IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee / Cross-Appellant	)	BRIEF ON BEHALF OF APPELLEE / CROSS-APPELLANT
v.	)	
Staff Sergeant (E-6) **ZACKERY J. ASKINS**, United States Army, Appellant / Cross-Appellee	)	Crim. App. Dkt. No. 20230303 USCA Dkt. No. 26-0014/AR

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UNITED STATES, Appellee / Cross-Appellant	)	BRIEF ON BEHALF OF APPELLEE / CROSS-APPELLANT
v.	)	
Staff Sergeant (E-6) **ZACKERY J. ASKINS**, United States Army, Appellant / Cross-Appellee	)	Crim. App. Dkt. No. 20230303 USCA Dkt. No. 26-0014/AR

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

Certified Issue

WHETHER THE ARMY COURT ERRED IN FINDING APPELLANT'S SEPARATE CONVICTIONS UNDER ARTICLE 128b(1) AND 128b(5), UCMJ MULTIPLICIOUS.

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)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

On May 23, 2023, a military judge sitting as a general court-martial

[1] Unless otherwise indicated, all references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM] with the 2020 and 2021 National Defense Authorization Act Amendments.

convicted Appellant, pursuant to his pleas, of one specification of forgery, two specifications of false official statement, two specifications of sale of military property of the United States, and four specifications of larceny and wrongful appropriation, in violation of Articles 105, 107–08, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 905, 907–08, and 921 [UCMJ], as well as one specification of transport of explosive materials, in violation of Article 134, UCMJ, 10 U.S.C. § 934 incorporating 18 U.S.C. § 842. (JA 25–29, 32–33). On May 24, 2023, the military judge convicted Appellant, contrary to his pleas, of three specifications of domestic violence, in violation of Article 128b, UCMJ, 10 U.S.C. § 928b.[2] (JA 26–27, 71).

On May 25, 2023, the military judge sentenced Appellant to reduction to the grade of E-1, confinement for 102 months, forfeiture of all pay and allowances, a fine of $35,000 and to serve an additional confinement of twelve months if the fine is not paid, and a dishonorable discharge. (JA 24, 30–31, 72–75). The military judge credited Appellant with 521 days of pretrial confinement credit. (JA 24, 75). The convening authority waived automatic forfeitures and disapproved the adjudged forfeitures. (JA 23). On June 27, 2023, the military judge entered judgment. (JA 22).

[2] The military judge acquitted Appellant of one specification of domestic violence. (JA 27, 71).

On August 28, 2025, the Army court sua sponte merged the findings of guilty to Specifications 1 and 2 of Charge V into a consolidated specification numbered as Specification 1 of Charge V, dismissed and set aside the original Specification 2 of Charge V, reassessed and affirmed the segmented sentence to confinement for Specification 1 of Charge V, affirmed the remaining findings of guilty, and affirmed the sentence to a dishonorable discharge, 102 months of confinement, a fine of $35,000, and reduction to the grade of E-1. (JA 14).

On October 22, 2025, this Court docketed this cross-appeal pursuant to The Judge Advocate General, U.S. Army certificate for review of the decision of the Army court and ordered government counsel to file a brief under Rule 22(b) on or before November 19, 2025.[3] (JA 01–04).

Statement of Facts

Appellant and Mrs. JA married in 2014. (JA 34, 49). The first time he was violent towards his wife was in 2019—the same year she considered ending their marriage.[4] (JA 35, 38, 55).

[3] On October 3, 2025, this Court docketed the case pursuant to Appellant's petition for grant of review and ordered appellate defense counsel to file a supplement under Rule 21 on or before October 23, 2025. Appellate defense counsel timely filed the supplement on an issue unrelated to the certified issue.

[4] He slammed her onto a hide-a-bed, pressed his body on top of her, and squeezed her with his arms so she could not move. (JA 35–37). This episode formed the basis for Specification 3 of Charge V. (JA 27, 71).

In 2021, when she asked for a separation, Appellant was again violent with her. (JA 41). This time he shoved her down before walking to the master bedroom and shutting the door. (JA 41). When she called him a coward, he flew out of the room, slammed her into a dog kennel, put his hands around her throat, and repeated, "You did this. You escalated this. This is your fault." (JA 41, 51). There was no evidence that while his hands were around her throat he caused her difficulty breathing or impeded her blood circulation. (JA 51). He eventually let go to put their dog in the kennel. (JA 41, 51).

As he did so, she grabbed her belongings from the kitchen counter and told him she would report the incident to his unit. (JA 41–42, 52). He then came after her. (JA 42, 52). She reached the back door before he caught up to her and put his hands around her neck, slammed her head into the breaker box, and again repeated, "You did this. You escalated this. This is your fault." (JA 42, 52). She struggled to breathe while his hands were around her neck.[5] (JA 44).

Appellant took her phone and car keys and began walking away, so she chased after him and swatted at him to retrieve them. (JA 42, 52). He placed her in a bear hug where she could not breathe. (JA 42). She went limp, figuring that

[5] For a week after the attack, she felt like there was a cable around her neck. (JA 45). She also suffered a concussion from the breaker box slam. (JA 45). Bruises were visible and she continued to experience pain in her neck and head. (JA 46–47, 54, 56, 78).

would be her best way to get out. (JA 42). Eventually both dropped to the floor and started fighting for her belongings. (JA 42). Mrs. JA cried and pleaded for her medicine before he eventually gave her belongings back. (JA 42). She then ran out the door to her car as fast as she could. (JA 44).

On cross-examination, Mrs. JA agreed with defense's characterization that the dog kennel and breaker box slams were two separate events. (JA 51). She also said Appellant strangled her against the dog kennel and when she was at the back door. (JA 52). In closing argument, trial counsel argued, "[I]n a fit of rage, he attacks her, throws her against the dog kennel, bashes her head against a breaker box, and ultimately strangles her." (JA 62).

While appellant never alleged these separate slams and strangulation were multiplicious at trial or on appeal, the Army court found plain and obvious error. (JA 12–13).

Summary of Argument

Congress took care to draft five substantively different subsections in Article 128b, UCMJ, demonstrating clear intent to separately punish Appellant for committing a "violent offense" against his wife under subsection (1) and for strangling his wife under subsection (5). Based on a plain reading of the statute, the Army court erred in failing to apply the elements test to Appellant's convictions. In deciding this case, the Court should clarify the test to determine multiplicity as

applied to Article 128b, UCMJ specifications, including the applicability of Article 128, UCMJ case law and the meaning of "same statute" versus "distinct statutory provision."

Argument

Standard of Review

This Court reviews questions of statutory interpretation de novo. *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024). Multiplicity claims are forfeited by failure to make a timely motion to dismiss, unless they rise to the level of plain error. *United States v. Coleman,* 79 M.J. 100, 102 (C.A.A.F. 2019). "To prevail [on plain error review], Appellant bears the burden of establishing (1) error, (2) that is clear or obvious, and (3) results in material prejudice to a substantial right of the accused." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019).

Law

A. Multiplicity.

The concept of multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments for the same offense. *United States v. Cardenas*, 80 M.J. 420 (C.A.A.F. 2021); *United States v. Lloyd*, 46 M.J. 19, 22 (C.A.A.F. 1997). It precludes a court, contrary to the intent of Congress, from imposing multiple convictions and punishments under "different statutes" for the same act or course of conduct. *Coleman*, 79 M.J. at 102. In such

cases, to determine whether charges are multiplicious, a court engages in a three-step inquiry:

> (1) [F]irst, it determines whether the charges are based on separate acts; if so, the charges are not multiplicious because separate acts may be charged and punished separately;
>
> (2) [S]econd, if the charges are based upon a single act, a court next must determine whether Congress made an overt expression of legislative intent regarding whether the charges should be viewed as multiplicious;
>
> (3) [T]hird, if the respective statutes are silent as to congressional intent, a court must seek to infer Congress's intent based on the elements of the violated statutes and their relationship to each other; specifically, if each statute requires proof of an element not contained in the other, it may be inferred that Congress intended for an accused to be charged and punished separately under each statute.

Id. at 103; *see generally* R.C.M. 907(b)(3)(B) ("A charge is multiplicious if the proof of such charge also proves every element of another charge.").

1. The Meaning and Significance of "Different Statutes" or "Distinct Statutory Provisions."

This Court has held that "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Coleman*, 79 M.J. at 103. The focus is on a strict facial comparison of the elements of the charged offenses, not the pleadings or proof of these offenses. *Id.*; *see, e.g.*, *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993)

(finding forgery and larceny based on a single act were not multiplicious).

As such, this Court and the service courts have used the phrases "distinct statutory provisions," "two sections of the same statute," and "different statutes" before deciding whether to apply the elements test. *See, e.g.*, *United States v. Adams*, 49 M.J. 182, 186 (C.A.A.F. 1998) (describing Article 128(a) and Article 128(b) as "two sections of the same statute" before applying the *Blockburger/ Teter*s elements test to find Article 128(a) a lesser-included-offense of Article 128(b)); *United States v. Banegas*, ACM 38569, 2015 CCA LEXIS 329 (A.F. Ct. Crim. App. 13 Aug. 2015) (describing Article 128(a) and Article 128(b) as "distinct statutory provisions" in applying the elements test); *cf. United States v. Malone*, 85 M.J. 573, 584 (Army Ct. Crim. App. 2025), *cert. filed* (characterizing Article 128(a) and 128(b) as paragraphs in the "same statute," not "different statutes" in declining to apply the elements test). At its core, the issue remains whether an appellant's convictions constitute separate offenses.

Merely because alternate phrases may be consolidated under a single article does not preclude them from constituting different offenses. *See United States v. Albrecht*, 43 M.J. 65, 68 (C.A.A.F. 1995) (discussing two distinct crimes under Article 123, UCMJ consolidated under a single article for convenience);[6] *see also*

---

[6] At common law, there were two separate and distinct

Blockburger v. United States, 284 U.S. 299, 303–04 (1932) ("Section 1 of the Narcotics Act . . . and § 2 . . . create two distinct offenses"). In other words, alternate phrases (provisions) in a statute may constitute different offenses.[7] Differing intent elements, punishments, and victims can also indicate Congress intended to create different offenses. *See, e.g.*, *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (citations omitted) (agreeing with state courts that have recognized forgery of an indorsement as not only factually distinct, but also legally distinct from forgery of the check itself in part because they create two victims).

> crimes of forgery and uttering a falsely made or altered writing. In enacting Article 123, Congress 'combined' these common-law crimes into one statute defined as forgery. . . . This consolidation within one statutory provision of what historically had been seen as two separate crimes, however, does not compel the conclusion that Congress meant to obliterate the distinction, and we have found no expression of intent to do so.

Id. at 68.

[7] Compare, for example, the analogous "divisibility test" used in the immigration context to determine whether alternate phrases in a statute refer to alternate means versus alternate offenses. *See Descamps v. United States*, 570 U.S. 254 (2013) (discussing the modified categorical approach); *Mathis v. United States*, 579 U.S. 500 (2016). A statute does not list alternative offenses unless the alternatively phrased facts are actual elements of distinct crimes, and not mere alternative means of committing a single crime. *See Mathis* at 505–06. Elements are those which must be proven beyond a reasonable doubt, which is not the case for mere means of commission. *Id.* at 504. Further, if different parts of the criminal statute carry different sentences, that definitively shows that they are elements. *Id.* at 517–18.

2. Discrete-Act versus Continuous-Course-of-Conduct Offense.

The Supreme Court in *Blockburger* discussed three related concepts: (i) continuing offenses, (ii) discrete act offenses, and (iii) continuous course of conduct offenses.[8] 284 U.S. at 299, 301–03 (citing *In re Snow*, 120 U.S. 274 (1887); *Ebeling v. Morgan*, 237 U.S. 625 (1915)). At issue in this case is whether the prohibition is on Appellant's individual acts or his course of conduct.[9] *Blockburger*, 284 U.S. at 302–03; *see also United States v. Campbell*, 71 M.J. 22 (C.A.A.F. 2012) (asserting that the terms "single impulse or intent" and "unity of time" with a "connected chain of events" are not derived from *Blockburger/Teters*, but better describes the factors found in the [*United States v. Quiroz*, 55 M.J. 338 (C.A.A.F. 2001)] test for unreasonable multiplication of charges). If it is a "distinct or discrete-act offense, separate convictions are allowed in accordance with the number of discrete acts." *Neblock*, 45 M.J. at 197; *see Blockburger*, 284 U.S. at 302 (holding two sales of morphine in violation of § 1 of the Narcotics Act (i.e.,

[8] The "doctrine of continuing offenses should be applied in only limited circumstances." *Toussie v. United States*, 397 U.S. 112, 116 (1970). Courts should find offenses continuous in nature only when "the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id*. Otherwise, "completion [of the criminal act] occurs at the moment the defendant's conduct satisfies every element of the offense." *United States v. Green*, 897 F.3d 443, 448 (2d Cir. 2018).

[9] The Army court does not discuss—and there is no indication—that Article 128b is a continuing offense.

violations of the same statute) separate and distinct offenses).

B. UCMJ article 128b.

Article 128b lists five alternative phrases (provisions), in relevant part:

> (1) commits a violent offense against a spouse[;]
>
> (2) with intent to threaten or intimidate a spouse . . .
> (A) commit an offense [ ] against any person; or
> (B) commits an offense [ ] against any property[;]
>
> (3) with intent to threaten or intimidate a spouse [ ] violates a protection order;
>
> (4) with intent to commit a violent offense against a spouse [ ] violates a protection order; or
>
> (5) assaults a spouse [ ] by strangling or suffocating

At the time Appellant committed these crimes, neither Congress nor the President had defined Article 128b, UCMJ strangulation. But effective January 26, 2022 and pursuant to the National Defense Authorization Act for Fiscal Year 2022, the President defined the term as "[i]ntentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." *MCM* (2024 ed.), pt. IV ¶ 77.c.(5)(c)(iii); Exec. Order No. 14,062, § 2(k), (o), 87 Fed. Reg. 4763 (Jan. 26, 2022).

No service court has addressed whether Article 128b's alternative phrases constitute separate offenses, or a single statute merely listing alternative means for committing a single offense, for purposes of deciding whether to apply the elements test.

Discussion

A. The Army court failed to apply the correct principles of law.

The government charged the two separate slams/banging as a single Article 128b(1), UCMJ specification and the strangulation as an Article 128b(5), UCMJ specification, not Article 128, UCMJ.[10] The Army court erred when it (i) failed to analyze whether Articles 128, 128b(1), and 128b(5), UCMJ were distinct statutory provisions, (ii) applied Article 128, UCMJ case law to Appellant's Article 128b(5), UCMJ conviction, and (iii) assuming arguendo *United States v. Forrester*, 76 M.J. 479 (C.A.A.F. 2017) applies, failed to consider the unit of prosecution for Article 128b(5), UCMJ.

1. *Blockburger* applies because Article 128b(1), UCMJ and Article 128b(5), UCMJ are "two sections of the same statute" and "distinct statutory provisions."

Without analyzing the statute at issue, the Army court applied its holding in *Malone* for "multiple violations of the same statute." (JA 12). In *Malone*, the

[10] Although not specified on the charge sheet, the language of Specifications 2 and 3 of Charge V track the statutory language of Article 128b(1) and Article 128b(5), UCMJ, respectively.

Army court explained that the *Blockburger/Teters* elements test only applied to convictions for "different statutes." *See Malone*, 85 M.J. at 582.

But Article 128b contains five substantively distinct subsections indicating Congress intended each to be separate offenses. Each of these subsections is a distinct provision that requires proof of a fact that the other does not. Namely, Article 128b(5), UCMJ requires proof that Appellant strangled his wife, while Article 128b(1), UCMJ does not. Moreover, the subparagraphs involve different intent elements; subsections (1) and (5) require general intent, while subsections (2)–(4) require specific intent. *See* UCMJ art. 128b. Evidently, Article 128b does not merely set out alternate ways to commit domestic violence but specifies five "conceptually distinct and different ways to commit [domestic violence] so that, in a given factual context, one or the other or both might be violated." *See Albrecht*, 43 M.J. at 68. Thus, by the Army court's own reasoning, it should have applied the *Blockburger* elements test to Appellant's Article 128b(1) and 128b(5) convictions.

2. *Blockburger* applies because Article 128, UCMJ and Article 128b, UCMJ are "different statutes."

In this case, Specification 2 of Charge V (Article 128b(1)) incorporated Article 128(a), UCMJ, but Specification 1 of Charge V (Article 128b(5)) did not. Thus, even if this Court considers Article 128b(1) and Article 128b(5) to be the "same statute," rather than "distinct statutory provisions," Article 128b, UCMJ and Article 128, UCMJ are not. Effective 1 January 2019, Congress established Article

128b, UCMJ, as a new punitive article in the UCMJ criminalizing domestic violence, separate from Article 128, UCMJ. This was an overt expression of Congressional intent to separate these offenses from an article criminalizing a mere bar fight. The Army court did not analyze why Article 128, UCMJ case law should apply to both Article 128b(1) and (5), UCMJ. This Court should hold that the elements test applies to Appellant's convictions.

3. In the alternative, Article 128b(5), UCMJ is a discrete act offense.

Citing to *Malone, Forrester*, and *United States v. Rushing*, 11 M.J. 98 (C.M.A. 1981), the Army court found Appellant's act of strangulation and acts of slamming to be a continuous course of conduct, rather than discrete acts because they were "united in time and location and sprung from the same impulse." (JA 12). But *Malone* is distinguishable; in *Malone*, the appellant was convicted of three Article 128b(1) specifications that incorporated Article 128(a) and (b), UCMJ. The instant case involves (i) Article 128b(1), UCMJ incorporating Article 128(a), UCMJ and (ii) Article 128b(5), UCMJ not incorporating Article 128, UCMJ. (JA 17–18). Nor were Appellant's slams and strangulation "blows in an altercation" as in *Rushing*. Rather, Article 128b(5) criminalizes "assault[ing] a spouse [ ] by strangling[.]" The offense is completed when an appellant impedes the normal breathing or circulation of the blood of their wife by applying pressure to her throat

or neck. Thus, the Army court should have evaluated whether Article 128b(5), UCMJ is a discrete act offense.

While debate surrounding Article 128b, UCMJ's passage included (i) compliance with notification requirements to the FBI background check system and (ii) inclusion of strangulation and suffocation—as indicators of future lethal violence—in conduct "constituting aggravated assault,"[11] nothing in the statutory text itself indicates Congress intended to prohibit separate convictions for acts of strangulation and acts of violence accomplished through an assault consummated by battery. In fact, Article 128b(5)'s separation into its own provision demonstrates that Congress viewed strangulation as its own offense.

B. Even if Article 128b(1) and (5), UCMJ are the "same statute" or are a "single statutory provision," the Army court clearly erred.

1. The Army court failed to analyze the unit of prosecution.

Assuming *arguendo* Article 128b(1) and (5) are the "same statute" or a "single statutory provision" and the *Blockburger/Teters* elements test does not apply, the Army court did not consider the applicable unit of prosecution for

[11] *See* H. Rep. No. 115-676 on H.R. 5515 (115), [NDAA FY19] (May 15, 2018) (proposing new punitive section); H. Rep. No. 115-676 Part 2 (May 21, 2018) (providing additional penalties); S. Rep. No. 115-262 on S2987 (Jun 5, 2018) (proposing inclusion of strangulation and suffocation); 164 Cong Rec S3932 (Jun 14, 2018) (Statement of Sen. Richard Blumenthal) (addressing accountability and referral to the FBI); 116 H. Rep. No. 442 (Jul 19, 2020) (discussing strangulation); 164 Cong. Rec. H. No. 7202 (Jul 25, 2018) (Conf. Rep.) (providing effective date).

Article 128b(5), UCMJ. *See Forrester*, 76 M.J. 479 (determining "material" as the unit of prosecution for Article 134, UCMJ possession of child pornography); *United States v. Szentmiklosi*, 55 M.J. 487 (C.A.A.F. 2001) (determining property as the unit of prosecution for Article 122, UCMJ robbery). Instead, it relied on its decision in *Malone* and *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) to treat the unit of prosecution for Appellant's domestic violence specifications the same as Article 128, UCMJ specifications. (JA 12). *See Malone*, 85 M.J. at 584 ("[T]he allowable unit of prosecution for Article 128, UCMJ is the "number of overall beatings the victim endured rather than the number of individual blows suffered.")

In determining the appropriate unit of prosecution, courts look to see "whether conduct constitutes one or several violations of a single statutory provision." *Callanan v. United States*, 364 U.S. 587, 597 (1961). Here, the words within the statute indicate the exact act to be criminalized: assault by strangling under subsection (5) and a violent offense under subsection (1). Stated another way, while the actus reus for subsection (1) depends on the underlying conduct constituting a violent offense, the actus reus for subsection (5) is strangulation.

2. The record does not support the Army court's determination that there was no meaningful break between the slams.

In finding no meaningful break in time between the two slams, the Army court failed to consider all the relevant facts. The court omitted that after he

slammed his wife into the dog kennel, Appellant had turned to a new task of putting their dog in the kennel while she grabbed her belongings and reached the back door. (JA 12–13). The Army court further omitted that while he came after her and slammed her into the breaker box in response to her announcing her intent to report the first slam to his unit, the reason he slammed her against the dog kennel was because she called him a coward. (JA 12–13). There was a clear break and re-ignition between these episodes. Thus, not only were Appellant's impulses different, but also the slams were separate acts that could be charged and punished separately. *See Coleman*, 79 M.J. at 103; *Neblock*, 45 M.J. at 197–99.

The Army court further erred when it found that even if there was sufficient break in time and impulse to create two successive impulses separately given, the specifications remain multiplicious because he strangled the victim in both instances. (JA 13). The record does not support the court's conclusions that Appellant strangled the victim twice and each strangulation occurred contemporaneously with a head slam.[12] (JA 13). Instead, there was only proof

[12] Another instance where the Army court mischaracterized the facts was in reference to Appellant bear hugging the victim after the breaker box slam. The Army court wrote, "Appellant then placed her in a bear hug until she could not breathe. She went limp and dropped onto the floor. Ultimately, she gained the ability to leave the home[.]" (JA 13). But the victim testified that she went limp, figuring that would be her best way to get out; that they both dropped to the floor and started fighting for her belongings; and that she ran out the house after Appellant finally gave them to her. (JA 42, 44). The court also omitted her chasing

beyond a reasonable doubt of one strangulation. While on cross-examination the victim characterized Appellant putting his hand around her throat as he slammed her against the dog kennel as strangulation, she did not testify—and there was no evidence—that he impeded her breathing or blood circulation during this episode. (JA 41, 51). Notably, trial counsel never argued so. (JA 61–70). The only episode that could survive a legal and factual sufficiency review for strangulation was when Appellant put his hand around the victim's neck at the back door because of testimony that she struggled to breathe. (JA 42).

Further, unlike when he put his hand on his wife's throat *as* he slammed her against the dog kennel, his strangling her by the back door was an individual act separate from his slamming her into the breaker box; he completed the strangulation when he caused her to struggle to breathe and before he slammed her into the breaker box. (JA 42, 44, 52). *See Blockburger*, 284 U.S. at 302 ("If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie."). Thus, the Army court plainly erred.

C. Remedy.

To the extent this Court considers the breaker box slam and strangulation by

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Appellant around and swatting for her belongings after being slammed into the breaker box, but before his bear hug. (JA 13, 42, 52).

the back door to be a continuous course of conduct, the Army court should not have merged the findings of guilty to Specifications 1 and 2 of Charge V into a consolidated specification. Had the government been given an opportunity, the government would have requested to keep the separate convictions and to narrow the scope of the language in Specification 2 of Charge V by striking the language "and banging her head against a breaker box." *See Cardenas*, 80 M.J. 420; *United States v. English*, 79 M.J. 116, 122 n.5 (C.A.A.F. 2019). These separate convictions more accurately reflect his criminality.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court vacate the Army court's order and affirm the findings and sentence as originally adjudged.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 4,569 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 on all four sides.

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