IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
Private (E-2) **OSCAR A. BATRES,** United States Army, Appellant	)	ARMY 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] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2019) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(2), UCMJ, 10 U.S.C. § 867.

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 battery, in violation of Articles 120 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928 (2019) [UCMJ]. (JA147; JA025). Appellant was sentenced to 20 months of confinement for each of his sexual assault convictions, 6 months of confinement for his assault consummated by a battery conviction, and to be dishonorably discharged. (JA148; JA025). The military judge directed all sentences be served consecutively. (JA148; JA025). On August 10, 2022, the convening authority took no action on the adjudged sentence. (JA149). On August 12, 2022, the military judge entered judgment. (JA150). On August 23, 2024, the Army Court affirmed the findings and sentence. (JA002).

Statement of Facts

A. Background.

Appellant met Private First Class (PFC) KN (hereinafter, "the victim) while waiting in line at a Fayetteville, North Carolina Walmart on July 2, 2021. (JA037). Over the next two days, the two spent time together and developed a sexual relationship. (JA037–038). On July 4, 2021, the victim met appellant at a party at Specialist (SPC) BH's house on Fort Bragg. (JA040). The victim did not know

anyone at the party other than appellant. (JA040). Appellant and the victim also met SPC PN at the party. (JA040, JA073).

After a few hours, appellant and the victim went to another party at the barracks room of appellant's friends who were also unknown to the victim. (JA042, JA075). While at the barracks, appellant and the victim had sex in PFC JV's room. (JA042). Before they finished having sex, SPC PN and PFC JV briefly came into the room. (JA043, JA076). Specialist PN closed the door as he and PFC JV walked out. (JA077). After they left, appellant and the victim dressed and left the barracks with SPC PN, PFC CL, and PFC JV to watch fireworks at another location on post. (JA044, JA077).

B. Appellant physically and sexually assaults the victim.

After thirty or forty-five minutes at the fireworks show, appellant, the victim, SPC PN, PFC CL and PFC JV returned to SPC BH's house to retrieve the victim's identification card and hire a taxi into Fayetteville to go to a club. (JA046, JA078). Appellant and the victim separated from the other three as they went to get the victim's card. (JA078). While the victim was retrieving her card from her car, she and appellant began to have consensual sex, with appellant standing behind her as she leaned against the driver's side of her car. (JA050).

Specialist PN approached the car while appellant and the victim were having sex. (JA051, JA079). He "kind of hesitated" and turned to walk away before

appellant "called him back and told him to join." (JA051, JA066, JA080). The victim turned around towards appellant and said "I did not ask for this. I did not agree to this." (JA051, JA071). Appellant grabbed her face, "aggressive[ly] squeez[ing]" it, and told her to shut up while continuing to penetrate her from behind. (JA051, JA071). Appellant told the victim to "take it" and forced the victim's head and mouth down onto SPC PN's penis. (JA052, JA081, 650). The victim could hear appellant and SPC PN talking and telling each other to put her into the backseat of her car. (JA052). Once SPC PN placed the victim on her back in the backseat, SPC PN got on top of her "and proceeded to have sex with her." (JA053, JA083). Specialist PN could see that she was crying and heard her say that "this is not what she wanted," but he continued to have sex with her until he ejaculated. (JA083–084).

C. Appellant is convicted and subsequently sentenced.

After the announcement of findings, the military judge asked the prosecution what the maximum authorized punishment was for appellant's convictions. (JA146). Trial counsel informed the court the maximum punishment was 60 years and 6 months of confinement, a dishonorable discharge, total forfeiture, and reduction to the lowest enlisted grade. (JA146). Defense counsel agreed that was the maximum authorized punishment. (JA146). Defense counsel did not raise any objection when the military judge announced appellant's sentence. (JA148).

Summary of Argument

Rule for Courts-Martial (R.C.M.) 1002(d)(2)(B)(i) ostensibly creates a review of closely related charges that resembles, but is distinguishable, from the legal doctrines of multiplicity and unreasonable multiplication of charges. Manual for Courts-Martial, United States (2019 ed.) [MCM]. In the present case, appellant was convicted of two specifications of sexual assault, and a single specification of assault consummated by a battery, for three distinct acts that were separated by seconds and minutes. Appellant was silent about the military judge's decision to run his sentences for each offense consecutively until the Army Court ordered briefing on the issue now before this Court. Despite never affirmatively raising the issue before the trial court, nor the Army Court, appellant now claims to this Court the military judge plainly erred. There is no dispute that each of the three specifications involve the same victim. There is no dispute that each of the three specifications involve separate and distinct acts. The sole question is whether the military judge erred by finding the three specifications were not a part of a single transaction, and subsequently running appellant's terms of confinement for each consecutively.

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

"The interpretation of UCMJ and [Rule for Courts-Martial] provisions and the military judge's compliance with them are questions of law, which we review de novo." *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). If an appellant forfeits a right by failing to raise it at trial, this Court reviews for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). This Court reviews questions of statutory construction de novo. *United States v. Kohlbek*, 78 M.J. 326, 333 (C.A.A.F 2019).

Law and Argument

This Court should recognize the starting point for review of this issue is with the acknowledgment that a military judge is presumed to know and follow the law; here, that presumption means that by adjudging consecutive sentences, the military judge must have concluded that concurrent sentencing under R.C.M. 1002(d)(2)(B) was not required. *See United States v. Cunningham*, 83 M.J. 367, 373 (C.A.A.F. 2023). Specifically, the military judge must have determined, in his broad

discretion, that the offenses did not involve the same act or transaction. R.C.M. 1002(d)(2)(B)(i). A review of the facts of the case demonstrate that this decision was within the range of reasonable choices available to the military judge, and he therefore did not abuse his discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019); *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011).

The parties agree the President has lawfully dictated the requirement that military judges impose concurrent sentences when two or more specifications involve the same victim and the same act or transaction. (Appellant's Br. 10; R.C.M. 1002(d)(2)(B)(i)). The parties agree R.C.M. 1002(d)(2)(B) is rooted in the United States Sentencing Guidelines. (Appellant's Br. 11–12). Utilizing federal precedent, the parties agree an appropriate analysis to determine if two or more events occurred within a single transaction requires consideration of whether the offenses involve "substantially the same harm." (Appellant's Br. 12–13). The parties agree the specifications involve the same victim, but the specifications allege separate acts.

Ultimately, the granted issue before the Court involves a narrow line of disagreements between the parties. The Government and appellant disagree as to (1) whether the Army Court's statutory construction analysis was correct, (2) whether the Army Court applied the correct standard of review and legal test to the

military judge's decision, and (3) whether appellant's three convictions involve substantially the same harm to the victim.

A. The Army Court properly examined the statutory construction of R.C.M. 1002(d)(2)(B)(i) to resolve the meaning of the word "transaction."

The first step in reviewing statutory construction begins with examining the language of the statute. *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (citation omitted). As this Court has reasoned:

> It is a general rule of statutory construction that if a statute is clear and unambiguous—that is, susceptible to only one interpretation—we use its plain meaning and apply it as written. *United States v. Kohlbek*, 78 M.J. 326, 331 (C.A.A.F. 2019); *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005). We may also resort to case law to resolve any ambiguity, although fundamentally "case law must comport with [the statute], not vice versa." *United States v. Warner*, 62 M.J. 114, 120 n.30 (C.A.A.F. 2005).

United States v. Tyler, 81 M.J. 108, 113 (C.A.A.F. 2021). The Army Court began its analysis here by looking at the plain language of R.C.M. 1002(d)(2)(B)(i) and based upon that review assessed that within the context of this issue the meaning of the word "transaction" was unclear. (JA009). The Army Court, recognizing the disparity between the words "act" and "transaction" for purposes of this analysis, reasoned:

> Transaction, [], is defined as "the act or an instance of conducting business or other dealings," or "something performed or carried out; business agreement or exchange" as well as "any activity involving two or more persons." Black's Law Dictionary 1653 (9th ed. 2009). To give each word meaning, "act" would constitute conduct done by a single person, whereas "transaction" would constitute an activity or an

> exchange between two or more people, or a series of occurrences or an aggregate of acts making up one "transaction," as distinct from a course of criminal conduct which could be made up of many different acts or transactions. But because this definition is far from clear, especially as applied to appellant's case, caselaw and legislative history may be instructive.

(JA009–JA010). Acknowledging the definition of "transaction" to be flexible, while simultaneously arguing the "language [of] R.C.M. 1002(d)(2)(B) is plain," is inherently inconsistent. (Appellant's Br. 11, 22).

The Army Court's analysis, and review of federal precedent, reasoned "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." (JA013). Appellant does not dispute the propriety of utilizing federal precedent as a guide for resolving any ambiguity with respect to the application of the word "transaction," and utilizes the Army Court's adopted test of each of the convictions to determine whether they constitute substantially the same harm in his argument to this Court. (Appellant's Br 15, 19).

B. The Army Court did not err by testing the military judge's decision to run appellant's sentences consecutively for reasonableness.

Appellant suggests, *inter alia*, jurisprudence from the doctrines of multiplicity and unreasonable multiplication of charges is inapplicable or unhelpful to the instant matter. (Appellant's Br. 14, 21). The Government disagrees. Appellant failed to object at trial to either multiplicity or unreasonable

multiplication of charges. A failure to object to unreasonable multiplication of charges forfeits the issue, absent an affirmative waiver. R.C.M. 905(e)(2); *Gladue*, 67 M.J. at 313. A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012).

The Army Court, reconciling the absence of a record where defense counsel failed to object, "review[ed] the military judge's finding under R.C.M. 1002(d)(2)(B)(i) for reasonableness." (JA013–JA014). The dissent argues the reasonableness standard the majority utilized is inapplicable here as this issue is not one of sentence appropriateness/severity, and that the Army Court should not deviate from the de novo and plain error standards of review. (JA020–JA021). The majority acknowledges, and the dissent ignores, that this Court endorsed "reasonableness" when a service court reviewed a forfeited claim of unreasonable multiplication of charges:

> In general, we conclude that this approach is well within the discretion of the court below to determine how it will exercise its Article 66(c) powers. We emphasize that, in this process, the court is making a determination of law under a classic legal test -- whether the action under review was "reasonable" or "unreasonable." Reasonableness, like sentence appropriateness, is a concept that the Courts of Criminal Appeals are fully capable of applying under the broad authority granted by Congress under Article 66. *See United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985).

(JA013); *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001).

The doctrine of unreasonable multiplication of charges is grounded in the belief that "[o]ne transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person." *Quiroz*, 55 M.J. at 337 (citations omitted). "[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id*. R.C.M. 1002(d)(2)(B) has a broader goal than unreasonable multiplication of charges, which the Army Court reasons "is to ensure an accused's sentence is not 'overly severe for what was essentially one criminal act.'" (JA013).

The doctrine of unreasonable multiplication of charges and R.C.M. 1002(d)(2)(B)(i) both require a reviewing court to examine whether each charge and specification is aimed at distinctly separate criminal acts. *See Quiroz*, 55 M.J. at 338. This Court's reasoning regarding charges that have been unreasonably multiplied for findings versus for sentencing provides another parallel between unreasonable multiplication of charges and R.C.M. 1002(d)(2)(B)(i), and the two provide the same relief: concurrent or merged sentences. *Campbell*, 71 M.J. at 23.

> Finally, unlike multiplicity -- where an offense found multiplicious for findings is necessarily multiplicious for sentencing -- the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing. For example, the charging scheme may not implicate the *Quiroz* factors in the same way that the sentencing exposure does. In such a case, and as recognized in *Quiroz*, "the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings."[]

Id. As discussed *supra*, the intent of these two analyses are distinct and different; contrary to appellant's assertion, the mere fact that they have overlapping factual determinations does not render R.C.M. 1002(d)(2)(B)(iii) superfluous. (Appellant's Br. 20–21). However, when charges have been unreasonably multiplied for sentencing purposes, as codified in R.C.M. 1002(d)(2)(B)(iii), the analysis shifts to examining "the nature of the harm," just as a reviewing court does when examining two or more specifications under R.C.M. 1002(d)(2)(B)(i). *Campbell*, 71 M.J. at 23.

The question this Court should answer is what the analysis would look like if appellant objected to his sentence at trial, and the military judge supported the imposition of consecutive sentences by placing his findings and reasoning on the record? What would be the correct standard of review? The Government believes it should be reviewed for an abuse of discretion, and that the decision as to whether two or more offenses involve the same victim, and the same act or transaction, is purely a question of fact. The military judge complied with the requirements of R.C.M. 1002(d)(2)(B) by announcing the consecutive nature of appellant's sentence, that is where any de novo review ends; the military judge's subsequent exercise of discretion should be afforded deference.

C. Appellant's three convictions each resulted in a separate and distinct harm to the victim.

Appellant urges this Court to find that when he forcefully grabbed the victim's face with his hand, then penetrated the victim's vagina with his penis, and then forced the victim to be orally penetrated by SPC PN, the victim only suffered a single harm. (Appellant's Br. 19). Appellant cites no authority for this proposition, and ignores the Army Court's analysis pertaining to this exact issue:

> The reasonableness of the military judge's finding is further highlighted by caselaw hinging on the identity of sexual partners and the important distinction of penetration of a victim by one person from penetration of the victim by a different person. *See United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994).

(JA014).

Specifications 1 and 3 of Charge I represent two separate and distinct criminal acts of sexual violence appellant perpetrated on the victim. The specifications are not predicated on the same criminal conduct; each specification charges a different sexual act appellant committed. The Specification of Charge II involves an instance of physical violence. Appellant simultaneously perpetrated sexual violence in Specification 1 of Charge I with the physical violence in The Specification of Charge II; however, these criminal acts were separate and distinct from each other and resulted in separate and distinct harms to the victim.

As charged in Specification 1 of Charge I, the term "sexual act" means "the penetration, however slight, of the penis into the vulva[.]" Article 120(g)(1),

UCMJ. Appellant was convicted of this charge because he penetrated the victim's vulva, with his penis, despite the victim's verbal demonstration of a lack of consent. (R. at 549, 569).

As charged in Specification 3 of Charge I, the term "sexual act" means "the penetration, however slight, of the penis into the mouth[.]" Article 120(g)(1), UCMJ. Appellant was convicted of this specification because he forced the victim's head and mouth down onto SPC PN's penis, despite the victim's verbal demonstration of a lack of consent. (R. at 549, 564, 578). A review of the record demonstrates this second act of sexual violence was separated, at least briefly, in time to the criminal conduct charged in Specification 1 of Charge I and The Specification of Charge II.

The Specification of Charge II involves bodily harm that was done to the victim after she revoked consent. (R. at 549). After the victim verbalized her lack of consent, appellant told her to "shut up" and "aggressive[ly] squeeze[d]" the victim's face with his hand and continued penetrating her vulva with his penis. (R. at 549). This physical assault, while occurring close in time to the sexual assault charged in Specification 1 of Charge I, did not constitute force used to overcome the victim's lack of consent. This physical assault was separate, distinct, and unrelated to the acts of sexual violence appellant inflicted upon the victim and resulted in an entirely different form of harm.

Appellant's argument that the three convictions stemmed from a single impulse, which was "to have a 'three-way' sexual encounter," is untenable. The logical conclusion of this argument would lead to an absurd result where a single impulse does not capture the criminality of an offender. This standard is also unwieldy in that courts would have to look into offenders' minds to determine what their impulse was. The Army Court's decision to rely on the more recent jurisprudence from *Quiroz* and the federal courts, in lieu of the "single impulse test" from a 1983 Court of Military Appeals case, was proper.

Conclusion

The United States respectfully requests this Honorable Court affirm the judgment of the Army Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **3,811** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 18, 2025.

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