IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20080640
First Lieutenant (0-2) **RICHARD L. EASTON,** United States Army, Appellant	)	USCA Dkt. No. 12-0053/AR

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INDEX OF FINAL BRIEF ON BEHALF OF APPELLANT

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Court of Appeals for the Armed Forces

Courts of Criminal Appeals

Federal Courts

Statutes

Uniform Code of Military Justice

Other

Manual for Courts-Martial, United States, 2005 Edition

Regulations and Publications

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Introduction and Summary of Argument

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187 (1957).

Appellant's second court-martial for missing movement violated his Fifth Amendment protection against being put twice in jeopardy for the same offenses. Not only do constitutional double jeopardy protections apply to the military, but where Article 44, UCMJ, narrows the scope of appellant's constitutional protections under the Fifth Amendment, the Fifth

Amendment's broader protections govern. The government cannot establish the manifest necessity required to overcome jeopardy's attachment by simply claiming manifest necessity and citing undefined "operational considerations." Therefore, both the military judge and the Army Court erred and appellant's findings and sentence must be set aside, and The Charge and its Specifications dismissed.

Issue Presented

WHETHER THE ARMY COURT ERRED IN HOLDING THE APPELLANT'S TRIAL DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY BECAUSE JEOPARDY DID NOT ATTACH AND EVEN IF IT DID, MANIFEST NECESSITY JUSTIFIED THE CONVENING AUTHORITY'S DECISION TO WITHDRAW CHARGES.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals ["Army Court"] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice ["UCMJ"]; 10 U.S.C. § 866 (2008). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On May 20 and July 8-10, 2008, First Lieutenant Richard L. Easton (appellant) was tried at Fort Stewart, Georgia before a military judge sitting as a general court-martial. (JA 1.) Contrary to his plea, appellant was convicted of two specifications of missing movement by design, in violation of

Article 87, UCMJ; 10 U.S.C. § 887.[1] *Id.* Appellant was sentenced to eighteen months confinement and a dismissal. *Id.* The convening authority reduced appellant's term of confinement to ten months, waived the automatic forfeiture of all pay and allowances for a period of six months, and otherwise approved the adjudged sentence. *Id.*

On July 28, 2011, the Army Court issued its opinion, *United States v. Easton*, 70 M.J. 507 (Army Ct. Crim. App. 2011). (JA 1.) The Army Court affirmed the findings of guilty and the sentence, holding that jeopardy did not attach in appellant's first court-martial and, even if it had, the convening authority was well within his power to withdraw, dismiss, and re-refer the charges to a new court-martial. (JA 11.) On December 15, 2011, this Court granted appellant's petition for review.

Statement of Facts

On April 18, 2007, appellant was charged with two specifications of missing movement in violation of Article 87, UCMJ, and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ. (JA 13.) On June 12, 2007, Appellant was arraigned on those charges at a general court-

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[1] The government also charged Appellant with willful disobedience of a lawful order and adultery in violation of Articles 90 and 134, UCMJ; 10 U.S.C. §§ 890 and 934 (2005). (JA 6.) However, the military judge dismissed the adultery charge prior to findings and found Appellant not guilty of the willful disobedience charge. *Id.*

martial. (JA 15.) During the arraignment, the government announced that the prosecution was "ready to proceed with the trial in the case of the *United States v. 1st Lieutenant Richard L. Easton,* United States Army, who is present in court." (JA 18.) The government had already requested and received an eight-day delay from the military judge. (JA 20.)

On June 12, 2007, the military judge, set a June 25, 2007, deadline to request forum, enter pleas, and file motions and witness requests. (JA 23.) The parties returned to court on June 29, 2007. (JA 24.)

On that date, the military judge addressed several pretrial motions. (JA 25.) One of those motions was the government's June 26, 2007, motion for the military judge to order depositions. (JA 47.) The government's position was that both Lieutenant Colonel (LTC) Michael Oliver and Major (MAJ) Gail Evans were unavailable for trial due to military necessity—deployment in Iraq—under both Article 49(d)(2), UCMJ, and Military Rule of Evidence (M.R.E.) 806(a). (JA 49.) The military judge agreed. (JA 79.) She ordered depositions of both LTC Oliver and CPT Evans in the presence of appellant and defense counsel. *Id.* At some time during the week of July 9, 2007, the parties traveled to Iraq and the depositions were taken. *Id.*

On July 16, 2007, the first in-court session following the depositions, both trial and defense counsel discussed the video-taped depositions with the military judge. (JA 51.) Following that conversation, trial counsel requested a delay. *Id.* The military judge, over defense objection, granted the government an additional delay until July 19, 2007. *Id.*

The military judge, without objection from either party, proceeded with the court-martial. *Id.* Appellant elected to be tried by an officer panel and entered a plea of not guilty to all charges. (JA 51-52.) During a brief recess following appellant's plea, both sides reviewed the video depositions and agreed that the tapes were useless. (JA 52.)

When the parties returned to court, the government was fully aware that the videotaped depositions of LTC Oliver and MAJ Evans were damaged and inoperable. *Id.* The government nonetheless informed the military judge that they still desired to proceed to trial on July 19, 2007. *Id.* The government prepared a Flyer for the panel members and provided it to the court. *Id.* Shortly thereafter, the panel members were seated and sworn. (JA 53.)

Without government objection, the military judge announced that the court was assembled. *Id.* The parties conducted collective and individual voir dire of the panel members. *Id.* The military judge granted two defense challenges for cause as

well as a peremptory challenge from the government. *Id.* When the court recessed on July 16, 2007, the government had completed every stage of the court-martial up to the presentation of evidence on the merits. *Id.* If the court resumed on July 19, 2007, as scheduled, the parties were set to begin their opening statements. *Id.*

The record is clear about five matters. First, it is clear that both defense and government counsel agreed that the videotaped depositions were inoperable; the video contained no visual image and the audio was incomprehensible. (JA 52.) Second, it is clear the government was aware of this mechanical flaw *prior to going on record* on July 16, 2007.[2] (JA 51.) Third, the government, despite not having its witnesses' testimony, maintained its desire to go to trial three days later on July 19, 2007. *Id.* Fourth, there is absolutely no evidence that the government's circumstances changed between July 16, 2007, prior to the panel being sworn, and July 18, 2007, the date the convening authority withdrew the charges. Fifth, there is absolutely no evidence that the malfunction was due to military operations.

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[2] The government knew or should have known about the deficiency the week of July 9, 2007. At a minimum, trial counsel should have discovered the issue when reviewing the depositions in preparation for trial.

Two days after the panel was assembled and sworn, on July 18, 2007, the Installation Commander, Colonel (COL) Todd A. Buchs, withdrew and dismissed without prejudice "the court-martial charge" against appellant. (JA 54-55.) He did so without any explanation or justification. *Id.* The record does not include any supporting documentation from the Staff Judge Advocate or members of the convening authority's staff identifying the reasons for withdrawal. (JA 55, 104.)

On March 26, 2008, the government charged appellant with the same two specifications of missing movement along with two additional charges. (JA 56.) On May 20, 2008, the appellant was arraigned. (JA 58-63.) On July 8, 2008, defense orally raised its motion to dismiss for violating Appellant's Fifth Amendment protection against double jeopardy. (JA 67-73.) In support of its motion, defense asserted that jeopardy attached on July 16, 2007, when appellant's panel was seated and sworn. *Id.* The government relied on the plain language of Article 44, UCMJ, in asserting that jeopardy did not attach because the panel did not receive evidence. (JA 73-74.)

In ruling against the defense's motion, the military judge relied on the language of Article 44(c), UCMJ. (JA 76-77.) He made the following findings:

> [T]he proceeding ended [when the charges were withdrawn and dismissed by the convening authority as reflected in

> Appellate Exhibt IV]. The initial proceeding ended in this case, that no evidence was presented, that no opening statements were made, and that under the clear reading of Article 44(c), **there's no distinction of whether it's a members case or a judge alone case.** Under 44(c), the jeopardy attaches with the introduction of evidence. There was no such introduction of evidence in this case at any time prior to dismissal/withdrawal by the convening authority, and therefore, the court finds that jeopardy did not attach and therefore the defense motion to dismiss on that basis is hereby denied.

Id. (emphasis added.)

On direct appeal, the Army Court held (1) that under Article 44, UCMJ, jeopardy did not attach to appellant's first court-martial; and, (2) even if jeopardy attached, the convening authority, acting under the principles of manifest necessity, "was well within his power to withdraw, dismiss, and re-refer charges to a new court-martial." (JA 11.)

Manifest necessity, if contemplated, was neither mentioned by the government during its response to defense's motion to dismiss at trial, nor was it mentioned by the military judge in his findings denying defense's motion. (JA 68-77.)

Standard of Review

The military judge's denial of appellant's motion to dismiss on double jeopardy grounds is a constitutional question reviewed de novo. *United States v. Hoeffner*, 626 F.3d 857, 863

(5th Cir. 2010); *see also United States v. Carothers*, 630 F.3d 959, 962 (9th Cir. 2011). This Court reviews the military judge's findings of fact on the double jeopardy motion (JA 81-82) under a clearly erroneous standard. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995.)

In addressing the defense motion, the military judge relied solely on the plain language of Article 44(c), and made no mention of the Fifth Amendment's Double Jeopardy Clause. (JA 76-77.) None of the parties raised the issue of whether manifest necessity existed for the convening authority to withdraw the charges. (JA 67-77.)

The Army Court exceeded its authority when it found that manifest necessity existed in this case, an issue it raised *sua sponte* on direct appeal. *See United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997)(noting that Congress intended the Courts of Criminal Appeals "to act as factfinder in an appellate-review capacity and not in the first instance as a trial court.").

The existence of manifest necessity is also a question of law reviewed de novo, as is the constitutionality of Article 44(c) as applied in this case. *Arizona v. Washington*, 434 U.S. 497 (1978); *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005.)

Argument

1. Jeopardy attached when the panel members were sworn.

The Fifth Amendment provides that no person shall be "twice put in jeopardy for life or limb." In a criminal proceeding, jeopardy attaches prior to the verdict to prevent the government from subjecting an accused from being tried more than once for the same offense. *Green*, 355 U.S. at 187. In addition to protecting an accused from the inconvenience and expense of defending himself indefinitely, the Double Jeopardy Clause prevents the government from unfairly increasing the likelihood of prosecution by using multiple trials to perfect its case. *Id.* The Fifth Amendment's protection against double jeopardy indisputably applies to the military. *See Wade v. Hunter*, 336 U.S. 684, 690 (1949); *Richardson*, 44 C.M.R. at 111.

The Double Jeopardy Clause is implicated when the government initiates a criminal proceeding before a trier of fact. *Kepner v. United States*, 195 U.S. 100, 133 (1904). In jury trials, the Fifth Amendment requires that jeopardy attach when the jury is empaneled and sworn. *Downum v. United States*, 372 U.S. 734 (1963). Because this rule is an integral part of the constitutional guarantee against double jeopardy, it may not be superseded or circumscribed by statute. *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

When an accused is brought to trial for a criminal offense, he has the right to have his case heard by the tribunal selected and empaneled for that purpose. *Id.* at 39. If the government proceeds so far as to assemble and seat a jury, the public interest in prosecution must be weighed against an accused's right to obtain a final decision in his case. *Id.* In making this assessment, the courts have uniformly rejected the notion that the government may prosecute an accused multiple times in an effort to perfect its case. *See United States v. Stringer*, 17 C.M.R. 122, 134 (C.M.A. 1954)(noting that "we could not sanction [a] second trial if it seemed reasonably apparent that because of want of evidence, the Government had failed originally to make a showing of merit.").[3]

Military servicemembers are in a unique position, as they are protected against being twice placed in jeopardy by both the Fifth Amendment and by statute—Article 44, UCMJ.[4] Article 44(c) was adopted to bring military practice in line with the federal courts by affording an accused jeopardy protection before

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[3] *See also Green*, 355 U.S. at 188 (the Double Jeopardy Clause prevents "a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.").

[4] Article 44(c) states that: "A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article."

findings.[5] At the time, it was unclear which provisions of the Bill of Rights applied to the military.[6] Nearly thirty years before the Supreme Court's decision in *Crist*, the drafters were unaware that the point at which jeopardy attaches is a matter of constitutional significance.[7]

Appellant's constitutional right against double jeopardy supersedes Article 44(c), insofar as it applies to panel cases.[8]

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[5] In the subcommittee hearings that preceded the adoption of the Uniform Code of Military Justice, Harvard Law Professor Edmund Morris Morgan, chair of the drafting committee, assured the Senate that "I really am just as anxious as you Senators are to have the double jeopardy clause apply, and apply the way it does in civilian courts." Hearings before the Subcommittee of the Committee on Armed Services, United States Senate, on S. 857 and H.R. 4080, 81st Cong., 1st Sess. (1949) p. 325.

[6] The Supreme Court did not apply the double jeopardy prohibition of the Fifth Amendment to the states until 1969, when it decided *Benton v. Maryland*. 395 U.S. 784, 794 (1969).

[7] Article 44(c) was not intended to limit the scope of servicemember's double jeopardy protection. The Senate Report on the proposed text states that Article 44 "prevents the retrial of a case which is terminated by the prosecution for failure of available evidence or witnesses. [The changes to Article 44] represent a substantial strengthening of the rights of an accused." Senate Report No. 81-486, 81st Cong., 2nd Sess. 1950, 1950 U.S.C.C.A.N. 2222, 2223. It was not until 1978 that the Supreme Court held that the point at which jeopardy attaches "may not be moved a few steps forward or back without constitutional significance." *Crist*, 437 U.S. at 37.

[8] In *United States v. Wells*, the Court of Military Appeals held that Article 44(c) sets the point at which jeopardy attaches at the reception of evidence on the general issue. *United States v. Wells*, 26 C.M.R. 289, 292 (C.M.A. 1958). The Court noted that Congress apparently intended Article 44(c) to conform to the federal rule attaching jeopardy when the court begins to hear evidence in judge alone cases. *Id.* Noting that "in some respects a court-martial functions as both a judge and a jury," the Court found that Congress' approach was "not inappropriate." *Id.* In light of the Supreme Court's subsequent decision in

United States v. Lopez, 35 M.J. 35, 39 (C.A.A.F. 1992)(noting that the highest source of rights is paramount unless a lower source provides greater protections); *see also Richardson*, 44 C.M.R. at 111 ("Article 44(b) is dispositive unless it constitutes an unconstitutional limitation on the protections against former jeopardy that a member of the armed forces would have by direct application of the Fifth Amendment."). The trial judge and the Army Court erred when both found that appellant's protection against double jeopardy is delineated, and therefore limited, by Article 44(c). (JA 6, 11, 76-77.)

Although the Army Court declined to rule on the constitutional issue in this case, the court's opinion rests on the assumption that the plain language of Article 44(c) dictates the point at which jeopardy attaches in the military, regardless of whether the case is before a judge alone or a panel. Without explicitly addressing the appellant's Fifth Amendment claim, the Army Court concludes that "according to the plain meaning of Article 44, UCMJ, jeopardy did not attach to appellant's first court-martial." [9] (JA 11.) This conclusion underpins the Army

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Crist v. Bretz, the Court's analysis in *Wells* is no longer valid. The point at which jeopardy attaches is not a technical matter to be determined by the legislature; Congress lacks the ability to choose between one of several "appropriate" approaches. *Crist*, 437 U.S. at 37.

[9] *See also Easton*, 70 M.J. at 510 (footnote 4)("Appellant cannot claim former jeopardy protections under the UCMJ because appellant's first court-martial, which ended prior to the

Court's entire analysis of appellant's case, particularly in its reliance on R.C.M. 604 and its assessment of manifest necessity.[10]

In its analysis, the Army Court assigns some significance to the Working Group's discussion of *Crist v. Bretz* in Appendix 21, Analysis of Rules for Court-Martial. (JA 8, n.8.) The Working Group's reasoning, inserted into the 1984 version of the Manual for Courts-Martial several years after the Supreme Court's decision in *Crist*, has carried over to the current version and is the only rationale for preserving Article 44(c) in its present form.[11] The Army Court's reliance on the Working Group's discussion of Article 44(c) is nonetheless misplaced.

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introduction of evidence, is not a 'trial' as defined by Article 44(c), UCMJ. Consequently, the first court-martial is not entitled to preclusive effect under the Code.").

[10] The Court argues that a convening authority's power to withdraw charges is governed by the M.C.M. and identifies R.C.M. 604 as an "important analytical starting point." *Easton*, 70 M.J. at 512. This analysis rests on the Court's assumption that the Fifth Amendment does not dictate the point at which jeopardy attached in appellant's case. If the Fifth Amendment applies, the convening authority's discretion is circumscribed by the Constitution and Supreme Court jurisprudence, and not by R.C.M. 604. Critically, R.C.M. 604 lowers the convening authority's burden from demonstrating manifest necessity to simply showing that the withdrawal of charges was not for an improper reason.

[11] The Working Group elected not to recommend an amendment to Article 44(c): "The holding in *Crist* would have adverse practical effect if applied in the military. In addition to being unworkable in special court-martial without a military judge, it would negate the utility of Article 29, which provides that the assembly of the court-martial does not wholly preclude later substitution of members. This provision recognizes military exigencies or other unusual circumstances may cause a

Supreme Court precedent has established, and the Working Group appears to concede, that jeopardy attaches in military courts-martial at some point prior to findings. Since the Fifth Amendment applies, the only issue open for debate is the point at which jeopardy should attach. The Working Group's reasoning utterly fails to address the underlying question: what about military practice is incompatible with attaching jeopardy when the members are sworn and empaneled? The "practical issues" the Working Group cites exist in every case, regardless of the point at which jeopardy attaches.

The Army Court also emphasizes the fact that Congress has failed to amend Article 44(c) following *Crist v. Bretz*. (JA 8, n.8.) To the extent the Army Court assigned this fact any significance, it erred. Congressional inactivity does not forestall the operation of the Fifth Amendment. The "men and women of the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A. 1994). In this arena, the Constitution dictates the point at

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member to be unavailable at any stage in the court-martial. It also recognizes that the special need of the military to dispose of offenses swiftly, without necessary diversion of personnel and other resources, may justify continuing the trial with substituted members, rather than requiring a mistrial. This provision is squarely at odds with civilian practice with respect to juries and, therefore, with the rationale in *Crist*." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 44 analysis, at A21-50 (1984).

which jeopardy attaches and supersedes any legislation to the contrary. *Crist*, 437 U.S. at 38.

To the extent that the Army Court considered Congressional intent in reaching its decision, it should have also weighed the intent of the drafters of Article 44(c), UCMJ. The hearings make it clear that Congress intended to prevent the government from doing what it did in this case: subjecting an accused to a second trial because the government failed to prepare for the first.[12] As General Riter testified before the Committee on Armed Services in 1949,

> In the Federal court a district attorney must have his witnesses in court at his peril.
>
> He cannot go ahead and try a lawsuit and put a man in the penitentiary and then, when he sees he is going to get licked, *nolle prose* his case and then come back and take a second bite.
>
> No commanding general should be permitted to do that today. He has to try the lawsuit and win or lose it right there. That is consonant with our whole concept of Anglo-American justice.

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[12] "Quite clearly, the legislative intendment of this provision was to forbid retrial of an accused when the prosecution failed to prepare its case properly and thereafter sought to have the charges withdrawn prior to findings for the purpose of presenting a more persuasive one before another court." *United States v. Stringer*, 17 C.M.R. 122, 127 (C.M.A. 1954).

Hearings before the Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498, 81st Cong., 1st Sess. (1949) p. 671.

Insofar as Article 44(c), UCMJ, would narrow the Fifth Amendment protections afforded to the members of the military, as it does in appellant's case, it violates the Constitution and cannot be enforced. *Crist*, 437 U.S. at 37-38. When the panel members were assembled and sworn to decide appellant's case on July 16, 2007, jeopardy attached. By withdrawing the charges on July 18, 2007, the government foreclosed the possibility of a second trial barring an affirmative showing of manifest necessity.

2. The Army Court erred in finding that operational considerations made withdrawal of the charges manifestly necessary.

The Army Court based its opinion on a single finding, wholly unsupported by the record, that "operational considerations drove the convening authority's decision to terminate appellant's first court-martial." (JA 11.) The problems with this analysis are manifold: (1) there is no evidence of the convening authority's decision-making process, much less which considerations "drove" his decision; (2) the Army Court conflates the unavailability of the government's witnesses and the need for depositions with the "manifest necessity" required to curtail a court-martial once jeopardy has

attached; (3) nothing about the government's failure to produce operable videotapes in this case is unique to the military or attributable to military operations.

An entire paragraph of the Army Court's opinion, ostensibly dedicated to a discussion of manifest necessity, simply reiterates what the parties all knew well in advance of trial: two of the government's witnesses were unavailable to testify. According to the Army Court:

> This case demonstrates a manifest necessity for the convening authority's actions. Appellant's unit was ordered to Iraq as part of a surge of forces designed to quell the deadly violence in that country. Appellant's crime was for intentionally missing movement to Iraq for this operation. As appellant's case neared trial, it became clear that operational requirements would prevent the return of some members of appellant's unit that possessed knowledge about the circumstances of the case. Thus, due to the very nature of appellant's crime and the ongoing operations in Iraq, two witnesses were unavailable for trial. The government still made efforts to prosecute appellant's first court-martial and secured depositions of the unavailable witnesses, but the depositions were inoperable.

(JA 10.)

The Army Court suggests that the deployment of witnesses well in advance of trial somehow necessitates the government proceeding to trial without their testimony, allowing the court-

martial to progress until opening statements, and then withdrawing the charges without explanation after jeopardy has attached. None of the factors the Army Court cites create a manifest necessity for withdrawal nor were they a surprise to the government. The war in Iraq did not break out between the government's declaration that it "was prepared to proceed" and the withdrawal of charges. The government was aware that its witnesses were deployed and its tapes were inoperable prior to seating the panel. The fact that this case took place during the conflict in Iraq and that two of the witnesses were unavailable to appear in person is hardly unique and cannot be used to retroactively justify the government's decision to halt the trial after placing the appellant in jeopardy.

In support of its conclusion, the Army Court relies heavily on the Supreme Court's decision in *Wade v. Hunter*, 336 U.S. 684 (1949). (JA 10.) After characterizing trial counsel's failure to secure the depositions as a non-dispositive factor, the Court cites *Wade* for the proposition that "implicit" operational considerations can meet the constitutional requirement of manifest necessity. (JA 10-11). Assuming for the sake of argument that an unidentified, "implicit" consideration can also be "manifest," the facts of *Wade* are completely dissimilar to the present case.

While both undeniably concern the military, in *Wade* the "operational considerations" involved the advance of the 76th Infantry Division across Germany and into Poland in March of 1945. *Wade*, 336 U.S. at 686. A court-martial was relocated to ensure that two witnesses, located some distance from the advancing front, could testify. *Id.* The distinctions between the cases are striking: this court-martial was convened at Fort Stewart, in an environment in which the unavailability of deployed witnesses was foreseen, planned for, and ultimately accounted for through the ordering of depositions; the parties traveled to Iraq and took the depositions without incident, despite ongoing military operations; the government decided to try the appellant with full knowledge that its videotaped depositions were inoperable; and the withdrawal of charges was precipitated, not by the movement of armies, but by the government's post-hoc realization that appellant would likely be acquitted without the tapes.

The doctrine of manifest necessity originated in *United States v. Perez*, 22 U.S. 579 (1824). In *Perez*, the Supreme Court addressed the question of whether the discharge of a jury prior to findings and without the consent of the accused is a bar to any future trial for the same offense. *Id.* at 579. In holding that a retrial was permissible, the Court observed that a judge has the discretion to discharge the jury without a

verdict, "whenever, in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.* at 580. The Court warned that this power "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Id.*

Halting a trial to afford the prosecution a second chance at obtaining a conviction is a classic example of when the Double Jeopardy Clause bars a second prosecution. *Downum*, 372 U.S. at 736. Simply put, the government's lack of preparedness is not a sufficient basis for discharging the jury prior to verdict:

> The question of whether that "high degree" [of necessity] has been reached is answered more easily in some kinds of cases than in others. At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this "abhorrent" practice.

Washington, 434 U.S. at 507.[13]

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[13] *See also United States v. Jorn*, 400 U.S. 470, 485 ("The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning

In *Downum v. United States*, the Supreme Court confronted a situation that is analogous to the present case. In *Downum*, the prosecuting attorney allowed a jury to be selected and sworn even though one of its key witnesses was missing. *Downum*, 372 U.S. at 734. After a brief recess, the government asked the judge to discharge the jury because it lacked the evidence it needed to proceed. *Id.* The Supreme Court held that the Fifth Amendment barred the second trial, noting that the constitutional prohibition against double jeopardy prevents the government from orchestrating a retrial simply because it lacks the evidence needed to prove its case. *Id.* at 738.

The Supreme Court's analysis dictates the outcome of this case. In *Downum*, the prosecuting attorney was responsible for arranging for the appearance of his witnesses and was aware that one of them had not yet arrived. *Downum*, 372 U.S. at 734. Here, the government was responsible for producing the depositions and aware that they were inoperable. In both cases, the government initiated a trial without the evidence it needed.

In this case, as in *Downum*, no manifest necessity arose after the trial began that would justify a second prosecution.

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both the double jeopardy provision and the speedy trial guarantee."); *Illinois v. Somerville*, 410 U.S. 458, 483 (1973)(Marshall, J., dissenting)(The Supreme Court's decisions in *Downum v. United States* and *United States v. Jorn* "show to me that 'manifest necessity' cannot be created by errors on the part of the prosecutor or the judge; it must arise from some source outside their control.").

The government knew the depositions were useless and yet did not ask the trial court for a continuance before July 16, 2007. (JA 51.) It did not ask for additional time to secure new depositions nor did it seek to use other prior testimony of the unavailable witnesses, like that obtained during the Article 32, UCMJ, pretrial investigation. *Id.* And finally, the government did not withdraw charges until two days after the panel was sworn. (JA 54.) Simply stated, the government had all of the information concerning the faulty depositions prior to seating the panel, yet it took no action. Once the government has begun to try a case, there is no difference in principle between withdrawing the charges just prior to the introduction of evidence and withdrawing the charges after a witness has testified. *Downum*, 372 U.S. at 734. In either case, the government's ineptitude is insufficient to overcome the Fifth Amendment's prohibition against double jeopardy.[14]

This Court should examine any claim that unavailable evidence necessitated a second trial with strict scrutiny and

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[14] Courts have found manifest necessity for discharging a jury when it appears that the jury is unable to reach a verdict. *Perez*, 22 U.S. at 579; *Wade*, 336 U.S. at 688-689. The Supreme Court has described "manifest necessity" as a continuum with the government's inability to produce critical evidence at one end and the judge's belief that the jury is unable to reach a verdict at the other. *Washington*, 434 U.S. at 508-09. In this case, the proceeding was curtailed long before deliberations and the appellant was deprived of his option to have the panel decide his case. *Jorn*, 400 U.S. at 484.

resolve any doubt in favor of the accused. *Washington*, 434 U.S. at 507; *Downum*, 372 U.S. at 738. "As a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Washington*, 434 U.S. at 505. In this case, the convening authority failed to provide any explanation for his withdrawal of charges. (JA 55.) When the military judge considered defense counsel's double jeopardy challenge, he resolved the motion on the basis of Article 44(c) and consequently failed to make any findings of fact regarding manifest necessity. (JA 76-77.)

As a result, there is no evidence that the convening authority exercised his discretion with the care that *Perez* requires or considered the appropriate factors, i.e. the appellant's right to have his case tried by the panel assembled for that purpose. *See Washington*, 434 U.S. at 503-04 (noting that an accused's right to have his case tried by a particular tribunal merits constitutional protection because a second prosecution may be "grossly unfair," in that it "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.").

The Army Court's decision erodes the doctrine of manifest necessity. If this Court were to adopt the Army Court's logic,

double jeopardy would potentially not apply in any case involving a deployed witness and the government's failure to secure their testimony. The determination that the missing witnesses were unavailable was separate and distinct from the question of whether the charges could be withdrawn after the government elected to proceed. The government elected to place the accused in jeopardy without securing the testimony of key witnesses. Nothing changed between the government's decision to proceed to trial and the convening authority's withdrawal of charges. No manifest necessity arose. To find that the government is entitled to a second trial so long as it "makes efforts" to secure the testimony of key witnesses is to eviscerate Supreme Court jurisprudence in this area.

This is not about military exigency and the interplay between operational considerations and a convening authority's discretion to withdraw charges from a court-martial. It is about government prosecutors taking an accused to trial without the evidence they need to prove their case and getting a second try when they realized they could not secure a conviction.

Conclusion

When the government seated and swore the panel in appellant's case, his constitutional right against double jeopardy attached and barred any subsequent proceeding absent an affirmative showing of manifest necessity. In concluding that

the government had met its burden in establishing manifest necessity, the Army Court erroneously relied on the unavailability of two government witnesses, a fact that was known to all parties well in advance of trial. The Army Court affirmed appellant's conviction for missing movement despite its inability to identify any urgent or unforeseen circumstances that would have necessitated withdrawing the charges. The government's decision to proceed without the depositions triggered the double jeopardy bar and foreclosed the possibility of a second court-martial.

WHEREFORE, appellant requests that this Court reverse the Army Court of Criminal Appeals' decision and set aside his convictions.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Easton*, Crim.App.Dkt.No. 20080640, USCA Dkt. No. 12-0053/AR, was electronically filed with both the Court and Government Appellate Division on January 26, 2012.

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