IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private (E-2) **OSCAR A. BATRES** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20220223 USCA Dkt. No. 25-0019/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Granted Issue

WHETHER APPELLANT'S OFFENSES INVOLVED THE SAME VICTIM AND THE SAME TRANSACTION UNDER RULE FOR COURTS-MARTIAL 1002(d)(2)(B)(i) SUCH THAT THE MILITARY JUDGE ERRED IN ORDERING APPELLANT'S SEGMENTED SENTENCES TO RUN CONSECUTIVELY.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.[1] This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

[1] All references to the UCMJ and Rules for Court-Martial (R.C.M.) are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM].

Statement of the Case

On May 5, 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault and one specification of assault consummated by a battery involving the same victim following virtually simultaneous incidents, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920 and 928, respectively. (JA023; R. at 1031; Charge Sheet). That same day, the military judge sentenced appellant to confinement for forty-six months, reduction to the lowest enlisted grade, and a dishonorable discharge. (JA148; R. at 1069).[2]

On August 10, 2022, the convening authority took no action on the findings and sentence. (JA149; Convening Authority Action). On August 12, 2022, the military judge entered judgment. (JA150; Judgment of the Court). On November 27, 2023, the Army Court ordered briefing on specified issues consistent with that presented here by Appellant. On August 23, 2024, the Army Court issued a memorandum opinion, affirming the findings and sentence by a divided vote. (JA002). Appellant was notified of the Army Court's decision. Appellant is still in confinement.

[2] The military judge sentenced appellant to 20 months for each specification of sexual assault – one for penetrating the victim's vulva with his own penis and one for penetrating the victim's mouth with SPC PN's penis. The military judge sentenced appellant to an additional six months for assault consummated by a battery. The military judge ordered all sentences to run consecutively.

Undersigned appellate defense counsel timely filed a Petition for Grant of Review with this court and on December 2, 2024 filed the accompanying Supplement. On January 21, 2025, this court granted appellant's Petition to review one issue.

Statement of Facts

On July 2, 2021, Appellant and Private First Class (PFC) KN met and quickly developed a consensual sexual relationship lasting two days, ending on July 4, 2021, when the allegations underlying the charges arose. (JA 038-39; R. at 536-37). Summarized, the two engaged in consensual vaginal and oral sex in multiple locations over those two days. (JA 038-39; R. at 536-37).

On the night of July 4, 2021, Appellant and PFC KN ('Victim') engaged in consensual intercourse in public against her car. (JA50; R. at 548). While this was happening, Specialist (SPC) Panashe Ncube (SPC PN) came upon the two. At Appellant's suggestion, SPC PN joined the two and proceeded to engage in oral and vaginal intercourse with PFC KN. (JA109; R. at 911). PFC KN testified that when SPC PN started participating, all sexual acts with both men turned non-consensual at that point. (JA052; R. at 550). Given the public setting, two other Soldiers discovered the three immediately following the sexual acts, while PFC KN was crying. (JA116-17; R. at 918-19). Shortly thereafter, SPC PN called 9-1-

1, in essence to self-report, making numerous admissions implicating both himself and appellant. (JA118; Pros Ex. 3).

Summary of Argument

R.C.M. 1002(d)(2)(B) states, in relevant part, that "[t]he terms of confinement for two or more specifications shall run concurrently – (i) when each specification involves the same victim and the same act or transaction;"

Presented with the rule's unambiguous and imperative language, the military judge plainly erred when he ordered appellant to serve three consecutive sentences for three different specifications when each arose out of the same brief transaction with one victim.

Granted Issue

WHETHER APPELLANT'S OFFENSES INVOLVED THE SAME VICTIM AND THE SAME TRANSACTION UNDER RULE FOR COURTS-MARTIAL 1002(d)(2)(B)(i) SUCH THAT THE MILITARY JUDGE ERRED IN ORDERING APPELLANT'S SEGMENTED SENTENCES TO RUN CONSECUTIVELY.

Standard of Review

Interpretations of the R.C.M. are matters of law that this Court reviews de novo. *See United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). Where appellant forfeits the opportunity to raise such an issue at trial, as here, this court reviews the military judge's decision for plain error. *See United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017).

Law

A. Congress Permits the President to Limit Punishments Under the UCMJ

Congress has the power to define criminal offenses and to prescribe punishments. *See Albernaz v. United States*, 450 U.S. 333, 344 (1981). Within certain limits, though, Congress has authorized the President to limit punishments within the military justice system. *See* 10 U.S.C. §§ 836, 856. One of these limitations explicitly requires a military judge – whose sentencing authority is ordinarily broad and determined in accordance with those factors listed under R.C.M. 1002(f) – to impose concurrent sentences for specifications that involve the same victim and the same transaction. R.C.M. 1002(d)(2)(B)(i)("[t]he terms of confinement for two or more specifications shall run concurrently . . .").

B. Appellant's Acts Occurred Within the Same Transaction, as That Term is Plainly Meant and Understood

The ordinary rules of statutory construction apply to the R.C.M., whereby courts begin by inquiring whether its language, "has a plain and unambiguous meaning." *United States v. McPhearson*, 73 M.J. 393, 395 (C.A.A.F. 2014). The initial inquiry envisions that this Court would first, "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F 2016)). Only after such inquiry, if the rule remains unclear,

should this Court look to the legislative history. *See United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999).

This Court's predecessor has described the word transaction previously as, "flexible in meaning" while adding that, "it is generally construed to embrace a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct."[3] *United States v. Baker*, 14, M.J. 361, 366 (C.M.A. 1983) (rev'd on other grounds).

C. Both Federal and Military Legislative History Point to Appellant's Acts Occurring in the Context of the Same Transaction, as That Term is Used in R.C.M. 1002(d)(2)(B)(i).

The legislative history surrounding R.C.M.1002(d)(2)(B) is extensive, but it is ultimately rooted in the United States Sentencing Guidelines (U.S.S.G.)[4], which served to influence the recommendations of the Military Justice Review Group (MJRG) to modify Article 56, UCMJ and adopt segmented sentencing. Mil. Just.

[3] Appellant agrees with the Army Court below that the plain meaning of the word "act" is apparent, and he does not contest that his two convictions under Article 120, UCMJ are each attributable to two separate acts. Rather, Appellant argues first that the word 'transaction' also has a plain meaning, and then even if it does not, this Court should look to federal district courts' interpretations as well as persuasive legislative history indicating that the term 'transaction' encompasses the entire course of conduct involving appellant, SPC PN, and the sole victim here.
[4] The U.S. Sentencing Guidelines – first created by the U.S. Sentencing Commission pursuant to the Sentencing Reform Act of 1984 – are updated regularly and while initially intended to be mandatory, they are now advisory after the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005).

Rev. Group, Report of the Military Justice Review Group: Part I: UCMJ Recommendations (2015).

With segmented sentencing came concerns that an accused could be, "unfairly sentenced twice for what is essentially one offense" and the possibility that overly severe sentences could occur in situations involving, "the same transaction, victim, and harm." *Id.* at 509-10. That the roots of R.C.M. 1002 extend so clearly into the federal system puts into relief that federal district court opinions should be viewed as instructive in attempting to give meaning to phrases that have been adopted by the UCMJ without yet having been tested in the military appellate courts.

The essence of R.C.M. 1002(d)(2)(B)(i) has a federal analogue in, "Groups of Closely Related Counts," as they are termed by the U.S. Sentencing Guidelines. *See* U.S.S.G §3D1.2. Counts or specifications which are to be grouped include those involving "(a) [w]hen counts involve the same victim and the same act or transaction," which the Guidelines then expressly deem to involve substantially the same harm within the meaning of the U.S.S.G.'s grouping rule. *Id.* at §3D1.2(a).[5]

[5] In the Application Notes commentary, the Guidelines also clarify that, "[u]nder subsection (a), counts are to be grouped together when they represent a single injury *or* are part of a single criminal episode or transaction involving the same victim. See U.S.S.G §3D1.2 n.3 (emphasis added).

D. Federal Precedent Indicates That the Term Transaction Generally Includes Multiple Specifications Involving Substantially the Same Harm

Federal appellate caselaw, although with some minimal divergence, has generally grouped sexual offenses occurring on the same day as one offense for sentencing purposes. *See generally United States v. Wise*, 447 F.3d 440 (5th Cir. 2006); *United States v. Sneezer*, 983 F.2d 920 (9th Cir. 1992) (per curiam). Other circuits have described the "fresh harm the victim must face anew" when the same defendant commits sex crimes "against the same victim over an extended period of time," facts which are not present here. *United States v. Bivens*, 811 F.3d 840, 843 (6th Cir. 2016); *Cf. United States v. Vasquez*, 389 F. 3d 65 (2d Cir. 2004)(finding that two sexual assaults occurring on separate days should not be grouped for sentencing purposes).

E. Offenses that Cause Substantially the Same Harm and the Reasonableness Standard

The Army Court's majority opinion states that, "whether offenses involved the same act or transaction under R.C.M. 1002(d)(2)(B)(i) is a question of whether the offenses involved substantially the same harm. We review the military judge's finding under R.C.M. 1002(d)(2)(B)(i) for reasonableness." (JA013). Such a reading is at odds with the plain meaning of the rule, and beyond that is a misapplication of the legislative history regarding concurrent sentencing for a transaction involving the same victim and causing substantially the same harm.

The *Booker* court's application of a reasonableness standard in certain circumstances related to sentencing and to sentencing *ranges* in particular. It did not advise or require the imposition of a blanket reasonableness standard to all sentencing considerations, such that would permit military judges to ignore the plain meaning of President's sentencing limitations in the Rules for Courts-Martial. The trial judge did not discuss R.C.M 1002(d)(2)(B) or make any finding that appellant's acts were separate and distinct.

F. Multiplicity and Unreasonable Multiplication of Charges (UMC) are Related but Different Areas of Law Than R.C.M. 1002(d)(2)(B)(i)

The Double Jeopardy Clause of the Fifth Amendment exists to protect individuals against multiple punishments for the same offense, in addition to protecting them against multiple prosecutions. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). This Court has adopted the *Blockburger* 'separate elements' test for multiplicity. *See United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). But as the majority and dissenting Army Court opinions here agreed, R.C.M. 1002(d)(2)(B)(i) is not simply a codification of the constitutional and statutory prohibitions against multiplicity. (JA008, JA015). This is because R.C.M. 1002 is specifically a sentencing rule, and 'multiplicity for sentencing' decoupled from 'multiplicity for findings' does not exist because a multiplicious finding would necessarily be dismissed, alleviating any multiple sentencing concerns. S*ee, e.g. United States v. Forrester*, 76 M.J. 479, 484 (C.A.A.F. 2018); *United States v.*

Campbell, 71 M.J. 19, 23 (C.A.A.F. 2012) (finding that if an offense is multiplicious for sentencing it must necessarily be multiplicious for findings as well).

Likewise, R.C.M. 1002(d)(2)(B)(i) is also not simply describing UMC per se because UMC is listed separately as a basis for mandatory concurrent sentencing. *See* R.C.M. 1002(d)(2)(B)(iii). To include UMC twice in the same list would be nonsensical in addition to rendering one of the subsections completely superfluous.

G. The Rule of Lenity

The rule of lenity is a principle of statutory construction which applies not only to interpretations of substantive criminal laws but also to the punishments they impose. *See Albernaz*, U.S. at 342. In essence, courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

Argument

A. Appellant's Acts Involved the Same Victim, Same Transaction, and Same Harm.

Appellant's acts in sexually assaulting the Victim and in assisting SPC PN in simultaneously assaulting the victim occurred not just on the same day, but contemporaneously. The harm was the same in each of the Article 120 specifications – a sexual assault. Appellant's criminal acts comprised one

transaction occurring at the same time and place and involving the same parties. Appellant's impulse was similarly singular – to engage in a sexual act with the Victim at the same time as a third party. Prior to SPC PN's participation, the Appellant and the Victim were engaged in noncriminal consensual sex – showing that the sole impulse - to have a 'three-way' sexual encounter – is what separated the criminal and non-criminal activity.

B. Where Appellant's Convictions all Stem from the Same Transaction, the R.C.M. Requires the Military Judge to Impose Concurrent Sentences

Appellant's argument does not ask this Court to sanction or to minimize the sexual assault of one person by two offenders as the same thing as a sexual assault by one person. To the contrary, appellant's separate convictions each stand as separate sexual acts, and rather than minimize the impact of a second offender (SPC PN) on the victim, it remains clear that SPC PN's participation in any violation of Article 120, UCMJ is independently subject to his own criminal conviction and sentencing for his part in the transaction. *See United States v. Sentmiklosi*, 55 M.J. 487, 491 (C.A.A.F. 2001) (finding robbery to be a continuous-course-of-conduct offense for multiplicity and merging two different victims' specifications into one despite the "important objective" of the Article "to vindicate the right of individuals to remain free of the use of force or violence against the person.")

Appellant's argument is a narrow one affecting appellant's sentencing only – that whether he committed two simultaneous sexual acts without consent using his own penis, the penis of another, his hand, the hand of another, any object, or any one of the above in combination with any other – that such a transaction, occurring at the same time, causing the same harm, by the same impulse, affecting the same victim, is clearly defined by the R.C.M. to require the military judge to order the various sentences to run concurrently.

This is why the President in R.C.M. 1002(d)(2)(B) included the imperative "*shall*," informed by both the MJRG and the U.S.S.G.'s concerns regarding excessive punishment for what is essentially one course of criminal conduct. The maximum statutory period of confinement for each sexual assault (that is, each sexual act without consent) – is 30 years. The plain language of the rule makes clear that it is not the intent of President for numerous nonconsensual sexual acts affecting the same victim and occurring in the space of several minutes or even a day, while technically separate offenses for multiplicity purposes, to result in consecutive sentences with potentially absurd maximum terms of confinement totaling in the hundreds of years.

C. Appellant's Acts were One Transaction Because There was a Lone Victim, One Location, and the Acts were Nearly Simultaneous and United in Circumstance and Impulse

As Senior Judge Walker correctly pointed out, appellant's criminal acts derived from a single impulse – to engage in sexual intercourse with the victim at the same time as a third party (JA021). The entire nonconsensual portion of the interaction among the three parties occurred over a period of several minutes, as reflected by each of their separate accounts when they testified at trial. (JA050-53, JA079-84, JA109-115). The events in question occurred in the same location – against and inside the victim's car. If we are to borrow from related concepts in law, such as multiplicity, it is apparent that the acts were also united in time, circumstance, and impulse. CAAF has repeatedly held that assault is a continuous-course-of-conduct-type offense. *See United States v. Morris*, 18 M.J. 450, 451 (C.M.A. 1984); *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981)).

Finally, there was only one victim, and while each offender may be sentenced separately for their separate roles in the transaction, the rules make clear that as to each offender, the nonconsensual sexual acts committed in these circumstances are intended to be grouped as a single transaction for sentencing, with the terms to run concurrently.

D. Appellant's Acts Should be Grouped for Sentencing Because They Caused Substantially the Same Harm

The two sexual assault specifications, and the Art. 128 assault specification should all be grouped together because they all occurred as part of the same transaction and the same continuous course of conduct and because they involved the same victim. R.C.M. 1002(d)(2)(B)(i) requires grouping the two sexual assault specifications, while this court's UMC jurisprudence requires sentencing the assault and sexual assault together because appellant should not be punished for one act under two separate statutes. In addition, the assault consummated by a battery occurred in facilitation of the sexual assault and so can be grouped with the two sexual assaults on diverse grounds.

E. Appellant's Offenses Caused Substantially the Same Harm and Reasonableness Standard is Inapposite

Contrary to the Army Court's majority opinion, reliance on *United States v. Booker* does not mean that the clear rules found in R.C.M. 1002 can be overlooked in favor of a blanket reasonableness standard. 543 U.S. 220 (2005). The Supreme Court's decision in *Booker* is foundational as it relates to the ongoing influence of the federal sentencing guidelines, and that court did apply a reasonableness standard to an appellate review of a district court's overall sentencing *range* as derived from the U.S.S.G., weighed against the sentencing factors found at 18

U.S.C. 3553(a). *Booker*, though, did not suggest or require that a reasonableness standard be simply be applied by appellate courts to the actual sentences imposed on individuals at courts-martial, and did not weigh in on whether such sentences should run consecutively, or concurrently, or whether such determinations would be left to a particular military judge's discretion in those situations described at R.C.M. 1002(d)(2)(B)(i)-(iv). As to whether the "critical question is whether the harm caused by one offense is substantially the same harm caused by another offense," as the majority contends, such a view excludes the possibility of one offense causing substantially the same harm as another, which would be an absurd result making the entire phrase superfluous, as no two acts can ever be exactly the same as each other. (JA014). The dissent's view of "substantially the same harm" gives actual meaning to the phrase, as it allows the possibility that distinct acts can cause harms that are substantially similar, namely simultaneous sexual assaults. (JA021). The assault consummated by a battery facilitated the sexual assault to the point that it too involved the same impulse and same harm.

Further, adopting the word "unreasonabl[y]" from R.C.M. 1002(d)(2)(B)(iii) as the Army Court's majority opinion does, and transferring its meaning into subsection (i) is not appropriate, both because they are separate subsections, and because in context the word is part of a phrase that is a term of art – "unreasonably multiplied" – meaning UMC specifically. (JA013).

In a recent opinion, the Army Court analyzed consecutive sentences in a case involving multiple nonconsensual sexual acts occurring over the course of a single night under UMC and R.C.M. 1002(d)(2)(B)(i) separately. *See United States v. Cuesta*, ARMY 20230024, 2025 CCA LEXIS 61, at *5 (Army Ct. Crim. App. 13 February 2025 (summ. disp.) (Appendix A).[6]

F. UMC and Multiplicity Jurisprudence do not Provide a Ready Solution for M.R.E. 1002(d)(2)(B)(i) or Appellant's Transaction

As the majority Army Court opinion and the dissent agree on, R.C.M. 1002(d)(2)(B)(i) is not simply a codification of the constitutional and statutory prohibitions against multiplicity, distinguishing and relying on *Blockburger* and *Teters*. (JA 8, 15).

Regarding unreasonable multiplication of charges, beyond plain meaning, another tenet of statutory interpretation is to disfavor interpretations of statutes that do not import distinct meanings to each word or those which would render certain words superfluous of other portions of the statute. The Army Court's decision and the Government's position do not acknowledge the plain meaning of R.C.M.

[6] In *Cuesta*, the Army Court upheld consecutive sentences, but noted that in that case the military judge noted distinct facts separating the two assaults, notably that they were separated in "time and location," that each "represented an act that was carried to completion," that they were "divisible and not interdependent," and that they reflected a "similar but separate criminal intent." *Cuesta*, 20__ CCA LEXIS ___ at *5.

1002(d)(2)(B) and would render either subsection (i) or subsection (iii) to the rule superfluous to the other.

G. The Rule of Lenity Requires an Interpretation that Favors Appellant where Congressional Intent is Ambiguous

While the language at R.C.M. 1002(d)(2)(B) is plain, to the extent this court decides that it is not plain and looks next to the legislative history, it should find that the legislative history here is at best ambiguous, and so the rule of lenity should apply to prohibit the imposition of consecutive sentences. *See Albernaz*, 450 U.S. at 342. "In other words, where there is ambiguity as to the legislative intent, the accused gets the benefit of the doubt." *Id.*

The clarity of the sentencing rules in the Manual for Courts-Martial, combined with the rule of lenity, mean that the military judge's error at trial was plain and obvious, and it led to a material prejudice to the substantial right of the appellant not to be sentenced consecutively for multiple specifications that the President has deemed a single transaction for which concurrent sentencing is required. *See* Art. 59(a), UCMJ.

Conclusion

Appellant respectfully requests this Honorable Court find for Appellant and remand his case to the Army Court of Criminal Appeals for sentence reassessment consistent with this Court's guidance.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4,650 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, PENLAND, and EWING[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist ANDRES F. CUESTA
United States Army, Appellant

ARMY 20230024

Headquarters, 21st Theater Sustainment Command
Charles L. Pritchard, Jr., Military Judge
Lieutenant Colonel William J. Stephens, Acting Staff Judge Advocate

For Appellant: Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Justin L. Watkins, JA (on brief); Colonel Philip M. Staten, JA; Major Robert W. Rodriguez, JA; Captain Justin L. Watkins, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Colonel Jacquline J. DeGaine, JA; Major Justin L. Talley, JA; Lieutenant Colonel Anthony O. Pottinger, JA (on brief).

13 February 2025

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

EWING, Judge:

Appellant turned up unexpectedly in two separate female soldiers' quarters following parties, once in Kansas and once in Germany. An enlisted panel convicted him of sexually assaulting the Kansas victim twice and of unlawfully entering the Germany victim's barracks room and sexually harassing her, in violation of Articles 120, 129, and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 929, 892 [UCMJ], respectively. The military judge sentenced appellant to a dishonorable discharge and an aggregate sentence of 13 years and 80 days. Appellant's lone

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[1] Judge EWING took final action in this case while on active duty.

briefed assignment of error is a sufficiency challenge to his sexual harassment conviction (for which he received no confinement). While we analyze this claim and one other issue, we ultimately provide no relief and affirm.[2]

BACKGROUND

A. Kansas

Appellant and Specialist (SPC) CC were fellow guards at the disciplinary barracks at Fort Leavenworth, Kansas.[3] The two went to an on-base party there in September 2020 at another soldier's home. Both drank alcohol. Specialist CC, who lived only a few doors down, did not remember leaving the party. At the end of the night, two fellow partygoers (but not appellant) walked SPC CC back to her quarters where they got her inside and closed the front door. The two friends described her as slurring her speech and needing help walking, but safely home. Appellant was nowhere to be seen.

In SPC CC's next memory, she was on her bed in her second-floor bedroom with appellant penetrating her vagina with his penis. She pushed appellant off and "crawled" to her children's room (they were away in California) to "try to get away" from appellant. Appellant followed her, lay down next to her, and penetrated her vagina with his penis a second time. Specialist CC then vomited on the bedroom floor, wall, bathroom floor, and in the bathroom. She then returned to her own bedroom and went to sleep.

The next morning SPC CC had vaginal pain and bleeding, and bruises on her side. She had no memory of appellant entering her home. Specialist CC knew appellant from work but had not socialized with him prior to the party, where she did not recall showing any sexual interest in him (and had none). She also testified that she had not consented to sex with appellant. Specialist CC did not immediately report the incident but did so a few months later after she heard that appellant had been "SHARPed" again at his next duty station (see below).[4]

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[2] We have also given full and fair consideration to all other matters appellant has raised, including matters he personally raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

[3] Specialist CC was a sergeant by the time of appellant's court-martial.

[4] While appellant did not testify on the merits, the defense's clear theory was that SPC CC could have provided at least apparent consent while in an alcohol-induced "blackout" or memory loss. In this vein, the defense pointed out that SPC CC's shorts and underwear were on the first floor the next morning, and she had no memory of how her clothes came to be there. To this end, the military judge instructed the panel on mistake of fact as to consent. The panel rejected this theory.

B. Germany

Three months later in December 2020, appellant had been reassigned to a post in Germany where he attended another party, this time in the barracks on Sembach Kaserne. After the barracks party, Private First Class (PFC) AG, whom appellant had just met that night, went to a friend's room to sleep.[5] The barracks' video security system captured appellant entering PFC AG's barracks room door at 0835 the morning after the party. Appellant had visited PFC AG's room briefly along with other soldiers the night before so knew where she lived.

When PFC AG returned to her room at 1030 she was surprised to see appellant asleep in her bed with only his head "peeking out" from the covers. She immediately woke him and told him to leave. Appellant refused, said that he was "embarrassed," and asked PFC AG to "help" him while nodding his head towards (per PFC AG) "his penis." She recognized this as a request for oral sex, responded "no," left the room, and called a friend for help. The friend—a male Specialist who was a sergeant by the time of trial—came, impersonated PFC AG's noncommissioned officer, and told PFC AG that appellant had to leave her room. Appellant left, and PFC AG immediately reported the incident.

LAW AND DISCUSSION

Appellant's only briefed assignment of error is a challenge to the factual sufficiency of the government's evidence for his Article 92, UCMJ, violation for sexual harassment. While we discuss that claim, it is without merit. We also address the propriety of the military judge's aggregate sentence for the two separate Kansas sexual assaults (one of appellant's *Grostefon* claims), but that issue likewise does not merit relief.

A. Sufficiency

This court reviews questions of factual sufficiency *de novo*. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (internal citation omitted).

Because this offense occurred in December 2020, the applicable test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Id.* (cleaned up). This court applies "neither a presumption of innocence nor a presumption of guilt" but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This "does

[5] Private First Class AG was a specialist (E-4) by the time of trial.

not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citation omitted).

Based on appellant's gesture towards his penis and request for "help" while in PFC AG's bed, the panel convicted appellant of violating Article 92, UCMJ, for, in turn, violating the relevant version of Army Regulation 600-20 (24 July 2020). Paragraph 7-7(a)(3) of that regulation defined "sexual harassment" in pertinent part as "Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature by any member of the Armed Forces or Civilian employee of the DoD."

Appellant contends that his gesture towards his penis and request for "help" was factually insufficient to convict him for (as charged) asking PFC AG to "touch his penis," or words to that effect, and thus violating the Army Regulation on sexual harassment. We disagree. In the context of appellant's surprising and unwelcome presence in PFC AG's bed, and his refusal to leave, the meaning of his request for "help" and gesture towards his penis was patently obvious, as evidenced by PFC AG's wholly reasonable and immediate reaction to the same. As such, we are convinced of appellant's guilt beyond a reasonable doubt.

B. Aggregate Sentences for the Kansas Assaults

The military judge sentenced appellant to consecutive 6-and-7-year terms of incarceration for the two Kansas sexual assaults; 6 years for the master bedroom assault and 7 for the children's room assault (and 80 days for unlawful entry in Germany and no confinement for the Article 92, UCMJ, violation). Appellant has challenged the propriety of the military judge's aggregate sentences in his *Grostefon* matters, noting that the military judge rejected his unreasonable multiplication of charges (UMC) motion and claiming that the military judge should have merged the two sexual assault convictions for sentencing.

We review preserved UMC claims for an abuse of discretion. *See, e.g.*, *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). We note that whether we conceptualize this as a UMC issue under *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), or a consecutive/concurrent sentencing issue that turns on "same act or transaction" language we recently discussed in *United States v. Batres*, ARMY 20220223, 2024 CCA LEXIS 358, at *8-19 (Army Ct. Crim. App. 23 Aug. 2024) (mem. op.), the analysis in both instances dovetails back to a factual question of whether the master bedroom assault and children's room assault were separate and distinct.

The military judge held that they were, and we agree. While the record does not cast much light on the timing between the master bedroom and children's room assaults, we agree with the military judge that they were separate and distinct crimes

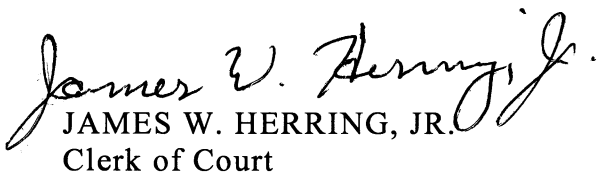
warranting separate punishments. The military judge applied the correct legal framework as to both the UMC and "same act or transaction" issues just prior to and after announcing appellant's sentence. The military judge noted the two assaults were "divisible and not interdependent," that they reflected a "similar but separate criminal intent," were separated by "time and location," and "each represented an act that was carried to completion." Specialist CC pushed appellant off following the first assault and "crawled" to another room, where she ultimately became violently ill. Appellant could have easily disengaged at this point, but he did not. Rather, he pursued Specialist CC to the second room and assaulted her again.

CONCLUSION

The findings of guilty and sentence are AFFIRMED.

Senior Judge FLEMING and Judge PENLAND concur.

FOR THE COURT:



JAMES W. HERRING, JR.
Clerk of Court

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Batres, Crim App. Dkt. No. 20220223, USCA Dkt. 25-0019/AR was filed electronically with the Court and Government Appellate Division on February 25, 2025.

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