**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

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| UNITED STATES<br>Appellee<br><br>v.<br><br>SGT (E-5)<br>**CHAS E. PHILLIPS**<br>United States Army,<br>Appellant | **BRIEF ON BEHALF OF APPELLANT**<br><br>Docket No. ARMY 20220233<br><br>Tried at Fort Bliss, Texas, on 1 November 2021, 6 December 2021, 24 January 2022, and 5–6 May 2022, before a general court-martial appointed by Commander, 1st Armored Division, Colonel Robert L. Shuck and Colonel Matthew S. Fitzgerald, presiding. |

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

## Assignments of Error[1]

**I.**

**WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO EL PASO POLICE OFFICERS.**

**II.**

**WHETHER THE SUBSTANTIAL OMISSION OF A RULING REGARDING MILITARY RULE OF EVIDENCE 404(b) RENDERS THE RECORD INCOMPLETE.**

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

**III.**

**WHETHER APPELLANT'S FACIALLY DUPLICATIVE CONVICTIONS FOR ASSAULT CONSUMMATED BY BATTERY UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 ARE MULTIPLICIOUS.**

**IV**

**IN THE ALTERNATIVE, WHETHER APPELLANT'S CONVICTIONS UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.**

## Statement of the Case

On 6 May 2022, a military judge sitting as a general court-martial found appellant, Sergeant (SGT) Chas E. Phillips, guilty, contrary to his pleas, of one specification of communicating a threat in violation of Article 115, Uniform Code of Military Justice (UCMJ) (10 U.S.C. § 915) and three specifications of assault consummated by battery in violation of Article 128, UCMJ. (R. at 419). The military judge sentenced appellant to forty months confinement and a dishonorable discharge.[2] (R. at 487). On 6 June 2022, the convening authority approved the

[2] The military judge apportioned appellant's sentence as follows: eight months for Charge I, to be served consecutively with Charge II; eighteen months for Specification 1 of Charge II, to be served consecutively with Charge I, and

adjudged sentence, and on 22 June 2022, the military judge entered judgment. (Convening Authority Action; Judgment of the Court).

## Assignments of Error

### I. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO EL PASO POLICE OFFICERS.

## Facts Relevant to Assignment of Error

Officers [redacted] and [redacted] of the El Paso Police Department received a report of an alleged physical assault from [redacted] appellant's spouse. (App. Ex. XLV). The officers proceeded directly to appellant's residence, where they were joined by two more officers. (App. Ex. XLV). All four officers were in uniform and armed. (App. Ex. XLV). Appellant allowed Officers [redacted] and [redacted] into his residence because his child was inside crying. (App. Ex. XLV). Two armed officers remained outside appellant's front door while Officers [redacted] and [redacted] entered to question appellant while he tended to his child. (App. Ex. XLV). Neither officer advised appellant of his rights under Article 31, UCMJ or *Miranda v. Arizona,* 384 U.S. 436 (1966).

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Specifications 2 and 3 of Charge II; fourteen months for Specification 2 of Charge II, to be served concurrently with Specification 3 of Charge II and consecutively with confinement for Charge I and Specification 1 of Charge II; and 10 months for Specification 3 of Charge II, to be served concurrently with Specification 2 of Charge II and consecutively with Charge I and Specification 1 of Charge II. (R. at 487).

Officer [redacted] told appellant the police were at his residence because of his wife's report and asked for appellant's version of events. (R. at 39; App. Ex. XLV). After Officers [redacted] and [redacted] interrogated appellant for up to an hour, and pressed him on his veracity, he made several damaging admissions. (R. at 40–42).

Officer [redacted] stated, as a matter of course, she did not read suspects their rights. (R. at 46) ("[I]t's not procedure to give rights."). Instantly, while questioning appellant, Officer [redacted] expressly told appellant he was not free to leave. (R. at 54–5). During the motion to suppress, the military judge and Officer [redacted] engaged in the following exchange:

> Q. Was [appellant] in this case, was he -- when you were all having this discussion in his house, was he ever told he was free to leave?
>
> A. No. No he was not, Sir. We did let him know that.
>
> Q. But he wasn't left with an impression that he was free to just --
>
> A. No, Sir. And at that time he was not free to go.
>
> Q. He was not free to go?
>
> A. He wasn't.
>
> (R. at 54–5.)

Officer [redacted] stated she would have only let appellant leave only after determining his guilt. (R. at 55) ("[S]o when I say he's not free to leave, he was not free to leave until we felt we had the information for our investigation to either

say he did do this or he did not do that."). When she finished questioning appellant, the officers handcuffed him and escorted him to a patrol car. (R. at 42).

Before trial, appellant moved to suppress all of his statements to the El Paso Police Department on 14 August 2019. (App. Ex. VI). Following Officer [redacted] testimony, the military judge found, "[t]he police officers considered [appellant] detained (similar to a traffic stop) and the [appellant] was not free to leave. However, the [appellant] *was never told this information*." (App. Ex. XLV) (emphasis added). The military judge denied appellant's motion, concluding, under the totality of the circumstances, appellant was not under custodial arrest, and as such, was not entitled to the protections afforded under *Miranda*. (App. Ex. XLV).

Trial counsel made repeated references to appellant's admissions throughout his opening statement, case-in-chief, and closing statement. (R. at 166) ("You're also going to hear the accused's words what the accused has already admitted to the police to doing."); (R. at 167) ("The government's case is going to be corroborated by the admission of the accused, what he told the police at the scene."); (R. at 182–83) (questioning Officer [redacted] during case-in-chief); (R. at 367) ("These are the words of the Accused to the El Paso Police Department when they showed up to his house to investigate the assault of his wife."); (R. at 384) ("[Officer [redacted] goes to the accused's house. . . . What does the accused tell her? . . .

I pushed her down. I held her down with my forearm. I may have whacked her with the chord as well."); (R. at 388) ("*Most importantly*, the accused's own admissions establish proof beyond a reasonable doubt. The accused's own words to [the] El Paso Police Department.") (emphasis added).

## Standard of Review

This court reviews a military judge's denial of a motion to suppress for an abuse of discretion. *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or his conclusions of law are incorrect. *Id*. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001) (citation and quotations omitted). This court reviews de novo any conclusion of law supporting the suppression ruling, "including . . . whether someone is in custody for the purposes of *Miranda* warnings[.]" *Id.*

## Law

### A. An Interrogation is Custodial When the Subject Cannot Leave.

"No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. Amend. V. To that end, the prosecution may not use any statement, exculpatory or inculpatory, obtained from custodial

interrogation of the accused in the absence of an appropriate warning concerning, *inter alia*, self-incrimination. *Chatfield*, 67 M.J. at 437 (citing *Miranda*, 384 U.S. at 444).

Custodial interrogation does not only occur in a police questioning room. It is defined as "questioning initiated by law enforcement after a person has been taken into custody or otherwise *deprived of his freedom of action in any significant way*." *Id*. (emphasis added). The court must assess the totality of the circumstances to determine, objectively, the degree to which law enforcement limited the freedom of the individual being questioned. *United States v. Hale*, 81 M.J. 651, 666 (Army Ct. Crim. Ap. 2021). In answering that question, courts evaluate: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred; (3) the length of the questioning; (4) the number of law enforcement officers present at the scene; and (5) the degree of physical restraint placed upon the suspect." *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017).

Among these factors, the law places an enormous emphasis on whether investigators allow the subject of an investigation freedom to leave. *See e.g. id.* at 417–18 ("although . . . not handcuffed . . . investigators required him to remain in place."); *Hale*, 81 M.J. at 667 ("[w]hile not restrained physically, appellant was directed to sit on the living room couch, a directive he was not free to ignore); and

*United States v. Catrett*, 55 M.J. 400, 404 (C.A.A.F. 2001) (concurring "the appellant was in custody once the police told him he was not free to leave the living room unless a police officer accompanied him.").

This emphasis accords with the question at the heart of inquiry—"how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal quotation marks omitted). Consequently, the subject of an investigation is in custodial interrogation at the point when he is not free to leave; conversely, *Miranda* does not extend to circumstances where, objectively, a suspect could freely leave. *See Catrett* 55 M.J. at 403 (finding appellant not free to leave where officers told him he needed to remain in his living room or have an officer accompany him, though he was not told he was under arrest, free to leave, or handcuffed); *cf Chatfield* 67 M.J. at 436 (finding appellant free to leave, though he was at police station, where "the office doors were open and Appellant had unimpeded access to them."); and *United States v. Evans*, 75 M.J. 302, 304–306 (C.A.A.F. 2016) (finding no custodial interrogation where appellant voluntarily entered conference room and provided statements to superior officer).

**B. Unwarned Confessions are Uniquely Prejudicial.**

As an appellant's right to remain silent is of a constitutional dimension, the government bears the burden of demonstrating their use was harmless beyond a

reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 311 (1991). An error is harmless when there is no reasonable possibility the error might have contributed to the conviction. *United States v. Tovarchaves*, 78 M.J. 458, 466 (C.A.A.F. 2019) (citation omitted).

An accused's admissions are "probably the most probative and damaging evidence that can be admitted[.]" *Fulminante*, 499 U.S. at 296. An erroneously admitted admission is not "harmless beyond a reasonable doubt if there is a reasonable possibility that the evidence complained of *might have* contributed to the conviction." *United States v. Mott*, 72 M.J. 319, 332 (C.A.A.F. 2013) (emphasis added) (internal quotation marks omitted). The greater the government relies on the use of the offending statements, the likelier the error is not harmless beyond a reasonable doubt. *Id.* (finding error not harmless beyond a reasonable doubt because "trial counsel used Appellant's statements extensively to support the[ir] theory[.]"); *see also United States v. Burnside*, 74 M.J. 783, 792 (Army Ct. Crim. App. 2015) (setting aside findings where "in its opening statement, case-in-chief-closing[,] and rebuttal arguments[,] the government prominently emphasized statements obtained in violation of the Fifth Amendment[.]").

## Argument

### A. The Military Judge's Most Critical Finding of Fact is Clearly Erroneous.

Unlike many similar cases, the military judge and this court need not guess or speculate what appellant was told or reasonably believed at the time of the interrogation as Officer [redacted] stated appellant knew he was not free to leave on two occasions. (R. at 54–55). The military judge, nevertheless, found appellant "was never told this information." (App. Ex. XLV). This is a clearly erroneous finding of fact.

First, the military judge asked "was [appellant] in this case, was he -- when you were all having this discussion in his house, was he ever told he was free to leave?" (R. at 54). The military judge plainly began asking whether appellant was free to leave, but midway through, paused, and pivoted to asking whether appellant *knew* he was free to leave. (R. at 54). Officer [redacted] answered both questions, stating "No. No he was not sir. We did let him know that." (R. at 54). To read her statement in any way other than answering both components of the military judge's question would render the second sentence nonsensical. Appellant could not have both been uninformed as to whether he was free to leave and have had Officer [redacted] "let him know that."

The military judge then asked a partial question—whether the appellant was "left with the impression that he was free to"—but he was cut off by Officer [redacted]

reply "No, sir. And at that time he was not free to go." (R. at 54). Her response, though quick on the draw, directly addressed the military judge's question about the appellant's subjective belief about whether he would have been free to leave. Her subsequent sentence addresses whether the police would have let him leave.

There is only one plausible reading of Officer [redacted] statements: appellant was not free to leave his home while under interrogation *and* he knew it. The miliary judge's finding is plainly mistaken, and, therefore, clearly erroneous. *See Martin*, 56 M.J. at 106.

**B. Any Reasonable Person Would Find His or Her Freedom of Action Significantly Restrained Under the Instant Circumstances.**

Suspecting him of having committed a criminal offense, four armed officers came to appellant's home, failed to advise him of his rights, interrogated him for over an hour, prevented him from leaving, and told him he couldn't leave until they determined, for themselves, whether he was a criminal. Three out of the five relevant factors[3] favor finding appellant's interrogation custodial, including the dispositive impact of the restraint placed on appellant's freedom of movement. *See Mitchell*, 76 M.J. at 417 (outlining five factors).

[3] The location and atmosphere of the interview favors neither appellant nor government, as, though the interview took place in appellant's home, it took place with two armed officers in his living room, and two standing outside his front door. The length of the questioning, "up to an hour[,]" is neither remarkably long nor short. (R. at 40–42).

First, appellant did not appear for questioning voluntarily. The police showed up at his home, armed and ready to use information gleaned from [redacted] to interrogate him. Second, appellant, alone with his child, was confronted by four uniformed and armed officers, two of whom stood watch outside his home while the other two entered.

Lastly, the degree of physical restraint placed upon appellant, in and of itself, placed him under custodial arrest. *Hale*, 81 M.J. at 667; *Catrett*, 55 M.J. at 404. Physical restraint is not a literal restriction of a suspect's freedom of movement by shackles or a locked cell. *See Mitchell*, 76 M.J. at 417–18 (finding appellant physically restrained "although appellee was not handcuffed"); *see also Hale*, 81 M.J. at 667 (finding appellant physically restrained when he was directed to remain on "the living room couch"); *see also Catrett*, 55 M.J. at 404 (finding appellant physically restrained as "police told him he was not free to leave the living room unless a police officer accompanied him."). Rather, evaluating the degree of physical restraint concerns: 1) whether the subject can leave the interrogation; and 2) whether the subject knows he cannot leave the interrogation. *See id.*

No reasonable person in appellant's position would believe he or she was free to leave questioning by Officers [redacted] and [redacted] particularly after they told him he could not leave. (R. at 54) ("No. No he was not, sir. We did let him know that.").

The *Catrett* court found less obvious restraint dispositive in resolving the issue of custodial arrest, wherein the subject was never informed he could not leave but was nevertheless subject to the pressures underpinning *Miranda*. *Catrett*, 55 M.J. at 403. Subsequent courts have agreed arrests are custodial where investigators require the subject remain in place pending questioning. *Mitchell*, 76 M.J. at 417; *Hale* 81 M.J. at 667. This court, similarly, should find appellant was subject to custodial interrogation, as no reasonable person would feel free to leave an interrogation when multiple armed officers tell that individual he is not free to leave. As such, the military judge erred as a matter of law by failing to suppress statements obtained during custodial interrogation in the absence of *Miranda* warnings. *Chatfield*, 67 M.J. at 437.

**C. The Government Cannot Show Harmlessness Beyond a Reasonable Doubt.**

The government heavily relied on appellant's unwarned statements at every phase of his court-martial, with the trial counsel going so far as to state, in closing argument, that appellant's admission was the most important piece of evidence in establishing his guilt. (R. at 388). These repeated references, including those ascribing the greatest import to his unwarned statements, leave no doubt this evidence "might have" contributed to his conviction. *Mott*, 72 M.J. at 332.

The Supreme Court agrees with trial counsel on the power and importance of admissions. *Fulminante*, 499 U.S. at 296 ("probably the most probative and

damaging evidence that can be admitted[.]"). The greater the government relies on the use of the offending statements at trial, the more difficult it becomes for the government to allege harmlessness beyond a reasonable doubt. *Mott*, 72 M.J. at 332–33 (citing trial counsel's extensive use of appellant's statements); *Burnside*, 74 M.J. at 792 (setting aside findings where government emphasized statements obtained in violation of fifth amendment in opening, case-in-chief, and closing). Given the government's extensive use of the offending statements, and the probative weight ascribed to those statements, the use of his unwarned statements was not harmless beyond a reasonable doubt, and the findings against appellant must be set aside.

## II. WHETHER THE SUBSTANTIAL OMISSION OF A RULING REGARDING MILITARY RULE OF EVIDENCE 404(b) RENDERS THE RECORD INCOMPLETE.

### Facts Relevant to Assignment of Error

Appellant's court-martial featured two military judges, three prosecutors, and four different defense counsel. (R. at 2, 16, 98, 107). During that turnover, the government filed notice of intent to introduce evidence pursuant to Military Rule of Evidence (Mil. R. Evid.) 404(b), which appellant opposed. Colonel (COL) Robert L. Shuck, the first military judge, heard argument. (App. Ex. XVII; App. Ex. XVIII; R. at 77–81).

Appellant opposed the following Mil. R. Evid. 404(b) evidence: 1) appellant stating to [redacted] he would "kick her mouth into the ledge[;]" 2) other instances of domestic violence; 3) issues between [redacted] and appellant related to finances; 4) appellant reducing or removing [redacted] from his death gratuity beneficiary selection; and 5) appellant leaving [redacted] in Los Angeles.[4] (App. Ex. XVII; App. Ex. XVIII). Without any ruling regarding the admissibility of evidence under Mil. R. Evid. 404(b), the government introduced testimony regarding only the first and third bases of the above-cited bases. (R. at 201, 252, 296, 337).

Regarding the first basis, Officer [redacted] stated, "[redacted] had explained to us that at one point during the assault [appellant] had placed her head and chin along that step and threatened to stop her head into the step right there." (R. at 201). The government argued the importance of this statement in closing. (R. at 377) ("What did [Officer [redacted] tell you? This -- this curb right here? What was he going to do? He was going to curb stomp her on this little step in their garage."). (R. at 377). [redacted] never described any such threat during appellant's court-martial.

Regarding the third basis, the government introduced testimony from [redacted] regarding the financial issues between appellant and herself. (R. at 251–53). (stating LP's understanding of how appellant viewed her responsibility to generate income while post-partum). In its closing, the government argued financial issues,

[4] Appellant did not challenge the government's use of a sixth basis. (App. Ex. XVII).

in part, served as appellant's motive for the charged assault. (R. at 381) ("She's accosted verbally in the garage by the husband about money, the power bill, the electric bill.").

A judge must first rule on the admissibility of evidence under Mil. R. Evid. 404(b) before it can be offered. The record, however, lacks a relevant ruling from either COL Shuck or his replacement, COL Matthew S. Fitzgerald.[5]

## Standard of Review

Whether a record of trial is complete is a question of law reviewed de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014).

## Law

### A. There Must be a Ruling under Mil. R. Evid. 404(b) Before Such Evidence Can Be Introduced at Trial.

Military Rule of Evidence 404(b) governs the admission of evidence of the accused's uncharged misconduct. Mil. R. Evid. 404(b). The government must provide "reasonable notice" before trial of the general nature of uncharged misconduct and proffer a valid, non-propensity purpose. *Id*. Furthermore, "[b]efore admitting evidence under Mil. R. Evid. 404(b), a military judge *must* make findings" on the factors established in *United States v. Reynolds*, 29 M.J.

[5] The government also filed a supplementary notice of its intent to introduce evidence under Mil. R. Evid. 404(b), which is not relevant to this assignment of error. App. Ex. XLIX.

105, 109 (C.M.A. 1989). *United States v. Whigham*, 72 M.J 653, 658 (Army. Ct. Crim. Ap. 2013) (emphasis added); *Huddleston v. United States*, 485 U.S. 681, 686 (1988) (describing the "threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b).").

This emphasis on this gatekeeping function stems from risk of contaminating the court-martial with propensity evidence. *See United States v. Yammine*, 69 M.J. 70, 77–78 (C.A.A.F. 2010) (noting problematic nature of admitting evidence without military judge "separately undertak[ing] the three-part *Reynolds* test before admitting the uncharged misconduct under Mil. R. Evid. 404(b).")

**B. The Record of Trial Must Contain Rulings Affecting the Substantial Rights of the Accused.**

Appellant is entitled to a complete record of the proceedings. Article 54, UCMJ. "Records of trial that are not substantially verbatim or are incomplete cannot support a sentence that includes a punitive discharge, confinement in excess of six months, or forfeiture of pay for more than six months." *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006), aff'd, 65 M.J. 190 (C.A.A.F. 2007).

Furthermore, any substantial omission from a record of trial renders it "incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). Substantial

omissions include unrecorded sidebar conversations involving the admission of evidence; insubstantial omissions include the absence of photographic exhibits, a flier given to members, a court member's written question, or the accused's personnel record. *Id*. (citations omitted); *see United States v. Gray* 7 M.J. 296, 298 (C.M.A. 1979) (finding unrecorded sidebar conversation regarding admissibility of photographic evidence rendered record nonverbatim under Article 54, UCMJ).

In the context of a missing ruling, the "correct approach" in determining whether or not an omission is substantial lies in whether "the missing rulings affected an appellant's rights at trial." *United States v. King*, 2021 C.C.A. LEXIS 415, 21–22 (A.F. Ct. Crim. App. 2021, aff'd, 2023 CAAF LEXIS 112 (C.A.A.F. 2023) (finding missing unreasonable multiplication of charges (UMC) ruling affected appellant's rights at trial). Rulings affecting the substantial rights of the appellant must be "recorded, transcribed, and attached to the record for the appellate review. Without them, proper appellate review is impossible." *United States v. Porter*, 2000 CCA LEXIS 307, 8–9 (N.M. Ct. Crim. App. 2000).

**Argument**

Despite both parties filing motions and the military judge hearing argument, the required ruling regarding the admissibility of Mil. R. Evid. 404(b) evidence is absent from the record. (App. Ex. XVII; App. Ex. XVIII; R. at 77–81); *see*

*Whigham* (requiring ruling on Mil. R. Evid. 404(b) evidence before presentation to finder-of-fact).

The relevant ruling must have been made for two reasons. First, the military judge needed to make findings regarding appellant's motion in opposition to the government's noticed evidence under Mil. R. Evid. 404(b). *Reynolds*, 29 M.J. at 109. Second, the manner in which the government used the relevant evidence, relying on only two of the five opposed bases, evinces a ruling excluding the remaining three. (App. Ex. XVII; App. Ex. XVIII; R. at 201, 252, 296, 337).

Of the five bases objected to by appellant, the three bases most likely to be excluded under the *Reynolds* test—uncharged instances of domestic violence, appellant's death gratuity beneficiary, and leaving [redacted] in Los Angeles—were the three bases not discussed by the government at trial. *Reynolds*, 29 M.J. at 109. The government, however, did introduce evidence of the uncharged threat against [redacted] and evidence of financial pressure as proof appellant committed the charged misconduct. (R. at 201, 251–52, 377, 381).

The importance of the evidence offered against appellant under Mil. R. Evid. 404(b) is made clear by its use in both the government's case-in-chief and closing argument. (R. at 201; 337) (describing uncharged threat); (R. at 251–53; 381) (describing evidence concerning financial manipulation of [redacted] The admission of such a ruling constitutes a substantial omission, as this evidentiary ruling concerns

highly damaging, potentially inadmissible character evidence against appellant. *See Henry*, 53 M.J. at 111 (contrasting substantial omissions, including missing conversations concerning admission of evidence, with insubstantial omissions, including missing, but admitted, photographic evidence). In the absence of this ruling, "proper appellate review is impossible." *Porter*, 2000 CCA LEXIS 307, at 8–9 (setting aside findings where record omitted transcripts of two Article 39(a) sessions concerning presentation of evidence). Consequently, the findings and sentence in the instant case should be set aside.

## III. WHETHER APPELLANT'S FACIALLY DUPLICATIVE CONVICTIONS FOR ASSAULT CONSUMMATED BY BATTERY UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 ARE MULTIPLICIOUS.

### Facts Relevant to Assignments of Error III and IV

The court convicted appellant of three specifications under Article 128, UCMJ. (Statement of Trial Results). All three specifications concerned allegations regarding appellant's conduct on 14 August 2019 in his garage, wherein appellant was charged with pushing and punching [redacted] dragging her by the hair, leaving the garage for "a little bit[,]" and returning to strike her with an extension cable. *Id*.; (R. at 255–61). The government argued all three specifications stemmed from the same impulse: "a fight with [redacted] over money[.]" (R. at 368). Appellant litigated a motion concerning UMC, which the military

judge denied, finding the use of an extension cord and an interruption in time rendering each specification distinct criminal acts. (R. at 363–66).

## Standard of Review

Absent express waiver or consent, this court reviews claims of multiplicity for plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000).

To prevail under a plain error analysis, appellant must demonstrate: 1) the presence of error; 2) the plain and obvious nature of the error; and 3) material prejudice to a substantial right caused by the error. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (citation omitted). "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

### A. Multiple Convictions for Physical Assaults United in Time, Circumstance, and Impulse are Multiplicious.

"Multiplicity occurs when two offenses are facially duplicative." *United States v. Long*, 2017 CCA LEXIS 131, at 3–4 (Army Ct. Crim. App. 28 Feb. 2017) (summ. disp.). Offenses are facially duplicative when the factual components of the charged offense are the same. *United States v. St. John*, 72 M.J. 685, 687 (Army Ct. Crim. App. 2013).

This court, its sister courts, and its superior court have long held physical assaults "united in time, circumstance, and impulse" constitute a single crime. *United States v. Clarke*, 74 M.J. 627, 629 (Army Ct. Crim. App.); *see also e.g*. *United States v. Morris*, 18 M.J. 450, 450 (C.M.A. 1984) (consolidating convictions on constitutional grounds, as separate assault convictions occurred "on the same date and in the same location[.]"); *United States v. Hernandez*, 78 M.J. 643, 647 (C.G. Ct. Crim. App. 2018); (finding convictions facially duplicative where the government charged appellant with three touches occurring "around the same time[.]"); and *United States v. Lombardi*, 2002 CCA LEXIS 138, 2–5 (N.M. Ct. Crim. App. 26 Jun. 2002) (mem. op.) (finding convictions facially duplicative where appellant spat on, pushed, and choked wife on same date, in same location).

The longstanding principle against charging assaults in a blow-by-blow fashion is a direct application of the Double Jeopardy Clause. *United States v. Forrester*, 76 M.J 389, 394 (C.A.A.F. 2017). "There are distinct types of multiplicity with correspondingly distinct tests to evaluate them." *Hernandez*, 78 M.J. at 645. The first, a single act charged under multiple statutes, requires analyzing the elements of each crime. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

The second, at issue instantly, involves multiple violations of the same statute, where those violations are predicated on the same conduct. *See id*.

("[W]hen the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.").

To determine whether multiple acts are multiplicious, the court must determine whether those acts fall within a single unit of prosecution. *Forrester*, 76 M.J at 394. This is not "a literal application of the elements test," but rather, a "realistic comparison of the . . . 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). Violent assaults are demarcated by "touchings united in time, circumstance, and impulse . . . as opposed to the specialized assaults under Article 120 or 134[.]" *Clarke*, 74 M.J. at 629; *see also Pauling*, 60 M.J. at 94 (appropriate unit of prosecution is "the number of overall beatings . . . rather than the number of individual blows suffered.").

**B. Multiplicious Convictions are Prejudicial *Per Se*.**

Imposing multiple convictions for what ought to be a single conviction is, in and of itself, prejudicial. *Ball v. United States*, 470 U.S. 856, 864–65 (1985).

> The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal

> conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

*Id*; *see also United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999) ("an unauthorized conviction . . . constitutes unauthorized punishment in and of itself.").

**C. Facially Duplicative Convictions May Be Consolidated by a Court of Criminal Appeals.**

This court may reassess a sentence marred by multiplicious convictions in accordance with *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). Such 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.* This court should consider the following factors in determining whether reassessment or a rehearing is appropriate:

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone.
>
> . . . .
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court martial remain admissible and relevant to the remaining offenses.

(4) Whether the remaining offenses are the type that judges of the courts of criminal appeals should have experience and familiarity with to reliably determine what sentence would have been imposed at trial.

*Id.* at 15–16.

## Argument

### A. Appellant's Convictions for Assault Consummated by Battery Under Charge II, Specifications 1–3 are Facially Duplicative.

The facts before this court show one "touching . . . united in time, circumstance, and impulse[,]" not three. *Clarke*, 74 M.J. at 629. The government charged appellant with entering his garage on 14 August 2019, pushing and punching his wife, dragging her by the hair, and striking her with an extension cable. (Statement of Trial Results). These events occurred one after the other, with appellant only leaving the garage for "a little bit[.]" (R. at 255–61). The government argued all three charges stemmed from the same impulse—a fight over money. (R. at 368).

The Double Jeopardy Clause only permits one conviction for touchings united in time, circumstance, and impulse,. *Clarke*, 74 M.J. at 629; *Pauling*, 60 M.J. at 94. By failing to consolidate facially duplicative specifications, the military judge committed plain error. *Heryford*, 52 M.J. at 266 (finding plain error even under circumstances where appellant pleaded guilty). Allowing facially duplicative convictions for violent assault to stand abrogates violates long-standing

case law consistent across all military courts. *See e.g. Morris*, 18 M.J. at 450; *Clarke*, 74 M.J. at 629; *Hernandez*, 78 M.J. at 647; *and Lombardi*, 2002 CCA LEXIS 138, at 2–5.

**B. Appellant's Facially Duplicative Convictions Merit Consolidation and Reassessment by This Court.**

Appellant's convictions merit consolidating Specifications 1–3 under Specification 1, the gravamen offense.[6] The principles articulated in *Winckelmann* favor this court reassessing appellant's sentence. *See id.* (consolidating assaults under single specification and dismissing superfluous charge): *see also Fiame*, 74 M.J. at 588 (consolidating and dismissing charges). Dismissing Specifications 2 and 3 does not dramatically change the penalty landscape or exposure, as Specifications 2 and 3 were set to run consecutively. Further, appellant chose to be sentenced by military judge alone. Third, the nature of the proposed consolidated offenses captures the gravamen of the original offense. Lastly, this court has significant experience assessing domestic assaults.

[6] Proposed SPECIFICATION 1: In that Chas E. Phillips, U.S. Army, did, at or near El Paso, Texas, on or about 14 August 2018, unlawfully strike Mrs. [redacted] the spouse of the accused, with an extension cable, push her onto the ground, punch her face with his fist, and drag her by the hair with hands.

## IV. IN THE ALTERNATIVE, WHETHER APPELLANT'S CONVICTIONS UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.

### Standard of Review

This court reviews claims of UMC for an abuse of discretion. *Untied States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004).

### Law

Rule for Courts-Martial [R.C.M.] 307(c)(4) states, "[w]hat is substantially one transaction should not be made the basis for [UMC] against one person." The Court of Appeals for the Armed Forces [CAAF] set five factors for assessing UMC claims: 1) whether appellant objected at trial; 2) whether the offenses constitute distinctly separate criminal acts; 3) whether the number of charged offenses exaggerates appellant's criminality; 4) whether the number of charged offenses unreasonably increases an appellant's punitive exposure; and 5) whether the record shows evidence of prosecutorial overreach. *United States v. Quiroz*, 55 M.J. 334, 338–39 (C.A.A.F. 2001).

"[O]ne or more factors may be sufficiently compelling . . . to warrant relief[.]" *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). "Relief is warranted where multiple charges reference a single impulse or intent, or reflect a unity of time with a connected chain of events." *Id.* This court has found a single

transaction resulting in multiple assault convictions constitutes UMC where identical facts support multiple assault convictions. *See e.g. United States v. Bearden*, 2013 CCA LEXIS 935, 6 (Army Ct. Crim. App. 31 Oct. 2013) (sum. disp.); *and* U.S. v. Perez, 2015 CCA LEXIS 191, 5–6 (Army Ct. Crim. App. 2015) (summ. disp.). This court may dismiss unreasonably multiplied charges. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006).

**Argument**

The *Quiroz* factors weigh in favor of appellant, as the second and third factors are dispositive; convicting appellant on three separate specifications more than doubles the number of appellant's convictions, unduly exaggerating his criminality. *See Bearden*, 2013 CCA LEXIS 935, at *5–*6 (finding second and third *Quiroz* factors control where same facts supported multiple convictions).

As appellant's convictions constitute UMC, his convictions merit consolidation. *Campbell*, 71 M.J. at 23. Further, it is appropriate for the court to consolidate appellant's convictions at its level. *See supra,* at Section III(B).

## Conclusion

Wherefore, appellant respectfully asks this honorable court to set aside appellant's findings and sentence.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on April 26, 2023.

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