(i). The consistent absence of Congressional action on this front is effectively an "intervening event" that weighs in favor of overruling Parker.

Third, there is no evidence that servicemembers have relied on the Parker decision for the proposition that the charged timeframe is a required element for factual sufficiency. Cardenas, 80 M.J. at 423. Indeed, the fact that this matter is being raised for the first time by the Government supports that conclusion.

And finally, if convictions for heinous crimes such as child rape can be set aside on a technicality—despite proof beyond a reasonable doubt that that rape itself occurred—public confidence in the law and military justice system will plummet. Id.

B. Variance can exist irrespective of whether the factfinder engaged in exceptions or substitutions and is the proper analysis in this case.

As a preliminary matter, Appellee's arguments are premised on a fundamental misunderstanding of variance. As evidenced by his assertions that "there was no variance at trial," Appellee appears to be under the impression that variance can only be "made" through exceptions and substitutions. (Ans. Br. at 17, 18, 21.) Appellee is wrong. "A variance between pleadings and proof *exists* when evidence at trial establishes the commission of a criminal offense by the accused,

but the proof does not conform strictly with the offense alleged in the charge." United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999) (emphasis added); *see also* United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001) (Court identified unobjected-to "variance" on appeal). Its occurrence is *not*, as Appellee suggests, dependent on the factfinder engaging in exceptions and substitutions. (*See* Ans. Br. at 16-26).

Considering this, Appellee's argument that this Court "cannot analyze findings for variance on appeal when there was no variance at trial" falls flat, as do his protestations that treating this issue as variance would require accused servicemembers to "object at trial for potential, future variances by appellate courts." (Ans. Br. at 21.) Since variance exists the instant there is a discrepancy between the pleadings and proof, the Government is indeed suggesting that Appellee should have objected to variance at trial if he believed it was an issue. (Id.) Given that he did not, this Court should be skeptical of any suggestion that Appellee did not know what he had to "defend against." (Ans. Br. at 20-21.) Appellee cannot point to anything in the record—be it motions, objections, or argument—which suggests he did not know what misconduct was the subject of the child rape offense. *See* United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001) ("Since counsel did not raise the issue of variance at trial, it is apparent the defense was not misled by this variance.").

1. Affirming a conviction with variance does not equate to affirming on a different "basis" of liability.

In nevertheless asserting that analyzing the discrepancy in this case as variance would be problematic, Appellee contends that "the appellate court would be affirming a conviction on different basis than on which the factfinder reached a guilty finding." (Ans. Br. at 18.) This Court need look no further than its own decision in English to know that Appellee is wrong, since "basis" means the theory of liability. 79 M.J. at 119.

In English, this Court reversed the Army CCA's decision to affirm the appellant's rape conviction on a broader theory of liability (unlawful force generally) than what was originally charged (grabbing the victim's head with his hands), citing the principle that "reviewing courts may not 'revise the basis on which a defendant is convicted.'" Id. (citing Dunn v. United States, 442 U.S. 100, 101 (1979)). The Court's rationale demonstrates what is considered the "basis" of a conviction—the theory of liability, which is a product of the facts connected to the statutory elements. And here, unlike in English, the appellate court would be affirming Appellee's conviction on the same basis as the trial court—rape of a child by force—because the variance in this case does not relate to a statutory element of the offense.

Indeed, this is precisely why the variance in United States v. Hunt did not factor into the sufficiency of the conviction in that case. 37 M.J. 344, 347

(C.A.A.F. 1993). Like this case, Hunt involved a variance between the timeframe alleged (on or about 20 October 1989) and the timeframe proved (late September to early October, three weeks prior to 20 October 1989). Id. The Court affirmed the conviction—even though the prosecution did *not* prove the exact date charged and the factfinder did not engage in exceptions or substitutions—because the specification used the language "on or about." Id.; *cf.* (Ans. Br. at 23) (suggesting that the Government "proved the charged timeframe"). This suggests that "on or about" is, in essence, a built-in safeguard for uncorrected temporal variances like these. Indeed, the federal circuit courts' approach to such variance supports this hypothesis.

2. Federal practice demonstrates that temporal discrepancies can properly be analyzed as variance for the first time on appeal.

That the federal circuits review such temporal variance on appeal because civilian juries cannot make exceptions and substitutions only further serves to underscore the idea that variance can be properly analyzed for the first time by an appellate court. *See e.g.*, United States v. Knowlton, 993 F.3d 354 (5th Cir. 2021).

Appellee disagrees and urges this Court to ignore the prevailing practice in the federal circuits because they do not have the same factual sufficiency review powers as the CCAs. (Ans. Br. at 22-25.) But this argument suffers from a fatal oversight. Although federal circuit courts do not conduct factual sufficiency

review, they *do* conduct legal sufficiency review,[8] which requires them to consider "[w]hether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the *essential elements of the crime* beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). In other words, both the CCAs and federal circuit courts have to consider whether there is proof of all the elements of the offense. Id.; Washington, 57 M.J. at 399. And the "starting point" for the federal courts' review, as explained by the Fourth Circuit, is "the statute and the elements constituting the offense." United States v. Baker, 611 F.2d 964, 967 (4th Cir. 1979). This explains why federal appellate courts analyze a discrepancy in non-elemental dates as variance instead of treating it as a deficiency of proof—because for most crimes, the precise date is not an element required by statute. *See e.g.*, Russell v. United States, 429 F.2d 237 (5th Cir. 1970) (affirming a conviction with a 12-month variance).

Despite Appellee's suggestions to the contrary, this approach to determining the "essential elements" of a crime is not "incompatible with military law," United States v. Nivens, 21 C.M.A. 420, 423 (C.M.A. 1972). This Court has treated our criminal statutes as determinative of "essential elements" for decades. *See, e.g.,*

[8] *See, e.g.,* United States v. Shaw, 670 F.3d 360 (1st Cir. 2012); United States v. McDermott, 277 F.3d 240 (2d Cir. 2002); United States v. Vastola, 989 F.2d 1318 (3d Cir. 1993); United States v. Baker, 611 F.2d 964 (4th Cir. 1979); United States v. Garcia, 883 F.3d 570 (5th Cir. 2018); United States v. Betancourt, 838 F.2d 168 (6th Cir. 1988); United States v. Viezca, 265 F.3d 593 (7th Cir. 2001).

United States v. Thun, 36 M.J. 468, 469 (C.M.A. 1993) ("[T]he statute that appellant was charged with violating reflects two essential elements"); United States v. Eagleson, 14 C.M.R. 103, 109 (C.M.A. 1954) (opining that "absence of any requirement of knowledge from the statute eliminates it as an essential element"). Had AFCCA been doing the same, it would have properly analyzed the date discrepancy in this case as a nonfatal variance.

In sum, both legal and factual sufficiency reviews focus on how the evidence introduced at trial supports the statutory elements of the offense. Thus, the fact that Courts of Criminal Appeals conduct factual sufficiency reviews under Article 66, UCMJ is no reason to depart from the established federal practice of treating discrepancies in non-elemental dates as variance.

3. Because variance is a matter of law and there has been no showing of prejudice, this Court can find it nonfatal.

AFCCA's failure to recognize that the discrepancy in this case should have been analyzed as variance produced the "anomalous result" before this Court—a child rape conviction that was supported by evidence of every statutory element but set aside because the proof showed that Appellee raped CH in the summer rather than in the fall. (JA at 38.) In other words, AFCCA granted Appellee the ultimate relief—set aside of his conviction—for what amounted to a fatal variance claim, despite there being no evidence (or even assertions) before the Court that he was in any way prejudiced by the discrepancy.

Considering this, if this Court agrees that the issue should have been analyzed as variance, it can and should determine for itself whether the variance was nonfatal, since that is a matter of law. *See* Article 67, UCMJ; *cf.* (Ans. Br. at 26) (suggesting that the Court remand the case for the CCA to determine whether variance was nonfatal). Both in front of the lower court and now this one, Appellee has not even attempted to demonstrate that he was prejudiced by the date discrepancy. This Court should take Appellee's silence for what it is—a tacit concession that there was no prejudice, and that the variance was nonfatal.

CONCLUSION

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 when it should have found nonfatal variance instead.

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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 19 March 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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

This brief contains 4766 words.

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

/s/ Kate E. Lee, Maj, USAF

Attorney for the United States (Appellant)

Dated: 19 March 2025