IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Sergeant First Class (E-7) **MICHAEL S. MALONE JR.** United States Army Appellant	**SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE (CORRECTED)** Docket No. ARMY 20230151 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

Specified Issues

I. WHETHER APPELLANT AFFIRMATIVELY WAIVED ANY ISSUES OF MULTIPLICITY, UNREASONABLE MULTIPLICATION OF CHARGES, AND PROPER UNIT OF PROSECUTION WHEN HE PLEADED GUILTY AND HIS DEFENSE COUNSEL STATED THE DEFENSE HAD NO MOTIONS BEFORE ENTERING PLEAS.

II. IF THOSE ISSUES WERE NOT AFFIRMATIVELY WAIVED, WHETHER APPELLANT'S MULTIPLE CONVICTIONS UNDER THE SAME STATUTE WERE CORRECT IN LAW.

On 23 May 2023, this court issued a Memorandum Opinion affirming the findings and sentence in this case. *United States v. Malone*, ARMY 20230151, 2024 CCA LEXIS 217 (Army Ct. Crim. App. 23 May 2024) (mem. op.).

Panel No 2

On 24 June 2024, appellant filed a Suggestion for *En Banc* Reconsideration. On 19 July 2024, this court ordered appellee to file a response to the Suggestion. On 22 July 2024, appellee filed its response. This court adopted appellant's Suggestion and issued a Notice of Hearing on 29 August 2024 and 9 October 2024, respectively. Appellant filed a supplemental brief on 18 October 2024 in accordance with the court's Notice of Hearing. (Appellant's Supp. Br., dated 18 October 2024).

Statement of Facts

The government incorporates the following facts in addition to those in Appellant's Brief, dated 22 February 2024:

Approximately one month after preferral, appellant submitted an offer to unconditionally plead guilty to the offenses for which he is now convicted. (Charge Sheet; JA 185; STR). Appellant agreed, in relevant part, to enter into a stipulation of fact agreed upon by both parties, proceed to trial on the earliest available date, and plead guilty to Specification 1 of Charge I, Specification 3 of Charge I, and Specification 4 of Charge I.[1] (JA 187–88). The Convening Authority approved the request and in exchange, agreed on behalf of the United States to limit the sentence to a confinement range of 20–28 months for Specification 1 of

[1] In addition, appellant agreed to plead to two specifications of disobeying a superior officer.

Charge I, 20–28 months for Specification 3 of Charge I, and 24–32 months for Specification 4 of Charge I, all to run concurrently and to withdraw and dismiss an additional domestic violence specification, one specification of assault with the infliction of substantial bodily injury, one specification of maiming, and one specification of obstruction of justice.[2]

Thereafter, the parties acted in accord with the plea agreement: the parties entered into a stipulation of fact on 10 March 2023 (JA 191–201); twelve days later, appellant's arraignment and guilty plea proceedings occurred (JA 202, 204); appellant entered pleas of guilty, in relevant part, to Specification 1 of Charge I, Specification 3 of Charge I, and Specification 4 of Charge I (JA 204); and trial counsel moved to withdraw and dismiss the specifications agreed upon and asked the military judge to adjudge 28 months for Specification 1 of Charge I, 28 months for Specification 3 of Charge I, and 32 months for Specification 4 of Charge I all to run concurrently. (JA 267).

In addition, before the military judge accepted appellant's pleas of guilty, the military judge asked if either party desired additional inquiry. (JA 231, 259). Both parties responded, "No." (JA 231). Thereafter, the military judge accepted

[2] At the time of the offense, the President had not enumerated the maximum punishment for Article 128b, UCMJ violations. However, the maximum punishment for these offenses was reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for twenty-three years, and a dishonorable discharge. (JA 233–34).

appellant's pleas and adjudged concurrent sentences of 20 months for Specification 1 of Charge I, 26 months for Specification 3 of Charge I, and 30 months for Specification 4 of Charge I. (JA 271; STR).

Specified Issue I

WHETHER APPELLANT AFFIRMATIVELY WAIVED ANY ISSUES OF MULTIPLICITY, UNREASONABLE MULTIPLICATION OF CHARGES, AND PROPER UNIT OF PROSECUTION WHEN HE PLEADED GUILTY AND HIS DEFENSE COUNSEL STATED THE DEFENSE HAD NO MOTIONS BEFORE ENTERING PLEAS.

Standard of Review

This court reviews whether an accused has waived an issue de novo. *United States v. Ahern*, 77 M.J. 194, 197 (C.A.A.F. 2017). A valid waiver leaves no error for this court to correct on appeal. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quotation omitted).

Law

Waiver is the intentional relinquishment or abandonment of a known right. *Davis*, 79 M.J. at 331. Whereas "a forfeiture is basically an oversight[,] a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Rich*, 79 M.J. 472 (C.A.A.F. 2020). "[T]here are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, of critical importance is the specificity with which counsel makes the basis

for his position known to the military judge." *Id.* at 475 (citations omitted). In making waiver determinations, a court looks to the record to see if the statements signify that there was a purposeful decision at play. *United States v. Gutierrez*, 64 M.J. 374, 377–78 (C.A.A.F. 2007) (considering whether an instructions claim was waived in a contested trial).[3]

"Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011). An appellant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). In the absence of an explicit prohibition, a party may knowingly and voluntarily waive a nonconstitutional right in a pretrial agreement. *Id.*

[3] *See, e.g.*, *Davis*, 79 M.J. at 331 (finding appellant affirmatively declining to object to the military judge's instructions was waiver); *Ahern*, 76 M.J. 194 (finding affirmative waiver where appellant stated "No, Your Honor" when the military judge asked if he objected to the stipulation); *United States v. Swift*, 76 M.J. 210, 217–18 (C.A.A.F. 2017) (finding "no objection" constitutes an affirmative waiver of the right or admission at issue); *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009) (finding affirmative waiver where appellant stated, "No objection," to the admission of testimony); *United States v. Danylo*, 73 M.J. 183, 188 (C.A.A.F. 2014) (holding that a waive all waivable motions clause waived a claim for sentencing credit).

An unconditional guilty plea waives "all defects which are neither jurisdictional nor a deprivation of due process of law." *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022). This is true for unreasonable multiplication of charges (UMC) claims because the caution against UMC is not a constitutional imperative, but rather a presidential policy. *Gladue*, 67 M.J. at 314 (citing *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995)); *see United States v. Hardy*, 77 M.J. 438, 439 (C.A.A.F. 2018) (finding a guilty plea waived UMC claims by operation of law under a pre-2018 rule).

However, the Court of Appeals for the Armed Forces [CAAF] has recognized some exceptions to this general principle. For instance, an unconditional guilty plea waives multiplicity claims when the offenses are not facially duplicative.[4] *United States v. Craig*, 68 M.J. 399 (C.A.A.F. 2010); *United States v. Campbell*, 68 M.J. 217 (C.A.A.F. 2009); *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004); *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997); *see also Day*, 83 M.J. at 56 (finding a military judge's incorrect advice to an appellant prevented the possibility of waiver).

Moreover, this court may overlook waiver with respect to the sentence. UCMJ art. 66(d)(1)(A)(2021); *see generally United States v. Steele*, 83 M.J. 188,

[4] The government will discuss why the specifications are not facially duplicative in Specific Issue II.

189 (C.A.A.F. 2023); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016) (discussing the language of "should be approved"); *United States v. Ramirez*, ARMY 2022 CCA LEXIS 669, *18 (Army Ct. Crim. App. 2022) (discussing amended version of Article 66, UCMJ, effective 1 January 2021). "While [ ] broad plenary authority allows this court to review issues that were waived, [this court has] held that exercising that unique power is more likely to occur only in those cases which 'have disadvantaged the accused in a manner that the CCA determines needs correction,' or a court-martial in which 'the perception of unfairness in the trial may have the actual effect of undermining good order and discipline.'" *United States v. Olson,* ARMY 20190267, 2021 CCA LEXIS 160, at *10–11 (Army Crim. App. 1 Apr 2021) (citing *United States v. Conley*, 78 M.J. 747, 752 (Army Ct. Crim. App. 2019)). Where the court finds "no evidence of impropriety, government overreach or excess, or other matter that might weigh in favor of noticing a waived issue," relief is not warranted. *Conley*, 78 M.J. at 753.

Argument

Appellant affirmatively waived multiplicity and UMC claims, including the proper unit of prosecutions, and the court should decline to overlook waiver.[5]

A. In the context of the entire record, appellant affirmatively waived multiplicity and unreasonable multiplication claims.

[5] The government discusses the proper unit of prosecution *infra* Specified Issue II.

Defense counsel's assertion that defense had no motions in response to the military judge's advisal about "motions to dismiss and other motions for relief" was an intentional relinquishment of multiplicity and UMC claims. (JA 204). While a guilty plea that contains a "waive all waivable motions" clause is a factor to consider that may demonstrate intentional relinquishment, its absence from an unconditional guilty plea agreement is not dispositive. *See Chin*, 75 M.J. 220 ("[A] waive all waivable motions" provision or unconditional guilty plea continues to serve as a factor for a CCA to weigh[.]"); *Conley*, 78 M.J. at 749–50 (finding appellant's guilty plea waived UMC claims despite no "waive all waivable motions" clause). Instead, this court must consider the context of the entire record. Appellant negotiated to plead unconditionally to Specifications 1, 3, and 4 of Charge I and to the imposition of separate sentences for each specification, albeit concurrently. (JA at 188–89). Thus, he specifically requested and agreed to the very thing that his multiplicity and UMC claims seek to remedy. Appellant received the benefit of the pre-trial agreement when trial counsel moved to withdraw and dismiss the specifications to which appellant pled guilty and the military judge adjudged segmented and concurrent sentences pursuant to its terms. (STR; JA 189, 271).

As in this court's unpublished decision in this case and *Pereira*, this court should find as counsel's express declination in response to the military judge's

advisal was an affirmative waiver. *See Malone*, 2024 CCA LEXIS 217, at *9–10; *United States v. Pereira*, ARMY 20190704, 2021 CCA LEXIS 15, at *6 (Army Ct. Crim. App. 19 Jan. 2021) (citing *Rich*, 79 M.J. at 477); *see also United States v. Morris*, ARMY 2020066, 2021 CCA LEXIS 182 at *19 (Army Ct. Crim. App. 15 Apr. 2021) (citing *Pereira*, 2021 CCA LEXIS 15, at *6) (applying to preliminary hearing discovery request); *United States v. Vogan*, 27 M.J. 882, 884 (A.C.M.R. 1989) (finding affirmative waiver where defense counsel stated the offenses were separate for sentencing purposes). *But see United States v. Goundry*, ARMY 20220218, CCA LEXIS 204, *3 n.4–5 (Army Ct. Crim. App. 6 Apr. 2023) (noting no express waiver where defense counsel stated, "defense waives-does not have any motions to file."); *United States v. Upton*, ARMY 20220044 (Army Ct. Crim. App. 13 Dec. 2022) (finding no waiver when counsel stated defense had no motions in response to the military judge's advisement that any motions to dismiss or for appropriate relief were to be made prior to appellant's plea).

Moreover, the fact that counsel was responding to a standard colloquy does not render his responses to the court meaningless. When considering whether a right was intentionally relinquished or merely an oversight, the procedural context and history inform the colloquy's significance. Less than two months after the crimes and one month after preferral, appellant negotiated to plead guilty unconditionally. Twelve days later, appellant was arraigned and pled guilty. This

is not a case where an appellant negotiated a conditional guilty plea or where his counsel expressly declined to file motions days, weeks, or months before appellant entered his unconditional plea. Instead, in this case, the providence inquiry immediately followed the colloquy when it was clear to all parties that appellant intended to fulfill a material term for his bargained for exchange: to enter pleas of guilty unconditionally to Specifications 1, 3, and 4 of Charge I and be sentenced for each. Viewed through the lens of an unconditional guilty plea, counsel's express declination in response to the military judge's advisal was not mere oversight.

The court should also consider the role of defense counsel in this guilty plea proceeding. Appellant represented to the military judge that he was satisfied with his counsel's advice and understood the meaning and effect of the provisions of his agreement. (JA 185, 190, 255–58). The record does not disclose evidence to the contrary and appellant does not allege ineffective assistance of counsel. The court should be reassured that when counsel advised his client throughout the guilty plea negotiation process, told the military judge that defense had no motions in response to the judge's advisal, and then declined further inquiry after the military judge solicited testimony relevant to the unit of prosecution, that defense counsel intentionally relinquished the right to raise these claims on behalf of his client. In the context of the entire record, this was a conscious and deliberate choice

to waive all "motions to dismiss and other motions for relief." Appellant, through his counsel, was presented with the opportunity to request or decline these motions. He chose to decline them and in doing so, affirmatively waived his right.[6] Thus, there is no error for this court to correct. *Davis*, 79 M.J. at 331. Furthermore, this court should hold that there is affirmative waiver when an appellant pleads guilty unconditionally and expressly declines to assert any motions when advised of the right during the plea colloquy.

B. This court should not overlook waiver because the military judge adjudged concurrent sentences.

While this court may overlook waiver under Art. 66(c), UCMJ, with respect to the sentence, appellant does not assert "cause or prejudice" to justify doing so. *See Campbell*, 71 M.J. at 23; *Steele*, 83 M.J. at 191 ("A CCA may select its own standard for exercising discretion under Article 66(c), UMCJ."). It is worth reiterating that appellant received the benefit of the pre-trial agreement when the military judge adjudged segmented and concurrent sentences pursuant to its terms. (STR; JA 188–89, 271). As appellant notes: "To be sure, [a]ppellant will remain convicted under Article 128b if this Court merges the Specifications[.]" (Appellant's Supp. Br. at 14).

Moreover, this assertion of multiplicity was never litigated at trial. *See*

[6] Even if this court determines appellant did not waive "all motions for relief," at a minimum, appellant chose to decline all motions to dismiss.

United States v. Clark, ARMY 20140252, 2016 CCA LEXIS 363, at *6–7 (Army Ct. Crim. App. 31 May 2016). "Had the parties not treated the matter as waived, additional inquiry may have revealed the unit of prosecution concerns to be without merit, or not." *Id.* Critically, after the military judge inquired about the timing, the parties declined additional inquiry, limiting the development of the record. (JA 62, 90). The invited error doctrine "prevents a party from creating error and then taking advantage of a situation of his own making on appeal." *United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (citations omitted); *see also United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) ("[A]n accused might make a conscious choice to plead guilty in order to 'limit the nature of the information that would otherwise be disclosed in an adversarial contest.'").

As this court persuasively reasoned:

> [I]t does not serve the ends of justice to allow appellant to deliberately decline to make a multiplicity challenge, even when directly asked by the military judge if he had any such motions, at a time when the convening authority could still withdraw from the agreement; and instead wait to raise such a challenge for the first time on appeal after he has reaped all of the benefits and the convening authority can no longer withdraw.

Malone, 2024 CCA LEXIS 217, at *5–6 (citing *United States v. Cook*, 12 M.J. 448, 455 (C.M.A. 1982); *United States v. Sanchez*, 81 M.J. 501, 506 (Army Ct. Crim. App. 2021)). There is "no evidence of impropriety, government overreach or excess, or other matter that might weigh in favor of noticing a waived issue,"

and as such, these facts do not merit review in the exercise of the court's discretion. *Conley*, 78 M.J. at 753.

Specified Issue II

IF THOSE ISSUES WERE NOT AFFIRMATIVELY WAIVED, WHETHER APPELLANT'S MULTIPLE CONVICTIONS UNDER THE SAME STATUTE WERE CORRECT IN LAW.

Additional Facts

The Stipulation of Fact provides, in relevant part:

> The Accused and the Victim discussed infidelity and broken plans, re-prompting the argument. Both parties were yelling at each other, and violence seemed imminent. The Victim became fearful and tried to, once again, create space.
>
> The Victim next grabbed her cell phone and attempted to dial 911 several times but failed to complete the call, resulting in several canceled calls. . . . The argument moved to the Master Bedroom and turned physical when the Accused . . . struck the Victim in her face with his hand during the argument. . . .
>
> The Accused then continued to aggressively . . . punch the Victim in her face, head, right arm, right shoulder, right side abdomen, and right leg. . . . The Victim plead[ed] for the Accused to stop; but he continued the assault and used his hands to push her to the ground resulting in the Victim breaking her clavicle. The Victim then locked herself in the Master Bathroom, hunched down into a corner, whilst she once again attempted to call 911 – this time she was successful in reaching dispatchers.

(JA 193–95). Screenshots of the Victim's phone show a canceled call to "911" at

12:27 AM, a canceled call to "911-911" at 12:34 AM, a canceled call to "9119119110911" at 12:36 AM, and a 13-minute call to "911" at 12:36 AM. (JA 194).

During the providence inquiry, appellant testified he hit the victim in the face in the area "transitioning between the master bedroom into the master bathroom." (JA 214). When he hit her, she "covered up." (JA 214). He stated that after he struck her in the face, he "kept striking her" with his hands and hit her in the head, shoulder, arm, torso, and leg. (JA 219). While he struck her, she yelled at him to stop but did not hit him back. (JA 219). Appellant indicated that his hits over other parts of her body "continued" after he struck her in the face. (JA 219).

After the inquiry into the timing, the military judge asked the parties if they desired additional inquiry and they declined. (JA 259). The parties further agreed that the maximum punishment was reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for twenty-three years, and a dishonorable discharge. (JA 233–34).

Standard of Review

Issues not raised at trial are reviewed for plain error, so long as they are not waived. *United States v. Cole*, 84 M.J. 398, 404 (C.A.A.F. 2024) (citation omitted); *see United States v. Coleman,* 79 M.J. 100, 102 (C.A.A.F. 2019). "To prevail [on plain error review], [a]ppellant bears the burden of establishing (1)

error, (2) that is clear or obvious, and (3) results in material prejudice to a substantial right of the accused." *Cole*, 84 M.J. at 404 (quoting *United States v. Bodoh*, 78 M.J. 231, 236 (C.A.A.F. 2019)); *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019).

Law

A. Forfeiture.

Rule for Courts-Martial 907(b)(3) provides that for multiplicity, a specification "may be dismissed upon timely motion by the accused[.]" Any defense or objection based on defects to the charges or specifications "must be raised before a plea is entered." R.C.M. 905(b)(2). The failure of a party to make a motion or objection that must be made before pleas are entered "forfeits the objection absent an affirmative waiver." R.C.M. 905(e)(1).

Unlike a waiver, "forfeiture is basically an oversight[.]" *United States v. Rich*, 79 M.J. 472 (C.A.A.F. 2020). Multiplicity claims are "forfeited by failure to make a timely motion to dismiss, unless they rise to the level of plain error." *Coleman,* 79 M.J. at 102 (quotation omitted). Similarly, absent an affirmative waiver, failure to raise a motion, request, or objection with respect to UMC constitutes forfeiture. R.C.M. 905(e)(1); *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001); *see generally United States v. King*, 83 M.J. 115 (C.A.A.F. 2023)

(citation omitted) (noting debate about the meaning of the word "waived" in R.C.M. 905(e)).

B. Multiplicity.

A charge is multiplicious if the proof of such charge also proves every element of another charge. R.C.M. 907(b)(3)(B). The concept of multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments for the same offense. *United States v. Forrester*, 76 M.J. 479, 484 (C.A.A.F. 2017).

An unconditional guilty plea waives multiplicity claims when the offenses are not facially duplicative. *Craig*, 68 M.J. 399; *Campbell*, 68 M.J. 217; *Pauling*, 60 M.J. 91; *see also United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). Facially duplicative means the factual components of the charged offenses are the same. *Lloyd*, 46 M.J. at 23; *Campbell*, 68 M.J. at 220 (citing *Pauling*, 60 M.J. at 94) (finding the charges were not facially duplicative because each required proof of a fact not required to prove the others). Appellant bears the burden of showing that the charges are facially duplicative. *See United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009).

When charges for multiple violations of the same statute are predicated on arguably the same criminal conduct, the court must first determine the allowable unit of prosecution, which is the actus reus of the defendant. *Forrester*, 76 M.J. at

485 (quotations omitted). This is significant for purposes of determining a maximum sentence. *Id.*

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. *Bell v. United States*, 349 U.S. 81, 84 (1955). However, if the actus reus under the circumstances is a distinct or discrete-act offense, "separate convictions are allowed in accordance with the number of discrete acts." *United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996).

When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. *Bell*, 349 U.S. at 83; *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). If Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when the United States Supreme Court has no more to go on. *Bell*, 349 U.S. at 84; *Forrester*, 76 M.J. 479 (C.A.A.F. 2017); *United States v. Szentmiklosi*, 55 M.J. 487 (C.A.A.F. 2001).

C. UMC.

Unreasonable multiplication concerns those features of military law that increase the potential for prosecutorial overreaching. *See Forrester*, 76 M.J. at 485; *United States v. Elespuru*, 73 M.J. 326, 328 n.1 (C.A.A.F. 2014) (citation

omitted). "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); *see United States v. Hines*, 73 M.J. 119 (C.A.A.F. 2014).

"In *Quiroz*, [CAAF] endorsed several factors iterated by the lower court in that case as a guide for military judges and appellate courts to consider in determining whether there has been an unreasonable multiplication of charges." *Campbell*, 71 M.J. at 23 (citing *Quiroz*, 55 M.J. at 338–39). The *Quiroz* factors include:

> (1) "Did the [appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?";
>
> (2) "Is each charge and specification aimed at distinctly separate criminal acts?";
>
> (3) "Does the number of charges and specifications misrepresent or exaggerate the [appellant's] criminality?";
>
> (4) "Does the number of charges and specifications unfairly increase the [appellant's] punitive exposure?"; and
>
> (5) "Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?"

55 M.J. at 338 (citation omitted); *see also Campbell*, 71 M.J. at 24 & n.10. The question of fairness in factor four addresses whether the number of charges and specifications "unreasonably" increased appellant's exposure. *Quiroz*, 55 M.J. at 339. Furthermore, "[o]ne or more factors may be sufficiently compelling, without more, to warrant relief." *Campbell*, 71 M.J. at 23.

Argument

A. Article 128b(1), UCMJ's unit of prosecution is the same as that of the underlying conduct but contemplates escalation of force and episodic violence.

Congress established Article 128b, UCMJ, as a new punitive article on domestic violence in the UCMJ with an effective date of 1 January 2019. The text of the statute, Article 128b(1), UCMJ (2019), includes two elements: (1) appellant commits a violent offense (2) against a spouse, an intimate partner, or an immediate family member of appellant. It does not define "violent offense" or these domestic relationships.

On the one hand, the text suggests Congress intended to permit discrete act charging based on the underlying conduct. Whereas assault under Article 128, UCMJ, focuses on "bodily harm," Article 128b, UCMJ focuses on "a violent offense." *Compare* UCMJ art. 128, *with* UCMJ art. 128b. As the phrase "violent offense" is preceded by an "a," Congress communicated an intent to punish a more discrete unit of prosecution as compared to a regular assault. *See Forrester*, 76 M.J. at 487 (citations omitted) (noting Federal courts have interpreted "any . . . matter that contains" to permit separate counts); *Neblock*, 45 M.J. at 197 (holding "any mail bag" permits separate counts).

The 2019 MCM did not include a Drafters' Analysis of Article 128b, UCMJ. But it did include an analysis of Article 128, UCMJ, wherein a new maximum punishment was added for assaulting a spouse, intimate partner, or immediate

family member under Article 128, UCMJ. MCM, pt. IV, para. 77d. Thus, domestic violence offenses prosecuted under Article 128, UCMJ, were "distinguishable from other types of Article 128[, UCMJ,] assaults by the greater severity of its punishment." CRS Report No. R46097, p.38 (4 Dec. 2019).

On the other hand, legislative history suggests Congress intended to omit separate definitions for the "violent offense." Early in its proposal, the House "recede[d] with an amendment removing the proposed definitions of immediate family, intimate partner, protection order, strangling, suffocating, and violent offense so that these elements could be defined through changes to the [MCM]." 164 Cong. Rec. H. No. 6653, 6921 (Jul 23, 2018) (Conf. Rep.).

Otherwise, debate surrounding Article 128b, UCMJ's passage included (i) compliance with notification requirements to the FBI background check system and (ii) inclusion of strangulation and suffocation—as indicators of future lethal violence—in conduct "constituting aggravated assault."[7] Its proposal was considered alongside other gun violence prevention measures in the wake of the Sutherland Springs shooting in November 2017 and efforts to provide

[7] *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 (Jun 5, 2018) (proposing inclusion of strangulation and suffocation); 164 Cong Rec S3932 (Jun 14, 2018) (Statement of Sen. Richard Blumenthal) (addressing accountability and referral to the FBI); 116 H. Rep. No. 442 (Jul 19, 2020) (discussing strangulation); 164 Cong. Rec. H. No. 7202 (Jul 25, 2018) (Conf. Rep.) (providing effective date).

multidisciplinary support to vulnerable victims (e.g., child victims, domestic violence victims, and sexual assault victims) on military installations.[8]

In view of this history and the language of Article 128b, UCMJ, when an accused is charged with multiple violations of Article 128b(1), UCMJ, the unit of prosecution is the same as the underlying "violent offense," which in this case is assault consummated by a battery and aggravated assault.

However, Congress contemplated the need for adequate deterrence of abusive behavior "characterized by recidivism and escalation, meaning offenders are likely to be repeat abusers, and the intensity of the abuse or violence is likely to grow over time." CRS Report No. R46097 (4 Dec. 2019). Given the potential for episodic violence, a factor in the inquiry should account for evidence of escalation relevant to whether the multiple assaults were united in "time, circumstance, and impulse." *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981); *see United States v. Phillips*, ARMY 20220233, 2024 CCA LEXIS 51, *7 (Army Ct. Crim. App. 30 Jan. 2024) (accounting for escalation between acts).

[8] 164 Cong. Rec. S3005 (Jun 6, 2018) (Statement of Sen. Jack Reed) (noting programs on military installations); 164 Cong. Rec. S3005 (Jun 6, 2018) (Statement of Sen. Dick Durbin) (referencing Sutherland Springs); 116 H. Rep. 442 (Jul 19, 2020) (noting concerns that the military health system does not have the capability to diagnose strangulation injuries in its emergency rooms).

B. The Specifications are not facially duplicative.

As an initial matter, the government maintains its position that Specification 4 is not facially duplicative with Specifications 1 and 3 because it "requires proof of a fact which the other[s do] not." *See Pauling*, 60 M.J. at 94. (Appellee's Br., dtd 22 Feb. 2024). Thus, the following discussion analyzes Specifications 1 and 3:

As previously discussed, the underlying conduct for Specifications 1 and 3 is assault consummated by a battery. Assault under Article 128, UCMJ, Congress intended assault to be a continuous course-of-conduct-type offense and each blow in a single altercation should not be the basis of a separate finding of guilty. *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989); *see Clark*, 2016 CCA LEXIS 363; *United States v. Clarke*, 74 M.J. 627 (Army Ct. Crim. App. 2015). "The course of each crime or intended unit of prosecution is best gauged by the duration of the specific intent required for commission of the offense." *Flynn*, 28 M.J. at 221 (finding no multiplicity where separate acts were involved, a short lapse of time occurred between those acts, and appellant's "criminal intent harbored at the time of the acts was different and did not include the other as a matter of fact.").

In this case, there were three distinct episodes demonstrating escalation: (1) appellant striking his partner on the right side of her face with one hand in the bedroom to get her away from him causing her to cover up; (2) appellant losing his

temper and then punching his partner all over her body in the bathroom while she yelled at him to stop; and (3) appellant pushing his partner to the ground causing her to break her clavicle. The progression of his actions (i.e., hit in the face, punches all over the body, push to the ground) and harms (i.e., impact to the face, lacerations and bruising all over the body, broken clavicle) demonstrate escalation of force. Two minutes separate the first and second episode in close, but different, locations in the house.

In *United States v. Hines*, the CAAF adopted the reasoning that "[t]he formulation of a plan or scheme or the setting up of a mechanism which, when put into operation, will result in the taking or diversion of sums of money on a recurring basis, will produce but one crime." 73 M.J. at 121 (citation and quotation omitted). But appellant did not strike his partner in the face and then punch her all over the body as a part of a similar single scheme.

Although appellant characterizes the assaults as part of a continuous course of conduct (JA 219), the objective evidence demonstrates a break between appellant's hit to the victim's face (Specification 1) and punches all over her body (Specification 3). Namely, the screenshots of the victim's phone suggest the entire incident took place within a nine-minute timeframe between 12:27 AM and 12:36 AM with up to two minutes between appellant's commission of Specification 1 (at 12:34 AM) and Specification 3 (at 12:36 AM). (JA 194).

Between 12:27 AM and 12:34 AM, appellant and the victim engaged in a renewed verbal argument where violence seemed imminent. The Stipulation of Fact provides that before the verbal argument moved to the Master Bedroom, the victim attempted to dial 911 several times but failed to complete the call, resulting in several canceled calls. (JA 193). While the first canceled call was placed to "911" at 12:27 AM, the next canceled call was placed to "911-911" at 12:34 AM. (JA 194). This suggests the victim attempted to dial 911 twice between 12:27 AM and 12:34 AM; a total of three attempts to dial 911 by 12:34 AM. Thus, at the earliest, the verbal argument moved to the Master Bedroom around 12:34 AM, during which time appellant committed Specification 1 of Charge I.

Thereafter, the parties moved into the Master Bathroom between 12:34 AM and 12:36 AM, during which time appellant committed Specification 3 of Charge I. The next canceled call was placed at 12:36 AM. (JA 194). However, the number dialed was "9119119110911," which suggests the victim attempted to dial 911 four times between 12:34 AM and 12:36 AM. (JA 194). The victim's ability to dial "911" four times between 12:34 AM and 12:36 AM—whether intermittently throughout those two minutes or all at once at some point within those two minutes—suggests there was a break in between appellant's conduct which enabled her to dial those numbers. (JA 194, 219). That appellant lost his temper leading him to commit Specification 3, circumstantially proves that some

triggering event in those two minutes caused him to renew and escalate his violence.

Finally, appellant completed Specification 4 of Charge I in the Master Bathroom no later than 12:36 AM. The victim reached a 911 dispatcher only after she was alone in the bathroom and the only successful call to 911 was at 12:36 AM. (JA 194–95). Thus, appellant pushed the victim with both his hands and broke her clavicle around before or at 12:36 AM.[9] (JA 226–28).

Distinguishing the acts from *Hines*, the impulses were distinct. Appellant explained he wanted the victim away from him because she was close to his face during a heated argument, so he hit her in the face, resulting in Specification 1. (JA 210–11). Unlike the first strike, he subsequently punched her all over her body, not to get her away from him, but because he lost his temper. (JA 219). Whereas his multiple punches all over her body were united in time, circumstance, and impulse and thus, properly charged as a single offense in Specification 3, the underlying acts charged in Specification 1 are distinct and do not require proof of the other. These differing impulses in addition to time and location, demonstrate

[9] For the sake of completeness, the government recalls appellant also testified he pushed her to the ground and broke her clavicle "right after" punching her all over her body. (JA 27, 57–58). The court can fairly infer that Specification 3 and 4 of Charge I occurred around on or before 12:36 AM.

that Specification 1 and 3 of Charge I are not facially duplicative.[10] Accordingly, appellant's waiver is not overcome and there is no error to review.[11] *Davis*, 29 M.J. at 331 (citing *Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)).

Furthermore, with respect to UMC, appellant fails the first and second prongs. First, he did not raise this objection likely because he wanted the benefit of the bargain. Second, the three specifications in this case represent three separate and distinct criminal acts under the relevant statute, rather than one criminal act charged three times, and the specifications were not multiplicious—thus, the second *Quiroz* factor fails. *See Phillips*, 2024 CCA LEXIS 51, *7 (distinguishing from uninterrupted attacks) (citing *Clarke*, 74 M.J. at 628). This also ends the *Quiroz* analysis: it was not unreasonable to sentence appellant for three specifications that reflected distinctly separate criminal acts. *See Forrester*, 76 M.J. at 484.

[10] The government maintains its request that if this court finds the specifications are facially duplicative, that the court should merge Specifications 1 into 3 of Charge I.

[11] To the extent this court finds mere forfeiture or exercises its discretion to overlook waiver, the government maintains appellant has not demonstrated prejudice because the military judge adjudged concurrent sentences and appellant will remain convicted under Article 128b, UCMJ.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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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 11th day of February, 2025.

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