

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**RESPONSE TO SUGGESTION
FOR *EN BANC*
RECONSIDERATION**

v.

Docket No. ARMY 20230151

Sergeant First Class (E-7)

MICHAEL S. MALONE, JR.

United States Army

Appellant

Tried at Fort Bliss, Texas, on 22
March 2023, before a general court-
martial convened by Commander,
Headquarters, Fort Bliss, Lieutenant
Colonel Jessica Conn, Military
Judge, presiding.

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

Pursuant to Rules 27 and 31.2(e) of this Honorable Court's Rules of
Appellate Procedure and Order, dated 19 July 2024, the undersigned appellate
government counsel files this response to appellant's Suggestion for *En Banc*
Reconsideration, dated 24 June 2024. The government does not oppose *en banc*
reconsideration with respect to whether appellant affirmatively waived multiplicity
claims.

1. On 22 March 2023, a military judge sitting as a general court-martial
convicted appellant, pursuant to his pleas, of three specifications of domestic
violence, in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C.

§§ 928b [UCMJ].^{1 2} (R. at 84; Statement of Trial Results [STR]). The military judge adjudged concurrent, segmented sentences. (R. at 155; STR).

2. On appeal, the parties filed their respective briefs with this court’s Panel Number 3 (“the Panel”). (Appellee’s Br., dated 10 November 2023; Appellant’s Br., dated 22 February 2024; Appellee’s Reply Br., dated 6 March 2024). The Panel issued its memorandum opinion affirming the findings and sentence on 23 May 2024. *United States v. Malone*, ARMY 20230151, 2024 CCA LEXIS 217 (Army Ct. Crim. App. 23 May 2024) (mem. op.).

3. The Panel found affirmative waiver consistent with this court’s prior decisions. *Id.*, at *5–7. Namely, at trial, defense counsel asserted defense had no motions in response to the military judge’s advisal about motions to dismiss. The Panel considered our superior court’s precedence, including both *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) and *United States v. Hardy*, 77 M.J. 438, 443 (C.A.A.F. 2018), and found the clause “waive all waivable motions” was not required under the facts of this case. *Malone*, 2024 CCA LEXIS 217, at *5–6.

4. The Panel further declined to pierce waiver in the exercise of its discretion because, to the extent appellant sought merger of the three sentences

¹ Every finding of guilty in the Entry of Judgment is for an offense that occurred after 1 January 2021. (STR; Judgment).

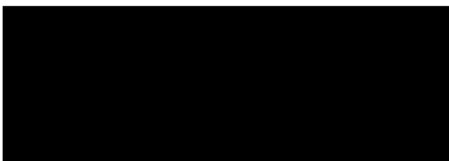
² The military judge also convicted appellant, pursuant to his pleas, of two specifications of disobeying a superior commissioned officer in violation of Article 90, UCMJ. (R. at 84; STR).

imposed for his domestic violence convictions, the military judge imposed concurrent sentences. *Id.*, at n.4.

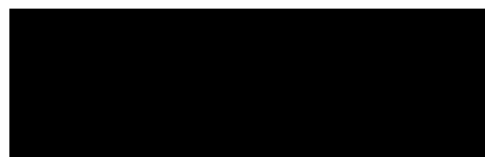
5. To the extent appellant is asking this court to reconsider whether Specifications 1 and 3 were facially duplicative, the government opposes reconsideration. The Panel in dicta declined to determine whether Specifications 1 and 3 were facially duplicative. *See id.*, at *8 (“[G]iven that appellant affirmatively waived his multiplicity challenge, we need not answer the question of . . . whether Specifications 1 and 3 are ‘facially duplicative.’”).

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court reconsider *en banc* the ruling in this case with respect to affirmative waiver.



VY/T. NGUYEN
CPT, JA
Appellate Attorney, Government
Appellate Division



CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division



RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

CERTIFICATE OF SERVICE, U. S. v. MALONE (20230151)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
[REDACTED] on the 22nd day of July, 2024.

[REDACTED]
DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[REDACTED]