

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

UNITED STATES,)	SPECIFIED ISSUE BRIEF ON
Appellant / Cross-Appellee)	BEHALF OF APPELLANT /
)	CROSS-APPELLEE
v.)	
)	
Staff Sergeant (E-6))	
ZACKERY J. ASKINS,)	Crim. App. Dkt. No. 20230303
United States Army,)	
Appellee / Cross-Appellant)	USCA Dkt. No. 26-0014/AR

VY T. NGUYEN
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0779
vy.t.nguyen14.mil@army.mil
U.S.C.A.A.F. Bar No. 37918

RICHARD E. GORINI
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35189

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

Specified Issue

WHETHER, IN LIGHT OF *UNITED STATES V. MALONE*, __ M.J. __ (C.A.A.F. 2026), APPELLEE/ CROSS-APPELLANT AFFIRMATIVELY WAIVED MULTIPLICITY WITH REGARD TO HIS DOMESTIC VIOLENCE CONVICTIONS.

Statement of Relevant Facts

The government incorporates the facts in its Brief, dated 18 November 2025 and adds the following additional facts:

Appellee’s charge sheet listed these domestic violence specifications of Charge V involving the same date, location, and victim:

Specification 1: In that Staff Sergeant Zackery J. Askins, U.S. Army, did, at or near Medicine Park, Oklahoma, on or about 15 September 2021, assault his spouse, Ms. JA, by strangling her around her neck with hands.

Specification 2: In that Staff Sergeant Zackery J. Askins, U.S. Army, did, at or near Medicine Park, Oklahoma, on

or about 15 September 2021, commit a violent offense against his spouse, Ms. JA, to wit: slamming her body into a dog kennel and banging her head against a breaker box.

(JA 17–18).

In two Pretrial Orders, the military judge advised Appellee’s trial defense counsel in writing that (1) counsel needed to consider issues required to be raised prior to entry of plea and prior to final adjournment and (2) multiplicity will be addressed in written motions. (SJA 89–90, 92–93) (citing R.C.M. 905(b)(1)–(6), 906, 906(b)(12), and 907(b)(1)–(2)). Then at arraignment, the military judge orally advised Appellee that any motions to dismiss should be made prior to receiving his plea. (SJA 78).

Subsequently, the parties litigated one motion to dismiss unrelated specifications based on grounds unrelated to multiplicity, which the military judge denied. (SJA 94). Thereafter, at least twice, Appellee submitted mixed plea offers—both offers included a savings clause, waive all waivable motions provision, and assertions that he both understood the meaning and effect of the agreement and was satisfied with the advice of his defense counsel. (SJA 96–97, 101, 104–05, 110). The plea agreement that the military judge ultimately accepted included sentencing ranges for the domestic violence specifications should Appellee be convicted. (SJA 108).

At trial, the military judge once again orally advised Appellee that any

motions to dismiss should be made prior to receiving his plea and that his counsel would speak for him. (SJA 79–80). In response to the military judge’s second oral advisement and immediately before entering guilty to some specifications and not guilty to the domestic violence Charge, trial defense counsel responded, “Your Honor, the defense has no additional pretrial motions.” (SJA 80). During the providence inquiry, Appellee repeatedly confirmed he understood the meaning and effect of the plea agreement, the waive all waivable motions provision and the savings clause, and was satisfied with the advice of his defense counsel. (SJA 85–87). The parties agreed that the waive all waivable motions provision applied to “any future motions” defense had not yet filed. (SJA 83–84).

During the contested portion of trial, the parties referenced one strangulation and characterized the circuit breaker and dog kennel assaults as separate events. (JA 51–52, 62). In closing, defense argued alternate source of injury, lack of corroboration, and motive to fabricate to suggest the events either were exaggerated or never occurred. (JA 65–70). Neither the parties nor the military judge raised multiplicity concerns prior to adjournment. On appeal, Appellee did not raise an ineffective assistance of counsel claim.

Summary of Argument

Based on the facts and circumstances surrounding this mixed plea case, the record clearly establishes an express waiver of multiplicity to all the charged

offenses: namely, (i) Appellee’s knowing and voluntary consent to the waive all waivable motions provision and savings clause, (i) the inclusion of a sentencing range for the domestic violence charge in the plea agreement, (iii) defense counsel’s statement, “Your Honor, the defense has no additional pretrial motions,” to the military judge following her repeated advisals, and (iv) with the presumption of competent counsel not overcome. These facts demonstrate Appellee’s knowing and intentional relinquishment or abandonment of all motions to dismiss, including multiplicity regarding his domestic violence convictions.

Argument

Standard of Review

This Court reviews de novo whether an accused has waived an issue. *United States v. Malone*, ___ M.J. ___ (C.A.A.F. 2026) (quotations omitted).

Law

A. Waiver versus Forfeiture.

A party’s failure to raise defenses, motions, or objections before pleas or before adjournment forfeits these claims “absent an affirmative waiver.” Rule for Courts-Martial 905(e)(1)–(2) (2019 ed.). Waiver extinguishes an issue, and as a result, that issue cannot be reviewed on appeal. *United States v. Harborth*, 85 M.J. 469, 475 (C.A.A.F. 2025) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). “Waiver can occur either by a party’s intentional relinquishment

or abandonment of a known right or by operation of law.” *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) (citing *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)).

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

B. Effect of a Guilty Plea.

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

will foreclose” this multiplicity inquiry. *Lloyd*, 46 M.J. at 23.

C. Express Waiver of Multiplicity.

An accused may knowingly and voluntarily waive many of the most fundamental protections the Constitution affords, including a double jeopardy objection based on multiplicity. *Gladue*, 67 M.J. at 314 (quotation omitted). The accused need not personally waive such a claim; counsel may waive a multiplicity claim on a client’s behalf. *Malone*, __ M.J. __, slip op at *10.

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

Discussion

Appellee relinquished or abandoned a known right. He took affirmative action to waive multiplicity when he knowingly and voluntarily agreed to a plea agreement with a waive all waivable motions provision. As this Court found in *Gladue*, this provision constitutes an express waiver of multiplicity. 67 M.J. at 314.

Moreover, as in *Malone*, the plea agreement contains a savings clause and his counsel is presumed competent because he never filed an ineffective assistance of counsel claim. *See Malone*, __ M.J. ___, slip op. at *11.

Both appellee and his counsel were on notice of this right. Twice the military judge advised his counsel in writing of motions to dismiss and multiplicity and cited to the relevant rules. (SJA 89–90, 92–93) (citing R.C.M. 905(b)(1)–(6), 906, 906(b)(12), and 907(b)(1)–(2)). Twice more she orally advised Appellee that motions to dismiss must be made before receiving his pleas. (SJA 78–80). Rule for Courts-Martial 907(b)(3)(B) plainly states that multiplicity serves as a proper ground for dismissal of specifications. Thus, when his trial defense counsel responded to the military judge, “Defense has no more pretrial motions” before immediately entering mixed pleas, he intentionally relinquished or abandoned multiplicity on Appellee’s behalf as to all the specifications on the Charge Sheet.

Moreover, the fact that Appellee contested the domestic violence specifications is not dispositive. The plea agreement addressed all the charges, including those he contested; the parties negotiated sentencing ranges for his domestic violence charge should he be convicted. (SJA 104, 108). Nothing in the waive all waivable motions provision limited its application to the charges to which he pled guilty. (SJA 84, 105) (using the non-exhaustive phrase “to include”). Additionally, pursuant to the savings clause, defense could have asserted

multiplicity during trial notwithstanding the prior waiver but did not. Thus, the record clearly establishes that Appellee intentionally relinquished or abandoned multiplicity with respect to his domestic violence convictions.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court vacate the Army court's decision and affirm the findings and sentence as originally adjudged.



VY T. NGUYEN
Major, Judge Advocate
Branch Chief, Government
Appellate Division



RICHARD E. GORINI
Colonel, Judge Advocate
Chief, Government
Appellate Division

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 1,597 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.

A handwritten signature in black ink, appearing to read 'VYT. NGUYEN', with a long horizontal flourish extending to the right.

VYT. NGUYEN
Major, Judge Advocate
Attorney for Appellant/Cross-
Appellee
February 12, 2026