IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellant / Cross-Appellee v. Private First Class (E-3) **PATRICK A. FORD** United States Army Appellee / Cross-Appellant	RESPONSE BRIEF ON BEHALF OF APPELLEE / CROSS-APPELLANT Crim. App. Dkt. No. 20230263 USCA Dkt. No. 25-0143/AR No. 25-0171/AR

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

Specified Issues

I. WHETHER THE ARMY COURT ERRED IN FINDING [CROSS-]APPELLANT 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 [CROSS-]APPELLANT'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 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867 (a)(2) (2018).

Statement of the Case

On May 23, 2023, a military judge sitting as a general court-martial convicted Appellee/Cross-Appellant, Private First Class (PFC) Patrick A. Ford, in accordance with 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, Uniform Code of Military Justice [UCMJ]. (JA 70). That same day, the military judge sentenced PFC Ford to reduction to the grade of E-1, confinement for sixteen months, and a bad-conduct discharge.[1] (JA 74). The miliary judge credited PFC Ford with 195 days of pretrial confinement credit and

[1] The military judge sentenced PFC Ford as follows:

Charge II, Specification 2	12 months
Charge II, Specification 3	14 months
Charge II, Specification 4	16 months
Charge III, The Specification	3 months
Charge IV, The Specification	No confinement
Charge V, Specification 1	3 months
Charge V, Specification 2	3 months
Charge V, Specification 3	3 months
Charge VI, The Specification	15 months

The military judge ordered all sentences to confinement to run concurrently. (JA 74).

29 days of judicially ordered credit, totaling 224 days. (JA 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).

Statement of Relevant Facts

PFC Ford's convictions for the domestic violence offenses stem from an argument he had with GB, his then-wife, on July 24, 2022 at their residence in El Paso, Texas. (JA 41, 76). As the argument began, PFC Ford grabbed GB's cellphone and smashed it on the ground with the intent to intimidate her. (Specification 3 of Charge II) (JA 42–45; 76).

GB fell to the ground as she walked outside of the residence to get away from PFC Ford. (JA 77). He then grabbed her arm with his hand. (Specification 2 of Charge II) (JA 45). PFC Ford let go of GB's arm. (JA 46). Almost immediately thereafter, GB fell to the ground. (JA 45–46). He then grabbed her arm and drug her along the ground. (Specification 4 of Charge II) (JA 45–46).

When asked by the military judge how much time separated each act, PFC Ford replied it was "a short time." (JA 46).

Prior to accepting PFC Ford's plea, the military judge asked defense counsel whether PFC Ford had any motions, advising that motions should be made at that time. (JA 32). The defense counsel responded:

> DC: PFC Patrick Ford requests for—motion for *Allen* credit of a total of 224 days, Your Honor. 195 days would

> be for the Otero Prison—County Prison. And then an additional 29 days in El Paso County, the local facility.
>
> MJ: Thank you. And we'll address that a little more—a little more fully before pre-sentencing proceedings, if we get there today. So, please go ahead and enter your plea.
>
> DC: Yes, Sir.

(JA 32–33). Trial defense counsel then entered pleas on behalf of PFC Ford. (JA 33).

During the colloquy concerning PFC Ford's plea agreement, prior to entry of findings, the military judge discussed the agreement's lack of a waiver provision:

> MJ: Now, I note that there are no other waivers of motions in this case. Is that correct?
>
> TC: Yes, Your Honor.
>
> DC: Yes, Your Honor.
>
> MJ: Is it—Even though there's no provision specifically for waiver of motions, do you understand that most motions are waived by virtue of pleading guilty? Do you understand that that is a waiver of most motions?
>
> ACC: Yes, sir.
>
> MJ: Just if there was no plea agreement and you just entered a guilty plea that would waive most of the motions that could possibly be brought. Do you understand that?
>
> ACC: Yes, sir.
>
> MJ: 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. Do you understand?
>
> ACC: Yes, sir.

(JA 61–61).

The military judge subsequently accepted PFC Ford's plea agreement and entered findings in accordance with the agreement's terms. (JA 67).

In a written opinion, the Army Court found Specifications 2 and 4 of Charge II were multiplicious. Citing its recent opinion in *Malone*, the Army Court reasoned these specifications "arose from an uninterrupted attack orchestrated by [PFC Ford]." (JA 16); *United States v. Malone*, 85 M.J. 573 (A. Ct. Crim. App. 2025), rev'd, __ M.J. __, 2026 CAAF LEXIS 62 (C.A.A.F. 2026). Additionally, the Army Court found that PFC Ford forfeited rather than waived his multiplicity claim:

> In the absence of a "waive all waivable motions" clause in a plea agreement, it takes more than defense counsel simply stating "no motions" to affirmatively waive a challenge for multiplicity. [citing *Malone*, 85 M.J. at 580–81.] It follows, then, that affirmative waiver of a challenge for multiplicity takes more than what happened in this case, which was counsel identifying one motion and then entering pleas at the direction of the military judge, forfeiting additional motions.

(JA 15).

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

Standard of Review

"'This Court reviews de novo whether an accused has waived an issue.'" *Malone,* 2026 CAAF LEXIS 62, at *7 (C.A.A.F. 2026) (quoting *United States v. Harborth*, 85 M.J. 469, 475 (C.A.A.F. 2025)).

Law & Argument

With the benefit of hindsight and this Court's decision in *Malone*, the Army Court erred in finding PFC Ford did not affirmatively waive multiplicity.

A. PFC Ford waived any multiplicity objection during the providence inquiry under the law as it was then understood.

The Army Court predicated its forfeiture finding on an early exchange in PFC Ford's providence inquiry, where "counsel identif[ied] one motion and then enter[ed] pleas at the direction of the military judge[.]" (JA 15). In reliance on its understanding of the Army Court's *Malone* opinion, and without the benefit of this Court's subsequent clarification, the Army Court concluded that PFC Ford had forfeited, rather than waived, additional motions. (JA 15).

But even if that initial exchange was debatable at the time, the record ultimately reflects an unequivocal, on-the-record relinquishment. When the military judge later explained that "[the motion for pretrial confinement credit is]

the only [motion] that this Court is going to consider or that an appellate court might consider[,]" and PFC Ford confirmed his understanding, he knowingly relinquished any remaining objections - including any claim that the specifications were multiplicious. (JA 61). That later exchange does not appear to have been addressed by the parties below or the Army Court. It nevertheless reflects a clear, on-the-record waiver under this Court's precedent.

B. The unsettled state of the law limits the consequences of PFC Ford's waiver and forecloses any ineffective assistance claim.

1. The law governing the unit of prosecution under Article 128b was unsettled at the time of PFC Ford's plea and trial.

At the time of PFC Ford's plea negotiations and court-martial, the law governing the unit of prosecution under Article 128b was unsettled and underdeveloped. Neither this Court nor the service courts had articulated a binding rule as to whether discrete acts of assault could be charged as separate domestic violence offenses under Article 128b(1), or whether such conduct instead constituted a single course of criminal behavior. In the absence of controlling precedent, counsel were required to navigate an open question of statutory interpretation with no definitive guidance.

The only contemporaneous treatment of the issue came in an unpublished, fact-specific decision of the Army Court. *See United States v. Goundry,* 2023 CCA LEXIS 204 (A. Ct. Crim. App., Apr. 6, 2023) (summ. disp.), pet. denied, 83

M.J. 396 (C.A.A.F. 2023). In *Goundry*, the Army Court merged two specifications of domestic violence under Article 128b(1) after the government conceded that the charged conduct—two assaultive acts occurring contemporaneously and without interruption—constituted a single course of conduct. *Id.* That decision, however, did not establish a governing rule. It was unpublished, turned on a concession by the government, and did not purport to resolve the broader question of the appropriate unit of prosecution under Article 128b.

Thus, at the time of PFC Ford's plea agreement on March 27, 2023, and court-martial on May 10, 2023, there was no settled legal framework governing multiplicity in the context of Article 128b offenses. Reasonable practitioners could look to competing analogies—either to Article 128, which has long been understood to focus on courses of conduct in certain contexts, or to other offense structures that permit charging discrete acts separately—without any authoritative resolution of the question. For example, reasonable practitioners could also look to this Court's precedents in the context of specialized offenses under Article 120, UCMJ. That uncertainty is central to both the scope of PCF Ford's waiver and the evaluation of counsel's performance.

2. In that unsettled environment, counsel's decision to forgo a multiplicity challenge—while securing a plea agreement that preserved the issue—was objectively reasonable.

In an uncertain legal environment, counsel's strategic decisions must be evaluated with appropriate deference. Defense counsel here did not ignore a clearly established right or fail to raise a settled claim. Rather, counsel confronted an open question regarding the unit of prosecution under Article 128b and negotiated a plea agreement that accounted for that uncertainty.

The plea agreement's savings clause is particularly significant. (JA 88). That provision expressly contemplated the possibility that one or more specifications might later be "amended, consolidated, or dismissed" without disturbing the agreement. (JA 88). In a legal landscape where the multiplicity question had not yet been resolved, such a clause reflects prudence, not oversight. It ensured that PFC Ford would retain the benefit of his bargain even if subsequent litigation—at trial or on appeal—resulted in the consolidation or dismissal of specifications. Far from demonstrating deficient performance, the inclusion of this clause indicates that counsel recognized the unsettled nature of the law and structured the agreement to accommodate potential developments.

Under these circumstances, counsel's decision not to litigate multiplicity at trial was well within the range of reasonable professional judgment. Counsel are not required to anticipate how an appellate court will ultimately resolve an open

question of statutory interpretation. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) (requiring courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). Where, as here, the governing law was unsettled, reasonable counsel could elect to secure the substantial benefits of a plea agreement rather than pursue a motion whose legal foundation remained uncertain.

Nor does the reasoning in *Malone* compel a different conclusion. There, the Court emphasized that competent counsel would recognize and pursue a multiplicity claim where the issue was "obvious on the face of the charge sheet, in the stipulation of fact, and during the providence inquiry." *Malone,* __M.J.__, 2026 CAAF LEXIS 62, at *13. But *Malone* did not resolve the underlying unit-of-prosecution question, nor did it suggest that counsel are ineffective for declining to litigate an unsettled legal issue in the course of plea negotiations. To the contrary, the Court reaffirmed the strong presumption of competence and evaluated counsel's performance in light of the particular facts and circumstances of that case.

Indeed, the dissent in *Malone* underscores the danger of conflating forfeiture, waiver, and ineffective assistance in this context. As Judge Hardy observed, competent counsel may make strategic decisions that do not rise to the level of constitutional deficiency, and the absence of an ineffective assistance

claim should not be used to retroactively characterize every un-litigated issue as an intentional waiver. *Malone,* __M.J.__, 2026 CAAF LEXIS 62, at *20–24 (Hardy, J., dissenting). That observation is especially apt here, where counsel's actions reflect a reasonable effort to navigate an unsettled area of law rather than a failure to recognize a clearly established right.

Nor does *Malone* require the conclusion that the absence of an ineffective assistance claim establishes an intentional waiver. The doctrines serve distinct purposes. Waiver turns on whether the accused intentionally relinquished a known right, whereas ineffective assistance concerns whether counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688–89. Although *Malone* considered the absence of an ineffective assistance claim as part of its analysis, it did not hold that competent representation alone establishes a knowing and intentional waiver of an unsettled legal claim. That distinction is particularly important here, where the governing law was unsettled and the existence of a "known right" was itself uncertain.

Accordingly, even if this Court were to conclude that PFC Ford waived a multiplicity objection at trial, that waiver does not imply deficient performance. The unsettled state of the law, combined with counsel's deliberate use of a plea agreement that preserved flexibility in the event of later consolidation or dismissal,

confirms that counsel acted within the wide range of professionally competent - and strategically prudent - assistance.

II. WHETHER THE ARMY COURT ERRED IN FINDING [CROSS-]APPELLANT'S CONVICTIONS UNDER ARTICLE 128B(1), UCMJ, MULTIPLICIOUS WHEN THE UNDERLYING "VIOLENT OFFENSES" WERE ASSAULTS CONSUMMATED BY BATTERY.

Standard of Review

Issues of multiplicity are reviewed de novo. *United States v. Forrester*, 76 M.J. 479, 484 (C.A.A.F. 2017) (citing *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010)).

This court reviews "questions of statutory interpretation de novo." *United States v. Mendoza,* 85 M.J. 213, 218 (C.A.A.F. 2024) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).

Law

Rooted in the Constitutional protections against double jeopardy, the doctrine of multiplicity "prohibits multiple punishments 'for the same offen[s]e.'" *Forrester,* 76 M.J. at 484–85 (quoting U.S. CONST. amend. V); *see also* Rule for Courts-Martial 907(b)(3)(B) ("A charge is multiplicious if the proof of such charge also proves every element of another charge.").

To determine whether multiple acts are multiplicious, the Court must determine whether those acts fall within a single unit of prosecution. *Forrester*, 76

M.J. at 394. This is not "a literal application of the elements test," but rather, a "realistic comparison of the . . . offenses to determine whether one is rationally derivative of the other." *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004).

If it appears "'charges for multiple violations *of the same statute* are predicated on arguably the same criminal conduct," this Court must determine the "'allowable unit of prosecution,'…which is the *actus reus* of the defendant." *Forrester,* 76 M.J. at 485 (quoting *United States v. Woerner*, 709 F.3d 527, 539 (5th Cir. 2013) (emphasis in original); *United States v. Planck,* 493 F.3d 503, 503 (5th Cir. 2007)); s*ee also Bell v. United States,* 349 U.S. 81, 83 (1955).

Argument

The Army Court did not err in finding PFC Ford's convictions under Article 128b(1), UCMJ were multiplicious.

A. Article 128b is best interpreted to employ a course-of-conduct unit of prosecution analogous to Article 128.

1. Article 128 reflects a course-of-conduct model that treats continuous assaults as a single offense.

Article 128 has long been understood to employ a course-of-conduct unit of prosecution for assaultive offenses. Military courts have repeatedly held that physical assaults "united in time, circumstance, and impulse in regard to a single person" constitute a single offense rather than multiple crimes. *See, e.g.*, *United*

States v. Rushing, 11 M.J. 95, 98 (C.M.A. 1981); *United States v. Clarke*, 74 M.J. 627, 629 (A. Ct. Crim. App. 2015).

Building on that principle, this Court has recognized that Congress intended assault under Article 128 to operate as a continuous course-of-conduct offense, such that "each blow in a single altercation should not be the basis of a separate finding of guilty." *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989).

The Army Court has applied this understanding in the unit-of-prosecution context, holding that an "an uninterrupted attack comprising touchings 'united in time, circumstance, and impulse'" constitutes a single offense. *Clarke*, 74 M.J. at 628–29 (quoting *Rushing*, 11 M.J. at 98). Under that approach, the relevant unit of prosecution is "the number of overall beatings the victim endured rather than the number of individual blows suffered." *Id.* at 628.

This line of cases reflects a consistent understanding: where assaultive conduct forms a single, continuous episode, it constitutes one punishable offense—not a series of separately chargeable acts.

2. Other "specialized assault" offenses employ a discrete-act model—but only where Congress has clearly signaled that approach.

By contrast, certain "specialized" assault offenses—such as those codified in Article 120—permit charging discrete acts separately.[2] But those offenses are structured differently and reflect clear congressional intent to criminalize specific acts rather than continuous conduct. *See Clarke*, 74 M.J. at 628 (distinguishing Article 120 offenses from Article 128).

The distinction is critical: where Congress intends to authorize separate punishments for individual acts within a broader course of conduct, it does so explicitly. *See Bell*, 349 U.S. at 83 ("When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit."). Absent such direction, courts have treated assaultive behavior as a continuous offense.

3. Article 128b is best understood to follow the Article 128 model.

This Court should now clarify that Article 128b, like Article 128, criminalizes courses of conduct—beatings, not individual blows. Properly understood, the gravamen of the offense is the accused's course of abusive

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[2] *See, e.g., United States v. Neblock,* 45 M.J. 191, 198-99 (C.A.A.F. 1996) (holding that "committing 'indecent acts or taking liberties with a child' is not a continuous-conduct crime as a matter of military substantive law.).

conduct, not the number of discrete contacts that may be parsed from a single, continuous episode. Interpreting the statute to permit separate punishments for each individual strike improperly fragments a single criminal episode into multiple offenses contrary to both the structure of Article 128b and settled principles governing the unit of prosecution for assault-based crimes.

a. Congress legislated against a settled backdrop of Article 128 jurisprudence.

Congress enacted Article 128b against a well-established backdrop: military courts have long treated assault under Article 128 as a course-of-conduct offense. *See Rushing*, 11 M.J. at 98; *Flynn*, 28 M.J. at 221. Under that framework, conduct "united in time, circumstance, and impulse" constitutes a single offense, and the unit of prosecution is the overall beating – not each individual blow. *Clarke*, 74 M.J. at 628.

Congress is presumed to legislate with knowledge of that settled interpretation. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 581 (1978) ("Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Yet when it enacted Article 128b, Congress provided no indication—express or implied—that it intended to depart from the established course-of-conduct model governing assault offenses.

b. The structure and placement of Article 128b confirm that it operates as an extension of Article 128—not a departure from it.

The statutory construction reinforces that conclusion. Congress did not create domestic violence as a standalone punitive article. Instead, it placed Article 128b within the broader assault framework, signaling that domestic violence is a contextualized form of assault—not a fundamentally different offense with a distinct unit of prosecution.

Had Congress intended to authorize separate punishments for each discrete act within a continuous episode, it could have done so explicitly, as it has in other contexts. But it did not. Nor did it structure Article 128b in a manner that treats each individual act as an independently punishable unit. The absence of both an express directive and a discrete-act structure weighs heavily against interpreting Article 128b to permit the fragmentation of a single course of conduct into multiple separately punishable offenses.

This conclusion does not turn on the number of statutory subsections within Article 128b. This Court has long recognized that distinct statutory formulations of assault may nevertheless be multiplicious when they arise from the same conduct. *See United States v. Adams*, 49 M.J. 182, 186 (C.A.A.F. 1998). The relevant inquiry is not how many statutory labels may be applied to a course of conduct, but whether that conduct constitutes a single criminal episode.

c. Absent clear congressional direction, the default rule governs: one continuous assault, one offense.

Absent a "clear indication of contrary legislative intent," courts apply traditional unit-of-prosecution principles to avoid multiple punishments for the same conduct. *See United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993). Here, there is no such indication. To the contrary, both the statutory structure and the historical treatment of assault offenses point in the same direction: Article 128b should be interpreted consistently with Article 128's course-of-conduct model.

To be sure, Congress has treated domestic violence as a matter of heightened concern, including by designating Article 128b offenses as "covered offenses" subject to specialized prosecutorial authority. *See* Articles 1 and 24a, UCMJ. But that procedural distinction does not speak to the unit of prosecution. It reflects *who* prosecutes such offenses—not *how many* punishments may be imposed for a single course of conduct. Absent clear statutory direction that question remains governed by traditional multiplicity principles.

Accordingly, where multiple acts of domestic violence are "united in time, circumstance, and impulse," they constitute a single offense for purposes of multiplicity analysis. The unit of prosecution is the overall abusive episode – not the number of discrete blows.

B. The Court should apply the course-of-conduct unit of prosecution in this case notwithstanding waiver.

1. This Court may resolve unsettled legal questions at the time of review, even where the issue was not preserved.

Even where an issue has been waived or forfeited at trial, this Court retains the authority to resolve unsettled questions of law at the time of appellate review. *See Henderson v. United States*, 568 U.S. 266, 279 (2013) (explaining that "plainness" is assessed at the time of review). That principle reflects a broader appellate function: courts do not merely correct preserved errors, but also clarify the governing law for future cases. *See Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987).

Here, the unit of prosecution under Article 128b remains unresolved. As discussed above, the law at the time of PFC Ford's court-martial provided no clear answer, and this Court has not yet articulated a definitive rule. Resolving that question now would provide necessary guidance to trial practitioners and lower courts, regardless of whether appellant preserved the issue below.

Recognizing that authority does not undermine waiver doctrine. Rather, it reflects the distinction between correcting an error in an individual case and declaring the law governing future cases. This Court may do the latter—even where the former would ordinarily be foreclosed.

2. This case presents a suitable vehicle to clarify and apply the correct unit of prosecution.

This case provides a particularly suitable vehicle for resolving the unit-of-prosecution question. The relevant facts are undisputed, the charges arise under the same statutory subsection, and the alleged multiplicity turns solely on a legal determination: whether multiple acts within a single episode constitute one offense or several.[3]

Moreover, the case arrives before this Court on certification under Article 67(a)(2), UCMJ, a mechanism designed to address "important or controversial legal issue[s]" and to make the law "more certain" for the system as a whole. *United States v. Schoof*, 37 M.J. 96, 98 (C.A.A.F. 1993); *United States v. Hoff*, 27 M.J. 70, 74 (CMA 1988). The recurring nature of Article 128b prosecutions—and the absence of a settled rule—make resolution of this issue both necessary and timely.

Because the question is purely legal and does not depend on disputed facts or case-specific nuance, this Court can articulate a clear rule and apply it here without the need for further factfinding or remand.

[3] Although the "impulse" was never conclusively defined at PFC Ford's court-martial, PFC Ford described these three offenses as occurring during the same argument and within a short period of time. (JA 46). There is no evidence that he left the scene only to return newly motivated to assault his wife.

3. Applying the correct unit of prosecution here avoids multiple punishments for a single course of conduct.

Finally, applying the course-of-conduct rule in this case ensures that PFC Ford is not subjected to multiple punishments for what is, in substance, a single criminal episode. Multiplicity doctrine exists to prevent precisely that result. *See Teters*, 37 M.J. at 377.

If Article 128b is properly understood to adopt a course-of-conduct unit of prosecution, then multiple specifications based on conduct "united in time, circumstance, and impulse" cannot stand as separate convictions. To hold otherwise would permit the fragmentation of a single assaultive episode into multiple punishable offenses – a result inconsistent with both longstanding jurisprudence and the absence of any clear congressional authorization for such cumulative punishment.[4]

Accordingly, even accepting that PFC Ford waived a multiplicity objection at trial, this Court should apply the correct unit of prosecution here and recognize that his convictions must be treated as a single offense.

[4] Imposing multiple convictions for what ought to be a single conviction is, in and of itself, prejudicial. *Ball v. United States*, 470 U.S. 856, 864–65 (1985).

Conclusion

This Court should hold that PFC Ford waived a multiplicity objection at trial, but clarify that Article 128b employs a course-of-conduct unit of prosecution analogous to Article 128. Applying that rule here, the Court should conclude that PFC Ford's convictions impermissibly fragment a single course of conduct into multiple offenses. Accordingly, this Court should affirm the decision of the Army Court of Criminal Appeals merging the affected specifications and reassessing the sentence.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Cross-Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4,358 words.

2. This Brief on Behalf of Cross-Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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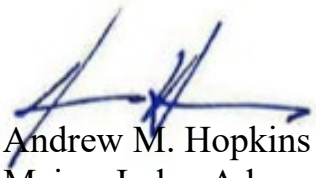
Certificate of Filing and Service

I certify that a copy of the foregoing in the case of *United States v. Patrick A. Ford*, Crim. App. Dkt. No. 20230263, USCA Dkt. No. 25-0143/AR, was electronically filed with the Court and Government Appellate Division on March 23, 2026.



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