

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20230263

Private First Class (E-3)

**PATRICK A. FORD,**

United States Army,

Appellant

Tried at Fort Bliss, Texas, on 23  
January 2023 and 10 May 2023,  
before a general court-martial  
convened by Commander, 1st  
Armored Division, Colonel Robert  
Shuck, Colonel Adam Kazin, military  
judges, presiding.

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

**Assignments of Error**

**I. WHETHER THE MILITARY JUDGE ABUSED  
HIS DISCRETION IN ACCEPTING APPELLANT'S  
GUILTY PLEA TO THE SPECIFICATION OF  
CHARGE III (DISRESPECT)**

**II. WHETHER APPELLANT'S FACIALLY  
DUPLICATIVE CONVICTIONS FOR DOMESTIC  
VIOLENCE IN SPECIFICATIONS 2, 3, AND 4 OF  
CHARGE II, ARE MULTIPLICIOUS**

**III. WHETHER THE MILITARY JUDGE ABUSED  
HIS DISCRETION IN ACCEPTING APPELLANT'S  
GUILTY PLEA TO SPECIFICATION 1 OF  
CHARGE V (VIOLATING ARMY REGULATION  
608-99)**

PANEL 2

## Argument

### **A. It was not appellant's fault the government turned off his pay and the military judge failed to resolve whether appellant could follow [REDACTED] order**

In this case, whether the defense of inability applied hinged on whose fault it was that appellant was not getting paid. The government is correct in that *if* appellant's inability to pay was his own fault, the defense did not exist. However, the government applies the query to "when" appellant had an inability to pay without looking to "why" he could not pay in the first place.

The judge correctly noted that the government was to blame for appellant's stopped pay. (R. at 62). However, he failed to elicit facts to help resolve whether he should have accepted appellant's plea. That is, when precisely was appellant's pay stopped? Even if he was not receiving money, did he have any savings from which he could make the payment? When did he receive his backpay, if ever? (R. at 62).

The government additionally blames appellant for his pay being turned off arguing it was a foreseeable consequence of his being placed in pretrial

confinement. (R. at 16).<sup>1</sup> Even if the DOD FMR's interpretation could lead to appellant as the one to blame for his pay being turned off, it was the government's fault that it was not turned back on when he was released from confinement.

**B. The instant case is distinguishable from *Najera* as appellant's statement was not directed to or made in ██████████ presence.**

A key fact supporting the C.A.A.F.'s ruling in *Najera* is that the appellant made his remarks directly to his company commander. *United States v. Najera*, 52 M.J. 247, 248 (C.A.A.F. 2000).

Here, appellant made a statement concerning his platoon leader outside of his presence. While Article 89 does not require the statement be made in the victim's presence, it is a critical fact towards whether, under the facts and

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<sup>1</sup> Although the government argues that appellant was confined by civilian authorities for a non-UCMJ/civilian offense (which would make him not entitled to pay during that time) that argument is not supported by the record. Per DoD 7000.14-R Volume 7A, Chapter 1, para 4.2.6.1 (and Table 1-12), one only loses pay when confined by civilian authorities for the civilian jurisdiction's crimes. Here, the military prosecuted those crimes and the trial court gave him credit for that time (*See* Statement of Trial Results blocks 21-23 awards 224 days of total credit) reinforcing that the civilians were holding him for the later military prosecution, or at least, it transitioned. Just like the facilities at Fort Cavazos and Fort Campbell who hold military pre-trial confinees in civilian facilities, it is not the location but "who" the confinement is "for." (Table 1-12). Therefore, since this was pre-trial confinement for military prosecuted crimes, per para 4.2.6, appellant's pay should have never been taken making the lack of pay a government error.

circumstances, the language was disrespectful to 2LT CC. *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, para. 15.b.1.

Judging by their lack of reaction, neither the noncommissioned officers who heard the statement nor [REDACTED] himself believed the statement to be disrespectful. (R. at 42). Rather, the statement was deemed disrespectful once the decision was made to prefer and stack charges against appellant. At the very least, more was needed to develop this aspect in the record by the judge.

**C. Appellant did not affirmatively waive any claim of multiplicity with respect to Specifications 2, 3, and 4 of Charge II**

Appellant's plea agreement did not contain a "waive all waivable motions" provision but required appellant to "waive any motions regarding Article 13 credit." (App. Ex. IV, p. 4).

Pursuant to this provision, the military judge performed a colloquy with appellant with respect to what waiving a motion regarding Article 13 meant. (R. at 75-81). Beyond that, the military judge noted that some motions are waived by virtue of pleading guilty, but did not ask appellant whether he waived any other motions or if he contemplated what other motions he would have filed had he not pled guilty. (R. at 82).

This court has recently held that an appellant's failure to move to dismiss should not be seen as an affirmative waiver. *United States v. Goundry*, ARMY

20220218, 2023 CCA LEXIS 204 (Army Ct. Crim. App. April 6, 2023) ([summ. disp.](#)); *United States v. Upton*, ARMY 20220044, 2022 CCA LEXIS 724 (Army Ct. Crim. App. December 13, 2022) ([summ. disp.](#)); *United States v. White*, ARMY 20210676, 2024 CCA LEXIS 96 (Army Ct. Crim. App. Feb. 28, 2024) ([summ. disp.](#)).<sup>2</sup>

**D. The case law has not changed the fact that physical assaults “united in time, circumstances, and impulse” constitute a single crime**

The government avoids the obvious: Specifications 2, 3, and 4 of Charge II were multiplicitous as they were facially duplicative. (Gov’t Br. at 26). The government does not attempt to argue why these specifications are not “united in time, circumstances, and impulse.” *United States v. Clarke*, 74 M.J. 627, 629 (Army Ct. Crim. App. 2015).

That is because these offenses were united. No more than a few seconds apart, in the same exchange, and driven by the same impulse.

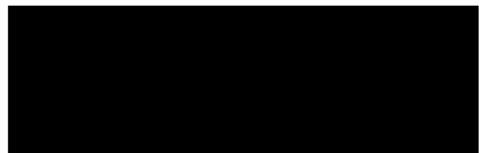
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<sup>2</sup> While the government cites *Malone* for this proposition, *Malone* directly conflicts with *Goundry*, *Upton*, *White*, and most importantly, *United States v. Hardy*, 77 M.J. 438, 446 (C.A.A.F. 2018) (Noting the standard for forfeiture and that due to the change in R.C.M. 905(e), forfeiture is expected to apply in the future). In finding “waiver” in *Malone*, the panel cited two other opinions for support, both by the same panel – however, no other current precedent stands for the proposition, like *Malone* posits, that the simple act of informing an accused during a standard plea inquiry of the effects of a guilty plea is equal to an “affirmative waiver” which is what is required – especially given the express language of R.C.M. 905(e) now making it forfeiture.

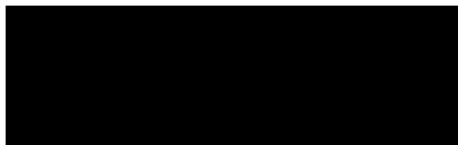
With respect to the government's reliance on dicta from a different panel's recent decision in *United States v. Malone*, neither this court nor the C.A.A.F. has adopted a new unit of prosecution for offenses charged under the new Article 128b. (Gov't Brief at 26). Likewise, that dicta is doubtful as it admits the crimes would have been multiplicitous under Article 128, but citing no legislative history in indicating Congress may have wanted to have change the standard for Article 128b because of domestic violence. However, cases like *Clarke*, which is cited for the same proposition that situations like these are multiplicitous, was already intimate partner cases which undercuts *Malone*'s rationale. Therefore, bifurcating this incident into three smaller separate assaults was inappropriate and demands this court to merge these specifications into one.

## Conclusion

Appellant reaffirms his original prayer for relief.



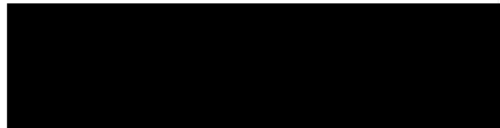
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to Army  
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