IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **ANDRES F. CUESTA** United States Army, Appellant	SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20230024 USCA Dkt. No. 25-0132/AR

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

Issue Presented*

WHETHER THE MILITARY JUDGE ERRED BY ORDERING APPELLANT'S 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. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

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* In accordance with Rule 21A(c) of this Court's Rules of Practice and Procedure, Appellant intends to submit matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), within twenty-eight days of the filing of this Supplement.

Statement of the Case

An enlisted panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of violation of a lawful general regulation, two specifications of sexual assault, and one specification of unlawful entry, in violation of Articles 92, 120, and 129, UCMJ, 10 U.S.C. §§ 892, 920, and 929 (2019). (R. at 622). The military judge sentenced Appellant to confinement for 13 years and 80 days, reduction to the grade of E-1, and a dishonorable discharge. (R. at 693). The convening authority took no action on the findings and sentence and disapproved Appellant's request for deferment of automatic forfeitures of pay and allowances, deferment of adjudged reduction in rank, and deferment of confinement for thirty days. (Convening Authority Action). The military judge entered judgment on March 17, 2023. (Judgment).

On February 13, 2025, the Army Court affirmed the findings and sentence. (Appendix).

Statement of Facts

The Government charged Appellant with two nearly identical specifications of sexual assault separated by only moments in time. (Charge Sheet). After a night of drinking, Specialist [SPC] CC testified she woke up in her bedroom to Appellant penetrating her vulva with his penis. (R. 279-82). She pushed him off

and went into an adjacent bedroom where Appellant followed her and continued to penetrate her vulva. (R. 279-82).

The military judge sentenced Appellant to six years confinement for the sexual assault in the first bedroom and seven years confinement for the continued sexual assault in the second bedroom—to run consecutively. (R. at 693). Addressing unreasonable multiplication of charges [UMC], the military judge found the assaults were two distinct criminal offenses separated by time and location. (R. at 689-90). He then concluded that because the assaults were divisible, the offenses were not part of the "same act or transaction" that would otherwise require concurrent sentences under Rule for Courts-Martial [R.C.M.] 1002(d)(2)(B)(i). (R. at 693-94).

The Army Court affirmed Appellant's consecutive sentences. According to the court, whether it conceptualized the issue as UMC or under R.C.M. 1002(d)(2)(B)(i) in accordance with its decision in *United States Batres*, the analysis "dovetails back to the factual question of whether the assault[s] . . . were separate and distinct." (Appendix, p. 4). The Army Court ultimately agreed with the military judge, finding that he applied "the correct legal framework" to both UMC and "same act or transaction" under R.C.M. 1002(d)(2)(b)(i). (Appendix, p.5).

Reasons to Grant

What constitutes the "same act or transaction" under R.C.M.1002(d)(2)(B)(i) is an open question of law currently being decided by this Court in *United States v. Batres*. *Batres*, No. 25-0019/AR, 2025 CAAF LEXIS 46 (Jan. 21, 2025). Like *Batres*, the total confinement Appellant will ultimately serve for the sexual assault hinges on how this Court interprets this phrase. For all the reasons this Court found prudent to grant review in *Batres*, so, too, should this Court grant review here.

Law and Argument

Under R.C.M. 1002(d)(2)(B)(i), sentences shall run concurrently when the offenses involve the same victim and "the same act or transaction." The plain meaning of "same act or transaction" is arguably ambiguous. This ambiguity is only compounded by the fact that UMC, which generally guards against charging decisions that are substantially the same transaction, is separately listed as a condition which mandates concurrent sentencing. R.C.M. 1002(d)(2)(B)(iii).

Resort to legislative history resolves the ambiguity. Segmented sentencing and the corresponding rules for when sentences must run concurrently are rooted in the federal system. *See* Military Justice Review Group, Report of the Military Justice Review Group: Part I UCMJ [MJRG Report], Sec. B, p. 510 (2015). As the

MJRG Report notes, while federal judges enjoy broad discretion in whether to have sentences run consecutively or concurrently, their discretion is predicated on the consideration of factors under 18 U.S.C. 3553(a), including applicable sentencing guidelines like § 3D1.2 *Id.*

Critically, § 3D1.2 requires courts to group offenses where they involve "substantially the same harm," and under § 3D1.2(a), offenses involve substantially the same harm when they are part of the "same act or transaction"—language identical to R.C.M. 1002(d)(2)(B)(i). The accompanying commentary to § 3D1.2 explains that subsection (a) covers offenses that represent "essentially the same injury" *or* are part of the "single criminal episode." § 3D1.2, n. 3. The commentary further provides several illustrative examples, including the following: where a defendant is convicted of two assaults for shooting twice at the same officer while attempting to prevent his apprehension during the same criminal episode, the assaults are grouped together; however, grouping is not required where the shooting occurs on two separate *days*. § 3D1.2, n. 3. Duration between offenses is, therefore, a critical factor in the analysis. *See e.g. See United State v. Sneezer*, 983 F.2d 920, 925 (9th Cir. 1992); *United States v. Carter*, 410 F.3d 1017, 1028 (8th Cir. 2005).

Given the intent to mirror the federal system, this Court should interpret the meaning of "same act or transaction" under R.C.M. 1001(d)(2)(B)(i) consistent

with § 3D1.2(a). In other words, the offenses are "the same act or transaction" when they represent "essentially the same injury" *or* are part of the "single criminal episode." Adopting § 3D1.2(a)'s corresponding commentary removes ambiguity with this interpretation and provides guidance to the field. *See Sneezer*, 983 F.2d at 925.

Moreover, applying § 3D1.2(a) resolves the interplay between UMC in subsection (d)(2)(B)(iii) and "same act or transaction" in subsection (d)(2)(B)(i). Indeed, § 3D1.2(a) covers offenses not typically treated as UMC, such as separate sexual acts during one criminal episode. *Compare United States v. Paxton*, 64 M.J. 484, 491 (C.A.A.F. 2007) (finding that digital penetration and touching of the victim's breast during rape was not UMC) *with Carter*, 410 F.3d at 1028 (finding that the failure to group digital penetration and oral sex under § 3D1.2(a) amounted to plain error). And because UMC focuses on prosecutorial overreach, there are instances where offenses may be UMC but are not the "same act or transaction" under subsection (d)(2)(B)(i)—for example, where a prosecutor decides to charge multiple counts of failure to report over different days in lieu of absent without leave so as to unreasonably increase a defendant's punitive exposure.

Applying § 3D1.2(a)'s framework to this case, the military judge erred by ordering the sentences to run consecutively. The Ninth's Circuit decision in *Sneezer* supports this conclusion. There, Sneezer kidnapped a girl, placing her in

his vehicle. *Sneezer*, 983 F.2d at 921-22. Sneezer stopped the car, removed her from the vehicle, and raped her on the ground. *Id*. at 922. He then raped her a second time on the hood of his car. *Id*. at 922. Given the Guideline's emphasis on timing, the Ninth Circuit found the judge erred in not grouping the offenses. *Id*. at 925. While the court recognized this gave Sneezer a "free rape," it was what the Guidelines nonetheless required. *Id.* Here, Appellant was convicted of two nearly identical sexual assaults on the same victim separated by what was perhaps only moments in time. Like in *Sneezer,* while applying § 3D1.2(a) may provide afford Appellant a "free assault," the law compels that result, nonetheless.

Conclusion

Appellant respectfully requests this Court grant the petition for review.

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APPENDIX

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

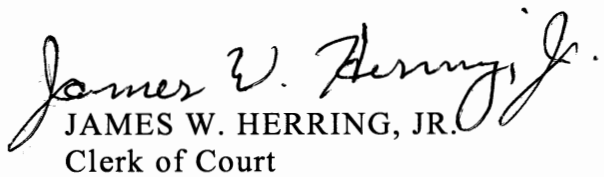
warranting separate punishments. The military judge applied the correct legal framework as to both the UMC and "same act or transaction" issues just prior to and after announcing appellant's sentence. The military judge noted the two assaults were "divisible and not interdependent," that they reflected 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. Cuesta*, Crim. App. Dkt. No. 20230024, USCA Dkt. No. 25-0132/AR, was electronically filed with the Court and Government Appellate Division on May 19, 2025.

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