IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Sergeant First Class (E-7) **MICHAEL S. MALONE**, United States Army, Appellee	)	Crim. App. Dkt. No. 20230151
	)	USCA Dkt. No. 25-0140/AR

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

Issues Presented

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 AND DECLINED ADDITIONAL INQUIRY INTO MATTERS RELEVANT TO THE UNIT OF PROSECUTION.

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

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 22 March 2023, a military judge sitting as a general court-martial convicted Appellee, pursuant to his pleas, of three specifications of domestic violence and two specifications of disobeying a superior commissioned officer, in violation of Articles 90 and 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 928b [UCMJ].[2] (JA 53–54, 139). The military judge sentenced Appellee to confinement for thirty months and a bad conduct discharge.[3] (JA 52, 55, 150). The military judge credited Appellee with ninety-two days of pretrial confinement credit. (JA 52). The convening authority approved the findings and sentence and waived automatic forfeitures effective upon entry of judgment. (JA 59). On 25 April 2023, the military judge entered judgment. (JA 56).

On 23 May 2024, a panel on the Army court affirmed the findings of guilty and the sentence in a memorandum opinion. (JA 36–44). On 9 October 2024, the Army court granted Appellee's Suggestion for En Banc Reconsideration. (JA 35)

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[1] 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.

[2] Every finding of guilty in the Entry of Judgment is for an offense that occurred after January 1, 2021. (JA 53-54, 56).

[3] The military judge adjudged concurrent, segmented sentences. (JA 55).

On 25 February 2025, the Army court issued an Opinion of the Court, merged the findings of guilty to Specifications 1, 3, and 4 of Charge I into a consolidated specification numbered as Specification 4 of Charge I, dismissed and set aside the original Specifications 1 and 3 of Charge I and their segmented sentence to confinement, and affirmed the sentence to a bad-conduct discharge, thirty months of confinement, and reduction to the grade of E-3. (JA 7–32).

Statement of Facts

A. Appellee's Crimes.

On the evening of 30 November 2022, Appellee and his girlfriend, GR, argued about alleged infidelity. (JA 72, 87–88, 98). At some point, GR became fearful and attempted to dial 911 without success. (JA 72–73).

The argument moved to the master bedroom. (JA 72). GR came close to Appellee's face, causing him to become angry and upset. (JA 89–90). To get her away from him, Appellee struck the right side of her face with his hand. (JA 72, 87, 89–90, 93).

The argument moved into the master bathroom. (JA 74–75, 93). Appellee lost his temper and punched her in the face again but now with both hands while also punching her in the head, right arm, right shoulder, right side abdomen, and right leg as she yelled at him to stop. (JA 73, 98–99). When asked how much time passed between his first strike to the victim's face and his punches to her body,

Appellee testified his strikes "continued." (JA 98). These strikes resulted in lacerations and bruises on her face and body. (JA 74, 76).

When "the fight" was "pretty much over," Appellee threw her to the ground by pushing her with his hands, causing her to fall backwards and break her right clavicle. (JA 73, 75,105–08). This injury would require surgery to repair. (JA 75–76, 107). When he walked away, the victim shut the bathroom door and called 911. (JA 99–100; *see also* JA 73–74).

Photos of GR's phone reflect canceled calls to 911 at 1227, 1234, and 1236 and a thirteen-minute call placed at 1236. (JA 72–73). The canceled calls at 1234 and 1236 reflect multiple "911" entries. (JA 73).

B. Plea Negotiations.

Approximately one month after preferral, Appellee submitted an offer to unconditionally plead guilty to the offenses for which he was convicted. (JA 45, 53–54; 64–69). Appellee agreed, in relevant part, to enter into a stipulation of fact, proceed to trial on the earliest available date, and plead guilty to Specification 1 of Charge I, Specification 3 of Charge I, and Specification 4 of Charge I.[4] (JA 66–67). The Convening Authority approved the request and in exchange, agreed on behalf of the United States to (i) limit the sentence to a confinement range of 20–

[4] In addition, appellee agreed to plead to two specifications of disobeying a superior officer.

28 months for Specification 1 of Charge I, 20–28 months for Specification 3 of Charge I, and 24–32 months for Specification 4 of Charge I, (ii) all to run concurrently and (iii) to withdraw and dismiss an additional domestic violence specification, one specification of assault with the infliction of substantial bodily injury, one specification of maiming, and one specification of obstruction of justice.[5] (JA 67–68).

C. Guilty Plea Proceedings.

Thereafter, the parties acted in accord with the plea agreement: the parties entered into a stipulation of fact on 10 March 2023 (JA 70); twelve days later, Appellee's arraignment and guilty plea proceedings occurred (JA 81); Appellee entered pleas of guilty, in relevant part, to Specification 1 of Charge I, Specification 3 of Charge I, and Specification 4 of Charge I (JA 83); and trial counsel moved to withdraw and dismiss the specifications agreed upon and asked the military judge to adjudge 28 months for Specification 1 of Charge I, 28 months for Specification 3 of Charge I, and 32 months for Specification 4 of Charge I all to run concurrently. (JA 138–39).

[5] At the time of the offense, the President had not enumerated the maximum punishment for Article 128b, UCMJ violations. However, the maximum punishment for these offenses was reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for twenty-three years, and a dishonorable discharge. (JA 112–13).

Prior to entry of pleas during these proceedings, the military judge advised Appellee, "[A]ny motions to dismiss or to grant other appropriate relief should be made at this time." (JA 83). In response, Appellee's counsel asserted, "Defense has no motions," and then immediately entered pleas of guilty. (JA 83).

During the providence inquiry, the military judge inquired into the timing between each specification. (JA 98, 105). Thereafter, the military judge asked if the parties desired further inquiry, but they declined. (JA 102, 110). They further agreed the maximum punishment was reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for twenty-three years, and a dishonorable discharge. (JA 112–13). Further, Appellee represented to the military judge that he was satisfied with his counsel's advice and understood the meaning and effect of the provisions of his agreement. (JA 121–22, 134). Consequently, the military judge accepted his pleas and adjudged concurrent sentences of 20 months for Specification 1 of Charge I, 26 months for Specification 3 of Charge I, and 30 months for Specification 4 of Charge I. (JA 55, 150).

Summary of Argument

Viewed in context, trial defense counsel's representations to the military judge are sufficient to demonstrate intentional relinquishment of a known right. The Constitution permits the government to punish an Appellee for each "violent offense" to which he negotiated to unconditionally plead guilty. In deciding this

case, the Court should clarify (i) the role of counsel and the military judge in finding affirmative waiver of multiplicity in guilty plea proceedings and (ii) the framework to determine facially duplicative Article 128b(1), UCMJ specifications.

Argument

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 AND DECLINED ADDITIONAL INQUIRY INTO MATTERS RELEVANT TO THE UNIT OF PROSECUTION.

Additional Facts

In the Opinion of the Court, the Army court reasoned that given the presumption against waiver of constitutional protections and the plain language of R.C.M. 905(e), there must be "some affirmative evidence in the record indicating a deliberative choice by [Appellee] prior to finding waiver of his multiplicity claim." (JA 16). Requiring proof that Appellee possessed "sufficient knowledge" to make his waiver knowing and intelligent, the Army court found that "nothing in the record reflected [Appellee] knew anything at all." (JA 14).

Standard of Review

Whether an appellee has waived an issue is a legal question that this Court reviews de novo. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). A

valid waiver leaves no error for this Court to correct on appeal. *Id.*

Law and Discussion

Waiver is the intentional relinquishment or abandonment of a known right. *Davis*, 79 M.J. at 331. 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. 472 (C.A.A.F. 2020). "[T]here are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, of critical importance is the specificity with which counsel makes the basis for his position known to the military judge." *Id.* at 475 (citations omitted). 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) (considering whether an instructions claim was waived in a contested trial).[6]

[6] *See, e.g.*, *Davis*, 79 M.J. at 331 (finding appellant affirmatively declining to object to the military judge's instructions was waiver); *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017) (finding affirmative waiver where appellant stated "No, Your Honor" when the military judge asked if he objected to the stipulation); *United States v. Swift*, 76 M.J. 210, 217–18 (C.A.A.F. 2017) (finding "no objection" constitutes an affirmative waiver of the right or admission at issue); *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009) (finding affirmative waiver where appellant stated, "No objection," to the admission of testimony); *United States v. Danylo*, 73 M.J. 183, 188 (C.A.A.F. 2014) (holding that a waive all waivable motions clause waived a claim for sentencing credit).

"Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011). An appellee may knowingly and voluntarily waive many of the most fundamental protections the Constitution affords. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009); *United States v. Cooper*, 78 M.J. 283 (C.A.A.F. 2019) (finding knowing and intelligent waiver of an appellee's right to individual military counsel).

While a plea agreement that contains a "waive all waivable motions" clause is a factor to consider that may demonstrate intentional relinquishment, its absence is not dispositive. *See United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016) ("[A] waive all waivable motions" provision or unconditional guilty plea continues to serve as a factor for a CCA to weigh[.]"); *United States v. Conley*, 78 M.J. 747, 749–50 (Army Ct. Crim. App. 2019) (finding the appellant's guilty plea waived UMC claims despite no "waive all waivable motions" clause). Instead, this Court considers the context of the entire record.

A. The Army court dismissed defense counsel's assertion as mere formality and did not give it meaning and effect.

The plain meaning of defense counsel's responses to the military judge demonstrates affirmative waiver. Namely, his assertion, "Defense has no

motions," in response to the military judge's advisal about "motions to dismiss and other motions for relief" immediately before entering unconditional pleas of guilty was an intentional relinquishment of multiplicity claims. (JA 83). Yet, the Army court characterized his counsel's response as "pro forma." (JA 14).

It is unreasonable to find counsel's response meaningless merely because he made it in response to a standard colloquy. Instead, when considering whether a right was intentionally relinquished or merely an oversight, the procedural context and history inform the colloquy's significance. Here, less than two months after the crimes and one month after preferral, Appellee negotiated to plead guilty unconditionally. Twelve days later, Appellee was arraigned and pled guilty. It was clear to all parties that Appellee intended to fulfill a material term for his bargained for exchange: to enter separate and unconditional pleas of guilty to Specifications 1, 3, and 4 of Charge I and be sentenced for each.

Viewed through the lens of an unconditional guilty plea, counsel's express declination in response to the military judge's advisal was not mere oversight. It was made in recognition that defense intended to perform their part of the bargain to plead guilty as described in the pretrial agreement, instead of risking conviction for seven felonies and two misdemeanors punishable by over sixty years in prison. This was more important to Appellee than arguing over whether the specifications of domestic violence were the same transaction.

Moreover, there was evidence Appellee knew he was giving up his right to make motions and that this was his "deliberative choice." Appellee told the military judge he understood the meaning and effect of the provisions in his plea agreement. (JA 134). That plea agreement included a savings clause: "If before or during trial, one or more specifications are amended, consolidated, or dismissed with my consent for any reason, this agreement will remain in effect." (JA 66). Specifications are consolidated after entry of pleas when they are multiplicious. For the Army court to find he did not know his rights with respect to multiplicity, means that the court found by implication that he did not understand this paragraph because his counsel failed to advise him about this right.

The Army court's decision did not meaningfully consider the role of defense counsel to advise Appellee and negotiate a deal based on Appellee's chief concern. First, Appellee has never asserted that he was not advised of this potential motion or that he would not have pled guilty if that were the case. *Cf. Lee v. United States*, 582 U.S. 357, 369 (2017) (finding ineffective assistance of counsel because there was "no question that 'deportation was the determinative issue in [the petitioner's] decision whether to accept the plea.'"). Second, Appellee has never alleged ineffective assistance of counsel. To the contrary, the record establishes he was satisfied with his counsel's advice and that satisfaction apparently continues. (JA 69, 134–35, 137).

Whether Appellee knowingly waived multiplicity and whether he received ineffective assistance of counsel are closely related issues. The savings clause demonstrates defense counsel either knew about multiplicity or advised his client to agree to this clause without understanding it. Again, without an allegation of ineffective assistance, this court "must indulge a strong presumption of" competent counsel. *See United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citation omitted). And if defense counsel knew about multiplicity, then his decision not to raise it prior to entry of pleas was a deliberate decision. Similarly, his decision to decline additional inquiry into the unit of prosecution was deliberate. In other words, when counsel advised his client throughout the guilty plea negotiation process, told the military judge that defense had no motions in response to the judge's advisal, and then declined further inquiry after the military judge solicited testimony relevant to the unit of prosecution, that defense counsel intentionally relinquished the right to raise these claims on behalf of his client. As Judge Penland stated in his dissent,

> [T]he only reasonable interpretation is that defense thought about motions that might apply – constitutional or otherwise – and decided not to bring them. Otherwise, the defense counsel was asleep at the switch; considering [appellee] has not alleged ineffective assistance of counsel, I am sure that is not the case. Instead, I am convinced trial defense counsel was aware of the multiplicity issue and decided not to pursue it.

All parties understood Appellee was waiving multiplicity. Otherwise, defense

counsel, who presumably knew about the right, invited error.

Because Appellee's satisfaction with his defense counsel's assistance is uncontroverted, the Army court's analysis should have begun with the presumption that defense counsel provided competent representation and acted in good faith at every stage, including negotiations. Plainly stated, there were three possible scenarios with respect to knowledge: (1) neither defense counsel nor Appellee knew about multiplicity (ineffective assistance of counsel); (2) only defense counsel knew about multiplicity (invited error); or (3) both defense counsel and Appellee knew about multiplicity (waiver). With no claim of ineffective assistance of counsel or evidence of bad faith, only the third scenario is reasonable. Thus, Appellee, through his counsel, knowingly waived multiplicity. Accordingly, the Army court had no error to correct. *Davis*, 79 M.J. at 331.

B. The Army court's decision failed to meaningfully distinguish this Court's holding in *United States v. Davis*.

The facts in *Davis* are similar to the facts in this case. In *Davis*, the military judge asked whether defense had any objections or requests for additional instructions. *Id.* at 330. After consulting with the assistant defense counsel, the defense counsel answered, "No changes, sir." *Id.* After the military judge granted a finding of not guilty on one of the specifications and marked the instructions as an appellate exhibit, he again asked the defense if there were any objections to the findings instructions. *Id.* The defense counsel replied: "No, Your Honor." *Id.*

Accordingly, this Court found the appellant affirmatively declined to object to the military judge's instructions; by "expressly and unequivocally acquiescing" to the military judge's instructions, the appellant waived all objections to the instructions, including with respect to the elements of the offense. *Id.*

The Army court sought to distinguish *Davis* by claiming the appellant "saw" what the instructions were before they went to the panel, such that he knew to what he was expressly and unequivocally acquiescing. (JA 15). But Davis's presence, participation, and understanding of those instructions were not discussed anywhere in *Davis*. In fact, the *Davis* Court noted only defense counsel's responses to the military judge. *Id.* at 330. If the court could find Davis saw the instructions based on his counsel seeing those instructions, then it is fair to conclude that in this case, Appellee saw his charge sheet.

Yet, the Army court found defense counsel's response to the military judge insufficient to waive his rights afforded by the Fifth Amendment Double Jeopardy Clause, citing to *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008)—a contested court-martial case addressing the Sixth Amendment Confrontation Clause right. (JA 11). But *Harcrow*, citing to *Brookhart v. Janis*, 384 U.S. 1 (1966), acknowledged that "where the circumstances are not exceptional," defense counsel may waive constitutional rights on behalf of their clients. 66 M.J. at 157. To the extent the Army court's required Appellee's personal participation or

declined to impute his counsel's knowledge on Appellee, nothing in the record demonstrates an exceptional circumstance as to prohibit defense counsel from waiving multiplicity on behalf of Appellee. Appellee does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy, appellate courts should not intervene.

Moreover, the Army court's decision implies that Davis was better situated to understand the content and meaning of a panel instruction, while Appellee was somehow less able to understand the contents and meaning of his charge sheet. But as Judge Penland wrote in his dissent, "In virtually every case, [an appellee] has far more time to study a preferred charge sheet . . . than proposed panel instructions." (JA 31). Here, Appellee had one month to review his preferred charge sheet before he offered to plead unconditionally and signed a stipulation of fact. (JA 45, 64, 80).

C. The Army court's decision renders the waiver process unclear.

1. The Army court relied upon confusing dicta in *United States v. Gladue*.

In *Gladue*, this Court found a waive all waivable motions provision in a plea agreement was sufficient to waive multiplicity even though the military judge did not discuss motions relating to multiplicity. 67 M.J. 311, 314 (C.A.A.F. 2009). The Army court reasoned that the record in *Gladue* reflected that the appellant

"knew enough about the consequences of the terms of his plea agreement to constitute waiver." (JA 15). And while a waive all waivable provision is not necessary to find waiver, here, there was no trigger for the military judge to ensure Appellee understood the effect of waiving multiplicity. (JA 27).

The Army court's assertion relied upon the following conclusion:

> [A]fter the military judge conducted a detailed, careful, and searching examination of [Appellee] to ensure that he understood the effect of the PTA provision, [Appellee] explicitly indicated his understanding that he was giving up the right to "to make any motion which *by law is given up when you plead guilty*." *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009).

(JA 13) (emphasis added). But a guilty plea does not waive a claim of facially duplicative multiplicity by operation of law. *United States v. Lloyd*, 56 M.J. 46 M.J. 19, 23 (C.A.A.F. 1997). As Judge Penland observed in his dissent:

> This passage indicates *Gladue* understood the agreed promise as a surplus restatement of the principle that a guilty plea waives most motions by operation of law. If that is all the phrase was intended to mean, then it would not seem to encompass waiver of a multiplicity motion, because of the related principle that a guilty plea cannot waive it per se.

(JA 32). It is unclear whether even Gladue would have met the Army court's standard of "knowing enough."

2. The Army court's decision leaves open parties' duties with respect to waiver of multiplicity.

The Army court's decision leaves open the duties of the military judge and defense counsel with respect to waiver of multiplicity. The court commented on the fact the military judge never clarified with Appellee nor the parties whether the plea agreement contemplated multiplicity or whether he discussed the issue with counsel. (JA 13). However, the Army court was silent regarding defense counsel's decision not to clarify anything and instead expressly decline additional inquiry. As Judge Penland posed in his dissent, "[F]or waiver to apply, will the military judge be required to convene an interlocutory session to question counsel – and accused – about their understanding of the scope and content of potential legal arguments against that evidence (or stipulation, or instructions)?" (JA 31).

D. The logic of an implicit waiver in *United States v. Hardy* should apply to multiplicity.

The Army court's decision disregarded the fact that Appellee elected to unconditionally plead guilty to three specific specifications and not guilty to others and declined to extend the holding in *United States v. Hardy* to multiplicity. 77 M.J. 438 (C.A.A.F. 2018).

1. Appellee negotiated to be separately punished for the exact specifications for which he now claims he cannot.

In *Hardy*, this Court relied upon a previous version of R.C.M. 905(e) to find the appellant waived a claim of unreasonable multiplication of charges (UMC)

through his plea of guilty. *Id.* This Court declined to create an exception for UMC to the general principle that an unconditional guilty plea waives all non-jurisdictional defects. *Id.* at 442. But in dicta, this Court noted that the parties agreed to the maximum punishment and that agreement was an implicit concession that there was no UMC objection because it would otherwise affect that maximum sentence. *Id.*

In both *Hardy* and this instant case, Appellee sought a post-trial merger of domestic violence specifications, notwithstanding the fact that he expressly agreed to a maximum sentence based in part on three separate specifications. (JA 112–13). Here, the explicit terms of the plea agreement were, "I offer . . . to plead guilty . . . to three specifications of domestic violence[.]" (JA 64). Namely, Specifications 1, 3, and 4 of Charge I. (JA 67). Appellee knowingly entered into a written plea agreement in which he agreed to plead guilty, and receive separate sentences, for each of the three domestic violence specifications he selected. He confirmed as much with the military judge. (JA 130–32). Thus, this Court should resolve the apparent discrepancy between *United States v. Hardy* and its prior precedent with respect to an implicit concession.

2. <u>It is not in the interest of justice to undo an agreement at a time when the Convening Authority may no longer withdraw.</u>

Guilty plea proceedings require only as much evidence as necessary to demonstrate providence; limiting facts is not only possible but also in an accused's

best interest and, in turn, a competent defense counsel's ordinary practice. *But see Lloyd*, 46 M.J. at 20 (distinguishing courts-martial records of trial from *United States v. Broce*, 488 U.S. 563 (1989)). Rule 910(e) and (j) state that there must be sufficient facts necessary to establish guilt and that they may not be controverted, not that they must be described in complete detail. For example, a plea agreement may include the convening authority's promise to have trial counsel present no evidence regarding one or more specifications. R.C.M. 705(b)(2)(D). This occurred here when trial counsel moved to dismiss other specifications, including Specification 2 of Charge I, wherein the Government accused Appellee of dragging the victim from one room to another after the first assault consummated by battery had occurred. (JA 45).

Moreover, in *Ricketts v. Adamson*, the Supreme Court found it was "not significant that 'double jeopardy' was not specifically waived in the agreement, since its terms are precisely equivalent to an agreement waiving a double jeopardy defense. 483 U.S. 1 (1987). There, "the trial judge read the plea agreement to the respondent, line by line, and pointedly asked him whether he understood the relevant provisions, while the respondent replied 'Yes, sir,' to each question." *Id.* The facts of this case are the same.

Here, Appellee negotiated to plead unconditionally to Specifications 1, 3, and 4 of Charge I and to the imposition of separate sentences for each

specification, albeit concurrently. (JA 67–68). Thus, he specifically requested and agreed to the very thing that his multiplicity claim seeks to remedy. Appellee received the benefit of the pre-trial agreement when trial counsel moved to withdraw and dismiss the specifications to which Appellee pled guilty and the military judge adjudged segmented and concurrent sentences pursuant to its terms. (JA 55, 67–68, 150).

The Army court's decision presents a windfall to Appellee after the convening authority may no longer withdraw from the plea agreement. *See generally* R.C.M. 705(e)(4)(B). As Judge Arguelles argued in his dissent:

> It does not serve the ends of justice to allow [Appellee] to "sandbag" the process by deliberately declining to make a multiplicity challenge at a time when the convening authority could still withdraw from the agreement, and instead wait to raise such a challenge for the first time on appeal, after he has reaped all of the benefits and the convening authority can no longer withdraw. *See United States v. Cook*, 12 M.J. 448, 455 (C.M.A. 1982) ("Justice would not be served by such an outcome, nor could such a result have been contemplated by the parties when they entered into the pretrial agreement.")[.]

(JA 27).

E. Remedy.

This Court should vacate the Army court's decision and affirm the findings and sentence. If this Court finds affirmative waiver, then the Army court has no authority under the 2021 version of Article 66, UCMJ, to set aside and dismiss

Specifications 1 and 3 of Charge I; its discretionary authority is limited to providing sentencing relief, which would not be appropriate under the facts in this case.

II.

WHETHER THE ARMY COURT ERRED IN FINDING APPELLEE'S CONVICTIONS UNDER ARTICLE 128b(1), UCMJ, FACIALLY DUPLICATIVE WHEN THE UNDERLYING "VIOLENT OFFENSES" WERE ASSAULT CONSUMMATED BY BATTERY AND AGGRAVATED ASSAULT.

Standard of Review

Absent an express waiver, "if an appellee has forfeited a right by failing to raise it at trial, [the Court] review[s] for plain error." *See Gladue*, 67 M.J. at 313; *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000); *Lloyd*, 46 M.J. at 20. An unconditional guilty plea waives multiplicity claims when the offenses are not facially duplicative. *United States v. Craig*, 68 M.J. 399, 400 (C.A.A.F. 2010) (applying *United States v. Campbell*, 68 M.J. 217 (C.A.A.F. 2009)). Appellee bears the burden of showing that the charges are facially duplicative. *See Campbell*, 68 M.J. 219.

Law and Discussion

Multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments for the same offense. *Lloyd*,

46 M.J. at 22 (citing *United States v. Teters*, 37 M.J. 370 (C.A.A.F. 1993)).

An Appellee may show plain error and overcome waiver by showing that the specifications are "'facially duplicative,' that is, factually the same." *Heryford*, 52 M.J. at 266; *Lloyd*, 46 M.J. at 23 (discussing *Broce*, 488 U.S. at 575). Facially duplicative means the factual components of the charged offenses are the same. *Lloyd*, 46 M.J. at 23; *Campbell*, 68 M.J. at 220 (citing *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004)). Whether specifications are facially duplicative is determined by reviewing the language of the specifications and facts apparent on the face of the record. *Heryford*, 52 M.J. at 266 (quotation omitted).

Two offenses are not facially duplicative if each "requires proof of a fact which the other does not." *Pauling*, 60 M.J. at 94 (citing *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004)). "Rather than constituting 'a literal application of the elements test,' determining whether two specifications are facially duplicative involves a realistic comparison of the two offenses to determine whether one is rationally derivative of the other." *Id.* (citation omitted). This analysis turns on both "the 'factual conduct alleged in each specification'" and "the providence inquiry conducted by the military judge at trial." *Id.* (quotations omitted) (finding two specifications of forgery were not multiplicious because the specifications were legally and factually distinct).

When charges for multiple violations of the same statute are predicated on

arguably the same criminal conduct, the court must first determine the allowable unit of prosecution, which is the actus reus of the defendant. *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017) (quotations omitted). Congress intended assault charged under Article 128, UCMJ to be a continuous course-of-conduct-type offense and 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).

Unless a statutory intent to permit multiple punishments is stated clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses. *Bell v. United States*, 349 U.S. 81, 84 (1955). However, if the actus reus under the circumstances 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). When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. *Bell*, 349 U.S. at 83; *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). If Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses. *Bell*, 349 U.S. at 84; *Forrester*, 76 M.J. 479; *United States v. Szentmiklosi*, 55 M.J. 487 (C.A.A.F. 2001).

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

In the Opinion of the Court, the Army court wrote about two species of multiplicity:

> In one instance, 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." *United States v. Coleman*, 79 M.J. 100, 102 (C.A.A.F. 2019) (government charged appellant's firing of a Smith and Wesson .40 caliber handgun at another soldier's car as both willfully discharging a firearm under circumstances to endanger human life and attempted murder) (citation omitted) (emphasis added). **To that species of multiplicity, courts apply the elements test set forth in *United States v. Blockburger*, 284 U.S. 299 (1931). *Id.* at 102–03. Another instance of multiplicity is "when charges for multiple violations of the same statute are predicated on arguably the same criminal conduct."** *Forrester*, 76 M.J. at 485 (appellant challenged his convictions for four specifications of possessing child pornography under Article 134, UCMJ) (citations and internal quotations omitted) (emphasis in original). It is this latter type of multiplicity at issue here.

(JA 17) (emphasis added). The court determined in analyzing this "species" of multiplicity, where the charges are under the same statute, the mere inclusion of an additional element is not sufficient to render Specification 4 unique from the others. (JA 20).

The Army court's dicta appears to treat *Forrester* and *Blockburger* as mutually exclusive tests. (JA 17). But this Court should clarify that *Forrester* is

derived from *Blockburger*. In *Blockburger*, the Supreme Court considered the intention of lawmakers when determining a continuous offense. *Blockburger*, 284 U.S. at 302. As an example, the court noted that the offense of cohabiting with more than one woman was "inherently, a continuous offense." *Id*. (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*.

In a footnote in *Forrester*, this Court distinguished between multiplicity based on multiple violations of the same statute from the multiplicity alleged in *Campbell*, 71 M.J. 19, a contested case that involved 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)). Ultimately, this Court held that "where acts constitute separate criminal conduct under the applicable statute, drafting separate charges and cumulative punishments for those acts were not unreasonable."[7] *Id.* at 484. *Forrester* does not cite to *Blockburger* but appears to review statutory construction for purposes of determining Constitutional limits. *Id.* at n.5 (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)). While the "species" of multiplicity in this case is not a *Blockburger* lesser-included-

[7] While the 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. 76 M.J. at n.5.

offenses test, it is a *Blockburger* pleadings elements test.[8] With this instant case, the Army court is the first service court of criminal appeals to apply this Court's reasoning in *Forrester*, outside the *Blockburger* framework, to multiplicity and a statute other than UCMJ article 134 possession of child pornography.[9] Thus, this Court should clarify whether *Forrester* applies to multiplicity outside the *Blockburger* framework and/or is limited to the statute in that case.

If the *Blockburger* framework applies, the Army court erred in finding the language of the specifications demonstrate that Specification 4 of Charge I is not factually distinct from Specification 1 and 3 of Charge I. Each of the specifications at issue assert the same date, victim, and location: on or about 1 December 2022 against GR at Fort Bliss, Texas. (JA 45). But for the actus reus, Specification 1 provides, "unlawfully striking her in the face with his hand.";

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[8] The government's understanding is that there are two types of *Blockburger* elements tests to determine multiplicity: lesser-included-offenses (strict statutory elements test) and facially duplicative specifications (pleadings elements test). *Compare Teters*, 37 M.J. 370 *and Coleman*, 79 M.J. 100 *and Campbell*, 71 M.J. 19, *with Pauling*, 60 M.J. 91 *and Heryford*, 52 M.J. 265 *and Lloyd*, 46 M.J. 19. Because a guilty plea waives multiplicity unless the specifications are facially duplicative absent an affirmative waiver, the latter type is at issue here.

[9] In an unpublished decision issued two months prior to *Forrester*, the Air Force court in *United States v. Douglas*, found an appellant's two specifications for aggravated assault with a weapon were not facially duplicative because they dealt with "factually different acts." ACM 38935, 2017 CCA LEXIS 407, *12–14 (A.F. Ct. Crim. App. Jun. 15, 2017) (mem op.) (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).

Specification 2 provides, "unlawfully striking her in the head, face, arm, shoulder, torso, and leg with his hand"; and Specification 4 of Charge I provides, "unlawfully throw [GR] to the ground with his hand, and did thereby inflict substantial bodily harm, a broken clavicle." (JA 45). Thus, Specification 4 of Charge I requires different factual components and is not facially duplicative. *See Heryford*, 52 M.J. 265.

Turning to the providence inquiry, it is clear each specification addresses factually different acts. Specification 1 of Charge I occurred while they were in the bedroom when Appellee hit GR in the face to get her away from him. (JA 90). Specification 3 of Charge I occurred afterwards when the argument moved to the bathroom and he punched her all over the body, including the face again. (JA 98). Specification 4 of Charge I was when the fight was "pretty much over" and he pushed her to the ground breaking her clavicle. (JA 106). Appellee was convicted for three 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 clarify the unit of prosecution for UCMJ article 128b(1) as each "violent offense."

If this Court determines *Forrester* overruled or is entirely separate from *Pauling/Blockburger* and Appellee was convicted for "arguably the same criminal conduct," the question is whether Appellee committed only one offense or three,

permitting a discrete punishment for each. 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. The Army court found Article 128b(1) encapsulates aggravated assault and assault consummated by battery based on Executive Order 14062, but that Order came into effect on January 2, 2022, after Appellee committed his crimes. (JA 18). Thus, this Court should clarify the unit of prosecution of Article 128b(1), UCMJ.

1. The 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 on domestic violence in the UCMJ with an effective date of 1 January 2019. The text of the statute, Article 128b(1), UCMJ (2019), includes two elements: (1) Appellee commits a violent offense (2) against a spouse, an intimate partner, or an immediate family member of Appellee. It does not define "violent offense" or these domestic relationships.

The text suggests Congress intended to permit discrete act charging based on the underlying conduct. Whereas assault under Article 128, UCMJ, focuses on "bodily harm," Article 128b, UCMJ focuses on "a violent offense." *Compare* UCMJ art. 128, *with* UCMJ art. 128b. As the phrase "violent offense" is preceded by an "a," Congress apparently 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).

The 2019 MCM did not include a Drafters' Analysis of Article 128b, UCMJ. But it did include an analysis of Article 128, UCMJ, wherein a new maximum punishment was added for assaulting a spouse, intimate partner, or immediate family member under Article 128, UCMJ. MCM, pt. IV, para. 77d. Thus, domestic violence offenses prosecuted under Article 128, UCMJ, were "distinguishable from other types of Article 128[, UCMJ,] assaults by the greater severity of its punishment." CRS Report No. R46097, p. 38 (Dec. 4, 2019).

2. In the alternative, the unit of prosecution for Article 128b(1), UCMJ domestic violence is the same as the underlying "violent offense."

On the other hand, legislative history suggests Congress intended to omit separate definitions for the "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.).

Otherwise, 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."[10] Its 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.[11]

In view of this history and the language of Article 128b, UCMJ, 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," which in this case is assault consummated by a battery and aggravated assault.

However, Congress contemplated the need for adequate deterrence of abusive behavior "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).

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[10] *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).

Yet, this interpretation diminishes the government's ability to charge domestic violence offenses without meaningful consideration of escalation of force and episodic violence—abusive behaviors Congress sought to deter. 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." *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981). Further, Congress considered Article 128b, UCMJ's passage alongside gun violence prevention measures in the wake of the Sutherland Springs shooting. Under the court's holding, the government may not be able to obtain separate convictions for an aggravated assault involving an offer to do bodily harm with a dangerous weapon under Article 128(b)(1), UCMJ, if it is part of a continuous-course-of-conduct with an assault consummated by battery under Article 128(a), UCMJ, despite there being a clear escalation of force from one to the other.

3. <u>If the unit of prosecution is the same as the underlying "violent offense," UCMJ article 128(a) assault consummated by battery and article 128(b) aggravated assault are separate offenses.</u>

In *Blockburger v. United States*, the Supreme Court stated:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two *distinct statutory provisions*, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. 299 (1932) (emphasis added); *see also Teters*, 37 M.J. at 377. Here, the Army court found that Article 128b(1) domestic violence incorporated Article 128(a) assault consummated by battery and Article 128(b) aggravated assault. Thus, the court implicitly found Article 128(a) assault consummated by battery and Article 128(b) aggravated assault were not distinct statutory provisions (i.e., that they were the same offense). *But see United States v. Adams*, 49 M.J. 182, 186 (C.A.A.F. 1998) (describing, in dicta, simple assault and aggravated assault as "two sections of the same statute").

Federal and State laws distinguish assaults consummated by a battery and aggravated assault by their degree of harm and severity of punishment. Other than the fact that aggravated assault and assault consummated by battery are two provisions consolidated under Article 128, the Army court does not explain why an assault resulting in grievous bodily harm is the same offense as an assault that does not. *See United States v. Weeks*, 71 M.J. 44 (C.A.A.F. 2012) (finding two separate and distinct offenses under Article 123, UCMJ, rather than alternative ways to commit the same offense). As a clearer illustration, the Army court's holding appears to suggest that assault involving the use of a dangerous of weapon may be the same offense as an assault that does not.

The Army court's view of UCMJ article 128(a) and 128(b) differs from the Air Force. In an unpublished opinion issued before *Forrester*, the Air Force CCA

applied the *Blockburger* elements test and found that Article 128(a) (assault consummated by a battery) and Article 128(b) (aggravated assault) were "distinct statutory provisions." *See*, *e.g.*, *United States v. Banegas*, ACM 38569, 2015 CCA LEXIS 329 (A.F. Ct. Crim. App. Aug. 13, 2015) (mem op.) (citing *Campbell*, 71 M.J. at 23) ("The assault consummated by a battery specification requires proof that the appellant hit the victim in the head with his own head. In contrast, the aggravated assault specification requires proof that the appellant struck the victim's head against the floor. Each requires proof of a fact that the other does not."). The Army court found that despite *Campbell*, assaults under both Article 128(a) and (b), UCMJ, are continuous course-of-conduct offenses.

Even though the Army court considered the *Blockburger* elements test inapplicable to Appellee's case, the court later cited to *Blockburger* to argue the unit of prosecution for assault. (JA 19). Of note, the Army court relied on cases that did not address the specific species of multiplicity at issue: facially duplicative specifications. The Army court asserted 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. (JA 18). The court then cited to *United States v. Flynn,* 28 M.J. 218, 221 (C.M.A. 1989)), *United States v. Morris,* 18 M.J. 450 (C.M.A. 1984), and *Rushing,* 11 M.J. 95. Not only are *Flynn* and *Morris* UMC

cases, but *Flynn* did not address UCMJ article 128 assault. Instead, *Flynn* addressed two Article 134 assaults with different specific intents such that the unit of prosecution was best gauged by the duration of the specific intent required. 28 M.J. at 221. Yet in this case, the court relied on *Flynn*, in part, to argue Article 128 assaults may be distinguished by specific intent.[12] (JA 18). This Court should clarify whether *Forrester* and *Blockburger* are mutually exclusive tests.

C. Appellee committed three separate offenses.

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. Here, the record demonstrates Appellee committed three distinct, escalating offenses: (1) Appellee striking his partner on the right side of her face with one hand in the bedroom to get her away from him causing her to cover up; (2) Appellee losing his temper and then punching his partner all over her body in the bathroom while she yelled at him to stop; and (3) Appellee pushing his partner to the ground causing her to break her clavicle. The progression of his actions (i.e., hit in the face, punches all over the body, push to the ground) and harms (i.e., impact to the face,

[12] Applying the Army court's reasoning with respect to intent in another case, 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. *Contrast United States v. Malone,* ARMY 20230151, 2025 CCA LEXIS 75 (Army Ct. Crim. App. Feb. 25, 2025), *with United States v. Ford*, ARMY 20230263, 2025 CCA LEXIS 123 (Army Ct. Crim. App. Mar. 21, 2025), *cert. filed* April 17, 2025.

lacerations and bruising all over the body, broken clavicle) demonstrate escalation of force. The first and second episode occurred in close, but different, locations in the house.

But the record does not resolve how much time passed nor whether any intervening events occurred. All that is apparent from the record is that Appellee described his actions as instantaneous. (JA 98, 105–06). This is insufficient to determine whether he committed one or three offenses because his perception of how much time passed is not the same as the actual passage of time; what an aggressor subjectively perceives is not what a victim enduring his beating perceives. Here, the victim did not testify and the military judge did not determine whether any intervening acts occurred from the time Appellee struck her to get away from him in the bedroom and the time he struck her all over the body in the bathroom. But the victim's phone shows her repeated attempts to dial 911. (JA 73). It is not clear whether her attempts to dial all occurred before the argument moved to the bedroom, after Appellee first struck her face, or while Appellee beat her all over the body. (JA 72–74). Her phone shows that as much as nine minutes or as little as two minutes passed between Specification 1 and Specification 3 of Charge I during which there may have been intervening events. (JA 73). *Cf. United States v. Phillips*, ARMY 20220233, 2024 CCA LEXIS 51, *7 (Army Ct. Crim. App. Jan. 30, 2024) (mem op.) (accounting for escalation between acts).

Similarly, he told the military judge that he stopped himself when realized what he was doing. (JA 100). Between the time he stopped beating the victim (Specification 3) and when he decided to push her to the ground (Specification 4), there was a clear break. And yet, the Army court found these three distinct violent offenses were part of a continuous course of conduct because Appellee's perception of time conflated his offenses. (JA 20).

Moreover, even if this Court considers that there was no meaningful break in time, the impulses were distinct. Appellee said he wanted the victim away from him because she was close to his face during a heated argument, so he hit her in the face, resulting in Specification 1. (JA 90). Unlike the first strike, he subsequently punched her with both hands all over her body, including her face, not to get her away from him, but because he lost his temper. (JA 98). While his multiple punches all over her body were united in time, circumstance, and impulse and thus, properly charged as a single offense in Specification 3, the underlying acts charged in Specification 1 are distinct and do not require proof of the other. These differing impulses in addition to time and location, demonstrate that Specification 1 and 3 of Charge I are predicated on different criminal conduct. Thus, Appellee's separate convictions were not a continuous course of conduct.

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 8,784 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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May 20, 2025

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on May 20, 2025.

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