IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Private First Class (E-3) **PATRICK A. FORD**, United States Army, Appellee	)	Crim. App. Dkt. No. 20230303 USCA Dkt. No. 25-0143/AR

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

Certified Issues

I. WHETHER THE ARMY COURT ERRED IN FINDING APPELLEE DID NOT AFFIRMATIVELY WAIVE MULTIPLICITY WHERE COUNSEL STATED DEFENSE HAD NO MOTIONS BEFORE ENTERING UNCONDITIONAL GUILTY PLEAS.

II. WHETHER THE ARMY COURT ERRED IN FINDING APPELLEE'S CONVICTIONS UNDER ARTICLE 128b(1), UCMJ, MULTIPLICIOUS WHEN THE UNDERLYING "VIOLENT OFFENSES" WERE ASSAULTS CONSUMMATED BY BATTERY.

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), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

On May 10, 2023, a military judge sitting as a general court-martial convicted Appellee, pursuant to his pleas, of one specification of absence without leave, one specification of disrespect toward a superior commissioned officer, three specifications of failure to obey a lawful order, one specification of communicating a threat, and three specifications of domestic violence, in violation of Articles 86, 89, 92, 115, and 128b, UCMJ, 10 U.S.C. §§ 886, 889, 892, 915, 928b. (JA 26–29, 70). The military judge sentenced Appellee to reduction to the grade of E-1, confinement for sixteen months, and a bad-conduct discharge. (JA 26, 30–31, 74). The military judge credited Appellee 224 days of confinement credit. (JA 26, 74). On June 2, 2023, the convening authority approved the findings and sentence. (JA 25). On June 14, 2023, the military judge entered judgment. (JA 24).[2]

On March 21, 2025, the Army court merged the findings of guilty to Specifications 2 and 4 of Charge II into a consolidated specification numbered as Specification 4 of Charge II, dismissed and set aside the original Specification 2 of

[1] Unless otherwise indicated, all references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2024 ed.) [*MCM*].
[2] Appellee waived his right to submit post-trial matters. (JA 24).

Charge II, reassessed and affirmed the segmented sentence to confinement for Specification 4 of Charge II, affirmed the remaining findings of guilty, and affirmed the sentence to a bad-conduct discharge, sixteen months of confinement, and reduction to the grade of E-1. (JA 16).

On April 21, 2025, this Court docketed this appeal pursuant to The Judge Advocate General, U.S. Army certificate for review of the decision of the Army court. (JA 6). This Court granted the government's motion for suspended briefing, pending this Court's decision in *United States v. Malone*, No. 25-0140/AR (C.A.A.F. 2026). (JA 3, 6). On March 2, 2026, this Court vacated the order suspending briefing and ordered the parties to concurrently file a brief under Rule 22(b) on or before March 23, 2026. (JA 1).

Statement of Facts

On July 24, 2022, Appellee and his six-month-pregnant wife got into a verbal argument that turned physical at their residence. (JA 41, 76). When his wife took out her cellphone, Appellee grabbed it and smashed it to the ground to intimidate her. (JA 42, 44–45, 76). She clutched her stomach in fear and went outside to get away from him, but he followed her. (JA 42, 45, 77). When she fell to the ground, Appellee grabbed her arms with his hands. (JA 41–42, 45, 77–78). She momentarily separated from him when some neighbors heard her yelling and came outside. (JA 45–46, 78). Appellee then grabbed her, dragged her in front of a

neighbor's house towards his vehicle, and attempted to force her inside. (JA 42, 46). But as the neighbors approached him, he let go, got in his car, and drove away. (JA 78). His wife went to the emergency room where she presented with abrasions on her legs, hands, torso, and upper arms as well as bruising on her right forearm. (JA 78–81).

From this incident, the government charged Appellee in January 2023 with four specifications of domestic violence and one specification of attempt to cause the death of an unborn child. (JA 18). Two months later, Appellee negotiated an unconditional plea of guilty, in relevant part, to three specifications of domestic violence in exchange for the government to withdraw and dismiss one of those specifications of domestic violence and the attempt. (JA 27, 87, 90, 92). The parties agreed to substitute the word "neck" with the word "arms" in Specification 2 of Charge II and to amend Specification 3 of Charge II from an assault consummated by a battery against his wife to an offense against her property with an intent to intimidate her. (JA 27, 38–39, 90). Appellee portrayed to the Convening Authority that it was in his best interest to offer to plead. (JA 87).

Pursuant to the plea agreement, the military judge sentenced Appellee to twelve months of confinement for grabbing his wife's arm, fourteen months of confinement for destroying her phone, and sixteen months of confinement for

dragging her on the ground, to be served concurrently.[3] (JA 26, 30, 74, 91–92). On appeal, he argued that despite this plea agreement, he could not be separately convicted for breaking his wife's phone, grabbing her arm, and dragging her because he committed these acts in a continuous course of conduct. (JA 98–106, 202–03). The Army court agreed in part. (JA 12–17).

Additional facts are incorporated below.

I. WHETHER THE ARMY COURT ERRED IN FINDING APPELLEE DID NOT AFFIRMATIVELY WAIVE MULTIPLICITY WHERE COUNSEL STATED DEFENSE HAD NO MOTIONS BEFORE ENTERING UNCONDITIONAL GUILTY PLEAS.[4]

Summary of Argument

The Army court erred in finding Appellee did not waive multiplicity because the record clearly establishes express waiver. Beginning with the presumption of competent counsel, the potential merits of a multiplicity claim obvious on the face of the charge sheet, stipulation of fact, and providence inquiry as well as the

[3] The maximum punishment for his plea to these and other crimes was 199 months of confinement, reduction to the grade of E-1, total forfeitures, and a dishonorable discharge. (R. at 70–71).

[4] The government respectfully brings to this Court's attention an error in the certified issue. In a footnote, the Army court relied upon its precedent in *United States v. Malone*, 85 M.J. 573 (A. Ct. Crim. App. 2025) to decline to find "the defense counsel's pro forma statement, following the military judge's request for appellee's plea, that 'defense has no motions' constitutes waiver." (JA 15). However, trial defense counsel in this case made no such statement. (JA 32–33). The certified issue is instead properly framed as whether the Army court erred in finding Appellee did not affirmatively waive multiplicity.

savings clause in Appellee's plea agreement demonstrate knowledge of multiplicity. Next, Appellee's consent to redrafting the purported multiplicious specifications, the same savings clause, and concurrent sentencing before subsequently entering unconditional pleas of guilty constitute affirmative actions. In the absence of evidence of bad faith negotiations, counsel's decision not to raise multiplicity before pleas or adjournment was a strategic decision, not mere oversight. Appellee intentionally relinquished or abandoned multiplicity claims.

Additional Facts

The terms of the plea agreement included a savings clause, but not a waive all waivable motions clause. (JA 88). Before entry of pleas, the military judge advised Appellee that all motions to dismiss or to grant other appropriate relief should be made at that time and that trial defense counsel would speak for him. (JA 32). Defense moved for *Allen* credit and then entered pleas of guilty with respect to Specifications 2–4 of Charge II.[5] (JA 33).

Before accepting Appellee's plea agreement, the military judge reviewed its terms with Appellee, including the Article 13, UCMJ waiver and savings clause. (JA 50–69). The military judge observed that there were no other waivers of motions in this case. (JA 60). Appellee confirmed his understanding that most

[5] In Specification 2, the parties agreed to substitute the word "arms" in place of "neck." (STR; Plea Agreement; R. at 25). Separately, the parties agreed to twenty-nine days of *Allen* credit. (R. at 96–98).

motions are waived by virtue of pleading guilty even though there was no provision specifically for waiver of motions. (JA 61). The military judge continued:

> The only motion so far that's been brought before this Court is an issue for pretrial confinement credit for civilian pretrial confinement. So that's the only one that this Court is going to consider or that an appellate court might consider.

(JA 61). He advised Appellee that if he accepted the plea agreement, the Court and the parties would be bound by its terms, to include imposing a sentence that comports with the limitations in the agreement. (JA 66). Appellee confirmed he understood the meaning and effect of each provision in his plea agreement, fully consulted with his defense counsel, and was satisfied with his counsel's advice. (JA 61, 65–69).

During the providence inquiry, the military judge asked Appellee how much time passed between when he grabbed his wife's arm and when he dragged her. (JA 46). Appellee responded that he did not remember the exact time, but knew it was a "short time." (JA 46). Appellee confirmed that he could have walked away and that he committed two separate violent offenses against his wife. (JA 48). Both parties declined additional inquiry; neither moved to consolidate specifications. (JA 48–49). On appeal, Appellee did not claim ineffective assistance of counsel, but the Army court found per se prejudicial plain error. (JA 15–16).

Argument

Standard of Review

This Court reviews de novo whether an accused has waived an issue. *United States v. Malone*, No. 25-0140/AR (C.A.A.F. 2026) (quotations omitted).

Law

A. Waiver versus Forfeiture.

A party's failure to raise defenses, motions, or objections before pleas or before adjournment forfeits these claims "absent an affirmative waiver." Rule for Courts-Martial 905(e)(1)–(2). Whereas "a forfeiture is basically an oversight[,] a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Rich*, 79 M.J. 492 (C.A.A.F. 2020). In making waiver determinations, a court looks to the record to see if the statements signify that there was a purposeful decision at play. *United States v. Gutierrez*, 64 M.J. 374, 377–78 (C.A.A.F. 2007).

Waiver extinguishes an issue, and as a result, that issue cannot be reviewed on appeal. *United States v. Harborth*, 85 M.J. 469, 475 (C.A.A.F. 2025) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). "Waiver can occur either by a party's intentional relinquishment or abandonment of a known right or by operation of law." *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) (citing *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)).

There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege. *United States v. Smith*, 85 M.J. 283, 287 (C.A.A.F. 2024) (quotation omitted). No magic words are required to establish a waiver. *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014) (quotation omitted). Instead, the determination of whether there has been an intelligent waiver must depend, in each case, upon the particular facts and circumstances surrounding that case. *Id.* (quotation omitted).

B. Effect of a Guilty Plea.

Generally, an unconditional guilty plea operates to waive all defects which are neither jurisdictional nor a deprivation of due process of law, including multiplicity, except when multiplicity involves specifications that are facially duplicative. *United States v. Hardy*, 77 M.J. 438 (C.A.A.F. 2018); *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997) (quoting *United States v. Broce*, 488 U.S. 563, 575 (1989)); *see also United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Even if specifications are facially duplicative, "[e]xpress waiver or voluntary consent . . . will foreclose" this multiplicity inquiry. *Lloyd*, 46 M.J. at 23.

C. Express Waiver of Multiplicity.

An accused may knowingly and voluntarily waive many of the most

fundamental protections the Constitution affords, including a double jeopardy objection based on multiplicity. *Gladue*, 67 M.J. at 314 (quotation omitted). The accused need not personally waive such a claim; counsel may waive a multiplicity claim on a client's behalf. *Malone*, No. 25-0140/AR, slip op at 10.

An "express" waiver (i) occurs when there is the intentional relinquishment or abandonment of a known right and (ii) is accomplished via affirmative action by the accused or the accused's counsel. *Malone*, No. 25-0140/AR, slip op at 7; *see, e.g.*, *United States v. Swift*, 76 M.J. 210, 217 (C.A.A.F. 2017) ("no objection" to a proposed course of legal action); *United States v. Ahern*, 76 M.J. 194, 198 (C.A.A.F. 2017) (same); *Gladue*, 67 M.J. at 314 (including a waive all waivable motions provision in the plea agreement); *United States v. Davis*, 79 M.J. 329, 330–32 (C.A.A.F. 2020) ("[n]o changes" to a military judge's instructions).

Discussion

The record clearly establishes express waiver. As in *Malone*, the potential merits of a multiplicity claim were obvious on the face of the charge sheet, in the stipulation of fact, and during the providence inquiry. *Malone*, slip. op. at 3, 11. The savings clause in Appellee's plea agreement demonstrates knowledge of the right to raise multiplicity given the uncontroverted presumption of competent counsel. It permitted specifications to be consolidated or dismissed for any reason. (JA 88).

The savings clause also demonstrates Appellee's ultimate desire to preserve the plea agreement. With the advice of competent counsel, he agreed to plead guilty unconditionally and took steps to mitigate multiplicity-related risks: he negotiated to be separately but concurrently punished for each violent act he committed and participated in redrafting these same specifications. (JA 27, 38–39, 90). These affirmative actions accomplished Appellee's intentional relinquishment or abandonment of multiplicity.

Further, after the military judge advised Appellee that all motions to dismiss should be made before entry of pleas and that his counsel would speak for him, his counsel did not raise multiplicity. (JA 32–33). And after Appellee told the military judge that the time between grabbing and dragging his wife was short and they were separate violent acts, his counsel declined additional inquiry and did not move to consolidate Specifications 2 and 4 of Charge II. (JA 46–49).

A competent counsel who has knowledge of multiplicity, advises his client to redraft purportedly mulitiplicious specifications and to agree to a savings clause as well as concurrent sentencing, but chooses to remain silent instead of exercising that right either invites error or strategically relinquishes or abandons the right on behalf of his client. Absent evidence of bad faith, only the latter scenario is reasonable. Trial defense counsel's silence was not a mere oversight, but rather a deliberate decision not to present a ground for relief that was available to his client

by the terms of the very same plea agreement. *See Rich*, 79 M.J. 492; *Gutierrez*, 64 M.J. at 377–78. Thus, the Army court erred in finding mere forfeiture.

II. WHETHER THE ARMY COURT ERRED IN FINDING APPELLEE'S CONVICTIONS UNDER ARTICLE 128b(1), UCMJ, MULTIPLICIOUS WHEN THE UNDERLYING "VIOLENT OFFENSES" WERE ASSAULTS CONSUMMATED BY BATTERY.

Summary of Argument

The Army court erred. Under *Blockburger v. United States*, 284 U.S. 299 (1932), Appellee's separate convictions for grabbing and dragging his wife are not multiplicious because they were separate acts. If *Blockburger* does not apply and instead only *United States v. Forrester*, 76 M.J. 479 (C.A.A.F. 2017) applies, this Court should determine the unit of prosecution for Article 128b(1), UCMJ is each "violent offense" and that Appellee committed two separate offenses.

Additional Facts

During the providence inquiry, the military judge explained to Appellee that the domestic violence statute under Article 128b enhanced the underlying offense of assault consummated by a battery in Specifications 2 and 4 of Charge II. (JA 36). Appellee confirmed he understood he would be admitting to the elements of the underlying offense which were enhanced because he committed them against his wife. (JA 35–36).

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

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* Rule for Courts-Martial (R.C.M.) 907(b)(3)(B) ("A charge is multiplicious if the proof of such charge also proves every element of another charge."); *United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993) (adopting the elements test in the context of lesser included offenses (LIO)).

In *Blockburger v. United States*, the Supreme Court discussed three related concepts: (i) continuing offenses, (ii) discrete act offenses, and (iii) continuous course of conduct offenses. 284 U.S. at 299, 301–03 (citing *In re Snow*, 120 U.S. 274 (1887); *Ebeling v. Morgan*, 237 U.S. 625 (1915)). If it is a "distinct or discrete-act offense, separate convictions are allowed in accordance with the number of discrete acts." *United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996); *see Blockburger*, 284 U.S. at 302 (holding two sales of morphine in violation of § 1 of the Narcotics Act (i.e., violations of the same statute) separate and distinct offenses).

Multiplicity is distinct from claims of unreasonable multiplication of charges (UMC). *See generally 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 UMC).

Discussion

Appellee was convicted of two specifications of Article 128b(1) whose underlying offense is Article 128(a) assault consummated by battery. At issue is whether the prohibition is on Appellee's different acts or his course of conduct.[6]

A. This Court should clarify whether and how *Blockburger* and *Forrester* apply.

In rendering its decision, the Army court applied its precedent in *United States v. Malone*, 85 M.J. 573 (A. Ct. Crim. App. 2025), *rev'd on other grounds*, *Malone*, No. 25-0140/AR. There, the Army court wrote about two "species" of multiplicity: one which applies the elements test set forth in *Blockburger* and the other for "when charges for multiple violations of the same statute are predicated on arguably the same criminal conduct." *Id.* at 582 (quoting *Forrester*, 76 M.J. at 485).

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

The Army court's *Malone* dicta appeared to treat *Forrester* and *Blockburger* as mutually exclusive tests. The Army court is also the first service court of criminal appeals to apply this Court's reasoning in *Forrester* to multiplicity (i) outside the *Blockburger* framework and (ii) to a statute other than Article 134 possession of child pornography.[7] Thus, as a threshold matter, this Court should clarify that either (i) *Forrester* applies to multiplicity generally and is part of the *Blockburger* framework or (ii) *Forrester* is limited to UMC and the statute in that case.

The government's position is that *Forrester* was not intended to be a test entirely separate from *Blockburger*. While *Forrester* does not cite to *Blockburger*, both cases consider Congressional intent when determining a continuous offense.[8]

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[7] Two months before *Forrester*, the Air Force applied *Blockburger* in an unpublished decision involving two violations of the same statute. *See United States v. Douglas*, No. 38935, 2017 CCA LEXIS 407 (A.F. Ct. Crim. App. Jun. 15, 2017) (mem. op.) The court determined an appellant's two specifications for aggravated assault with a weapon were not facially duplicative because they dealt with "factually different acts." *Id.* at *12–14 (citing *Lloyd*, 46 M.J. at 20; *Pauling*, 60 M.J. at 94; *Hudson*, 59 M.J. at 359; *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), *overruled on other grounds*; and *Blockburger*, 284 U.S. at 304; *see also United States v. Casillas*, No. 40551, 2025 CCA LEXIS 445 (A.F. Ct. Crim. App. Sep. 18, 2025), *cert. filed*. (applying *Blockburger*, *Forrester*, and *Coleman* to Article 134 possession of child pornography); *United States v. Coley*, No. 40675, 2026 CCA LEXIS 69 (A.F. Ct. Crim. App. Feb. 12, 2026) (same).

[8] The Court noted as an example that the offense of cohabiting with more than one woman was "inherently, a continuous offense." 284 U.S. at 302 (quoting *In re Snow*, 120 U.S. 274 (1887)). "A distinction is laid down in adjudged cases and in textwriters between an offence continuous in its character . . . and a case where the statute is aimed at an offence that can be committed *uno ictu* [with one blow]." *Id.*

Compare Blockburger, 284 U.S. at 302 *and Forrester*, 76 M.J. at n.5 (citing *Quiroz*, 55 M.J. at 338). Then, in a footnote, this Court distinguished between multiplicity based on multiple violations of the same statute from a single act improperly transformed into three separate crimes. *Forrester*, 76 M.J. at n.6 (citing *United States v. Campbell*, 71 M.J. 19, 20–21 (C.A.A.F. 2012)). While this Court stated that the question in *Forrester* was best answered as multiplicity and that multiplicity was necessary to resolve the second *Quiroz* factor, the Court also noted the issue was waived. *Id.* at n.5. Thus, *Forrester* appears to build on the *Blockburger* framework.

And so, assuming *Blockburger* always applies to multiplicity—irrespective of whether the acts in question violate the same or different statutes—the Army court erred. The language of the specifications demonstrate that Specification 2 of Charge II is factually distinct from Specification 4 of Charge II. Both specifications at issue assert the same date, victim, and location: on or about 24 July 2022 against his wife at El Paso, Texas. (JA 18). While the specifications do not reference the punitive subsections, both are violations of Article 128b(1), UCMJ incorporating Article 128(a), UCMJ. But the actus reus for Specification 2 is "unlawfully grab on the arms with his hand," while for Specification 4 it is "unlawfully drag with his hands." (JA 27–28). Thus, each specification as written

requires different factual components and is not facially duplicative. *See Coleman,* 79 M.J. at 103; *Heryford*, 52 M.J. 265.

Likewise, Appellee's statements during the providence inquiry prove each specification addresses factually different acts. (JA 48). Specification 2 of Charge II occurred when his wife first left their home to try to get away from him but fell to the ground and he grabbed her arms. (JA 41–42, 45, 77–78). Specification 4 of Charge II occurred after they momentarily separated and then he again grabbed her, but this time dragged her in front of the neighbor's house towards his vehicle. (JA 42). Appellee was convicted for two violations of Article 128b(1), UCMJ that were not predicated on "arguably the same criminal conduct." Thus, the inquiry ends and the Court should find the specifications are not facially duplicative.

B. This Court should determine the unit of prosecution for UCMJ article 128b(1) as each "violent offense."

Should this Court determine *Forrester* is wholly separate from *Blockburger* or that the Appellee's grab and drag convictions were predicated on "arguably the same criminal conduct," the question remains whether Article 128b(1), UCMJ is a discrete act offense or continuous course of conduct offense.

If a "violent offense" under the circumstances 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. But here, by applying its decision in *Malone*, the Army court found Article 128b(1) "subsumed" the elements of the

underlying offense and thus, shared the same unit of prosecution. (JA 16) (citing 85 M.J. at 582–84). And as such, the Army court considered the unit of prosecution in this case was Article 128's "continuous course of conduct."

The Army court relied on analogous case law in determining that military courts have consistently held Congress intended Article 128, UCMJ assault to be a continuous course-of-conduct-type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty. In discussing the unit of prosecution, the Army court (i) relied on cases that did not address facially duplicative specifications, (ii) cited to *United States v. Flynn,* 28 M.J. 218, 221 (C.M.A. 1989) and *United States v. Morris,* 18 M.J. 450 (C.M.A. 1984), and *United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981), and (iii) relied on *Flynn* to argue Article 128 assaults may be distinguished by specific intent.[9] 85 M.J. at 583–

[9] In so doing, the Army court produced an anomalous result where an appellee may be separately punished for breaking a phone during an argument, but not for breaking the victim's clavicle. *See Malone,* 85 M.J. at 584. Here, the Army court found that Specification 3 of Charge II was not multiplicious with Specifications 2 and 4 of Charge II but did not further explain its reasoning. Nevertheless, the Army court was correct in result here because Article 128b(1) and Article 128b(2)(B), UCMJ are distinct statutory provisions and separate 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); *see also Blockburger*, 284 U.S. at 303–04 ("Section 1 of the Narcotics Act . . . and § 2 . . . create two distinct offenses"). Differing intent elements, punishments, and victims can also indicate Congress intended to create different offenses. *See, e.g.*, *Pauling*, 60 M.J. at 94 (citations omitted) (agreeing with state courts that have recognized forgery of an indorsement as not only factually distinct, but also legally distinct

84. Not only are *Flynn* and *Morris* UMC cases, but *Flynn* did not address Article 128 assault. Similarly, while *Rushing* found a "single offense," it relied on cases involving assault and battery as LIOs of the offense of striking a superior noncommissioned officer and a drug offense, not domestic violence. Thus, this Court should clarify the unit of prosecution of Article 128b(1), UCMJ.

1. The plain language of the statute suggests the "violent offense" provision is a distinct or discrete-act offense.

Congress established Article 128b, UCMJ as a new punitive article criminalizing domestic violence. *See MCM*, App'x 17 ¶¶ 77d, 78a (2022 Amendment). Before Article 128b's enactment, domestic violence offenses prosecuted under Article 128, UCMJ, were merely "distinguishable from other types of Article 128 assaults by the greater severity of its punishment." Congressional Research Service (CRS) Report No. R46097, p. 38 (Dec. 4, 2019); *see MCM*, App'x 17 ¶ 77d (2018 Amendment) (adding a new maximum punishment for assaulting a spouse, intimate partner, or immediate family member). Now, the elements of Article 128b(1) are: (1) Appellee commits a

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from forgery of the check itself in part because they create two victims); *Barrett v. United States*, 146 S. Ct. 482, 223 L. Ed. 2d 398, 417 (2026) ("If offenses that share elements—as they must to satisfy *Blockburger*—have penalties that operate on their own *rather than by reference to each other* . . . that suggests Congress intended to place in front of a prosecutors a menu, not a buffet." (emphasis added)).

violent offense (2) against a spouse, an intimate partner, or an immediate family member of Appellee.

Article 128b's statutory text demonstrates Congress intended to permit discrete act charging distinct from that of the underlying offense. Whereas assault under Article 128, UCMJ, focuses on "bodily harm," Article 128b, UCMJ focuses on "a violent offense." *Compare* UCMJ art. 128(a), *with* UCMJ art. 128b(1). As the phrase "violent offense" is preceded by an "a," Congress communicated an intent to punish a more discrete unit of prosecution than a regular assault. *See Forrester*, 76 M.J. at 487 (citations omitted) (noting Federal courts have interpreted "any . . . matter that contains" to permit separate counts); *Neblock*, 45 M.J. at 197 (holding "any mail bag" permits separate counts).

2. If the statute is ambiguous, the unit of prosecution for Article 128b(1), UCMJ should be the same as the underlying "violent offense."

If this Court considers the statute unclear or ambiguous, such ambiguity should be resolved in favor of lenity. *See United States v. Szentmiklosi*, 55 M.J. 487, 491 (C.A.A.F. 2001) (citing *United States v. Bell*, 349 U.S. 81 (1955)).

On the one hand, Congress contemplated the need for adequate deterrence of abusive behavior in the domestic violence context "characterized by recidivism and escalation, meaning offenders are likely to be repeat abusers, and the intensity of the abuse or violence is likely to grow over time." CRS Report No. R46097 (Dec. 4, 2019). Thus, interpreting the statute as requiring the unit of prosecution be

the same as the underlying "violent offense," would hamstring the government's ability to charge domestic violence offenses without meaningful consideration of escalation of force and episodic violence.

But on the other hand, Congress intentionally omitted separate definitions for "violent offense." Early in its proposal, the House "recede[d] with an amendment removing the proposed definitions of immediate family, intimate partner, protection order, strangling, suffocating, and violent offense so that these elements could be defined through changes to the [MCM]." 164 Cong. Rec. H. No. 6653, 6921 (Jul 23, 2018) (Conf. Rep.) (emphasis added). Otherwise, the congressional debate on this provision did not shed light on whether Congress intended to limit the unit of prosecution to the underlying offense.[10] And, effective

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[10] Debate surrounding Article 128b, UCMJ's passage included (i) compliance with notification requirements to the Federal Bureau of Investigation (FBI) background check system and (ii) inclusion of strangulation and suffocation—as indicators of future lethal violence—in conduct "constituting aggravated assault." *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); H. Rep. No. 116-442 (Jul 19, 2020) (discussing strangulation); 164 Cong. Rec. H. No. 7202 (Jul 25, 2018) (Conf. Rep.) (providing effective date).
11 164 Cong. Rec. S3005 (Jun 6, 2018) (Statement of Sen. Jack Reed) (noting programs on military installations); 164 Cong. Rec. S3005 (Jun 6, 2018) (Statement of Sen. Dick Durbin) (referencing Sutherland Springs); H. Rep. 116-442 (Jul 19, 2020) (noting concerns that the military health system does not have the capability to diagnose strangulation injuries in its emergency rooms). Its

January 26, 2022, Executive Order 14062 defined "violent offense" as a violation of specifically enumerated articles of the UCMJ and "any other offense that has as an element that includes the use, attempted use, or threatened use of physical force against the person or property of another." *MCM*, pt. IVc(1). This history weighs in favor of the interpretation that when an accused is charged with multiple violations of Article 128b(1), UCMJ, the unit of prosecution is the same as the underlying "violent offense" —in this case, Article 128. Thus, legislative history is unclear.

C. Appellee committed two separate offenses.

Even if the unit of prosecution for Article 128b(1), UCMJ in this case is the same Article 128(a), UCMJ assault consummated by battery, Appellee's unlawful grab and subsequent unlawful drag were not part of a continuous course of conduct. In domestic violence cases, it is critical to consider that arguments can pause, re-ignite, or escalate within seconds or over a period of hours. Given the potential for episodic violence, a factor in the inquiry should account for evidence of escalation relevant to whether the multiple assaults were united in "time, circumstance, and impulse." *Rushing*, 11 M.J. at 98.

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proposal was considered alongside other gun violence prevention measures in the wake of the Sutherland Springs shooting in November 2017 and efforts to provide multidisciplinary support to vulnerable victims (e.g., child victims, domestic violence victims, and sexual assault victims) on military installations.

Here, the record demonstrates Appellee committed two distinct, escalating offenses: (1) Appellee grabbing his wife's arm; and (2) Appellee dragging her across their neighbor's house towards his car. The progression of his actions (i.e., grab and drag) and harms (i.e., abrasions to her legs, hands, torso, upper arms, and forearm) demonstrate escalation of force.

While the stipulation of fact and Appellee's statements to the military judge show that Appellee's actions were separated by only a short time (JA 45–46, 78), Appellee told the military judge that between his violent acts, he could have walked away.[11] (JA 47). Yet, the Army court found these two separate violent offenses were part of a continuous course of conduct because they occurred within a short time, were instigated by the same argument, and were not interrupted by a break in time. (JA 16). The Army court erred.

[11] *See United States v. Reed*, No. 20240321, 2025 CCA LEXS 556, at *9–13 (A. Ct. Crim. App. Dec. 3, 2025) (Morris, J., dissenting) (distinguishing the majority's opinion versus those in *Malone*, *Askins*, 2025 CCA LEXIS 420, *cert. filed*, *Cavillomagana*, 2025 CCA LEXIS 115, *rev'd on other grounds*, and this instant case) ("[I]n most assault-style offenses, the attacker almost always has the option to stop assaulting the victim and walk away. . . . I would invite [the majority] to define what makes an interruption legally significant. Short of doing so, this court will have created a new, ambiguous legal standard[.]").

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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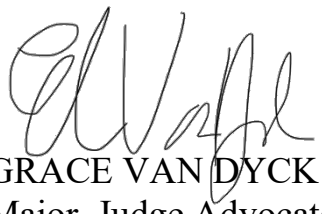

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 5,928 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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March 23, 2026