IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Certified Issue

WHETHER THE ARMY COURT ERRED IN FINDING APPELLANT'S SEPARATE CONVICTIONS UNDER ARTICLE 128b(1) AND 128b(5), UCMJ, 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)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

On May 23, 2023, a military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of four specifications of larceny, one

specification of an incorporated Federal offense (18 U.S.C. § 842), two specifications of wrongful disposition of military property, two specifications of false official statement, and one specification of forgery, in violation of Articles 121, 134, 108, 107, and 105, UCMJ (10 U.S.C. §§ 921, 934, 908, 907, 905). (JA 16–21, 32–33).

On May 24, 2023, the same military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of three specifications of domestic violence, in violation of Article 128b, UCMJ (10 U.S.C. § 928b). (JA 17–18, 71).[1] The same day, the military judge sentenced Appellant to be reduced to the grade of E-1, forfeiture of all pay and allowances, a total of 102 months of confinement, a total fine of $35,000 (with an additional 12 months of confinement if the fine is not paid), and to be dishonorably discharged. (JA 72–75). Appellant was credited with 521 days of pre-trial confinement credit. (JA 75).

On June 15, 2023, the convening authority disapproved the forfeiture of all pay and allowances but took no other action. (JA 23). The military judge entered Judgment on June 27, 2023. (JA 22).

On August 28, 2025, the Army Court found Specifications 1 and 2 of Charge V (domestic violence) to be multiplicious. *United States v. Askins,* Army 20230303, 2025 CCA LEXIS 420 (A. Ct. Crim. App. August 28, 2025); (JA 12–

[1] The military judge acquitted Appellant of one specification of domestic violence.

14). The Army Court consolidated the specifications and dismissed Specification 2 of Charge V. (JA 14). The Army Court reassessed the sentence and affirmed the 6-month total sentence for the remaining specifications of Charge V. (JA 14).

On October 3, 2025, Appellant filed a petition for review. On October 22, 2025, Appellant filed a supplement to the petition. This court has not yet acted on the issues presented by Appellant.

On October 14, 2025, The Judge Advocate General of the U.S. Army certified the above question to this court. (JA 2–3). On October 20, 2025, this court ordered briefing on the Certified Issue pursuant to Rule 22(b). (JA 1).

Summary of Argument

The Army Court did not abuse its discretion when it held Appellant's domestic violence convictions were multiplicious and remedied the error by consolidating the specifications.

When a Court of Criminal Appeals [CCA] reviews a conviction for multiplicity under Article 128b, the analysis is no different than that employed for offenses under Article 128. Congress has given no overt indication it intended for Article 128b to be treated distinct from Article 128 specifically for multiplicity purposes. Rather, Congress implied the two articles should be treated similarly when it placed Domestic Violence within the same statutory scheme as Assault.

Despite the Government's contention, the enumeration of strangulation and violent offense as two separate subsections under Article 128b does not create a "clear intent to separately punish." Instead, the delineation is akin to simple assault and aggravated assault enumerated as different subsections under Article 128. Just as there are multiple ways to commit assault, there are multiple ways to commit domestic violence. This does not mean the offenses are immune from a multiplicity analysis.

Further, this court need not even reach the certified issue, as the Army Court determined that, even if there was "a break in time or impulse between the dog kennel and breaker assaults," the two instances in which Appellant strangled the victim "occurred contemporaneously with the other and arose from the same impulse," thus they were multiplicious. The Army Court found the charging scheme created ambiguity and it could not be satisfied which strangulation was the *actus reus* the military judge relied on when she convicted Appellant. Therefore, the Army Court's consolidation properly resolved the ambiguity and did not create a novel multiplicity analysis.

Statement of Facts

A. The Government Charged Appellant With Two Specifications of Domestic Violence That Arose Out of a Single Incident

On September 15, 2021, Mrs. JA approached Appellant and asked him for a separation. (JA 41). Appellant shoved Mrs. JA and went into the master bedroom. (JA 41). She then called Appellant a "fucking coward." (JA 41). Appellant "flew" out of the room, slammed Mrs. JA into a dog kennel in the room, and put his hands around Mrs. JA's throat. (JA 41). She felt "pain" and struggled to breathe. (JA 43–44).

Appellant let go and Mrs. JA went to get her belongings because she intended to leave and report Appellant to his unit leadership. (JA 41). Appellant "came after" her again as she was near the back door of the house. (JA 41). Appellant put his hands around Mrs. JA's throat and slammed her head into a circuit breaker box. (JA 42).

The Government charged Appellant with two specifications of domestic violence for this incident.[2] After the military judge found Appellant guilty of both

[2] Specification 1 of Charge V alleged that Appellant assaulted his wife "by strangling her around her neck with his hands;" Specification 2 of Charge V alleged that Appellant committed a violent offense against his wife, "to wit: slamming her body into a dog kennel and banging her head against a breaker box." (JA 17–18).

specifications, she sentenced Appellant to six months confinement for each specification, to run concurrently with each other. (JA 73–74).

B. The Army Court Found the Specifications Multiplicious and Merged the Specifications for Findings

In its Article 66(d)(1) review, the Army Court found the specifications were multiplicious and found Appellant did not waive the issue. (JA 12–13). The Army Court primarily focused on Appellant's underlying acts of assault which it found were borne of the same impulse and occurred at the same time. (JA 12–13).

The Army Court also found that even if the incidents were separated in time and impulse under the *Blockburger* test (284 U.S. 299 (1932)), they were still multiplicious because the specifications were charged in a way that created "an issue here as either strangulation that the military judge could have found appellant guilty of was multiplicious with another action—either slamming the victim into the dog kennel or into the breaker box—as they occurred contemporaneously with the other and arose from the same impulse." (JA 13).

Certified Issue

WHETHER THE ARMY COURT ERRED IN FINDING APPELLANT'S SEPARATE CONVICTIONS UNDER ARTICLE 128b(1) AND 128b(5), UCMJ, MULTIPLICIOUS.

Standard of Review

A service court enjoys "broad discretion" in conducting its review and as such, actions by a service court under Article 66 are generally reviewed for "an

abuse of discretion." *United States v. Guinn,* 81 M.J. 195, 199 (C.A.A.F. 2021) (citing *United States v. Swift,* 76 M.J. 210, 216 (C.A.A.F. 2017)).

Issues of multiplicity are reviewed de novo. *United States v. Forrester,* 76 M.J. 479, 484 (C.A.A.F. 2017) (citing *United States v. Anderson,* 68 M.J. 378, 385 (C.A.A.F. 2010)). Failure to raise a claim of multiplicity at trial results in forfeiture, which is reviewed for plain error. *United States v. Davis,* 79 M.J. 329, 331 (C.A.A.F. 2020). Whether an error constitutes "'plain error' is a question of law that [this court] reviews de novo." *United States v. Tovarchavez,* 78 M.J. 458, 463 (C.A.A.F. 2019) (quoting *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017)). "For an appellant to prevail under plain error review, there must be an error, that was clear or obvious, and which prejudiced a substantial right of the accused." *Id.* at 462. "When [this court reviews] a constitutional issue . . . for plain error, the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id.* (quoting *United States v. Jones,* 78 M.J. 37, 45 (C.A.A.F. 2018)).

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

Law

A. Elements and Definitions of Related Assault Statutes

At the time Appellant was charged, the element of aggravated assault by strangulation under Article 128(b)(3) was, "Any person subject to this chapter who commits an assault by strangulation…is guilty of aggravated assault and shall be punished as a court-martial may direct." 10 U.S.C. § 928(b)(3).

The element of "strangulation" under Article 128b(5) was, "Any person who assaults a spouse…of that person by strangling…shall be punished as a court-martial may direct." 10 U.S.C. § 928b(5). [3]

The element of "violent offense" under Article 128b(1) was, "Any person who commits a violent offense against a spouse…shall be punished as a court-martial may direct." 10 U.S.C. § 928b(1).

The *Manual for Courts-Martial* (2019 ed.) [*M.C.M.*], as well as Supplements I (2020) and II (2021), did not define "strangulation" for Article

[3] The 2024 edition of the *M.C.M.* defines strangulation for both Article 128 and Article 128b as, "Intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." *M.C.M.* (2024 ed.) pt. IV, ¶ 77.c.(5)(C)(iii).

128(b)(3) nor Article 128b(5). The *M.C.M.* also did not specify which offenses constituted a "violent offense."[4]

B. Congressional Intent for Whether Multiple Acts May Be Multiplicious

This court's initial step when examining issues of multiplicity is to ask "whether Congress intended appellant at a single court-martial to be convicted of [multiple offenses]." *United States v. Teters*, 37 M.J. 370, 378 (C.M.A. 1993). "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately…If the latter, there can be but one penalty." *Blockburger,* 284 U.S. at 302 (internal quotations omitted).

"Textual clues are critical because Congress is aware of the *Blockburger* rule and legislate[s] with it in mind…So Congress typically includes *Blockburger*-surmounting language when it wishes to authorize dual convictions for the same offense." *Barrett v. United States,* 2026 U.S. LEXIS 433, at *16 (2026) (slip. op.) (internal quotations omitted).

Legislative intent may be found "expressly in the pertinent statutes violated or in their legislative histories." *Teters,* 37 M.J. at 376. "Absent such an overt

[4] The 2024 edition of the *M.C.M.* specifies the following as "violent offenses": "Articles 118, 119(a), 119a, 120, 120b, 122, 125, 126, 128, 128a, 130, or any other offense that contains an element of the use, attempted use, or threatened use of violence." *M.C.M.* (2024 ed.) pt. IV, ¶ 78a.c.(1)(a–l).

expression of legislative intent, it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Id.* at 376–77 (citing *Blockburger,* 284 U.S. at 304).

Further, "determining whether two specifications are facially duplicative involves a realistic comparison of the two offenses to determine whether one is rationally derivative of the other." *United States v. Pauling,* 60 M.J. 91, 94 (C.A.A.F. 2004) (citing *United States v. Foster*, 40 M.J. 140, 146 (C.M.A. 1994)). "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)).

"'Unless a statutory intent to permit multiple punishments is stated clearly and without ambiguity, doubt will be resolved against turning a *single transaction* into multiple offenses.'" *Forrester,* 76 M.J. at 485–86 (quoting *United States v. Szentmiklosi,* 55 M.J. 487, 491 (C.A.A.F. 2001) (emphasis in original).

C. Separate Convictions for Physical Assaults United in Time, Circumstance, and Impulse are Multiplicious

1. Doctrine of Multiplicity

Rooted in the Constitutional protections against Double Jeopardy, the doctrine of multiplicity "prohibits multiple punishments for the same offense." *Forrester,* 76 M.J. at 484–85 (quoting U.S. Const. amend. V); *see United States v. Coleman,* 79 M.J. 100, 102 (C.A.A.F. 2019); *see also* Rule for Courts-Martial

907(b)(3)(B) ("A charge is multiplicious if the proof of such charge also proves every element of another charge").

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

2. Assaults United in Time, Circumstance, and Impulse

In cases involving assault, this court has long held the unit of prosecution is the overall altercation, not the number of individual blows. *See United States v. Morris,* 18 M.J. 450, 451 (C.M.A. 1984); *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981). "When Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault." *Morris,* 18 M.J. at 450. Assaults "united in time, circumstance, and impulse" should not be charged as multiple offenses. *Rushing,* 11 M.J. at 98.

In *United States v. Adams,* a servicemember's convictions for both simple assault and aggravated assault that stemmed from the same overall interaction, though distinct types of assault, were still multiplicious. 49 M.J. 182, 186 (C.A.A.F. 1998). This court concluded the two types of assaults were "two

sections of the same statute [Article 128], based on the same conduct." *Id.* Accordingly, under the *Teters* factors, this court held the simple assault was properly set aside on multiplicity grounds. *Id.*

Contrast the holding in *Adams* with that in *United States v. Neblock* (45 M.J. 191 (C.A.A.F. 1996)), where this court determined multiple indecent acts under Article 120 (10 U.S.C. § 920) could be charged distinctly without being multiplicious. This court held that "committing 'indecent acts or taking liberties with a child' is not a continuous-conduct crime as a matter of military substantive law. We further conclude that [Appellant's] two convictions of this crime based on discrete facts were not the same offense for purposes of the Double Jeopardy Clause." *Neblock,* 45 M.J. at 198–99.

D. Consolidation of Specifications and Sentence Reassessment

Courts of Criminal Appeal may, under their broad Article 66 powers, reassess a sentence marred by multiplicious convictions. *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). Reassessment is appropriate when, under the totality of the circumstances, "the court can determine . . . absent any error, the sentence adjudged would have been of at least a certain severity[.]" *Id.*

Argument

Multiple violations of Article 128b—united in time, circumstance, and impulse—are multiplicious. This court's jurisprudence has long required a continuous course of conduct charging scheme under Article 128. *Rushing*, 11 M.J. at 98.

It is presumed Congress is aware of this court's treatment of assault offenses. *See United States v. Kelly,* 77 M.J. 404, 407 (C.A.A.F. 2018) (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)). And given Congress provided no "overt expression" it meant to establish Article 128b as a discrete act offense, the Army Court correctly applied the same multiplicity analysis as it would for Article 128 offenses. As such, the Army Court's consolidation of the two specifications was not an abuse of discretion and should remain undisturbed.

A. There Is No Evidence Congress Intended the Unit of Prosecution for Article 128b Offenses to Depart From the Continuous Course of Conduct Standard for Article 128 Offenses.

1. Congress Did Not Provide an "Overt Expression" That Article 128b Is a Continuous-Conduct Crime.

The Government argues "Article 128b(5)'s separation into its own provision demonstrates that Congress viewed strangulation as its own offense." (Gov't Br. at 15). Yet to support this argument, the Government employs a non sequitur when it claims that "*nothing in the statutory text itself indicates Congress intended to*

prohibit separate convictions for acts of strangulation and acts of violence accomplished through an assault consummated by battery." (Gov't. Br. at 15) (emphasis added). The government reads "this silence as an ambiguity over whether Congress intended to authorize multiple punishment. [The government], however, reads much into nothing." *Albernaz v. United States,* 450 U.S. 333, 340–41 (1981) (internal quotations omitted). "Nothing in the statutory text itself" is the precise definition of a lack of overt expression.

In *Teters*, this court noted that when it examines for multiplicity, its first question should be whether there was any "overt expression" from Congress that it intended a servicemember face "multiple convictions at a single trial for different statutory violations arising from the same act or transaction." 37 M.J. at 376. For Article 128b, there is no such overt expression.

Contrast this case with *Missouri v. Hunter,* where the Supreme Court found "crystal clear" intent when the state legislature specifically authorized separate convictions and consecutive punishments for single criminal act that violated separate statutes. 459 U.S. 359, 368 (1983). No such "crystal clear" language is found in Article 128b.

The House, Senate, and Congressional reports to which the Government directs this court do not reflect a Congressional intent for strangulation to be treated as a distinct or standalone offense from other acts of domestic violence

arising out of the same course of conduct. (Gov't. Br. at 15, footnote 11). Rather, the reports reference the House and Senate's recommendations to establish a domestic violence statute; a concern that the military health system cannot properly treat victims of strangulation; and the inclusion of strangulation in "aggravated assault" under Article 128.[5] Notably absent is an "overt expression" of Congress's intent that the subsections of Article 128b are to be treated as discrete acts and thus, not subject to a multiplicity analysis.

Also absent is Congress' overt intent for the subsections to be treated as separate statutes. Similar to how this court should approach the two subsections of Article 128b, the Supreme Court in *Barrett* conducted a full *Blockburger* analysis as to two different sections of 18 U.S.C. § 924 (Possession of a Firearm in Furtherance of Crime of Violence or Drug Trafficking). Ultimately, the Court held that the underlying gun crime constituted a single act and as "Congress did not clearly manifest a contrary intention, as it would have to do if it wished to authorize two convictions in these circumstances," it reversed the lower court's

[5] *See* H. Rep. No. 115-676 on H.R. 5515 (115), [NDAA FY19] (May 15, 2018) (proposing new punitive section); H. Rep. No. 115-676 Part 2 (May 21, 2018) (providing additional penalties); S. Rep. No. 115-262 on S2987 (June 5, 2018) (proposing inclusion of strangulation and suffocation); H. Rep. No. 116-442 (July 19, 2020) (discussing strangulation); 164 Cong. Rec. H. No. 7202 (July 25, 2018) (Conf. Rep.) (providing effective date).

imposition of two separate convictions and two separate sentences. *Barrett,* 2026 U.S. LEXIS 433, at *7, 28.

Further, "Congress is presumed to know the law" and how this court has conducted its analysis of multiplicity in regard to Article 128. *Kelly,* 77 M.J. at 407. Yet Congress did not enact specific guidance or provide an overt expression to this court for how it is to analyze Article 128b. Without such overt expression and with the presumption Congress is aware of this court's jurisprudence, a lack of expression cannot be elevated to an overt expression that Congress intended to prohibit Article 128b from being analyzed the same as Article 128.

2. Lack of Implied or Presumed Congressional Intent.

While the lack of an overt expression does not necessarily cease this court's examination of Congressional intent, it weighs heavily in favor of utilizing the same multiplicity analysis for Article 128b as this court has done for Article 128. This is further demonstrated by examining Congress's implied intent when looking to the "elements of the violated statutes and their relationship to each other." *Teters,* 37 M.J. at 376–77.

The only facial difference is the status of the victim. Should an accused strangle their spouse, they have necessarily committed a violent offense contemplated by Article 128b(1), but they have also committed an aggravated

assault under Article 128(b)(3). The implied intent is clear – the multiplicity analysis is the same.

Given the multiplicity analysis for Article 128 is the overall interaction, not the number of discrete blows, it follows the same should be applied for Article 128b, regardless of the modality or *actus reus*. If each underlying blow is united by time, place, and impulse, it is the overall assault that is charged. The individual acts cannot be made to exaggerate an accused's penal exposure.

Yet the Government argues "Article 128b contains five substantively distinct subsections indicating Congress intended each to be separate offenses." (Gov't Br. at 13). The underlying theory is that any violation under Article 128b could be individually charged—without implicating multiplicity—merely because there are five subsections of the statute. This theory is flawed.

Following this logic, it could then be said Article 128 contains three different ways to commit an assault and none are subject to a multiplicity analysis because they are each enumerated.[6] But this court need look no further than its own reasoning in *Adams* to reject that assertion because a strangulation can be a violent offense. In *Adams*, this court found two different types of assault—a simple assault and an aggravated assault—were multiplicious. Though the types of

[6] Article 128(a) (simple assault), 128(b) (aggravated assault), and 128(c) (assault with intent to commit specified offenses).

assault constitute different subsections of Article 128, the acts should still be merged for charging because one is necessarily a lesser included offense. 49 M.J. at 186. Contrary to the government's argument, it has long been "presumed that Congress does *not* intend for a defendant to be cumulatively punished for two crimes where one crime is a lesser included offense of the other." *Almendarez-Torres v. United States*, 523 U.S. 224, 231 (1998).

Further, absent overt expression to the contrary, the placement of domestic violence within Article 128's rubric demonstrates Congress's implied intent that the statutes be treated similarly. Congress could have made domestic violence a wholly separate article, but it did not. Congress could have made domestic violence a sister statute of Article 120 (which authorizes discrete act charging and denotes special categories of victims), but it did not. Contrary to the Government's argument, the implied intent of Congress is that Article 128b is similarly situated to Article 128.

Given there is neither an overt expression nor an implied intent—and indeed that the implication runs in other direction— there are no "clear indications of contrary legislative intent" for the multiplicity analysis under Article 128b to be conducted differently than that of Article 128. *Teters,* 37 M.J. at 377.

B. The Army Court Did Not Abuse its Discretion When It Found the Acts to be Indistinguishable

The Army Court correctly found that the overall beatings were united in time, place, and circumstance. But it also found that even if the assaults were separated into two successive impulses (the dog kennel incident and the breaker box incident), the charging language still created confusion. (JA 13).

The Army Court noted that strangulation occurred in both instances. Therefore, the Army Court was unsure as to which incident the military judge relied on to form the guilty finding, as the strangulations and other types of assaults "occurred contemporaneously with the other and arose from the same impulse." (JA 13).

This alternative finding and holding does not implicate the same multiplicity analysis as whether strangulation could be merged with a violent offense. Rather, the Army Court correctly held that even if it separated the overall assault into two distinct incidents, a fact finder could find that strangulation was the *actus reus* of either incident, and thus, the Army Court could not separate the two acts.

Conclusion

This Honorable Court should uphold the Army Court's decision that Appellant's domestic violence convictions are multiplicious.

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Certificate of Compliance with Rules 24(c) and 37

1. This Response Brief on Behalf of Appellant / Cross–Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4,005 words.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Askins, Crim. App. Dkt. No. 20230303, USCA Dkt. No. 26-0014/AR was electronically filed with the Court and Government Appellate Division on January 15, 2026.

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