IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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.

Argument

As a preliminary matter, the Government misstates the standard this Court (and the Army Court) should apply and distorts Appellant's position regarding the appropriate analysis. The Government recognizes this Court reviews questions of statutory construction and interpretation of the Rules for Courts-Martial (R.C.M.) *de novo* (Gov't Br. 6). But the Government also argues the military judge's

decision should be reviewed for an abuse of discretion and that he should receive deference even though he placed no findings or conclusions on the record. (Gov't Br. 6-7) (". . . this decision was within the range of reasonable choices available to the military judge, and he therefore did not abuse his discretion.").

This Court should not afford the military judge discretion or a presumption of correctness. Determining whether sentences will run concurrently or consecutively within the confines of R.C.M. 1002(d)(2)(B) is a question of law. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). Whether a set of events is "one transaction" is a question of law that does not hinge on traditional notions where deference is afforded. *See United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). [1]

The mandatory "shall" in the rule creates an obligation on the military judge to impose concurrent sentences and allows no discretion. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). The plain language of R.C.M. 1002(d)(2)(B)(i) and the legislative intent indicate *de novo* review is appropriate.

---

[1] *If* the military judge had made any findings of fact regarding why he believed this was not one transaction, those *may* have been reviewed for an abuse of discretion. However, the question of whether those facts constitute one "transaction" is a question of law which is reviewed *de novo*. While the government argues the judge is presumed to know the law, he did not articulate any "law" in his decision, and as discussed below, his reasoning was erroneous given the rules of statutory construction and common usage in the criminal law context.

The President promulgated language of command in R.C.M. 1002(d)(2)(B)(i): "*shall* run concurrently." The mandatory clause serves to protect an individual from broad or arbitrary disparity in sentencing and "the prosecutorial incentive to slice a single event into as many components as possible." *See United States v. Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995) (noting the contrast between federal and military sentencing practice when military sentences were unitary at the time). As the Military Justice Review Group (MJRG) noted, "[s]egmented sentencing requires protections to ensure that an accused is not unfairly sentenced twice for what is essentially one offense" and "[i]f the offenses involved the same transaction, victim, and harm, the sentence would be overly severe for what was essentially one criminal act." Mil. Just. Rev. Group, Report of the Military Justice Review Group: Part I: Recommendations (2015).

The commentary to the United States Sentencing Guidelines establishes that the "substantially the same harm" analysis is useful, but not required, to resolve ambiguity related to whether the *victim* is the same in counts. [2] U.S.S.G. § 3D1.2 n.2. The commentary states that "under subsection (a), counts are to be grouped together when they represent essentially a single injury *or* are part of a single

[2] This in further clarification to what the Guidelines plainly state is meant by their use of "substantially the same harm." ("[c]ounts involve substantially the same harm within the meaning of this rule . . . [w]hen counts involve the same victim and the same act or transaction.") U.S.S.G. § 3D1.2(a).

criminal episode or transaction involving the same victim." U.S.S.G. § 3D1.2 n.3 (emphasis added). Indeed, the commentary provides an example of two counts that are "substantially the same harm" and should be grouped together, namely shooting at a federal officer twice as part of a single criminal episode. U.S.S.G. § 3D1.2 n.3. The commentary further highlights a temporal concern when it also rejects grouping those same two counts together when they occur on two separate days. *Id.* And here, both parties and the Army Court agree the offenses occurred almost simultaneously. (JA002; Appellant's Br. 15-16; Gov't Br. 13).

A. Appellant's case could have been joined with SPC PN in the federal system, where the rules on joinder also use the "same act or transaction" language found in R.C.M. 1002(d)(2)(B)(i).

In the federal system, joinder of two or more defendants is permitted "if they are alleged to have participated in *the same act or transaction*, or in the same series of acts or transactions, constituting an offense or offenses." Fed R. Crim. P. 8(b) (emphasis added). Federal appellate courts have analyzed this rule and found joinder to be proper when "the crimes shared the same victim and location and occurred sufficiently close in time so that a reasonable person would easily recognize the common factual elements that permit joinder." *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (quoting *United States v. Turoff*, 853 F.2d 1037, 1044 (2d Cir. 1988) (internal quotations omitted). In the context of drug offenses, the Eighth Circuit determined that Rule 8(b) was clearly satisfied

when, on the same day at the same place, one defendant handed cocaine to another in order to consummate a transaction. *United States v. Roell*, 487 F.2d 395, 402 (8th Cir. 1973).

It is notable that the joinder rules often permit joint trials for the sake of efficiency even while acknowledging and balancing the risk of substantial prejudice to each accused – fundamental fair trial concerns that are not present here. *See McElroy v. United States*, 164 U.S. 76, 79-80 (1896). Federal courts construe Federal Rule of Criminal Procedure 8(b) to apply to situations where two or more persons commit criminal acts that are "unified by some substantial identity of facts or participants, or arise out of a common plan or scheme." *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989) (quoting *United States v. Porter*, 821 F. 2d 968, 972 (4th Cir. 1987); *see also United States v. Rittweger*, 524 F.3d 171, 177 (2d Cir. 2008) (applying a commonsense balancing rule to weigh factual overlap among charges against possibility of prejudice to the defendants).

Like Rule 8, R.C.M. 812 governs joint and common trials, but does not use the same language as the Federal Rule. The discussion accompanying R.C.M. 812 notes that a "joint offense" is one where the co-accused "acted together with a common purpose." *Id.* A "common trial" is appropriate when two or more accused are tried for an offense which, although not jointly committed, were committed at the same time and place and are provable by the same evidence. *Id.*

B. The Rules of Statutory Construction do not support the Government's position.

The Army Court's decision, as highlighted in the Government's brief, makes an unwarranted logical leap in relying on only one dictionary definitions of "act'" to glean that an act can only be done by a single person. (JA009-JA010; Appellee's Br. 8-9). But both the Government's and the Army Court's interpretation misinterpret the rule's ordinary meaning.

It is well-established that this Court applies the ordinary principles of statutory construction to the Rules for Courts-Martial. *See, e.g. United States v. Stout*, 79 M.J. 168, 169 (C.A.A.F. 2019) (citing *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2009). To this end, "[c]ourts should interpret statutory language by its plain meaning and construe individual provisions as interrelated." *A.T. v. Everett Sch. Dist.*, 794 Fed. Appx. 601, 604) (9th Cir. 2019) (citing *Food Marketing Inst. V. Argus Leader Media*, 588 U.S. 427 (2019)). This Court interprets 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, 162 (C.A.A.F. 2017

C. A rule which includes words that are flexible in meaning can still have a plain reading that is unambiguous.

Contrary to the Government's argument, it is not inconsistent for a term to be flexible within the context of a plain reading. (Appellee's Br. 9). While the meaning of the word "transaction," in its ordinary usage is clear and the rule is amenable to a plain reading, clarity does not demand that each word within the rule have only one meaning, or that its applicability is limited to a single narrow range of occurrences. Individual terms are routinely used in clear rules and statutes, even when such terms are often susceptible to multiple meanings in other contexts. This is why considering the purpose and context of a rule when construing its plain meaning are vital.

The plain reading of the rule acknowledges that sometimes a single act will encompass different offenses, or a single transaction will encompass several acts, which may in aggregate encompass different offenses. In those instances, the President has limited the discretion ordinarily afforded to military judges to impose consecutive sentences.

Conclusion

WHEREFORE, Appellant respectfully requests this Court to vacate the decision of the Army Court of Criminal Appeals and remand the case to that Court for reconsideration.

Patrick McHenry
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 37900

Amir Hamdoun
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar Number 37920

Robert D. Luyties
Lieutenant Colonel, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 37955

Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37938

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 electronically with the Court and Government Appellate Division on April 1, 2025.

PATRICK MCHENRY
Captain, Judge Advocate
Defense Appellate Attorney
Defense Appellate Division
(703) 693-0725