IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY 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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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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.

Summary of the Argument

This Court should not adopt a balancing test in this case because the government has failed to articulate a governmental interest to balance against an accused's right against double jeopardy. The mere assertion that "courts-martial are unique" cannot justify the deprivation of a servicemember's constitutional rights under the Double Jeopardy Clause of the Fifth Amendment. Contrary to the government's assertion that manifest necessity existed in this case, there is *no* direct evidence of the convening authority's reasons for withdrawing the charges, much less any indication that he considered

withdrawal "manifestly necessary." The Army Court erred when it engaged in a post-hoc fact-finding expedition to rationalize the government's actions in this case.

Argument

The government asks this Court to apply an unspecified balancing test to determine if the Double Jeopardy Clause of the Fifth Amendment applies to servicemembers. Although this approach is inappropriate for any number of reasons, the central flaw in the government's analysis is its inability to articulate a governmental interest that requires jeopardy to attach at the introduction of evidence in panel cases. Absent a showing of military necessity that mandates the point at which jeopardy should attach, this Court has no countervailing interest to balance against a servicemember's individual rights under the Double Jeopardy Clause.

The government's reliance on *Middendorf v. Henry*, 425 U.S. 25 (1976), is misplaced. The *Middendorf* test is used to determine whether a military practice violates the Fifth Amendment's prohibition against the deprivation of "life, liberty, or property, without due process of law," a claim that has not been made in the present case. *Middendorf*, 425 U.S. at 34. In addition, the *Middendorf* Court was evaluating the scope of an accused's due process right to counsel in the context of a summary court-martial. After observing that a servicemember has

the right to refuse a summary court-martial, the Court noted that "the presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offense being tried." *Id.* at 45. There is no comparable interest at stake in this case, and no evidence that Congress intended to circumscribe an accused's double jeopardy protection when it adopted Article 44(c).

Instead of identifying a pertinent military interest, the government simply argues that this Court need not afford its members the full protection of the Double Jeopardy Clause because of the "unique nature of military courts-martial." The government fails to explain which, if any, of a court-martial's unique characteristics dictates the point at which jeopardy should attach.[1]

Although servicemembers do not have a constitutional right to a jury trial under the Sixth Amendment, they have a statutory right under Article 16, UCMJ, to elect trial by members. That election is constitutionally significant, in that once an

[1] The government's observation that a court-martial "is not a standing court" and that a special court-martial can still be convened with only three panel members has no relevance to the question before this Court.

accused elects to be tried by a panel, he has a due process right to fair and impartial members as well as an equal protection right to be tried by a jury from which no cognizable racial group has been excluded. *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001); *United States v. Santiago-Davila*, 26 M.J. 380 (1988). It also triggers a number of statutory protections, including the requirement that the convening authority select only those members "best qualified" for service.[2] Article 25(d)(2), UCMJ.

The government nonetheless characterizes an accused's "valued right to have his trial completed by a particular tribunal" as an unrecognized or limited right under the UCMJ. In support of this argument, the government cites to a convening authority's ability to remove a panel member for "good cause" under Article 29, UCMJ. While acknowledging that a federal judge has the same ability to excuse jury members in the civilian system,[3] the government notes that "good cause" in a

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[2] This Court has repeatedly addressed the convening authority's responsibilities under Article 25. In *United States v. Dowty*, this Court reiterated that "we will not tolerate an improper motive to pack the member pool" or permit "systematic exclusion of otherwise qualified potential members based on an impermissible variable such as rank." *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004).

[3] The government has no authority for the proposition that "what constitutes 'good cause' to a convening authority goes well beyond traditional notions of 'good cause' in civilian courts." Federal judges have considerable discretion to excuse jurors for any number of reasons, including emotional instability,

military context may include military exigency. This distinction is not particularly meaningful and certainly does not render the principles of *Crist* and *Downum* inapplicable to the military. *See United States v. Grow*, 11 C.M.R. 77, 83 (C.M.A. 1953)(observing that "because the substitution of court members after arraignment is such a departure from the principles applicable to jury trials, and presents such a risk of abuse, we will view with circumspection any relief of a member after arraignment.").

Instead, the structure of the UCMJ acknowledges an accused servicemember's right to have his case completed by the panel selected for that purpose. The Rules for Court-Martial (RCM) establish procedures for the voir dire of individual members and provide an accused with the right to challenge members peremptorily and for cause. R.C.M. 912; *see also United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008)(noting that an excusal for cause encompasses challenges based on both implied and actual bias). Immediately after the members are sworn, the

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depression and stress; travel and vacation plans; illness, physical impairment and family emergencies. *See U.S. v. Longwell*, 410 Fed. Appx 684 (4th Cir. 2011)(illness and travel plans); *U.S. v. Hivey*, 437 F.3d 752 (8th Cir. 2006)(family emergency, medical emergencies, car accidents); *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997)(emotional instability); and *U.S. v. McFarland*, 34 F.3d 1508 (9th Cir. 1994)(vacation plans and religious holidays). The scenarios cited by the government (transfer to duty in Vietnam, mandatory retirement, and military schooling) could certainly constitute "good cause" for excusal in the federal system.

military judge is required to announce the assembly of the court-martial, signifying the point at which substitution of members and the military judge may no longer take place without good cause. R.C.M. 911; *United States v. Dixon*, 18 M.J. 310 (C.M.A. 1984). Once a panel is assembled, furthermore, the court may not proceed without the requisite number of members. Article 29, UCMJ. These provisions would be completely superfluous if an accused servicemember had no cognizable interest in the composition of his panel.

A member of the military has the same "valued right to have his trial completed by a particular tribunal" as his or her civilian counterpart. The Supreme Court settled the issue in *Wade v. Hunter*, 336 U.S. 684 (1949), when it applied the Double Jeopardy Clause to the military. In doing so, the Supreme Court used precisely the same analysis that it would later apply in *Crist* and *Downum*. Nothing in the *Wade* opinion suggests that an accused's interest in having his trial completed by a particular tribunal is affected by his military service; instead, in the context of a military court-martial, the Court specifically acknowledged that right and adopted the same test that applies in civilian courts. *Wade*, 336 U.S. at 689.

The government asserts that this Court need not examine the constitutionality of Article 44(c) in panel cases because "Congress has already undertaken the delicate task of balancing

the rights of servicemembers against the needs of the military." The government does not cite to legislative history in support of this proposition, relying instead on a discussion of what Congress "apparently" intended in *United States v. Wells*, 25 C.M.R. 289 (C.M.A. 1958). In *Wells*, the Court did no more than interpret and apply the language of the rule as written, without the benefit of the Supreme Court's decision in *Crist*. *Id.*

The Congressional hearings do not specifically address the point at which jeopardy should attach, much less identify a military purpose for choosing one point or another.[4] Contrary to the government's unsupported assertion that Congress took the "unique" nature of a court-martial into consideration when drafting Article 44(c), the hearings reflect a general

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[4] The congressional hearings on this subject refer to several points of time as the "beginning" of a trial. Colonel John P. Oliver, legislative counsel of the Reserve Officers Association, noted that Article 44 "should be corrected to provide that jeopardy attached when the court is sworn." 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. 150. In a written statement provided by Mr. Robert D. L'Heuruex, a former Judge Advocate, he urged Congress to "make it somewhat similar to the Federal rules. It should provide that any proceeding in which evidence is taken after arraignment but interrupted prior to findings should constitute a former trial, if interrupted for any reasons except for 'imperious necessity.'" Hearings before the Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498, 81st Cong., 1st Sess. (1949) p. 821.

determination to afford servicemembers the same double jeopardy protection they would receive in federal court.[5]

Congress has not revisited the question since the Supreme Court's decision in *Crist*. Although the Working Group inserted a discussion of the case into the 1984 version of the UCMJ, Article 44(c) was not discussed during the Commission hearings or made the subject of a particular recommendation. Advisory Commission Report Vols. I and II, Military Justice Act of 1983 Advisory Commission (1984). The government nonetheless argues that Congress' inactivity in this area amounts to an affirmative decision to restrict the scope of a servicemember's protection against double jeopardy in panel cases. Congress is entitled to deference only when it *acts* in the area of military affairs; when Congress last addressed this issue, it did so with the intent of strengthening a servicemember's protection against double jeopardy by emulating federal practice.

The government's argument for manifest necessity rests on the military judge's findings of fact on a defense motion alleging that the convening authority improperly withdrew the charges under R.C.M. 604. (JA 24, 75.) That motion, including

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[5] General Riter, for example, suggested that statutory language could be adopted directly from the Supreme Court's pending opinion in *Wade v. Hunter*, bringing the military in line with civilian practice. Hearings before the Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498, 81st Cong., 1st Sess. (1949) p. 670.

the associated findings of fact and conclusions of law, are separate and distinct from the defense's double jeopardy motion.[6] The government did not argue manifest necessity at trial and the military judge made no findings on that issue.

This case is consequently analogous to *United States v. Ortiz*, where this Court rejected the government's invitation to make post-hoc findings on an issue the military judge did not address. *United States v. Ortiz*, 66 M.J. 334, 342 (C.A.A.F. 2008). *See also United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002)(holding that the Army Court's attempt to craft findings of fact and conclusions of law that should have been made at the trial level was not an adequate substitute). Here, the trial procedure to address appellant's double jeopardy right requires the convening authority to make a showing of manifest necessity and to carefully balance that necessity against an accused's valued right to have his trial completed by a particular tribunal. *Downum v. United States*, 372 U.S. 734, 737 (1963); *Wade v. Hunter*, 336 U.S. 684, 689 (1949); and *United*

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[6] The analysis applicable to the two motions is similarly distinct. Under R.C.M. 604(a), the convening authority may "for any reason" cause any charges or specifications to be withdrawn. If jeopardy has attached, however, the convening authority may only withdraw the charges if it is "manifestly necessary to do so." The military judge was clearly not conducting a R.C.M. 604(b) analysis because his ruling on the double jeopardy motion was based on the fact that charges were withdrawn *prior* to the introduction of evidence. (JA 76-77.) He had no basis for applying the higher standard in R.C.M. 604(b).

States v. Perez, 22 U.S. 579 (1824). There is no indication that the convening authority found manifest necessity in this case.

As in *Ortiz*, the question here is not whether an appellate court can rationalize the government's decision to deprive appellant of his constitutional right against double jeopardy. *Ortiz*, 66 M.J. at 342. Instead, the question in this case is whether the convening authority identified the competing interests and balanced them. The government cannot meet that burden.[7] The only evidence of the convening authority's "analysis" is a one-sentence memorandum stating simply: "the court-martial charge...is hereby withdrawn and dismissed without prejudice." (JA 55.) The Army Court's opinion is full of facts that were before the *military judge;* the government never established that the same facts were before the convening authority.

The military judge recognized this problem at trial. As he told the parties, "How do I know that the reason the case was withdrawn was because of unavailable witnesses? What evidence do I have that this was the reason? I have the 18 July memo

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[7] The military judge's failure to make findings of fact and conclusions of law is no doubt based on the government's failure to make that argument at trial. A recent Supreme Court decision suggests that the government forfeited its manifest necessity argument when trial counsel failed to raise it at trial. *United States v. Jones*, No. 10-1259, 565 U.S. _ (2012).

from Colonel Buchs, Appellate Exhibit IX. That's what I got. I have no staffing paper, no testimony, no evidence of why he withdrew and dismissed." (JA 78.) Several minutes later, trial counsel conceded that he had *no direct evidence* of why the charges were withdrawn. (JA 80.) As a result, there is no evidence that the requisite decision-maker (the convening authority) made the requisite decision (that manifest necessity for withdrawing the charges existed).

Even if this Court decides to adopt the military judge's findings of fact on the improper withdrawal motion, those facts do not establish manifest necessity. The government cannot point to a single "operational concern" that arose between the time trial counsel elected to proceed without the depositions and the convening authority's withdrawal of the charges. Contrary to the government's characterization of this case, it is *precisely* a situation where the government proceeded at its own peril without key witnesses.

Conclusion

WHEREFORE, appellant requests that this Honorable Court dismiss the Charge with prejudice.

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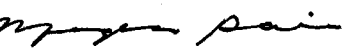

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I certify that a copy of the foregoing in the case of *United States v. Easton*, Crim.App.Dkt.No. 20080640, USCA Dkt. No. 12-0053/AR, was electronically filed with both the Court and Government Appellate Division on March 5, 2012.

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