

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES
Appellee

v.

Specialist (E-4)
SHERWOOD E. REED
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 20240321

USCA Dkt. No. 26-0109/AR

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

GRANTED ISSUE

**WHETHER THE MILITARY JUDGE ERRED WHEN HE
DENIED THE DEFENSE’S MOTION TO DISMISS
APPELLANT’S DOMESTIC VIOLENCE CONVICTIONS FOR
SPECIFICATIONS 4 AND 6 OF THE CHARGE AS
MULTIPLICIOUS.**

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

On June 26, 2024, a military judge sitting as a general court-martial convicted Appellant, Specialist Sherwood E. Reed, pursuant to his pleas, of three specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. Appellant was sentenced by the military judge to 180 days of confinement,¹ a bad conduct discharge, and a reprimand. (JA0078). The convening authority took no action on the findings but did approve Appellant's request to defer automatic forfeitures until entry of judgment. (Action). The military judge entered judgment on August 6, 2024. (Judgment of the Court).

On December 3, 2025, the Army Court affirmed Appellant's findings and sentence. *United States v. Reed*, ARMY 20240321, 2025 CCA LEXIS 556 (Army Ct. Crim. App. December 3, 2025 (JA0027)). On January 30, 2026, Appellant filed a petition for a grant of review to this Court. (JA0002). This Court granted Appellant's petition for grant of review on April 9, 2026, and ordered briefing under Rule 25. (JA0001).

¹ The military judge apportioned Appellant's sentence to confinement as follows: sixty days of confinement for Specification 4 of The Charge, thirty days of confinement for Specification 5 of The Charge, and one hundred and eighty days for Specification 6 of The Charge, with all terms of confinement to be served concurrently. (JA0078).

Summary of Argument

Domestic assault under Article 128b, UCMJ should be treated as a course of conduct offense, just like assault under Article 128, UCMJ. Appellant pled guilty to three specifications of Article 128b, with the underlying “violent offense” for each being an assault consummated by a battery. (JA0036, JA0042). Appellant timely moved to merge the three specifications, but the military judge denied the motion. Specifications 4 and 6 arose from the same course of conduct, striking the victim, and therefore the allowable unit of prosecution for these offenses, like assault, is “the number of overall beatings the victim endured rather than the number of individual blows suffered.” *United States v. Clarke*, 74 M.J. 627, 628 (Army Ct. Crim. App. 2015), pet. denied 74 M.J. 459 (C.A.A.F. 2015).

Though Ms. LT, Appellant’s niece by marriage who was living in the home at the time, attempted to interrupt the assault, this was not enough to create a break in time, circumstance, or impulse. Therefore, Specifications 4 and 6 should have been merged.

Statement of Facts

Appellant pled guilty to three specifications of domestic assault. (JA0042). Specification 4 and Specification 6 of The Charge involved the exact same date, location, and victim; Specification 5 concerned a battery on Ms. LT. (JA0036). After accounting for the excepted language in the plea and plea agreement

(JA0042 and 0106),² the two specifications at issue here contain the following language:

SPECIFICATION 4: In that [Appellant], U.S. Army, did, at or near Joint Base Lewis-McChord, Washington, on or about 17 December 2023, commit a violent offense upon Mrs. LR, the spouse of [Appellant], to wit: unlawfully strike Mrs. LR on her head with an open hand.

SPECIFICATION 6: In that [Appellant], U.S. Army, did at or near Joint Base Lewis-McCord, Washington, on or about 17 December 2023, commit a violent offense upon Mrs. LR, the spouse of [Appellant], to wit: by striking her on the head with his fist.

(JA 0036, 0042, 0106).

A. Providence Inquiry.

During the providence inquiry regarding Specification 4, Appellant said he used the back of his hand to slap Mrs. LR across the face. (JA0046). Regarding Specification 5, Appellant said that right after he struck his wife [Mrs. LR], Ms. LT “got between us.” (JA0047). The military judge asked Appellant, “why didn’t you want [Ms. LT] between you and your wife? (JA0050). Appellant answered that he “was still in a rage,” and that he “didn’t want anybody getting between me and my wife.” (JA0050).

² The charged language for Specification 6 included the words “and did thereby inflict substantial bodily harm upon her, to wit: a black eye and a concussion” (JA0036). Consistent with the plea agreement, Appellant pled “not guilty” to this excepted language. (JA0042, 0106).

During the providence inquiry for Specification 6, Appellant said “right after he moved [Ms. LT],” he punched his wife again at the “same spot in [his] house.” He told the military judge it was on the “same span,” “same day,” and within a couple of seconds or minutes. (JA0053-0054). The stipulation of fact also established that the conduct of Specification 4 and Specification 6 occurred on the same day, in the same location, and with the same victim. (JA0079).

The defense moved to dismiss for multiplicity and unreasonable multiplication of charges. (JA0090). After announcing findings, the military judge heard the defense’s motion. (JA0061). During that hearing, the military judge asked the Government if both blows were “connected in impulse?” (JA0066). The Government conceded “the intent was the same.” (JA0066). The military judge said:

the predicate violent offense is still one offense. And if this were 128, the unit of prosecution would be one continuous fight, the “beating” is the word that *Clarke* uses. So, if the underlying predicate offense applies, the unit of prosecution for the predicate offense is just the one transaction.

(JA0066-0067).

But the Government asked the military judge to rely on the Army Court’s unpublished opinion, *United States v. Malone*, Army 20230151, 2024 CCA LEXIS 217 (Army Ct. Crim App. 23 May 2024) (mem. op.), for the proposition that a

domestic violence offense under Article 128b “is different than a simple assault consummated by battery.” (JA0068).

The military judge denied Appellant’s motion for multiplicity and unreasonable multiplication of charges. (JA0073-0077). “Though not binding on this court, I find the analysis in *Malone* persuasive and agree in principle with the logic of the Army Court of Criminal Appeals.” (JA0074-0076). The military judge also noted the assault was momentarily interrupted by the intervention of a third party and the interruption provided an opportunity to withdraw. (JA0076).

The decision the military judge found persuasive was reversed by the Army Court sitting en banc. *United States v. Malone*, 85 M.J. 573, 576 (Army Ct. Crim. App. 2025). This Court overturned the Army Court’s en banc opinion, finding that Malone waived review by failing to object at trial. *United States v. Malone*, 86 M.J. 297 (C.A.A.F. 2026). This Court did not reach the ultimate issue raised in this case.

Standard of Review

This court reviews preserved multiplicity challenges *de novo*. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007).

Law

Rooted in the Constitutional protections against double jeopardy, the doctrine of multiplicity “prohibits multiple punishments ‘for the same offen[s]e.’”

United States v. Forrester, 76 M.J. 479, 484–85 (C.A.A.F. 2010); *see also* Rule for Courts-Martial 907(b)(3)(B) (“A charge is multiplicitous if the proof of such charge also proves every element of another charge.”).

To determine whether multiple acts are multiplicitous, the Court must determine whether those acts fall within a single unit of prosecution. *Forrester*, 76 M.J. at 394. Charges are multiplicitous if the “the specifications are facially duplicative.” *United States v. St. John*, 72 M.J. 685, 687 n.1 (Army Ct. Crim. App. 2013). Offenses are facially duplicative when the factual components of the charged offense are the same. *Id.* To determine whether offenses are facially duplicative, this Court goes beyond the four corners of the charge sheet, looking to “the factual conduct alleged in each specification and the providence inquiry conducted by the military judge.” *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). “This analysis turns on both ‘the factual conduct alleged in each specification’” and facts brought forth at trial. *Id.* (quoting *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997)).

If it appears “‘charges for multiple violations of the same statute are predicated on arguably the same criminal conduct,” this Court must determine the “‘allowable unit of prosecution,’ ... which is the *actus reus* of the defendant.” *Forrester*, 76 M.J. at 485 (quoting *United States v. Woerner*, 709 F.3d 527, 539

(5th Cir. 2013) (emphasis in original); *United States v. Planck*, 493 F.3d 503, 503 (5th Cir. 2007)); see also *Bell v. United States*, 349 U.S. 81, 83 (1955).

A. Multiple Convictions for a Physical Assault United in Time, Circumstance, and Impulse are Multiplicious.

Military courts have long held that physical assaults “united in time, circumstance, and impulse in regard to a single person” constitute a single crime. See, e.g., *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981); *United States v. Clarke*, 74 M.J. 627, 629 (Army Ct. Crim. App. 2015). “The Double Jeopardy Clause prohibits ‘multiplicious prosecutions ... [i.e.,] when the government charges a defendant twice for what is essentially a single crime.’” *Forrester*, 76 M.J. at 395.

In *Rushing*, the CAAF held that the appellant’s acts in striking the victim with his fists and then throwing a billiard cue at the victim as he fled “were so united in time, circumstance, and impulse in regard to a single person as to constitute a single offense.” 11 M.J. 95 at 98 (C.M.A. 1981). The CAAF found the acts united, even though the acts charged were broken by other, uncharged misconduct. *Id.* This Court did not view *Rushing* as having the ability to withdraw between these acts despite *Rushing* using different methods of attack.

B. The Number of Overall Beatings vs. the Number of Individual Blows

In *Forrester*, this Court outlined “the analytic conflation of unreasonable multiplication of charges and multiplicity in cases where several offenses are

charged as separate specifications under the same statute.” *Id.* at 394–95. To this extent, “[o]ne instance of multiplicity . . . occurs when charges for multiple violations *of the same statute* are predicated on arguably the same criminal conduct.” *Id.* For this type of multiplicity, courts assess the statute’s “allowable unit of prosecution” to determine if it prohibits each individual act or a continuous course of conduct, even when comprised of multiple acts. *Id.*

In *Clarke*, the Army Court concluded that the “unit of prosecution” for “an uninterrupted attack comprising touching’s ‘united in time, circumstance, and impulse’—charged under Article 128, UCMJ . . . is the number of overall beatings the victim endured rather than the number of individual blows suffered.” 74 M.J. at 628 (quoting *Rushing*, 11 M.J. at 98). “Our superior court ‘has held that Congress intended assault, as prescribed in [Article 128, UCMJ], 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.’” *Id.*

Argument

A. Article 128 Reflects a Course-of-Conduct Model that Treats Continuous Assaults as a Single Offense.

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

11 M.J. at 98; *Clarke*, 74 M.J. at 629. This Court has recognized that Congress intended assault under Article 128 to operate as a continuous course-of-conduct offense, such that “each blow in a single altercation should not be the basis of a separate finding of guilty.” *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989).

Here, the majority correctly acknowledged that the unit of prosecution for domestic violence offenses is “the number of overall beatings the victim endured rather than the number of individual blows suffered.” *Malone*, 85 M.J. 584 (quoting *Clarke*, 74 M.J. at 628).

B. Article 128b Also Reflects a Course-of- Conduct Model that Treats Continuous Assaults as a Single Offense.

Congress did not create domestic violence as a standalone punitive article. Instead, it placed Article 128b within the broader assault framework, signaling that domestic violence is a contextualized form of assault—not a fundamentally different offense with a distinct unit of prosecution. The President confirms this intent by defining a violent offense as a violation of... (j) 10 U.S.C. § 928 (Article 128). *Manual for Courts Martial, United States* (2024 ed.) [*MCM*], pt. IV-126-127 ¶ 78a. Because Article 128b, UCMJ, subsumes the elements of Article 128, UCMJ, in defining “a violent offense,” this unit of prosecution also applies to the domestic violence specifications. *Malone*, 85 M.J. at 584.

Had Congress intended to authorize separate punishments for each discrete act within a continuous episode, it could have done so, as it has in other contexts. For example, Article 120 offenses, Congress authorized discrete act charging. But Congress did not for Article 128b offenses. Nor did Congress structure the statute in a manner that treats each individual act as an independently punishable unit. The absence of both an express directive and a discrete act structure shows Congress never intended to permit the Government to break up a single course of conduct into multiple convictions merely because of the relationship status of the parties. “Absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive.” *Consumers Product Safety Comm ’m v. GTE Sylvania, Inc.*, 7474 U.S. 102, 108 (1980).

This conclusion does not turn on the number of statutory subsections within Article 128b. This Court has long recognized that distinct statutory formulations of assault may nevertheless be multiplicitious when they arise from the same conduct. *See United States v. Adams*, 49 M.J. 182, 186 (C.A.A.F. 1998). The relevant inquiry is not how many statutory labels may be applied to a course of conduct, but whether that conduct constitutes a single criminal episode. Where multiple acts of domestic violence are “united in time, circumstance, and impulse,” they constitute a single offense for purposes of multiplicity analysis.

C. The Rule Regarding Time, Circumstance, and Impulse Applies to Domestic Assaults.

The Army Court has applied this understanding in the unit-of-prosecution context, holding that an “an uninterrupted attack comprising touchings ‘united in time, circumstance, and impulse’” constitutes a single offense. *Clarke*, 74 M.J. at 628–29 (quoting *Rushing*, 11 M.J. at 98). “If there is one impulse, there can only be one indictment ‘no matter how long the action may continue.’” *Malone*, 85 M.J. at 583 (quoting *United States v. Blockburger*, 284 U.S. 299, 302 (1932)).

Appellant’s assaults on his spouse occurred in the same spot in the house, on the same day, involved the same victim, and happened “within a couple of seconds, a couple minutes of each other.” (JA0053-0054). Specification 5 also occurred at the same time and was the result of the same impulse, although involving a separate victim. The unit of prosecution remained the same for all three acts—all united in time, circumstance, and impulse. *Clarke*, 74 M.J. at 628; (JA0053-0054).

The majority believe the two specifications against Appellant’s wife constituted an interrupted attack with separate impulses. *Reed*, 2025 CCA LEXIS 556, at *5. The record does not support the notion that Appellant had separate impulses during Specification 4 and 6.

The record provides that the strikes by Appellant were one after another, with the same intent. The reason Appellant assaulted Ms. LT was to continue

hitting his wife. Appellant “was in a rage” and “didn’t want anybody getting between [Appellant] and [Ms. LR].” (JA0050). Appellants’ impulse never changed. And because Appellant’s impulse never changed, Ms. LT never created a break in time, circumstance or impulse. Therefore, Specifications 4 and 6 were united in time, place, and circumstance, and were thus multiplicitous. *See Rushing*, 11 M.J. at 98 (finding acts were united in time, place, and circumstance even though the acts charged were interspersed within other, uncharged misconduct). There was no uncharged misconduct interspersed here. There was no time or impulse by the Appellant to reach for a weapon or pool cue like in *Rushing*. Here, Appellant’s case is even more compelling considering the time, circumstance and impulse all remained the same throughout the assault.

D. There Was Not a Significant Interruption to Create a Break in Time, Circumstance, or Impulse Between Specifications 4 and 6.

As Judge Morris highlighted, it is more important to weigh the impact of the interruption³ than just finding an interruption occurred. *Reed*, 2025 CCA LEXIS 556, at *12 (Morris, dissent). As Judge Morris pointed out, in most assault-style offenses, the attacker almost always has the option to stop assaulting the victim

³ The Supreme Court of Vermont held that where the alleged acts happened close in time, and in the same geographic location, they considered the acts interrupted because the complainant left the kitchen, took a highchair to a bedroom, and then placed a child in the highchair giving the complainant the ability to reconsider his actions. *State v. Abel*, 2019 VT 22, P16, 2019 Vt. LEXIS 39, *9.

and walk away. *Id.* at *12. If as the majority suggests, an assault must be both “uninterrupted” and united in time, circumstance and impulse, the majority should define what makes an interruption legally significant. *Id.* Without doing so, the majority seemed to create a new, ambiguous, legal standard with little guidance to the field. *Id.*

The Army Court acknowledged Appellant’s conduct “was within moments and shared the same victim and location.” *Reed*, 2025 CCA LEXIS 556, at *8. Yet the court concluded that, “[u]nlike *Malone*, the interruption here disunited the time, circumstance or impulse of the ‘beating.’” *Id.* at *8-9. The majority believe the interruption of Ms. LT provided the Appellant with an opportunity to withdraw. *Reed*, 2025 CCA LEXIS 556, at *7. The facts of this case do not establish an opportunity to withdraw.

The assaults on Ms. LT and Ms. LR occurred in immediate succession and at the same location. The uninterrupted and contemporaneous nature of the acts afforded Appellant no meaningful opportunity to pause, reflect, or form a new criminal impulse between the acts. *See United States v. Ompad*, 36 C.M.R. 91 (C.M.A. 1966) (recognizing that separation in time and location may indicate distinctive assaultive episodes, thereby implying that closely connected acts may constitute a single continuous transaction). Appellant further established the sole reason for assaulting Ms. LT was so he could continue hitting his wife. (JA0050);

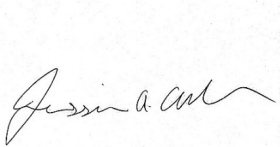
Reed, 2025 CCA LEXIS 556, at *8 (Morris, dissent). It is clear, the impulse among Appellant never changed and therefore, Specifications 4 and 6 are “united in time, circumstance and impulse.” *Rushing*, 11 M.J. at 98. Ms. LT being shoved out of the way during the assault on Appellant’s wife, did not interrupt the attack in a way that allows Specifications 4 and 6 to stand independently. *Reed*, 2025 CCA LEXIS 556, at *8-9 (Morris, dissent). Ms. LT was not an interruption, but merely an obstacle. Appellant almost simultaneously moved the impediment [Ms. LT] and continued to assault his wife. This demonstrates Appellant had no intention of stopping, nor the ability to pause and reflect that an interruption requires.

If, as the Army Court determined, an assault must be both “uninterrupted” and united in time, circumstance and impulse, the majority failed to define what makes an interruption legally significant. *Reed*, 2025 CCA LEXIS 556, at *8 (Morris, dissent). Appellant pushed Ms. LT to the side so she was no longer between him and Ms. LR. (JA0079). Appellant’s impulse was still focused on Ms. LR— he was still in rage and didn’t want anybody to get between him and Ms. LR. (JA0045). Appellant pushed Ms. LT so he could continue hitting Ms. LR, which is Specification 6. (JA0050, 0053). All three acts were confirmed by the military judge to be on the same day, in the same spot, and within a couple seconds of each other. (JA0053-0054). The evidence in this case demonstrates this

insignificant obstacle did not create separate impulses nor an opportunity for Appellant to reprieve.

Conclusion

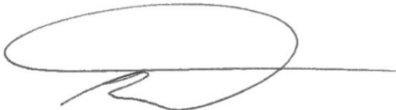
This Honorable Court should reverse the Army Court's decision and hold that Appellant's domestic violence convictions are multiplicitous.



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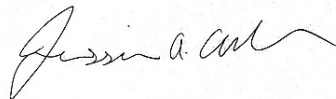
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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4164 words.
2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Reed, Crim. App. Dkt. No. 20240321, USCA Dkt. No. 26-0109/AR was electronically filed with the Court and Government Appellate Division on May 28, 2026.



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