IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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 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 (2021). This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2022).

Statement of the Case

On March 22, 2023, a military judge sitting as a general court-martial convicted Appellee, pursuant to his pleas, of two specifications of disobeying a superior commissioned officer and three specifications of domestic violence, in violation of Articles 90 and 128b, UCMJ (10 U.S.C. §§ 890, 928b). (JA53–54, 139). The judge sentenced Appellee to a bad conduct discharge confinement for thirty (30) months, and reduction to the grade of E-3.[1] (JA52, 55, 150). Appellee was credited with ninety-two (92) days of pretrial confinement credit. (JA52). The convening authority approved the findings and sentence and waived automatic forfeitures effective upon entry of judgment. (JA59). On April 25, 2023, the judge entered judgment. (JA56).

[1] All terms of confinement were served concurrently. (JA55). For the Specifications of Charge I, the judge apportioned the sentence to confinement as follows:

Specification 1 of Charge I	Twenty (20) months
Specification 3 of Charge I	Twenty-six (26) months
Specification 4 of Charge I	Thirty (30) months

Every finding of guilty is for an offense that occurred after January 1, 2021. (JA53-54, 56).

On May 23, 2024, a panel on the Army Court affirmed the findings of guilty and the sentence. (JA36–44). On October 9, 2024, the Army Court granted Appellee's Suggestion for En Banc Reconsideration. (JA35).

On February 25, 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 sentences to confinement, and affirmed the same sentence of a bad-conduct discharge, thirty (30) months of confinement, and reduction to the grade of E-3. (JA7–32).

Summary of Argument

The Army Court correctly determined that the Appellee did not explicitly waive his multiplicity claim, as there was no evidence indicating that he understood he was relinquishing that right. The plea agreement had no "waive all waivable motions" provision, the military judge did not address multiplicity with Appellee, and the defense counsel's remark of "no motions" did not indicate that Appellee intentionally decided to forgo the claim. The Army Court ruled that assaults under Article 128, UCMJ, including domestic violence offenses under 128b, are considered continuous course of conduct offenses, making separate specifications multiplicitous if they stem from an uninterrupted attack. Appellee's

statements during the providence inquiry indicated that the three specifications were duplicative, stemming from the same transaction.

The Government's claim that an accused or his counsel "know" the application of multiplicity by simply viewing the charge sheet is a questionable assumption, given the evident misunderstanding of established precedent addressed below. The Government's request that this Court clarify the law regarding multiplicity undercuts its claim of waiver. The Government contradicts itself by asserting that Appellee understood the law (Issue I), while simultaneously seeking this Court's assistance in clarifying its application (Issue II).

The change in R.C.M. 905(e), which presumes forfeiture and aligns with *Hardy's* earlier analysis of the Rule's language, indicates that any multiplicity issue, unless there is an affirmative waiver, should undergo plain error review.

Statement of the Facts

Appellee pleaded guilty to three specifications of domestic violence with the same date/time, location, and victim. (JA45, 67, 72-74, 83). After accounting for the excepted language in the plea and plea agreement (JA67, 83), the three specifications contain the following language:

> SPECIFICATION 1: In that [Appellee], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against Ms. [GR], the intimate partner of the accused, to wit: by unlawfully striking her in the face with his hand.

> SPECIFICATION 3: In that [Appellee], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against Ms. [GR], the intimate partner of the accused, to wit: by unlawfully striking her in the head, face, arm, shoulder, torso, and leg with his hand.
>
> SPECIFICATION 4: In that [Appellee], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against Ms. [GR], the intimate partner of the accused, to wit: unlawfully throw Ms. [GR] to the ground with his hand, and did thereby inflict substantial bodily harm, a broken clavicle.

(JA45, 53, 67, 83).

During the providence inquiry for Specification 1, Appellee explained that he had "several verbal arguments" with his partner, and for the timing and location: "[o]nce the argument moved to the bedroom, I struck her in the face with my hand." (JA87). When the judge asked if it was "a physical argument before you struck her with your hand," Appellee responded, "No. . . " (JA88).

During the inquiry for Specification 3, Appellee described an identical act as to Specification 1. (JA98). Appellee and the judge had the following exchange:

> ACC: . . . After I struck her in the face, I kept striking her with my hands. I hit her in the head, shoulder, arm, torso, and leg while I struck her.
>
> . . .
>
> MJ: So this was all part of the same event that happened in Specification 1 of Charge I; is that correct?
>
> ACC: Yes, your Honor.

MJ: So, after you struck her in the face, about how much time passed before you began to hit her over other parts of her body?

ACC: It continued, your Honor.

(JA98).

During the inquiry for Specification 4, Appellee and the military judge had a similar exchange:

ACC: . . . After striking her several times all over her body, I pushed her hard with both hands. She fell backwards and hit the ground hard.

. . .

MJ: And this was all part of the same transaction that you've been talking to me about?

ACC: Yes, ma'am.

MJ: This happened right after you hit her all over her body?

ACC: Yes, ma'am.

. . .

MJ: And this was right after you struck her all over her body?

ACC: Yes, ma'am.

(JA105-06).

The stipulation of fact establishes that everything happened on the same night, in the same location, with the same victim as part of the same occurrence; indeed, the stipulation designates the entire incident collectively as "the assault." (JA72).

The Stipulation of Fact describes the assault:

> . . . The argument moved to the Master Bedroom and turned physical when the Accused, without provocation or acting in self-defense/defense of others, struck the Victim in her face with his hand during the argument . . . .
>
> The Accused then continued to aggressively, without provocation or acting in self-defense/defense of others, punch the Victim in her face, head, right arm, right shoulder, right side abdomen, and right leg. *See* Prosecution Exhibit 5. The Victim plead for the Accused to stop; but he continued *the assault* and used his hands to push her to the ground resulting in the Victim breaking her clavicle.

(JA72-73) (emphasis added). Based on Appellee's providence inquiry and the undisputed stipulation of fact, the assault took place between the last unsuccessful 911 call (JA72-73) and the successful 911 call (JA73-74).

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 Relevant to this Issue

Appellee's plea agreement did not contain a "waive all waivable motions" provision, any provision(s) specifically waiving any motion or referencing Rules for Courts-Martial [R.C.M.] 905-907, or any provision referencing multiplicity. (JA64-69). At trial, there was no discussion of multiplicity by either the parties or

the judge, and there is no indication that anyone at the trial level was aware of its potential applicability.

Prior to Appellee entering his plea, defense counsel did not affirmatively waive any motions. (JA83). During the standard pre-colloquy, the defense counsel only stated "no motions." (*Id.*). The judge did not inquire whether Appellee was waiving motions or which motions might have been considered.

Law and Standard of Review

The issue of waiver is a question of law reviewed de novo. *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019).

A. Waiver versus Forfeiture; R.C.M. 905(e)'s change was meaningful.

Since R.C.M. 905(e) was amended, "absent an affirmative waiver," failure to raise a motion is treated as forfeiture.[2] That change was meaningful, as the rule's previous version noted that the same failure to raise a motion "shall constitute waiver." R.C.M. 905(e) (MCM 2016). This Court recognized the change in *United States v. Hardy*, 77 M.J. 438, 439 (C.A.A.F. 2018) ("We also note that an executive order soon will amend R.C.M. 905(e), likely affecting the analysis of future cases involving unpreserved UMC objections in which there is no other ground for finding waiver."); *see also id*. at 446 (Ohlson, J., dissenting)

[2] Unless noted, all references are to the 2019 Manual for Courts-Martial (MCM). R.C.M. 905(e) remains unchanged in the 2024 MCM.

(". . . [R.C.M.] 905(e) has been interpreted as a forfeiture provision in the past, will be interpreted as a forfeiture provision in the future, but will be interpreted as a waiver provision right here and right now.").

This change highlights the often dispositive distinction between waiver and forfeiture. Waiver is the intentional relinquishment of a known right. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009); *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) ("a deliberate decision not to present a ground for relief") (citations omitted). When an accused intentionally and voluntarily waives a known right, it is not reviewable. *Haynes*, 79 M.J. at 19.

On the other hand, "forfeiture is basically an oversight," or simply a failure to timely assert a right. *Rich*, 79 M.J. 472; *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008) (citation omitted). Forfeiture "does not extinguish an 'error[,]'" it is reviewed for plain error. *United States v. Olano*, 507 U.S. 725, 732-33 (1993).

B. The "personal involvement," "procedure," and whether an accused must be "particularly informed" vary "on the right at stake."

Waiver can occur either by operation of law or the "intentional relinquishment of abandonment of a known right." *Harcrow*, 79 M.J. at 19 (citations omitted). When offenses are facially duplicative, multiplicity is not waived because of an unconditional guilty plea. *United States v. Pauling*, 60 M.J.

91, 94 (C.A.A.F. 2004).[3] In such circumstances, this Court's focus is on the latter form of waiver – what "affirmative"/"express" waiver means in the context of R.C.M. 905(e) and multiplicity.

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." *Harcrow*, 66 M.J. at 156 (citing *Olano*, 507 U.S. at 733-34). By lumping every waiver case post *Hardy* into one amorphous category based on similar language to "no objection," the Government fails to recognize there will be differences based on "the right at stake." *Id.* Therefore, the Government never addresses the different procedures, personal involvement, and the choice to waive being "particularly informed." *Id.*

C. Constitutional Rights – Heightened protections including a presumption against waiver.

Waiver of constitutional rights, including protection from double jeopardy, must be "knowing, intelligent, and voluntary." *Ricketts v. Adamson*, 483 U.S. 1, 23 (1987) (citation omitted). While constitutional rights, including multiplicity, can be affirmatively waived, courts apply a presumption against finding waiver for constitutional rights. *United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F.

[3] The Government agrees that multiplicity is not waived by operation of law where the offenses are facially duplicative. (Gov't Br. 22, 26 n.8).

2020) (citation omitted). When a constitutional right is at stake, courts presume forfeiture unless affirmatively/expressly rebutted; similar to the new R.C.M. 905(e). This is true for guilty pleas.[4]

The notion certain constitutional rights require a clearly articulated waiver during a plea has been echoed in federal courts: "Because the waiver principle is construed liberally in favor of the defendant, we are cautious about interpreting a defendant's behavior as intentional relinquishment." *United States v. Barnes*, 883 F.3d 955, 957 (7th Cir. 2018); *see United States v. Menna*, 423 U.S. 61, 62 (1975) (where the United States Constitution prevents prosecuting a charge on Double Jeopardy ground, "federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a guilty plea.").[5]

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[4] *See, e.g., Pauling*, 60 M.J. at 94 (reiterating that an unconditional guilty plea, even after losing a multiplicity motion, does not waive offenses that are "facially duplicative."); *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (court determining whether specifications were multiplicitous under plain error when raised on appeal); *United States v. Lloyd*, 46 M.J. 19, 20 (C.A.A.F. 1997) (in an unconditional plea, in the absence of express waiver, applying plain error to multiplicity claims raised on appeal).

[5] A guilty plea, without some indication of express waiver, does not waive double jeopardy. *See, e.g., United States v. Class*, 583 U.S. 174, 180-81 (2018). The Supreme Court has utilized the *Blackledge-Menna* doctrine to note that while some constitutional rights are waived by an unconditional guilty-plea (e.g., self-incrimination, the right to a jury trial, and the right to confront accusers), others like malicious prosecution and double jeopardy, require something express in the record. *Id.* at 182 (citing *United States v. McCarthy*, 394 U.S. 459, 466 (1969); *Mitchell* v. *United States*, 526 U.S. 314, 324 (1999). The carve out for Double

Consistent with that precedent, this Court has looked for "express waiver" for constitutional rights. *See, e.g., Gladue*, 67 M.J. at 313; *Harcrow*, 66 M.J. at 157. Express means "clearly and unmistakably communicated; directly stated." *Black's Law Dictionary* 601 (7th ed. 1999).[6] In practice, "express" functions similar to R.C.M. 905(e)'s term "affirmative." *Merriam-Webster's Dictionary* (1996) ("asserting the existence of certain facts; proof"").

While no magic words establish an affirmative/express waiver, courts look to the record to find a "purposeful decision." *United States v. Gutierrez*, 64 M.J. 374, 376 (C.A.A.F. 2007) (discussing mandatory instructions). And as *Cole* recently noted, a plea combined with both a failure to make a motion along with a waive all waivables provision establishes an affirmative waiver. *See United States v. Cole*, 84 M.J. 398, 404 n.8 (C.A.A.F. 2024).

Jeopardy applies even without R.C.M. 905(e). Additionally, the constitutional protections that are "waived" using the *Blackledge-Menna* doctrine are all affirmatively discussed with an accused as part of the standard plea colloquy – whereas waiver of motions is not unless there is a plea term covering it. *See Dep't of the Army Pamphlet 27-9*, Military Judge's Benchbook, para 2-2-1 ("By your plea of guilty, you give up three important rights. . . First, the right against self-incrimination, . . . Second, the right to a trial of the facts by this court, . . .Third, the right to be confronted . . .").

[6] An earlier edition clarifies the meaning of "express" in its discussion of its antonym, "implied," and states in relevant part: "This word is used in law in contrast to 'express'; i.e., where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties." Black's Law Dictionary 679 (5th ed. 1979).

Service CCAs also have not applied waiver in cases where multiplicity was not affirmatively waived and the offenses were facially duplicative. *See*, *e.g.*, *United States v. St. John,* 72 M.J. 685, 687 (Army Ct. Crim. App. 2013); *United States v. Hernandez*, 78 M.J. 643, 645-47 (C.G. Ct. Crim. App. 2018); *United States v. Simpson*, 2020 CCA LEXIS 67, *26-*27 (N.M. Ct. Crim. App. 11 March 2020) (unpub.); *United States v. Goundry*, ARMY 20220218, 2023 CCA LEXIS 204, *3-4 (Army Ct. Crim. App. 2023) (summ. disp.); *United States v. White*, ARMY 20210676, 2024 CCA LEXIS 96, *3-5 (Army Ct. Crim. App. 28 Feb. 2024) (summ. disp.).

Argument

In the absence of any statement in the record or any colloquy regarding waiver or multiplicity, forfeiture, not waiver, applies. Simply put, there was no express demonstration that Appellee knew about multiplicity, understood its significance in the context of a plea, and voluntarily and intentionally sacrificed it. Without anything "clear and unmistakable" or "directly stated" in the record, pursuant to precedent regarding multiplicity, this Court should affirm the Army Court.

A. To waive multiplicity, there must be something express or affirmative to show that an accused knew the right and intended to waive it.

Even with *Gladue's* workable precedent, the Government still categorizes all waivers, irrespective of the rights involved, into one broad category and handles

them uniformly. In doing so, the Government ignores *Olano* and this Court's precedent that the procedure involved, the accused's involvement, and the accused's personal knowledge necessarily "vary" "on the right at stake." *Harcrow*, 66 M.J. at 156 (citing *Olano*, 507 U.S. at 733-34).

The Government criticizes the Army Court for "declin[ing] to extend the holding in *Hardy* to multiplicity." (Gov't Br. 17). *Hardy* involved a non-constitutional issue (unreasonable multiplication of charges [UMC]) analyzed under a different rule. In arguing "affirmative" waiver, the Government relies on one part of *Hardy's* analysis which states "the parties agreed to the maximum punishment and that agreement was an *implicit* concession there was no UMC objection." (Gov't Br. 17) (emphasis added).

In applying *Hardy*, the Government fails to explain how an "implicit" action translates to "affirmative waiver," given that R.C.M. 905(e)'s change cabined *Hardy's* applicability, which this Court itself acknowledged. *See* 77 M.J. at 440, n. 2. The Government has not offered what R.C.M. 905's change signifies – its sole reference to the change is where it states that *Hardy* "relied on a previous version." (Gov't Br. 17). The Government fails to address the rule change, all the while criticizing the Army Court for not extending *Hardy* to a constitutional right, despite the clear and consistent precedent established.

Indeed, *Hardy* undercuts the Government's arguments. *Hardy* was rooted in two principles: (1) the former R.C.M. 905(e)'s plain language, and (2) the general effect of unconditional guilty pleas on UMC. *Id*. at 440-42. But here neither principle applies: this case involves a different version of R.C.M. 905(e), and *Hardy* acknowledged multiplicity is an exception: "To be sure, we have recognized some exceptions to this general principle about the effect of a guilty plea," including "that a guilty plea does not waive a multiplicity issue when the offenses are 'facially duplicative.'" *Id*. at 442, 446, n.5 (citations omitted).

B. Pre-trial Motions of a constitutional nature versus instructions and evidentiary objections – distinctions with a difference.

The Government equates saying "no objection" to proposed panel instructions or a pre-sentencing argument with the knowing and voluntary nature of plea discussions. (*See, e.g.,* Gov't Br. 8, n.6). The Government consequently fails to implement the very principle it cites: "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." (Gov't Br. 9) (citation omitted). The constitutional nature of the questions underlying multiplicity and an accused's knowing and voluntary guilty plea carry more significance than the rights and necessity for personal

participation/knowledge required for requesting instructions (*Davis* and *Rich*) or objecting to a pre-sentencing argument (*Cunningham*).

A response to the plea colloquy in a case with no "waive all waivable motions" clause does not indicate that an accused knows multiplicity is at play and voluntary and intentionally waives that issue as part of his plea. The nature of a guilty plea, the knowing and voluntariness required by military precedent, and Appellee's involvement are all substantially greater than for a specific objection to instructions.

While the Government criticizes the Army Court's use of the word "saw" (Gov't Br. 14) when discussing *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020), the Government fails to acknowledge: (1) the degree of personal involvement varies in drafting/requesting instructions versus waiving constitutional rights in a guilty plea, and (2) how instructions work. (Gov't Br. 13-14). Even discounting the checklist in DA PAM 27-9 used by counsel for instructions, military judges cite the specific instructions from the Benchbook, generally draft and distribute instructions off the record to both parties to consider, and then discuss the proposed instructions on the record, giving both parties an opportunity to object.

And as the Army Court correctly explained, *Davis* presented a different scenario. "The military judge explained to counsel for both parties the instruction

that he chose to give, including the consent element instructions" and " [twice] asked whether the defense had any objections or request for additional instructions." *Davis*, 79 M.J. at 331.

The Government's misunderstanding of the heightened requirement for a matter of constitutional significance is evident when it asserts that "[t]o the extent the Army Court's [sic] 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." (Gov't Br. 14-15). The Government conflates the necessary personal involvement for waiving a constitutional right in a guilty plea with the process of drafting panel instructions.[7]

Although the Government asserts there was no "trigger" to discuss the waiver of motions or multiplicity (Gov't Br. 16), several existed. But the judge recognized "this was all part of the same event that happened in Specification 1 of Charge I" (JA98) and "[a]nd this was all part of the same transaction that you've been talking to me about?" (JA105-06). But the judge asked no further questions about this single event.

[7] The Government asserts that because Appellee likely reviewed his charge sheet, he was aware about multiplicity and its implications, and thus intended to waive it. (Gov't Br. 14). However, merely viewing the charge sheet did not provide Appellee information about multiplicity or double jeopardy.

C. The role of the parties supports that no one "knew" or "intentionally" believed multiplicity was in play.

The Government's final argument, which it only advanced after the initial Army Court opinion in this case, is that Appellee has not raised ineffective assistance of counsel [IAC]. The Government asserts that Appellee intentionally sandbagged to secure the exact same punishment on appeal,[8] but with three convictions instead of five. (JA52-55). This Court rejected the Air Force Court's creation of a bright line rule that all multiplicity claims were effectively waived absent IAC claims. *Lloyd*, 46 M.J. at 21 ("We reject this 'new bright line rule' . . . and the suggestion that multiplicity issues need be addressed only when they rise to the level of [IAC]").

The Government's concern about gamesmanship is not new, nor has it evolved since *Lloyd*.[9] In cases with unpreserved issue, one could argue that a

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[8] Appellant requested the Army Court merge the specifications into a single specification that listed each assault from each specification and kept "substantial bodily harm." *See* Supplemental Brief on Behalf of Appellant, at 22 ("Wherefore, appellant maintains his request for appropriate relief by merging the Specifications of Charge I.").

[9] Under the old pre-trial agreement system like in *Gladue*, *Pauling*, and *Lloyd*, a sneaky counsel likely would have been a larger concern for appellate courts as the convening authority could not set a minimum sentence or mandatory discharge and the defense counsel had an opportunity to also obtain a lower sentence from the judge given the hidden quantum. If the ever-present fear of mischievous counsel knowing more about multiplicity than the judge or prosecutors who charged the case and did not change the analysis pre-*Gladue*, the government recirculating a

cunning defense counsel outwitted both the judge and prosecutor. Nonetheless, this speculative concern has never influenced this Court's analysis regarding multiplicity or waiver. The Government fails to provide any precedent to support its claim.

The Government's premise overlooks the simultaneous responsibilities of the prosecutor and judge. The Government emphasizes the defense counsel's duties, arguing this Court should determine waiver since Appellee said he "understood the meaning and effect of the provisions of his agreement." (Gov't Br. 11) (citing JA134). No provision in the agreement discussed multiplicity, or motions. The Government's claim that the boilerplate language in the Savings Clause concerning amending, consolidating, or dismissing a specification "by any party" implies Appellee must have been aware of multiplicity, or else he would not have known the Savings Clause made his plea involuntary. (Gov't Br. 11).

Understanding the implications of amending, dismissing, or consolidating a specification does not equate to the accused being aware of the underlying constitutional doctrines relevant to their case. The most reasonable interpretation is an accused believes that if anyone— be it is the judge, prosecutor, or defense—

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decades-old speculative fear should not flip the analysis; especially in a case where the sentence *remains the same*.

attempts to change anything on the charge sheet, the deal remains intact unless the accused does not agree, exactly as the judge clarified here. (JA121-22).

But that same Savings Clause also contradicts the Government's argument. Relying on the dissent below, the Government submits that Appellee may have waited to challenge his conviction so that "the convening authority can no longer withdraw" and get a massive "windfall." (Gov't. Br. 20) (citing JA 27). This fails to account for the roles and functions of the other actors: the trial counsel negotiated and the convening authority approved the Savings Clause that states when specifications are merged, the agreement "will remain in effect." (JA60).

The clause ensured the agreement would persist in the event of consolidation, leaving the defense with no reason not to make the motion other than an oversight. And with the agreement in place, Appellee had no reason to "sandbag," as multiplicity would lead to a nearly identical outcome: the firearm prohibition still applies (JA22), there are multiple convictions and two charges, the same sentence applies, the aggravation remains the same, the same most serious offense (aggravated assault) survives, each blow accounted for in Specification 4's text, and the victim's ability to discuss the impact of "the assault." (JA73, 75). Given Appellee is not requesting this Court alter the sentence, it's unclear what this defense scheme seeks to undermine, especially when he still must overcome plain error on appeal.

The policy concerns over multiplicity cut both ways, as the Government should not seek convictions on multiplicitous specifications. And if the error is plain and obvious, it raises the question as to why the Government is seeking convictions on specifications that would violate the constitution's Double Jeopardy provision. What is good for the goose is good for the gander. Did the Government know they was charging in a multiplicitous way and intend to obtain convictions on all three specifications despite contrary precedent? Is it more reasonable to believe everyone knew and intentionally did not say anything, or that this was merely "an oversight"? *Rich*, 79 M.J. 472 (forfeiture is an oversight). Appellee submits it is the latter.[10]

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.

[10] The Government certified this same issue in three other cases, including a case charged under Article 128 (*Jones*, 25-0141/AR). This suggests that multiple judges and counsel do not understand multiplicity and thus these are simply omissions. Indeed, as further demonstrated in Issue II, the Government has asked this Court to "clarify" the law, which further cuts against any finding of waiver. Thus, the Government is claiming Appellee's defense counsel knew and understood the law (Issue I) but then asks this Court to clarify that same law (Issue II).

Standard of Review

An unconditional guilty plea waives a multiplicity issue unless the offenses are facially duplicative. *Pauling*, 60 M.J. at 91 (citation omitted); R.C.M. 905(e). This is reviewed for plain error. *Heryford*, 52 M.J. at 266. To prevail under a plain error analysis, Appellee must demonstrate: (1) the presence of error; (2) it is plain and obvious; and (3) material prejudice to a substantial right caused by the error. *Harcrow*, 66 M.J. at 158.

Appellee can "show plain error and overcome waiver by showing that the specifications are 'facially duplicative.'" *Heryford*, 52 M.J. at 266 (citations omitted). Whether offenses are facially duplicative is a question of law reviewed de novo. *Id.* "Where the error is constitutional . . . the government must show that the error was harmless beyond a reasonable doubt to obviate a finding of prejudice." *United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019).

Law and Discussion

The Double Jeopardy Clause "is not such a fragile guarantee that its limitations can be avoided by the simple expedient of dividing a single crime into a series of temporal or spatial units . . ." *Sanabria v. United States*, 437 U.S. 54, 56 (1978). The Clause prohibits "multiplicitous prosecutions . . . [i.e.,] when the government charges a defendant twice for what is essentially one single crime." *United States v. Forrester*, 76 M.J. 479, 484-85 (C.A.A.F. 2017) (citation omitted).

Multiplicity prohibits multiple punishments or convictions "for the same offense." *Id*. (citing U.S. Const. amend. V).

The initial step in a multiplicity analysis is to identify the species of multiplicity, as that determines the precedent and tests. *See Sanabria*, 437 U.S. at 69, n.24 (discussing the different types of multiplicity with string citations). There are two species of multiplicity: one where the violations are charged under different statutes, which is analyzed using the elements test, and the other where they are under the same statute. *Id.*; *see also Forrester*, 76 M.J. at 485; *United States v. Weymouth*, 43 M.J. 329 (C.M.A. 1995) (multiplicity review for one act that violated one statute); *Universal C. I. T. Credit Corp.,* 344 U.S. 218, 221 (1952) (finding multiple violations of one statute to be multiplicitous due to the unit of prosecution/continuous-course-of-conduct despite charging different subsections); *Bell v. United States*, 349 U.S. 81 (1955) (finding two counts of one statute, involving two different victims, multiplicitous based on the unit of prosecution/continuing-course-of-conduct); *cf., United States v. Oatney*, 45 M.J. 185, 190 (C.A.A.F. 1996). ("In *Teters*, we were not looking at one act that violated one statute but, rather, at one transaction that violated two separate and distinct statutes.").[11]

[11] The Government muddles the established framework. First, the Government suggests friction between *Forrester* and *Blockburger* where none exists. (Gov't

Since Appellee was found guilty of three violations under one subsection of the same statute, this Court is analyzing "one statute" multiplicity. *Bell*, 349 U.S. at 81-82 (internal citations omitted). But even if all offenses were not contained under Article 128b(1)'s "violent offense" definition, and instead looked to Article 128's subsections, it is still one statute. *United States v. Adams*, 49 M.J. 182, 186 (C.A.A.F. 1998) ("It is clear that [appellant] was found guilty of violating two sections of the same statute, based on the same conduct" – "assault consummated by a battery" and "aggravated assault")).

Contrary to the Government's claim that *Forrester* must be limited to Article 134 child pornography offenses (Gov't Br. 26), this Court has analyzed single statute cases for several non-Article 134 offenses, for example in *Lloyd*, 46 M.J. 19

Br. 24-27). The Government omits virtually all Supreme Court precedent on single statute violations, which trace back to *Blockburger*. *See, e.g., Sanabria*, 437 U.S. at 69, n. 24; *Universal C. I. T.,* 344 U.S. at 221 (tracing continuous-course-of-conduct to *Blockburger*). The Government also does not analyze any military precedent on single statute violations discussed *infra*. Additionally, the Government incorrectly suggests *Forrester* did not apply *Blockburger* or its progeny and asks this Court to clarify "if *Forrester* or *Blockburger* applies." (Gov't Br. 25). But this Court has consistently applied the same test prior to *Forrester* in one statute multiplicity cases. *See, e.g., Neblock*, 45 M.J. 91 (multiple specifications under the same statute); *Szentmiklosi*, 55 M.J. 487 (same); *Pauling*, 60 M.J. 91 (same); *Collins*, 36 C.M.R. 323 (same). Indeed, both multiplicity tests trace back to *Blockburger*, as noted in *Sanabria*, *Universal C.I.T.*, and *Bell*. The Government's suggestion that *Forrester* did not apply *Blockburger* is wrong. (Gov't Br. 26)) (". . .this Court's reasoning in *Forrester*, outside the *Blockburger* framework . . .").

(Article 125); *Pauling*, 60 M.J. 91 (Article 123); *United States v. Szentmiklosi*, 55 M.J. 487 (C.A.A.F. 2001) (Article 122).

A. The "first step" in a "one statute" multiplicity analysis is the unit of prosecution: did Congress, clearly and without ambiguity, allow for discrete-act charging.

After determining the species of offense, "the Court must first determine the 'allowable unit of prosecution.'" *Forrester*, 76 M.J. at 485 (citations omitted); *Sanabria*, 437 U.S. at 69 (string cite omitted). For this test, a "unit of prosecution" "is the *actus reus* of the defendant." *Id.* (referencing *Bell*, 349 U.S. at 83). The *actus reus* is the main 'act' of the crime, for example, a "burglary" or "robbery" or "assault." This analysis does not delve into individual body parts or victims as the Government asserts. (Gov't Br. 27).[12]

Instead, the test looks to see if the "unit of prosecution"/"*actus reus*" is a "continuous-course-of-conduct" or discrete-acts offense. *See United States v. Neblock*, 45 M.J. 191, 192 (C.A.A.F. 1996) (a court must determine whether two specifications were or were not "a continuous offense as a matter of law so as to permit the consolidation of the factually discrete specifications."); *Universal C. I.*

[12] The Government reverses the analysis by attempting to analyze the factual component and facially duplicative question first, and then claiming that because different individual body parts were touched, the analysis "ends here." (Gov't Br. 27). Its flawed analysis leads to its incorrect conclusion; if it was determined to be a continuous-course-of-conduct assault, the individual blows are still just one crime when united in time, place, and circumstance (*i.e.*, punch versus slap).

T., 344 U.S. at 221 ("the offense made punishable under [statute] is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse,' a conception recognized by this Court in *Blockburger*.").

"If it is a continuous-course-of-conduct offense, a separate conviction for each alternative method of commission or component of this offense during the course" is not authorized. *Neblock*, 45 M.J. at 197 (citing *Universal C.I.T.,* 344 U.S. 218). Conversely, if the *actus reus* is a "distinct act or discrete-act offense, separate convictions are allowed." *Id.* (internal citations omitted).

In determining the "unit of prosecution"/"*actus reus*," this Court looks to the statute's text to see if Congress, "without ambiguity," authorized multiple convictions. *Bell*, 389 U.S. 84; *Szentmiklosi*, 55 M.J. at 491; *Forrester*, 76 M.J at 485-86. If the text is not "clear and without ambiguity" in allowing for discrete-act charging, "doubt will be resolved against turning a *single transaction* into multiple offenses[.]" *Forrester*, 76 M.J. at 486 (citations omitted). When a statute does not expressly answer the question, "the ambiguity should be resolved in favor of lenity." *Bell*, 349 U.S. at 83; *Universal C. I. T.*, 344 U.S. at 221-22 (applying rule of lenity unless Congressional text is "clear and definite.").

Courts utilize the tools of statutory construction to determine whether Congress intended a discrete act or a continuous course of conduct. *Forrester*, 76 M.J. at 486; *Bell*, 349 U.S. at 84. This starts with the statute's text. *Id.* Although not binding, this Court has considered the President's explanations of enumerated offenses as often persuasive. *Forrester*, 76 M.J. at 485 (citations omitted). This Court has also looked to other courts' interpretations of the same or similar statutes to reenforce its interpretation. *See, e.g., id.* at 487; *United States v. Collins*, 36 C.M.R. 323, 325 (C.M.A. 1966); *Neblock*, 45 M.J. at 195; *Szentmiklosi*, 55 M.J. 487. Courts also look to see whether Congress set different punishments. *Bell*, 349 M.J. 83-84 ("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.").

B. Facially Duplicative – facially apparent from the record without need for supplementation.

After determining the unit of prosecution, the Court looks to the record to determine if the offenses are facially duplicative. *Lloyd,* 46 M.J. 19; *Heryford,* 52 M.J. 265; *United States v. Broce*, 488 U.S. 563 (1989). This demonstrates why the Government's inverted analysis fails. If the analysis involved different statutes, the need for a "facially duplicative" determination would be irrelevant because that question demands an elements comparison.

Facially duplicative means two things: (1) "on the face of the record" without supplementation, and (2) factually the same. *Broce*, 488 U.S. at 575. This Court noted that unlike federal cases, there is usually a robust record to make that determination. *Lloyd*, 46 M.J. at 23 ("Accordingly, the record of trial in a guilty plea court-martial is a more than adequate basis from which to determine whether the offenses are duplicative in the sense intended in *Broce*.").

This Court has stated facially duplicative means "factually the same." *Id.* (citing *Oatney*, 45 M.J. at 189 (C.A.A.F. 1996)). Whether specifications are facially duplicative "involves a realistic comparison of the two offenses to determine whether one is rationally derivative of the other." *Pauling*, 50 M.J. at 93 (citation omitted).

In most cases the determination of the unit of prosecution and whether discrete-act charging is allowed is outcome determinative for multiplicity. *Compare Pauling*, 55 M.J. 487 (finding a simultaneous double forgery not multiplicitous since Congress authorized discrete-act charging) *with Szentmiklosi*, 55 M.J. 487 (finding one simultaneous robbery of two different victims multiplicitous); *see also Lloyd*, 46 M.J. at 24 ("since sodomy is complete upon penetration of *any* type, all of the above acts clearly constitute discrete offenses").

But if the analysis involves a continuous-course-of-conduct-offense, specifications can be multiplicitous even with notable factual differences. For

example, different victims can still result in multiplicitous specifications. *See, e.g., Bell*, 349 U.S. 81 (two counts of one statute involving two different victims); *Szentmiklosi*, 55 M.J. 487 (same). Relevant here, multiplicity is implicated even if different body parts are used or injured in an assault. *See, e.g., United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981); *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984); *Cf., United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989) (specifically noting and distinguishing continuous-course assaults under Article 128 from specialized/discrete-act assaults under Article 134).

Multiplicity can also be implicated if the two acts took place in adjoining locations. *Collins*, 16 U.S.C.M.A. at 326; *see also Rushing*, 11 M.J. at 98 (an assault inside of an establishment and an assault by offer with a pool cue once the victim had fled the building "impels the conclusion that the acts were so united in time, place, and impulse in regard to a single person as to constitute a single offense."). As *Collins* notes, a location change is not a meaningful distinction to change a continuous-course-of-conduct into a discrete-act. *Id.* In *Collins*, the accused entered a manager's back office and attempted to break into a safe which led to its damage. *Id.* at 324. He then left the back office and entered the public area where he damaged pinball machines and a jukebox. *Id.* The safe was owned by one company and the pinball machines and jukebox were owned by a separate one – two victims. *Id.*

The Government properly charged Collins for one burglary, and on appeal, Collins attempted to sever the charges so that the monetary value would not be aggregated. *Id.* After finding burglary to be a continuous-course-of-conduct offense, the Court stated "the evidence, and the reasonable inferences to be drawn therefrom, demonstrate that while the respective uses of the two areas were different, their physical contiguity and their function in the operation of the business made them" all part of one establishment/location. *Id.* at 326.

C. The order of analysis matters – continuous-course-of-conduct offenses produce different outcomes even on similar facts.

This Court's opinion in *Forrester* highlights why the order of analysis is crucial. For instance, in a child pornography case, if the Government charged specifications based on the type of depiction (*i.e.*, all still-images in one specification and all videos in another), but all depictions were stored on one device, this would be viewed as a continuous-course-of-conduct offense, thus multiplicitous and merged. *See United States v. Mobley*, 77 M.J. 749 (Army. Ct. Crim. App. 2018). However, if there were multiple devices containing the same single image and the Government attempted to separately charge each device, discrete-act charging is permitted, like in *Forrester*.

Similarly, in *Szentmiklosi*, this Court found the robbery of multiple victims was one continuous offense; not severable by victim. 55 M.J. at 488-89. Even acknowledging that multiple states allowed robbery prosecutions on a one-victim-

per-specification status, this Court found the statute's language regarding a threat or injury "to the person . . . or of anyone in his company at the time" unclear as to the question of "discrete-act charging" and applied the rule of lenity. *Id.* at 491 (internal citations omitted). This merger was despite the "important objective" of the Article "to vindicate the right of individuals to remain free of the use of force or violence against the person." *Id.*

D. Unit of Prosecution and Facially Duplicative Analysis in Assault Cases.

This Court and the service courts have consistently maintained that assaults occurring together in time, place, and circumstance are regarded as a single assault. (*i.e.*, assault is a continuous-course offense). *See, e.g.*, *Rushing*, 11 M.J. at 98; *Morris*, 18 M.J. at 450; *United States v. Clarke*, 74 M.J. 627, 629 (Army Ct. Crim. App. 2015); *Hernandez*, 78 M.J. at 645-47 (full analysis of relevant precedent); *cf., Flynn*, 28 M.J. at 221 (noting and distinguishing specialized assaults from normal Article 128 assaults).

The analysis has not wavered even when there are different types of blows or even more than one type of assault under Article 128. *See Rushing*, 11 M.J. 95 (merging specifications of assault by battery in punching a victim and assault by offer by throwing a pool cue as the victim fled the building); *Morris*, 18 M.J. at 450-51 (merging a specification for shoving a man in the chest and striking him in the forehead); *United States v. Adams*, 49 M.J. 182, 186 (C.A.A.F. 1998) ("It is

clear that [appellant] was found guilty of violating two sections of the same statute, based on the same conduct" – "assault consummated by a battery" and "aggravated assault"); *Clarke*, 74 M.J. at 627-29 (merging specifications of aggravated assault under two theories into one based on the same congressional intent); *Hernandez*, 78 M.J. at 645-47.[13]

E. Article 128b(1) adopted Article 128 and its precedent.

In passing Article 128b(1)'s relevant subsection, Congress wrote that "any person who – (1) commits a violent offense against a spouse, an intimate partner, or an immediate family member of that person . . . shall be punished as a court-martial may direct." 10 U.S.C. § 928b(1);(5); *MCM*, Pt. IV, para. 78a.a.(1);(5) (2024 ed.) ("*MCM*"). Specifically, showing the all-encompassing nature of the offense, Congress did "not define 'violent offense' . . ." (Gov't Br. 28), but

[13] However, one exception to continuous-course-of-conduct precedent is what the Army Court coined as "specialized assaults charged under Article 120 or 134." *Clarke*, 74 M.J. at 628. "Specialized assaults" mean behavior where Congress expressed, in the statute, discrete-act charging was permitted. *See Adams*, 49 M.J. at 186 (noting that Congress has created classes of victims for enhanced punishment, but those classes did not differentiate the severity of assaults (i.e., assault versus aggravated assault) as different). In distinguishing that principle, this Court found each assault in *Flynn* included a specific intent to commit a more severe *and* separately enumerated crime, and thus, discrete-act charging was permitted. *Id*; *see also Neblock*, 45 M.J. at 195.[13] Likewise, in sexual assault offenses, Congress specifically listed each body part in the statute out individually showing congressional intent for discrete-act charging as to each touching or penetration. *See, e.g., United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007).

removed the proposed definitions for "strangling, suffocating, and violent offense." (Gov't Br. 29) (citing 164. Cong. Rec. H. No 6653, 6291 (July 23, 2018) (Conf. Rep.)). But even in the originally proposed definitions, "violent offense" encompassed virtually all assaults under Article 128, but Congress drafted discrete distinctions for "strangling [and] suffocating." *Id.*

In the original proposed definitions in defining "violent offense," the President expressly adopted Article 128 without change. *MCM*, Pt. IV, para. 78a.c(1)(i). Neither the President or Congress noted any change in Article 128's interpretation for Article 128b(1) adopting those definitions wholesale. The Government concedes this point. (Gov't Br. 30).

Argument

Article 128b(1)'s text never states that multiple prosecutions are permitted for the same *actus reus* (*i.e.*, any assault of a continuous nature), and therefore, under *Bell*, this favors Appellee. Thus, the assaults must be merged as the unit of prosecution shows a continuous-course-of-conduct, and under the facts here, the specifications are facially duplicative.

A. The statutory text and circumstances do not unambiguously indicate Congress intended to change the consistent application regarding assaults.

The first question is whether Congress made an unambiguously "clear" showing in Article 128b(1)'s language to permit discrete-act charging. It did not. The Government agrees 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,' which in this case is assault consummated by a battery and aggravated assault." (Gov't. Br. 30). Both are continuous-course-of-conduct offenses. *Adams*, 49 M.J. 182; *Rushing*, 11 M.J. 95; *Morris*, 18 M.J. 450; *Clarke*, 74 M.J. 627.

1. Article 128b(1)'s text does not "clearly" permit discrete-act charging.

When Congress wishes to allow discrete act or individual charging, it uses words that allow for it, such as "any" or listing out individual body parts. Both *Forrester* and *Neblock* cite the word "any" to discuss discrete-act charging. *Forrester*, 76 M.J. at 487; *Neblock*, 45 M.J. at 197 (noting *Ebeling* held "any mail bag" permitted separate counts); *Cf., Bell*, 349 U.S. 91 (no indication of words like "any"). Congress has repeatedly done the same in Article 120 ("any touching of any body part . . ."), or listing out specific body parts in the old Article 125. *See, e.g., Lloyd*, 46 M.J. 19. In terms of violent assaults, the CCAs, and this Court in *Flynn*, even flagged so-called "specialized assaults" to highlight when discrete-act charging is allowed. Here, however, Article 128b(1) does not contain any text that indicates Congress wanted to separately criminalize every individual push/shove in one encounter.

Despite precedent demonstrating what Congress' clear intent looks like, the Government asserts that, because Article 128b(1) uses proper grammar in stating

"a violent offense," Congress unambiguously indicated discrete-act charging is permissible. (Gov't Br. 28-29). Notably, other military statutes also use "a" or "an" in crimes that this Court and the Army Court have stated are continuous-course-of-conduct offenses. *See, e.g.,* Article 128 ((Aggravated Assault) ("any person who, in committing *an* assault, inflicts substantial bodily harm . . .")); Article 129 ((Burglary) ("Any person . . . who, with intent to commit *an* offense . . ."). If Article 128(b)(1) said "a[ny] violent offense," this may be a closer call.

Here, Congress never defined "violent offense." The Government's attempt to demonstrate explicit Congressional intent is undermined by Congress' silence.

2. Article 128b(1)'s structure does not unambiguously permit discrete-act charging.

Article 128b(1)'s classifying other continuous-course-of-conduct offenses, like assault or aggravated assault, into the singular "violent offense" does not unambiguously support that Congress, or even the President, wanted to alter Article 128's analysis. In fact, it indicates the opposite – for Article 128b(1), Congress and the President wanted to retain that interpretation and lump those varying offenses together, especially since it broke out suffocation and strangling into Article 128(b)(5). When Congress wanted to show a change for a particular body part, it did.

While the Government argues that Congress may have permitted discrete-act charging based on the status of the victim, like *Szentmiklosi*, a different analysis is

not warranted just because this crime is meant to protect a person. *Adams*, 49 M.J. 182; *Bell*, 349 U.S. at 84; *Forrester*, 76 M.J. 479 (no matter how many different images on *one* device). While Congress could undoubtedly make a "class-of-victim" exception to ensure assaults can be charged in a blow-by-blow fashion, it must do so without ambiguity.

Here, Congress did not set the maximum punishment for this offense. Instead, the statute authorizes an accused "be punished as a court-martial may direct." *MCM*, Pt. IV, para. 77a.a.(5). The Government acknowledges the President did not specify the maximum punishments at the relevant time here. (Gov't Br. 5 n.5). While the plea agreement may have noted a different minimum and maximum confinement range for two of the three specifications, "it is Congress, not the prosecution, which established and defines offenses." *Sanabria*, 437 U.S. at 57; *Collins*, 36 C.M.R. at 325 (internal citations omitted).

If this Court affirms the merged specification, Appellee will remain convicted under Article 128b(1). As such, like the robbery victims in *Szentmiklosi*, the Army Court's holding "does not diminish the interest in protecting individuals." 55 M.J. at 491. If merging specifications for the two victims in *Szentmiklosi* and *Bell* did not undermine a victim's protection, then merging specifications for one victim from the same occurrence does not either.

3. Although legislative intent is only used when a statute is unclear, even the legislative history and Presidential action support continuous-course-of-conduct.

The Government presents various interpretations based on the legislative history and its policy perspective rather than the text itself. *Compare* (Gov't Br 28, Header 1) ("the language of the statute *suggests* the "violent offense provision is a distinct or discrete-act offense.") *with* (Gov't Br. 29) ("*On the other hand*, legislative history *suggests* Congress intended to omit . . ."") (emphasis added). Recognizing that multiple interpretations are suggested indicates ambiguity, and this Court should apply the rule of lenity in favor of the Appellee.

Courts typically rely on legislative history only when a statute lacks clarity, which in a lenity analysis supports Appellee.

While Congress categorized a class of victims in Article 128b which warrants enhanced punishment for an accused, it did not state an intent to allow each individual push or shove to be a discrete-offense for Double Jeopardy purposes. Congress had a clear rationale for creating Article 128b separate from discrete-act charging—to demonstrate its commitment to addressing domestic violence and facilitate easier reporting for Lautenberg purposes. The Government agrees this rationale is supported by the widely publicized failure of the Air Force to record a domestic violence conviction that allowed a former airmen to purchase

a weapon and commit the Sutherland Springs' Texas shooting in 2017. (Gov't Br. 29). Article 128b was passed the next August. Pub. L. 115-232 (2018).

The Government invites this Court to clarify Congressional ambiguity by interpreting a single line regarding recidivism (*i.e.*, repeat offenders; not a continuous single incident) "over time" as indicating a clear intent to categorize a single episode as multiple discrete-offenses if there is any escalation of force within that episode. (Gov't Br. 30-31). This Court should decline this invitation to redraft the statute. The more likely interpretation of that one sentence is that Congress wanted to have Article 128b, which would have higher punishments than simple assaults, to deter and punish offenders due to the power and control exerted throughout a relationship "over time," not turn all Article 128b into discrete-acts. This is supported by the term "recidivism" and the escalation "over time."

In discussing "escalation," that same document references the "repetition of violence or abuse following an initial offense" and the cyclical nature of abuse due to power and control throughout the relationship. CRS Report No. R46097 (4 Dec. 2019) (citing Defense Task Force on Domestic Violence, Third Year Report, 2003).

B. The offenses are facially duplicative and the Government must contradict the stipulation of fact and providence inquiry to argue otherwise.

The providence inquiry and stipulation of fact establish that the three specifications resulted from a single uninterrupted altercation. This includes

multiple confirmations to the judge that the successive blows were part of the "same event" and "same transaction," and that the incident was "continu[ous]." (JA98, 105-06). The stipulation of fact is equally clear and refers to the entire incident in the singular "the assault." (JA73, 75).

The Government seeks to artificially extend the timeline by combining the argument timeline with the assault timeline to create a supposed intervening event. (Gov't Br. 35) (noting "the phone shows that as much as nine minutes"). But the providence inquiry and stipulation of fact establish the assault started sometime after the 12:34 AM phone calls; the first strike occurred after a verbal argument and "several" unsuccessful 911 calls. (JA77-78; 72-73).

> . . . The Accused and the Victim discussed infidelity and broken plans, re-prompting the argument. Both parties were yelling at each other, and violence seemed imminent. The Victim became fearful and tried to, once again, create space.
>
> The Victim next grabbed her cell phone and attempted to dial 911 several times but failed to complete the call, resulting in several canceled calls. *See* Prosecution Exhibit 4. The argument moved to the Master Bedroom and turned physical when the Accused, without provocation or acting in self-defense/defense of others, struck the Victim in her face with his hand during the argument.

(JA72).

The Government cites unsuccessful 911 calls before the argument turned physical to claim the specifications were separate incidents at separate times. But

the last unsuccessful attempt to dial 911 was at 12:36 AM, thereafter the brief assault took place and less than a minute later the victim successfully dialed 911. (JA72-73; 77-78).

The Government also asserts, without record support, that the striking specifications took place in two separate locations: the master bedroom and master bathroom. (Gov't Br. 35) ("struck her to get away from him in the bedroom and . . . struck her all over her body in the bathroom"). The record indicates Appellee's initially struck the victim transpired "transitioning from the master bedroom into the master bathroom; right in that area." (JA93). Appellee struck the victim and pushed her down (JA32, 105-06, 72-74), after which she locked herself in the bathroom. (JA100, 75).

But even if there was a move from the bedroom to bathroom, as *Collins* and *Rushing* note, that is not a meaningful distinction to alter the facially duplicative analysis. *Rushing*, 11 M.J. at 98. Indeed, in *Rushing*, the victim left the building, throwing a pool cue at the victim. *Id.* In *Collins*, the burglar moved into different portions of a building that had different uses and stole property owned by different companies, but nonetheless facially duplicative. *Collins*, 36 C.M.R. at 324.

The Government mistakenly contends that the "stop" when Appellee realized what he was doing was "a clear break," and then attributes that action as taking place between the specifications' occurrences. (Gov't Br. 36) (citing JA

100). That is not accurate, and the subsequent lines excluded from the referenced record clearly demonstrate this:

MJ: What made you stop?

ACC: I realized what I was doing.

MJ: What did she do when you stopped hitting her?

ACC: She attempted to shut the bathroom door, and I walked away.

MJ: Did she lock the bathroom door?

ACC: Yes, ma'am.

(JA 100).

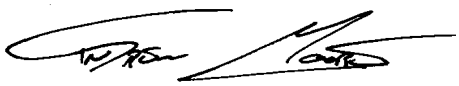
The victim closed and locked the door after all three specifications were completed. (JA73-74). Only then did she call 911 at 12:36. (JA74). The "stop" occurred after "the assault." (JA73, 75).

Finally, the Government cannot demonstrate Appellee's motives changed in mere seconds. (Gov't Br. 36, "the impulses were distinct."). As *Flynn* noted, the *mens rea* was the same here for each specification, so if the impulse was the "intent as seen through the *actus reus*," it supports a continuous-course-of-conduct as these are all general intent crimes. *Flynn*, 28 M.J. at 221. "[T]he assault['s]" genesis was an argument regarding infidelity that left Appellee "angry and upset" and made him "lose his temper." (JA87, 90, 98). That motive carried through the assault. The Government seeks to differentiate between synonyms that convey the

same emotional state and motive; yet, the impulse behind the assault was anger stemming from the argument.

Conclusion

Based on the foregoing, this Court should affirm the Army Court's decision.



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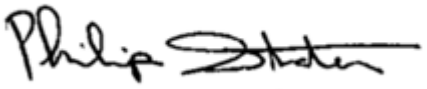

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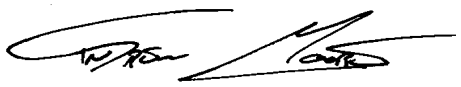
CERTIFICATE OF COMPLIANCE WITH RULES 24(B) AND 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 10,875 words.

2. This brief 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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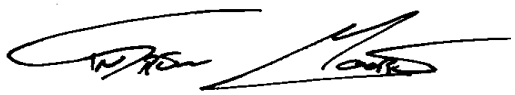
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Malone*, Crim App. Dkt. No. 20230151, USCA Dkt. 25-0140/AR was electronically filed with the Court and Government Appellate Division on July 10, 2025.



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