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	RESPONSE BRIEF ON BEHALF OF APPELLANT / CROSS-APPELLEE Crim. App. Dkt. No. 20230303 USCA Dkt. No. 26-0014/AR

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Table of Contents

Table of Authorities

SUPREME COURT OF THE UNITED STATES

FEDERAL CIRCUIT COURTS

COURT OF APPEALS FOR THE ARMED FORCES / COURT OF MILITARY APPEALS

SERVICE COURTS OF CRIMINAL APPEALS

RULES FOR COURTS-MARTIAL

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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), [STAFF SERGEANT ZACKERY J. ASKINS] AFFIRMATIVELY WAIVED MULTIPLICITY WITH REGARD TO HIS DOMESTIC VIOLENCE CONVICTIONS.

Statement of Relevant Facts

Staff Sergeant (SSG) Askins incorporates the facts from his response brief, submitted to this Court on January 15, 2026, and provides these additional facts on consideration of the specified issue:

A. The Plea Agreement Did Not Expressly Extend the "Waive All Waivable Motions" Provision to the Contested Specifications.

Staff Sergeant Askins entered into a plea agreement in which he agreed to plead guilty to ten specifications. (SJA 103–11). The plea agreement contained

multiple conditions. Under the plea agreement, the government agreed to direct the dismissal of nine other specifications and to impose negotiated sentence limitations to all remaining specifications—including the four contested specifications under Charge V. (SJA 104, 108).

Staff Sergeant Askins agreed to "waive all waivable motions to include all previously submitted motions that have yet to be ruled upon by the Military Judge[.]" (SJA 105). The plea agreement did not expressly extend this provision to the contested charge and its specifications. (SJA 93–111).

At the time of SSG Askins' trial, this Court had not held whether acts charged under Article 128b should be charged as discrete acts (similar to acts under Article 120) or whether they constitute a continuing course of conduct (similar to acts under Article 128).

B. Defense Counsel Stated SSG Askins Had "No Additional Pretrial Motions."

In accordance with the plea agreement, SSG Askins pled not guilty to Charge V and its four specifications. (SJA 81). Prior to his entrance of pleas, the military judge advised SSG Askins that "any motions to dismiss or to grant other appropriate relief should be made at this time." (SJA 80). Defense counsel responded, "Your Honor, the defense has no additional pretrial motions." (SJA 80).

C. Evidence of Domestic Violence Introduced at Trial.

At the contested portion of the trial, Mrs. JA testified that SSG Askins placed his hand around her throat twice within a few moments. (JA 41, 52). Specifically, SSG Askins "put his hands around [Mrs. JA's] throat" when he slammed her into the dog kennel and then he "strangled [Mrs. JA] again" when he pushed her head into the breaker box. (JA 41, 52).[1]

In closing argument, trial counsel stated, "threats and abuse culminated in the accused attacking Mrs. JA, throwing her into the dog kennel, banging her head against the breaker box, ultimately strangling his wife[.]" (JA 64–65). Defense counsel argued that no strangulation ever occurred. (JA 67–68).

The military judge found SSG Askins guilty of the following two specifications of Charge V:

> 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 his hand.
>
> 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.

[1] The government stated in its brief, "the parties referenced one strangulation[.]" (Gov't Supp. Br. at 3). This is a misstatement of the facts presented at trial, as Mrs. JA testified to two acts of strangulation. (JA 41, 52).

(JA 71). The military judge did not make special findings.

D. The Army Court Found Multiplicity and Merged the Domestic Violence Specifications.

Addressing the issue sua sponte, the Army Court of Criminal Appeals (Army Court) held that the underlying acts of the two specifications were multiplicious and merged the specifications. (JA 14). Because SSG Askins contested his guilt at trial, the Army Court found forfeiture—not waiver—and reviewed for plain error. (JA 12).

The Army Court found the specifications multiplicious because SSG Askins' acts were "united in both time and location, and sprung from the same impulse" and because even if the acts were separated by a break in time and impulse, the two separate assaults also contained strangulation as an *actus reus*. (JA 13). Therefore, as the Army Court could not be sure which strangulation the military judge relied on to find SSG Askins guilty, the Army Court merged the specifications following *Blockburger v. United States,* 284 U.S. 299, 302 (1932). (JA 13).

Standard of Review

"'This Court reviews de novo whether an accused has waived an issue.'" *United States v. Malone,* __M.J.__, 2026 CAAF LEXIS 62, at *7 (C.A.A.F. 2026) (quoting *United States v. Harborth*, 85 M.J. 469, 475 (C.A.A.F. 2025)).

Law

A. The Rules for Courts-Martial and Precedent Presume Forfeiture of a Multiplicity Claim Absent an Affirmative Waiver.

Rule for Courts-Martial 907(b)(3)(B) (2019 ed.) states that multiplicious specifications are grounds for a motion to dismiss. Claims of multiplicity are based in the Constitution and the protection is "grounded in the Fifth Amendment right against double jeopardy." *Malone,* at *11.

"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.'" *Malone,* at *10 (quoting *United States v. Smith*, 85 M.J. 283, 287 (C.A.A.F. 2024); *see also United States v. Olano*, 507 U.S. 725, 733 (1993). "'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.* at *10 (quoting *Smith,* 85 M.J. at 287) (subsequent quotations omitted).

Forfeiture, on the other hand, is "the failure to make the timely assertion of a right." *United States v. Davis,* 79 M.J 329, 331 (C.A.A.F. 2020). Should an accused fail to move to dismiss on multiplicity grounds, and "absent an affirmative waiver," this Court's precedent and R.C.M. 905(e)(1–2) both demand a presumption of forfeiture. *Malone*, at *7.

B. The Supreme Court Favors a "Time of Review" Interpretation if an Error Becomes Obvious While on Direct Appeal.

If an issue was novel or unsettled at the time of trial, this Court may still review for plain error under a "time of review" interpretation. *Henderson v. United States,* 568 U.S. 266 (2013) (clarifying the Court's holding that appellate courts are not bound to whether an error was plain at the time of trial from *United States v. Olano,* 507 U.S. 725 (1993)).

In *Henderson*, the Supreme Court expressed concern over the inconsistent outcomes for appellants whose cases were tried while the law was unsettled, as opposed to those tried after a reviewing court had clarified the law. "The competing 'time of error' rule is out of step with our precedents, creates unfair and anomalous results, and works practical administrative harm. Thus, in the direct appeals of cases that are not yet final, we consider the 'time of review' interpretation[.]" 568 U.S. at 276–77. Accordingly, Federal civilian courts have adopted and applied this doctrine.[2]

[2] *See e.g.*, *United States v. Williams,* 946 F.3d 968, 971–72 (7th Cir. 2020) ("courts now must always analyze whether an error is plain based on the law at the time of review."); *United States v. Bonner,* 826 Fed.Appx. 52, 55 (2d Cir. 2020) ("'we look not to the law at the time of the trial court's decision to assess whether the error was plain, but rather, to the law as it exists at the time of review.'").

Argument

Staff Sergeant Askins did not waive the issue of multiplicity. The Army Court found forfeiture, analyzed for plain error, and correctly found the two specifications were multiplicious. So, too, should this Court.

A. Staff Sergeant Askins Did Not Intentionally Relinquish a Known Right Because—Distinct from *Malone*—He Did Not Unconditionally Plead Guilty to the Affected Specifications.

The government argues SSG Askins waived his claim of multiplicity because his defense counsel's response to the military judge's advisement on motions constituted a relinquishment of a known right. (Gov't Supp. Br. at 7). This argument fails to note the distinction between the response in *Malone* and the response in the present case.

In *Malone*, the appellee's defense counsel told the military judge, "Your Honor, the defense has *no motions*." 2026 CAAF LEXIS 62, at *6 (C.A.A.F. 2026) (emphasis added). In this case, the defense stated, "Your Honor, the defense has *no additional pretrial motions*." (SJA 80) (emphasis added).

This Court in *Malone* focused its waiver analysis on the "no motions" portion of the response, finding it was similar to stating "no objection" to a military judge's proposed instruction. *Id.* at *15–16. The analysis here is distinct because both the phrasing and the context were different.

As to the specific response, SSG Askins' defense did not respond with a blanket "no motions" statement, but rather told the military judge there was no further pretrial litigation. That statement did not apply to the contested portion and should not be read to do so. While multiplicity normally should be raised pre-trial, a failure to do so is presumed to be forfeiture, not waiver. *See* R.C.M. 905(e). The statement "no additional pretrial motions" did not expressly waive SSG Askins' known right or ability to raise the issue at any future point. The response is cabined to the guilty plea portion of the proceedings, not a holistic relinquishment of SSG Askins' ability to ever make further motions. Malone unconditionally pled guilty to the affected specifications, SSG Askins did not. The differing response should not be read the same.

B. Context Matters Because the Plea Agreement Did Not Specify Whether the "Waive All Waivable Motions" Provision Applied to the Contested Specifications.

1. The Army Court Found the "Waive All Waivable Motions" Provision Did Not Apply to the Domestic Violence Specifications.

The government argues that "the fact that [SSG Askins] contested the domestic violence specifications is not dispositive." (Gov't Supp. Br. at 7). However, the Army Court explicitly rejected this argument, citing SSG Askins' challenge to his guilt at trial as the key reason for finding forfeiture rather than waiver: "In the present case, there is no evidence of affirmative waiver as [SSG Askins] contested his guilt at trial. As there is no waiver, we will review for plain

error." (JA 12). This Court should similarly find forfeiture, rather than waiver, based on SSG Askins' challenge to Charge V and its four specifications.

2. It is Unreasonable to Apply the "Waive All Waivable Motions" Provision to the Contested Specifications.

The plea agreement did not specify whether the "waive all waivable motions" provision covered the contested specifications. Yet the government now argues it does. This argument is unsupported by reason.

Neither the plea agreement nor any party at trial addressed the provision's application to the contested specifications, which is unsurprising. Applying the "waive all waivable motions" provision to contested specifications would be nonsensical. Common sense dictates, and the parties surely understood, that the provision only applied to the specifications for which SSG Askins pled guilty.

The Army Court implicitly and correctly found that the provision did not apply to the domestic violence specifications. The Army Court found "no evidence of affirmative waiver" and analyzed for forfeiture. (JA 12). So, too, should this Court.

C. Counsel Are Presumed Competent, but This Case Involved a Novel Issue of Law, and This Court Should Apply the "Time of Review" Interpretation When Analyzing Whether Appellant Forfeited the Issue.

At the time of trial, no service appellate court, nor this Court, had held whether acts under Article 128b(1) and (5) could be multiplicious.[3] Defense counsel were without precedential guidance as to the issue of multiplicity. The unsettled nature means the issue is now only plain on appellate review. In line with *Henderson*, this Court should apply the "time of review" doctrine.

Staff Sergeant Askins agrees with the presumption of competent counsel this Court discussed in *Malone.* 2026 CAAF LEXIS 62, at *12–15; *Strickland v. Washington,* 466 U.S. 668 (1984). But if an issue is novel, the failure to raise it at trial does not equate waiver. Nor does it equate ineffective assistance of counsel. Rather, it means defense counsel were unaware of the issue, and the failure to raise it should not be construed to mean a known right was relinquished. Indeed, the disparate results that occurred under appellate courts' strict adherence to whether an error was plain at the time of trial—disregarding the obvious nature of the error

[3] Only the Army Court's decision in this case has addressed acts charged under both Article 128b(1) and (5) and whether they can be multiplicious. The issue is still unaddressed by other service courts and this Court. The Army Court has addressed multiplicity in regard to domestic violence, but the focus has been on whether two acts solely under Article 128b(1) could be multiplicious. *See United States v. Goundry,* 2023 CCA LEXIS 204 (A. Ct. Crim. App., Apr. 6, 2023); *United States v. Malone,* 85 M.J. 573 (A. Ct. Crim. App., Feb. 25, 2025).

on appeal—was the precise reason the Supreme Court obsoleted its prior holding in *Olano*.

Defense counsel are presumed to note multiplicity and raise the issue with their client. But in this case, SSG Askins did not raise a claim of ineffective assistance because the multiplicity issue was not obvious at the time of trial. This Court should apply the "time of review" doctrine and review for plain error now that the issue has become obvious on direct appeal.

Conclusion

Specifications 1 and 2 of Charge V were multiplicious. The Army Court correctly merged the specifications. Staff Sergeant Askins did not waive the issue and *Malone* is not applicable to the present case.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Cross-Appellee complies with the type-volume limitation of Rule 24(c) because it contains 2,494 words.

2. This Brief on Behalf of 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 March 4, 2026.

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