IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ALEXANDER L. DRISKILL,
Airman (E-2),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0066/AF

Crim. App. Dkt. No. ACM 39889 (f rev)

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

IN APPELLANT'S FIRST COURT-MARTIAL, THE MILITARY JUDGE DISMISSED THE CHARGE OF WRONGFUL POSSESSION OF OBSCENE CARTOONS AFTER CLOSING ARGUMENTS. DID THE GOVERNMENT'S REPROSECUTION OF APPELLANT FOR THE SAME OFFENSE VIOLATE THE FIFTH AMENDMENT AND ARTICLE 44'S PROHIBITIONS AGAINST DOUBLE JEOPARDY?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Airman (Amn) Alexander L. Driskill, Appellant, was tried at a general court-martial at Ramstein Air Base (AB), Germany, Aviano AB, Italy, and Buckley Air Force Base (AFB), Colorado, on May 20, June 20–27, and October 28 through November 4, 2019. In accordance with Amn Driskill's plea, the military judge found him guilty of one charge and specification of wrongful possession of obscene cartoons in violation of Article 134, UCMJ, 10 U.S.C. § 934. Joint Appendix (JA)

[1] All references to the punitive articles are to the *Manual for Courts-Martial, United States* (2016 ed.) [*2016 MCM*]. All other references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*], unless otherwise noted.

at 512. Contrary to his pleas, a panel of officer members convicted Amn Driskill of one charge and one specification of rape of a child and one specification of sexual abuse of a child, both in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. Record of Trial (ROT) Vol. 1, Entry of Judgment, dated Mar. 2, 2020. The court-martial sentenced Amn Driskill to reduction to E-1, forfeiture of all pay and allowances, confinement for forty years and nine months, and a dishonorable discharge. *Id.*

On December 14, 2021, the Air Force Court remanded this case to the Chief Trial Judge, Air Force Trial Judiciary, to take corrective action as the convening authority failed to take action on the sentence as required. *See United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *2 (A.F. Ct. Crim. App. Aug. 23, 2022) (unpub. op.); JA at 2. After remand, the Air Force Court affirmed the findings on August 23, 2022. JA at 4, 30. With regard to the sentence, the Air Force Court concluded that Amn Driskill's sentence to confinement for forty years and nine months was inappropriately severe. JA at 29. It reassessed the sentence and approved a sentence of reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 30 years, and a dishonorable discharge. *Id.*

On September 22, 2022, the United States requested reconsideration, suggesting reconsideration *en banc*. JA at 45. Appellant opposed the United States' motion. JA at 54. On October 19, 2022, the Air Force Court denied the motion for reconsideration. JA at 63. On May 1, 2023, this Honorable Court granted review.

United States v. Driskill, 2023 CAAF LEXIS 284 (C.A.A.F. May 1, 2023) (order granting review).

STATEMENT OF FACTS

Amn Driskill's First Court-Martial

Years before the procedural history detailed above in the Statement of the Case, Amn Driskill was the accused in a prior court-martial. Between October 29 and November 2, 2018, Amn Driskill was tried by a general court-martial (hereinafter *Driskill I*) at Aviano AB, Italy. At that trial, the Government charged Amn Driskill with three specifications, all in violation of Article 134, UCMJ. The first two specifications alleged child pornography offenses, the third alleged knowing and wrongful possession of obscene cartoons, a clause 3 offense alleging a violation of 18 U.S.C. § 1466A(b)(1). JA at 71. The obscene cartoons specification—which later became the subject of the instant appeal—alleged:

> In that AIRMAN ALEXANDER L. DRISKILL, United States Air Force, 31st Operations Support Squadron, Aviano Air Base, Italy, did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, to wit: visual depictions of minors engaging in sexually explicit conduct, and that said visual depictions were transported in foreign commerce by computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.

Id.

In *Driskill I*, Amn Driskill pleaded not guilty to all offenses. JA at 406. During closing argument, defense counsel argued that the Government could not

prove the obscene cartoons specification due to a "charging defect and an elements failure because the Government had put on no evidence of the images movement to, from, or through a State or Territory of the United States." JA at 68. The Defense itself did not raise the issue in the form of a motion to dismiss; rather, the military judge considered it as such *sua sponte*. JA at 67. The military judge ordered the parties to draft written briefs on the issue after the conclusion of closing arguments. *Id.* The military judge characterized the issue as "one of jurisdiction" which should have been addressed "before entry of pleas." JA at 408-409. Defense counsel clarified that they raised an "elements issue" during closing argument because they wanted to ensure Amn Driskill's rights were protected "and that he was not subject to re-preferral and referral of that charge." JA at 410.

After receiving written briefs and argument, and before entering findings on the other offenses, the military judge dismissed the obscene cartoons specification. JA at 405. The military judge relied on this Court's holding in *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005), that the Child Pornography Prevention Act (CPPA), 18 U.S.C. § 2252A, lacked extraterritorial application and found that 18 U.S.C. § 1466A as charged in *Driskill I* similarly did not apply extraterritorially. *Id.* The military judge concluded that this lack of extraterritorial application "foreclosed prosecution under the current charging scheme." *Id.* Despite the Defense styling their motion as a "Motion to Dismiss for Failure to State an Offense," the military

judge ruled, "The Defense Motion to Dismiss Specification 3 of the Charge *for failure of Jurisdiction* is GRANTED."[2] JA at 171, 405 (emphasis added).

The military judge subsequently acquitted Amn Driskill of the remaining child pornography specifications. JA at 406, 412. After announcing the findings, trial counsel (TC) asked the military judge to clarify whether the obscene cartoons specification was dismissed with prejudice:

> TC: The Court's ruling on the Defense Motion to Dismiss Specification 3 of the Charge says that the motion is granted. The Defense asks that the specification be dismissed with prejudice. I am not sure whether the Court –
>
> MJ: The Court did not find that. The Court found it had no jurisdiction and dismissed it as that.

JA at 412.

Amn Driskill's Second Court-Martial

At Amn Driskill's second court-martial (the one at issue for this appeal, hereinafter *Driskill II*), the Government re-charged him with wrongful possession of the same obscene cartoons as the previous court-martial; however, this time it charged him with conduct of a nature to bring discredit upon the armed forces under clause 2 of Article 134, UCMJ, rather than a crime and offense not capital under clause 3. JA at 64. The specification alleged:

[2] The Government's response was captioned "Response to Defense Motion to Dismiss for Failure of Jurisdiction." JA at 309.

> In that AIRMAN ALEXANDER L. DRISKILL, United States Air Force, 31st Operations Support Squadron, Aviano Air Base, Italy, did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, such conduct being of a nature to bring discredit upon the armed forces.

Id.

Before entry of pleas, the Defense moved to dismiss the specification as it violated the Fifth Amendment and Article 44's prohibitions against double jeopardy. JA at 66. The Defense argued that jeopardy attached to the possession of obscene cartoons when evidence was introduced at Amn Driskill's first court-martial. JA at 68. The Defense clarified that the court-martial in *Driskill I* had jurisdiction over the accused and the offense, "just not in the way the Government chose to charge it," pointing to the military judge's ruling in *Driskill I* that "lack of extraterritoriality within 18 U.S.C. § 1466A does not foreclose prosecution for the alleged offense, it only forecloses prosecution under the current charging scheme." JA at 68, 405. In their written response to the Defense motion to dismiss, the Government argued that jeopardy did not attach to the obscene cartoon specification due to a lack of jurisdiction. JA at 421. However, during oral argument on the motion, the Government reversed course and conceded that jeopardy attached upon the presentation of evidence. JA at 451. The Government then argued that even though jeopardy had attached, the prohibition against double jeopardy did not bar

reprosecution because the specification at issue in *Driskill I* was dismissed for "lack of jurisdiction" rather than a finding of guilt or innocence. JA at 451-52.

The military judge (a different judge than in *Driskill I*) denied the Defense's motion to dismiss. JA at 428. The military judge found jeopardy had attached because Amn Driskill was arraigned, entered pleas, and evidence on the merits was admitted. *Id.* However, the military judge concluded that because there was no final judgment on the obscene cartoons specification, Amn Driskill "suffered no injury cognizable under the Double Jeopardy Clause or Article 44, UCMJ." *Id.* The Defense then filed a petition for extraordinary relief with the Air Force Court requesting a writ of mandamus setting aside the military judge's denial of the Defense's motion to dismiss and ordering the offense dismissed with prejudice. *In re Driskill,* Misc. Dkt. No. 2019-03, 2019 CCA LEXIS 281 (A.F. Ct. Crim. App. July 2, 2019) (order); JA at 32. The Air Force Court denied the petition. JA at 34.

Amn Driskill ultimately pleaded guilty to the specification alleging possession of obscene cartoons pursuant to a pretrial agreement. JA at 440, 460, 499. Amn Driskill pleaded not guilty to the charge and specifications of rape and sexual abuse of a child. JA at 2, 460. During the trial on the merits for that charge, and in accordance with the pretrial agreement, the Government admitted and published to the members an exhibit containing 100 cartoon images in support of the possession of obscene cartoons specification, as well as an exhibit containing 50 additional

cartoon images. JA at 440-41, 504-505. The military judge instructed the members that both exhibits could be used as evidence of Amn Driskill's motive to commit rape and sexual abuse of a child, as well as evidence of Amn Driskill's intent to commit sexual abuse of a child. JA at 514-518. The members ultimately convicted Amn Driskill of both rape and sexual abuse of a child. JA at 2.

The Air Force Court's Opinion

In an unpublished opinion, the Air Force Court affirmed the findings and approved the reassessed sentence of reduction to E-1, forfeiture of all pay and allowances, confinement for 30 years, and a dishonorable discharge. JA at 30. Relevant to the issue here, the Air Force Court echoed the reasoning of the military judge in *Driskill II*. The Air Force Court found that jeopardy attached in Amn Driskill's first court-martial when he was arraigned, entered pleas, and evidence on the merits was admitted. JA at 22. However, the Air Force Court found that there was no final judgment because the military judge dismissed the specification alleging possession of obscene cartoons without prejudice; therefore, no Fifth Amendment or Article 44 violation occurred. *Id.* The Air Force Court reasoned that there was no evidence of bad faith on behalf of the military judge or trial counsel, that Amn Driskill's counsel "raised the issue during argument which eventually led to the dismissal of the specification," and that it was "clear the

specification was dismissed for lack of jurisdiction—grounds wholly unrelated to Appellant's guilt or innocence." *Id.*

SUMMARY OF THE ARGUMENT

The charge and specification should be set aside and dismissed because the Double Jeopardy Clause of the Fifth Amendment and Article 44, UCMJ, barred prosecution of the possession of obscene cartoons offense in *Driskill II*. Notwithstanding the military judge's *characterization* of her ruling dismissing the specification in *Driskill I* as a *jurisdictional* issue, that court-martial had jurisdiction over the accused and the offense; thus, "jurisdiction" was not an appropriate concern. Instead, the military judge's dismissal of the obscene cartoons specification, after jeopardy had attached, reflected her determination that the Government could not prove the offense they charged due to insufficient evidence of the jurisdictional *element*, a substantive element in 18 U.S.C. § 1466A the Government needed to prove with evidence beyond a reasonable doubt.

In *Driskill I*, the Government alleged that the possession of obscene cartoons took place in Italy and that the images were transported in foreign commerce via computer in violation of 18 U.S.C. § 1466A. JA at 71. The Government presented no evidence that Amn Driskill's conduct reached the United States. The military judge correctly found the federal statute did not apply extraterritorially, however, because "[t]he extraterritorial reach of a statute ordinarily presents a merits question,

not a jurisdictional question,"[3] the military judge's dismissal of the specification in *Driskill* I for lack of jurisdiction was error. In *Martinelli*, the lack of extraterritoriality of the statute did not preclude jurisdiction but *did* provide a substantial basis to question the providence of the appellant's guilty plea. Similarly here, the lack of extraterritoriality did not cause the court-martial to lose jurisdiction over the offense, but it did foreclose the Government from being able to prove the jurisdictional elements of the federal offense beyond a reasonable doubt.

In *Driskill I*, jeopardy attached to the specification alleging possession of obscene cartoons when the Government presented evidence on the offense. That court-martial had jurisdiction over the accused and the offense; Amn Driskill was on active duty and the specification alleged an offense under the code. Neither of these propositions are debatable, nor are they contested in this appeal. The military judge's dismissal of the specification, regardless of its characterization, signaled her understanding that the evidence was insufficient to result in a conviction, and thus jeopardy terminated with a final judgment.

The military judge in *Driskill II* adopted the erroneous conclusion of the military judge in *Driskill I*, finding it "clear" the "proceeding lacked jurisdiction to try [Amn Driskill] for the offense." JA at 428. In finding the "contested specification terminated through a lack of jurisdiction, not on the basis of factual guilt[] or

[3] *United States v. Munoz Miranda* (*Munoz*), 780 F.3d 1185, 1191 (D.C. Cir. 2015).

innocence," the military judge in *Driskill II* failed to consider that the lack of extraterritorial application of 18 U.S.C. § 1466A meant that the Government could not prove all required elements beyond a reasonable doubt. *Id.* In failing to dismiss the specification in *Driskill II*, the military judge permitted the Government to prosecute Amn Driskill for the same offense in violation of the Double Jeopardy Clause and Article 44, UCMJ.

This Court should set aside the charge and specification, with prejudice, and remand to the Air Force Court to either reassess the sentence or order a sentence rehearing. *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F 2022); *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022).

ARGUMENT

THE REPROSECUTION AT ISSUE VIOLATED THE FIFTH AMENDMENT AND ARTICLE 44'S PROHIBITIONS AGAINST DOUBLE JEOPARDY.

Standard of Review

"Whether a prosecution violates double jeopardy is a question of law" this Court reviews *de novo*. *United States v. Rice*, 80 M.J. 36, 40 (C.A.A.F. 2020).

Law

1. Double Jeopardy

The Fifth Amendment provides that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The prohibition against double jeopardy provides protection against multiple punishments and successive prosecutions for the same misconduct. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977). Another purpose is to ensure that the Government, "with all its resources and power," is not "allowed to make repeated attempts to convict an individual" for an 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, 187–88 (1957).

Article 44, UCMJ, 10 U.S.C. § 844, and R.C.M. 905 (g) provide even more robust double jeopardy protection than the constitutional provision. Article 44,

UCMJ, provides:

> (a) No person may, without his consent, be tried a second time for the same offense.
>
> . . . .
>
> (c) 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.

Trial courts must answer three questions to determine if a subsequent trial is barred by double jeopardy: (1) whether jeopardy attached; (2) whether jeopardy terminated; and (3) which party is responsible for bringing the accused to trial a second time for the same offense. *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 312 (1984). Jeopardy attaches in courts-martial upon the introduction of evidence. *United States v. Easton,* 71 M.J. 168, 172 (C.A.A.F. 2012). "Once jeopardy has attached, an accused may not be retried for the same offense without consent once jeopardy has terminated." *Id.* (citing *Richardson v. United States*, 468 U.S. 317, 325 (1984)).

A "judgment of acquittal, whether based on a jury verdict of not guilty or *on a ruling by the court that the evidence is insufficient to convict*, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." *United States v. Scott*, 437 U.S. 82, 91 (1978) (emphasis added). A defendant is acquitted when "the ruling of the judge, *whatever its label*, actually

represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Id.* at 97 (emphasis added) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). Appeal of such an acquittal is barred when "it is plain" that the judge "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.* A "trial judge's characterization of his own action cannot control the classification of the action." *United States v. Jorn*, 400 U.S. 470, 478 n. 7 (1971) (citing *United States v. Sisson*, 399 U.S. 267, 290 (1970)).

The Double Jeopardy Clause may also protect defendants from multiple prosecutions "even where no final determination of guilt or innocence has been made"[4]—for example, when the judge declares a mistrial. In the case of a mistrial, the court's analysis of whether double jeopardy bars reprosecution depends, in part, on which party initiated the motion for a mistrial. A "motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *Jorn*, 400 U.S. at 485. On the other hand, where the declaration of a mistrial is "granted at the behest of the prosecutor or on the court's own motion," the court must balance "'the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him,' against the public interest in insuring that justice is meted out to offenders." *Scott*, 437 U.S. at 93 (citation omitted) (quoting

[4] *Scott*, 437 U.S. at 92.

Downum v. United States, 372 U.S. 734, 736 (1963)).

A mistrial declared without the defendant's request or consent cannot be retried in the absence of "manifest necessity." *United States v. Dinitz*, 424 U.S. 600, 606-07 (1976). The Government has the burden of meeting the "high" manifest necessity standard. *Easton*, 71 M.J. at 174. In *Easton*, resolving the appeal in the appellant's favor, this Court found the Government did not meet its manifest necessity burden when "the prosecution entered upon the trial of the case without sufficient evidence to convict." 71 M.J. at 174 (quoting *Downum*, 372 U.S. at 737). The Double Jeopardy Clause bars retrial where declaration of a mistrial "afford[s] the prosecution a more favorable opportunity to convict." *Dinitz*, 424 U.S. at 611.

Pursuant to R.C.M. 905(g), "[a]ny matter put in issue and finally determined by a court-martial . . . which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused." "It does not matter whether the proceeding ended in an acquittal, conviction, or otherwise, as long as the determination is final." R.C.M. 905(g), Discussion. "The United States is bound by a final determination by a court of competent jurisdiction." *Id.* However, in cases where the original trial suffered from a jurisdictional defect, jeopardy does not attach because the original trial is invalid. R.C.M. 810(e); R.C.M. 907(b)(2)(C)(iv). In such circumstances, "another trial" is not prohibited by Double Jeopardy.

2. Jurisdiction

Jurisdiction means "the courts' statutory or constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998)). "The extraterritorial reach of a statute ordinarily presents a merits question, not a jurisdictional question." *Munoz*, 780 F.3d at 1191. "[T]o ask what conduct [a statute] reaches . . . is to ask what conduct [a statute] prohibits, which is a merits question." *Id.* (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010)). "Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case." *Id.*

Article 2, UCMJ, 10 U.S.C. § 802, states "members of a regular component of the armed forces" are subject to UCMJ jurisdiction. R.C.M. 201(b) provides "for a court-martial to have jurisdiction: . . . . (4) The accused must be a person subject to court-martial jurisdiction; and (5) The offense must be subject to court-martial jurisdiction." Further, "courts-martial may try any offense under the UCMJ." R.C.M. 203.

3. Federal Offenses Under Clause 3, UCMJ, and Extraterritoriality

Conduct is punishable under Article 134—the "General Article"—if it "'prejudices good order and discipline in the armed forces' (clause 1), if it is 'of a nature to bring discredit upon the armed forces' (clause 2), or if it is a crime or offense not capital (clause 3)." *Martinelli*, 62 M.J. at 56 (quoting *United States v.*

O'Connor, 58 M.J. 450, 452 (C.A.A.F. 2003)). The President, in the *Manual for Courts-Martial*, explains "Clause 3 offenses involve noncapital crimes or offenses which violate Federal law." 2016 *MCM*, pt. IV, ¶ 60.c.(1).

> Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred. Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132.

2016 *MCM*, pt. IV, ¶ 60.c.(4)(b). On the other hand:

> A person subject to the code may not be punished under clause 3 of Article 134 for an offense that occurred in a place where the law in question did not apply. For example, a person may not be punished under clause 3 of Article 134 when the act occurred in a foreign country merely because that act would have been an offense under the United States Code had the act occurred in the United States. Regardless where committed, such an act might be punishable under clauses 1 or 2 of Article 134.

2016 *MCM*, pt. IV, ¶ 60.c.(4)(c)(i).

"The Supreme Court has recognized as a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Martinelli*, 62 M.J. at 57 (quoting *Equal Employment Opportunity Commission v. Arabian American Oil Co.* (*Aramco*), 499 U.S. 244, 248 (1991)). In *Martinelli*, the case the military judge in *Driskill I* relied upon to dismiss the obscene cartoons specification for lack of jurisdiction, the appellant pleaded guilty to violating the CPPA under clause 3 of Article 134. *Id.* at 55. The specifications alleged the conduct occurred in Germany,

and three of the four specifications alleged use of interstate or foreign commerce via computer. *Id.* This Court found the language and legislative history of the CPPA did not demonstrate any clear congressional intent for the statute to apply extraterritorially, and therefore held the CPPA did not overcome the presumption against extraterritorial application. *Id.* at 62 (citing *United States v. Bowman*, 260 U.S. 94 (1922); *Aramco*, 499 U.S. 244). This Court observed the CPPA specifications against Specialist Martinelli fit squarely in the category of offenses that cannot be punished under clause 3 of Article 134 when they occurred in a foreign country. *Id.* (quoting *MCM*, pt. IV, ¶ 60.c.(4)(c)(i)). Therefore, this Court concluded there was "a substantial basis in law and fact for viewing Martinelli's guilty pleas to the CPPA-based clause 3 offenses under Article 134 for conduct occurring in Germany as *improvident*." *Id.* (emphasis added).

Yet this Court's inquiry into Specialist Martinelli's guilty plea did not end with finding the CPPA did not apply extraterritorially. Because Specialist Martinelli stipulated that the e-mail accounts he used to receive or send child pornography were electronically routed through servers in the United States, this raised the possibility "that the CPPA could be applied domestically to the three specifications that were based upon e-mail messages sent or received" through his accounts. *Id.* at 63. This Court analyzed those specifications and found that one specification had domestic application because it involved conduct that continued into the United States, thus

there was no basis to question the plea to that specification on extraterritoriality grounds. *Id.* at 64.

However, this Court ultimately found Specialist Martinelli's guilty plea to the domestically applicable CPPA specification improvident in light of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-56 (2002), prohibiting prosecution under the CPPA based on "virtual" child pornography. *Martinelli*, 62 M.J. at 66. The Court then went on to evaluate whether a lesser included offense under clause 1 or clause 2 of Article 134 applied to Specialist Martinelli's guilty plea to the child pornography-related conduct. *Id.* Finding "no reference to or discussion during the providence inquiry of Martinelli's conduct as service-discrediting or prejudicial to good order and discipline," this Court could not find the guilty plea provident to a lesser included offense under clause 1 or clause 2 of Article 134.

4. 18 U.S.C. § 1466A

Relevant to Amn Driskill's case, 18 U.S.C. § 1466A criminalizes possession of a visual depiction of any kind, including a cartoon, that:

> (1) (A) depicts a minor engaging in sexually explicit conduct; and
>
> (B) is obscene; or
>
> (2) (A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse . . . ; and

> (B) lacks serious literary, artistic, political, or scientific value . . . .

In order to be criminal, the statute requires the possession be under the following circumstances:

> (1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;
>
> (2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;
>
> (3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;
>
> (4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or
>
> (5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

18 U.S.C. § 1466A(d).

In *Luna Torres v. Lynch*, the Supreme Court explained that federal criminal laws contain two types of elements: substantive elements, which "describe the evil Congress seeks to prevent;" and the jurisdictional element, which "connects the law to one of Congress's enumerated powers, thus establishing legislative authority."

578 U.S. 452, 467 (2016). "Both kinds of elements must be proved to a jury beyond a reasonable doubt; and because that is so, both may play a real role in a criminal case." *Id.*

Analysis

The Government's reprosecution of Amn Driskill for possession of obscene cartoons in *Driskill II* violated the Double Jeopardy Clause and Article 44, UCMJ. Jeopardy attached to the offense when evidence was presented in *Driskill I*, the military judge's dismissal of the specification was a final judgment akin to an acquittal, and the Government re-tried Amn Driskill for the same offense without his consent.

1. Jeopardy attached to the offense in Driskill I.

As a preliminary matter, during argument on the motion to dismiss for double jeopardy in *Driskill II*, the Government conceded that jeopardy attached to the offense in *Driskill I*. JA at 451. The military judge in *Driskill II* and the Air Force Court agreed. JA at 22, 428. This concession and acknowledgement are correct. Jeopardy attaches in courts-martial upon the introduction of evidence and evidence was surely introduced in that court-martial. *Easton,* 71 M.J. at 172; *see also*, R.C.M. 907(b)(2)(C)(i)(1).

Jeopardy cannot attach where the court-martial lacked jurisdiction. R.C.M. 907(b)(2)(C)(iv). The military judge in *Driskill I* made a significant error when she

determined the extraterritoriality aspect of the charged offense was a "jurisdictional" problem rather than a simple deficit in proof. *See Munoz*, 780 F.3d at 1191. ("[T]he extraterritorial reach of a statute ordinarily presents a merits question, not a jurisdictional question.") While the military judge correctly held that that 18 U.S.C. § 1466A does not apply extraterritorially, this presents only a merits question—not a jurisdictional one—and thus falls outside R.C.M. 907(b)(2)(C)(iv).

The *Driskill I* court-martial *did* have jurisdiction because it had the "power" to try the case. *Munoz*, 780 F.3d at 1191; *see also* R.C.M. 201(a)(1), Discussion ("'Jurisdiction' means the power to hear a case and to render a legally competent decision."). Simply, Amn Driskill was subject to the UCMJ, and Article 134 is a punitive article within the UCMJ. Thus, there was jurisdiction.

The Government's problem with the charged offense was not jurisdiction; it was proof. The Government could not prove the jurisdictional or "situs" element of 18 U.S.C. § 1466A, which require communication, transportation, or transmission in interstate or foreign commerce, including by computer; or that the offense took place in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States. The situs element is a substantive component of the criminal offense, just as much as the actual possession of the cartoons. Had the alleged possession of obscene cartoons taken place within the United States, or had the Government presented any evidence that Amn Driskill's

possession extended to the United States or to the special or maritime jurisdiction or any territory or possession of the United States, even via computer servers, Appellant likely would have been convicted of this offense in *Driskill I*. Instead, there was a failure of proof under 18 U.S.C. § 1466A, not a lack of jurisdiction.

Martinelli underscores this essential point. The statute at issue in *Martinelli*, 18 U.S.C. § 2252A, included similar "circumstance" requirements to 18 U.S.C. 1466A: either movement of the child pornography in interstate or foreign commerce; or that the act occurred in the "special maritime and territorial jurisdiction of the United States, or on any land or building owned, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country." 62 M.J. at 59. The appellant in *Martinelli* was in Germany when the charged acts occurred, analogous to Amn Driskill being in Italy. *Id.* at 55; JA at 171. This Court found the CPPA did not apply extraterritorially, and thus Specialist Martinelli could not be punished under clause 3 of Article 134 since the acts occurred in a foreign country. *Id.* at 62. Importantly, this Court did *not* find that the lack of extraterritoriality caused the court-martial to lose jurisdiction, but rather that it created a substantial basis in law and fact to question the providence of his guilty plea. *Id.* If the extraterritoriality question were truly jurisdictional, the analysis would have ended there. Instead, this Court turned to the facts of the case to see if there was any potential domestic application of the CPPA such that the plea could

still be provident. *Id.* at 63-64.

This Court's analysis of the providence of the plea in *Martinelli* was a resolution of the merits of the case, not the jurisdiction of the court-martial. The question was whether the facts proved the circumstance or "situs" required by the CPPA. The military judge in *Driskill I* was correct to analogize *Martinelli* to the specification alleging possession of obscene cartoons under 18 U.S.C. § 1466A to determine the sole question of whether the statute applied extraterritorially. Amn Driskill does not question her determination that 18 U.S.C. § 1466A does not apply extraterritorially. However, the military judge erred when she concluded that the lack of extraterritoriality caused the court-martial to lose jurisdiction over the offense. As *Martinelli* demonstrates, the court-martial still had jurisdiction over the offense, but the Government lacked sufficient evidence to prove the required circumstance or situs. Because the court-martial had jurisdiction over Amn Driskill and the offense, and evidence was presented on the merits of the case, jeopardy attached in *Driskill I.*

2. *Double Jeopardy bars reprosecution because the dismissal was for failure of proof and not lack of jurisdiction.*

    a. *The dismissal of the specification was a final judgment akin to an acquittal.*

The military judge's characterization of her decision in *Driskill I* as a dismissal "for failure of jurisdiction" does not "control the classification of the

action." JA at 405; *Jorn*, 400 U.S. at 478 n.7. A *de novo* evaluation of the circumstances leading to the dismissal shows the specification was dismissed due to a failure of proof; thus, reprosecution is barred by the Double Jeopardy Clause.

The military judge's dismissal of the obscene cartoons specification amounted to an acquittal. As discussed above, the extraterritorial application of 18 U.S.C. § 1466A was a merits question. In order for Amn Driskill to be convicted of the specification as charged, the Government needed to prove that Amn Driskill's conduct fell into the territorial application of the statute. In *Martinelli*, this Court found the appellant's guilty plea to one specification could be upheld because his conduct reached the territorial United States via computer servers. 62 M.J. at 64. No such similar evidence was available in Amn Driskill's case, so the military judge was unable to fit Amn Driskill's conduct into a territorial application of the statute.

Regardless of the military judge's classification of the dismissal, her finding demonstrated a failure of proof of the elements. Because all elements, even jurisdictional elements, must be proven beyond a reasonable doubt for the Government to achieve a conviction, Amn Driskill could not be convicted of possession of obscene cartoons under 18 U.S.C. § 1466A. *Luna Torres*, 578 U.S. at 467.[5] The military judge's determination that Amn Driskill's conduct did not satisfy

[5] *Cf. United States v. Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *7 (C.A.A.F. 2022) ("Article 134, UCMJ, is a statutory criminal offense, and as such, this Court has recognized that the Constitution demands that the Government

the jurisdictional requirements of the statute makes plain that the court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Scott*, 437 U.S. at 97. The label of the military judge's ruling does not matter—it represented a final resolution of the elements in Amn Driskill's favor. *Id.* The lack of extraterritoriality caused the Government to be unable to prove the offense as charged and should have resulted in a finding of not guilty on the possession of obscene cartoons specification. This "dismissal" was functionally and effectively an "acquittal."

b. In the alternative, the dismissal was analogous to a mistrial over defense objection.

In the alternative, if this Court finds the military judge's dismissal was not akin to an acquittal, it was similar in nature to a declaration of a mistrial over the objection of the Defense, and reprosecution is barred absent manifest necessity. In finding there was no final judgment in *Driskill* I, the Air Force Court applied the Supreme Court's reasoning from *Lee v. United States*, 432 U.S. 23 (1977). In *Lee*, the defendant moved to dismiss the specification after the prosecutor's opening statement because the information failed to charge the specific intent as required. 432 U.S. at 25. The judge tentatively denied the motion, and the Government

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prove *every* element of an Article 134 offense—including the second or 'terminal' element—beyond a reasonable doubt." (citing *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011); *United States v. Fosler*, 70 M.J. 225, 226 (C.A.A.F. 2011); *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008))).

presented its case. *Id.* The defendant then moved for a judgment of acquittal on the ground "the prosecution failed to establish the required intent," distinguishing the motion for an acquittal from the earlier motion to dismiss. *Id.* at 26. The court then granted the motion to dismiss because the information failed to charge either knowledge or intent. *Id.* The Supreme Court found there was no distinction between the dismissal in *Lee* and the declaration of a mistrial in *Dinitz*[6] and proceeded to apply the "double jeopardy principles governing the permissibility of a retrial after a declaration of a mistrial." *Id.* at 31.

Under this analysis, when a mistrial is requested by the defense, double jeopardy only bars reprosecution where "bad-faith conduct by judge or prosecutor" predicated the mistrial request. *Id.* at 33. In *Lee*, the defendant requested termination of the proceedings and his counsel "offered no objection when the court . . . decided to terminate the proceedings without having entered any formal finding on the general issue." *Id.* The Supreme Court found neither the prosecutor's failure to properly draft the information nor the court's denial of the motion to dismiss prior to the attachment of jeopardy were "motivated by bad faith or undertaken to harass

[6] In *Dinitz*, the trial judge excluded one of the defendant's counsel from the case after the attorney's repeated improper comments during opening statement. 424 U.S. at 603. The defendant moved for a mistrial in order to obtain other counsel, which the trial judge granted. *Id.* at 604. The Supreme Court found the mistrial was declared at the defendant's request and was not provoked by bad-faith on the part of the judge or prosecutor, thus double jeopardy did not bar reprosecution. *Id.* at 611.

or prejudice" the defendant. *Id.* at 34. Therefore, reprosecution did not violate the Double Jeopardy Clause. *Id.*

This case is distinguishable from *Lee*. First, unlike the defective information in *Lee*, the specification in *Driskill I did* state an offense—just an offense the Government could not prove, as discussed above. Second, Amn Driskill did not initially request dismissal in *Driskill I*. Unlike *Lee*, where the defense moved to dismiss after the prosecution's opening statement, in *Driskill I*, the Defense argued in closing argument that the military judge should acquit Amn Driskill; it was the military judge that re-styled this argument as a motion to dismiss. JA at 67, 410, 447. The Defense did not file a motion to dismiss until ordered to do so by the military judge. JA at 19, 67. Even after being ordered to provide a written brief on the motion to dismiss, the Defense still argued that any dismissal should be with prejudice because jeopardy had attached. JA at 171.

Unlike the defense in *Lee*, who did not object to the dismissal after the attachment of jeopardy, Amn Driskill made every effort to secure a final judgment in *Driskill I*; the military judge thwarted that effort. Consequently, there is no need to consider whether the motion to dismiss was predicated by bad-faith, because Amn Driskill did not consent to a dismissal without prejudice. In other words, this should not even be considered a "defense request" because the Defense was ordered to request it. The Defense wanted an acquittal; that is what Amn Driskill was entitled

to. JA at 410 (Defense counsel raised the Government's failure to prove the elements during closing argument to ensure Amn Driskill "was not subject to re-preferral and referral of that charge.").

As explained in *Lee*, a defendant has the right to pursue a final judgment and "perhaps, end the dispute then and there with an acquittal," despite a judicial or prosecutorial error prejudicing his prospects. 432 U.S. at 32 (quoting *Jorn*, 400 U.S. at 484). This right is only lost in "circumstances of manifest necessity requiring a sua sponte judicial declaration of a mistrial." *Id.* Manifest necessity is a high standard; the Government has the burden of showing its existence. *Easton*, 71 M.J. at 173. Manifest necessity does not exist when the prosecution begins a trial "without sufficient evidence to convict." *Id.* at 174 (quoting *Downum*, 372 U.S. at 737). Such was the case in *Driskill I*. "There is no dispute that the government controls the charge sheet." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). The Government has "complete discretion" over how to charge an accused, and therefore must "accept[] the risk" that an accused may not be criminally liable based upon how the charging scheme connects with the evidence. *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021).

The Government chose to charge Amn Driskill under 18 U.S.C. 1466A and proceed to trial without sufficient evidence. As the Defense argued in *Driskill I*, they had no obligation "to help the government perfect its case against

[Amn Driskill]." JA at 176. The Government should not be granted a windfall and permitted to perfect their charging scheme after the specification has been fully litigated and is determined to be insufficient on the evidence presented.

3. The Government re-tried Amn Driskill for the same offense without his consent.

The Specification of the Charge in *Driskill II* is the same offense as Specification 3 of the Charge in *Driskill I*. Both specifications alleged possession of obscene cartoons between October 11, 2016, and March 27, 2018. JA at 64, 71. The Specification in *Driskill I* includes a description of the obscene cartoons—"visual depictions of minors engaging in sexually explicit conduct"—but it is clear from the record that the specifications from both courts-martial covered the same cartoons. *Id.* In fact, both Trial Counsel and the military judge in *Driskill II* acknowledged the specifications covered the exact same misconduct. JA at 422, 427.

For purposes of double jeopardy, "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). A lesser included offense, which "requires no proof beyond that which is required for conviction of the greater," is the same as any greater offense in which it inheres. *Brown*, 432 U.S. at 168. "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a

greater and lesser included offense." *Id.* at 169. While all elements must be proven beyond a reasonable doubt for a conviction, when comparing elements to determine what constitutes the same offense the jurisdictional elements may be ignored. *Luna Torres*, 578 U.S. at 468; *Rice*, 80 M.J. at 43.

In *Rice*, this Court applied that reasoning to find the federal offense of possession of child pornography charged under 18 U.S.C. § 2252A was a lesser included offense of possession of child pornography charged under Article 134, UCMJ, because the Article 134 offense "wholly encompasse[d] the civilian possession offense and require[d] the Government to additionally prove the conduct was service discrediting." 80 M.J. at 44. Because the appellant in *Rice* had been previously prosecuted by the U.S. Attorney's Office for possession of child pornography under 18 U.S.C. § 2252A, this Court held the military possession specifications were barred by Article 44, UCMJ, and the Double Jeopardy Clause of the Fifth Amendment. *Id.*

The only difference between the specifications in *Driskill I* and *Driskill II* is that the former required proof of a jurisdictional element, while the latter required proof the conduct was service discrediting. The specification in *Driskill II* wholly encompassed the offense charged in *Driskill I* but for the jurisdictional element, which can be ignored when comparing elements for double jeopardy purposes. *Luna Torres*, 578 U.S. at 468; *Rice*, 80 M.J. at 43. Moreover, both specifications

addressed "the same act or transaction." *Blockburger*, 284 U.S. at 304. Considering all these factors, it is clear the specifications alleged the same offense. The constitutional and statutory protections against double jeopardy do not permit the Government to prosecute an accused like Amn Driskill multiple times for the same offense under different theories until they find the correct charging scheme. The military judge in *Driskill II* allowed the Government to do just that.

Conclusion

Amn Driskill was "forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney v. United States*, 431 U.S. 651, 662 (1977). In *Driskill I*, The Government chose to charge Amn Driskill with an offense they could not prove. The military judge conflated the lack of extraterritoriality of 18 U.S.C. § 1466A with a lack of jurisdiction, but regardless of its characterization, her dismissal of the specification reflected a final judgment that the Government could not prove the specification as charged. The Government "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green*, 355 U.S. at 187-88. The Government's prosecution of Amn Driskill after the first fully litigated court-martial not only subjected him to the embarrassment, anxiety, and insecurity of a second court-martial; it enabled the Government to perfect their charging scheme. Appellant has a conviction on his record the Constitution and the UCMJ forbid. Moreover, the cartoons became an

essential component of the litigated phase of the court-martial. JA at 513-18. The Government violated Amn Driskill's constitutional "right not to be twice prosecuted for the same offense." *Rice*, 80 M.J. at 36.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside and dismiss the Specification of the Charge, and remand to the Air Force Court to either reassess the sentence or order a sentence rehearing. In either scenario, the Air Force Court must consider not only the sentence in light of a dismissed conviction, but also how the admission of the obscene cartoons as evidence impacted the findings of guilty for the other contested offenses.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on May 31, 2023.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 7,918 words.

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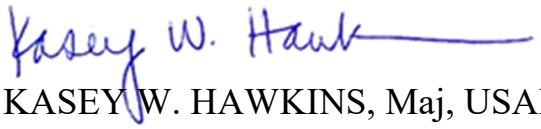

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