IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39889 (f rev)
	)	
Airman (E-2)	)	USCA Dkt. No. 23-0066/AF
ALEXANDER L. DRISKILL, USAF	)	
Appellant.	)	12 July 2023

BRIEF ON BEHALF OF THE UNITED STATES

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v.	)	Crim. App. No. 39889 (f rev)
Airman (E-2) **ALEXANDER L. DRISKILL** United States Air Force *Appellant.*	)	USC Dkt. No. 23-0066

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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 (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

STATEMENT OF THE FACTS

Appellant had two courts-martial, one in 2018 and another in 2020. (JA at 64, 71.) In the first court-martial ("Driskill I"), the government charged Appellant with the wrongful possession of obscene visual depictions of minors engaging in sexually explicit conduct in violation of 18 USC § 1466A. The offense was alleged to have occurred "at or near Italy." (JA at 71.) The Driskill I specification was charged under clause 3 of Article 134, UCMJ and read:

> 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.)

At Driskill I, trial defense counsel challenged the extraterritorial application of 18 USC § 1466A for the first time during closing arguments. (JA at 394.) Trial defense counsel cited to United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005) to support his position, a case that addressed the extraterritorial application of the Child Pornography Prevention Act of 1996 and briefly discussed jurisdictional issues associated with that statute. (JA at 394.) Upon hearing the trial defense counsel's argument, the military judge ordered briefing on whether the court-

martial had subject matter jurisdiction over the offense. (JA at 394.) In their written filings, trial defense counsel framed the argument as a motion to dismiss for failure to state an offense because § 1466A did not apply extraterritorially to a service member's misconduct occurring in Italy. (JA at 171-177.) Specifically, Appellant argued, "Because 18 USC 1466A is not a statute of extraterritorial application, Specification 3 of the Charge should be dismissed." (JA at 171.)

After reviewing the written briefs from the parties and hearing oral argument, the military judge dismissed the specification for lack of jurisdiction. (JA at 405.) On the record, the military judge began the discussion on her ruling by discussing the timing of Appellant's motion and what she felt was the ultimate crux of the issue as follows:

> The issue before the court is one of jurisdiction. And while jurisdiction is a non-waivable ground so that it can always be heard, closing arguments are not the mechanism to raise it and the reason is simple. The Court, as a trier of fact, is very different than the Court when it rules on issues of law. Only one of those permit the Court to research legal issues. And as shown by the lengthy and well-briefed arguments on both sides, the issue before this Court is both significant and strikes at the foundation, that of jurisdiction, the ability to hear the matters before it.

(JA at 408-09.) She continued, "[A] Court without jurisdiction is no Court under the Rules for Court-Martial." (JA at 409.)

Regarding the timing of Appellant's motion, Appellant's trial defense counsel stated:

> Right, Your Honor. Just to add the best time we found to raise both an elements issue and also the jurisdictional issue that Your Honor refers to was during closing argument. Perhaps we could have raised it a few hours earlier after the presentation of evidence when jeopardy attached. Our concern was with making sure that the rights of our client were protected and that he was not subject to re-preferral and referral of that charge. And so we did what we thought was in the best interest of the client within our ethical obligations.

(JA at 410.)

The military judge dismissed the Driskill I specification after the presentation of evidence. (JA at 410.) In her 13-page ruling, the military judge highlighted that "[i]n closing arguments . . . defense counsel raised a challenge against extraterritorial application of 18 USC 1466A for the first time, largely citing United States v. Martinelli, 62 M.J. 52 (CAAF 2005), in support of its position."[1] (JA at 394.) In her analysis, the military judge wrote as follows:

> It is undisputed that Specification 3 of the Charge alleges an offense under Article 134, clause 3, with 18 USC § 1466A serving as the "crime or offense not capital." However, the *offense alleges the conduct at issue occurred in Italy, and thus lies the issue* – whether 18 USC § 1466A applies to conduct engaged in outside the territorial boundaries of the United States when charged under clause 3 of Article 134, UCMJ, and therefore *the offense as alleged is subject to court-martial jurisdiction*.

[1] The government does not dispute the military judge's ruling that 18 USC §1466A does not apply extraterritorially and treats it as the law of the case.

(JA at 403.) (emphasis added). The military judge held 18 USC §1466A did not apply extraterritorially while adding that this "lack of extraterritoriality with 18 USC § 1466A does not foreclose prosecution for the offense alleged, it only forecloses prosecution under the current charging scheme." (JA at 405.) In her written ruling, the military judge decided "the Defense Motion to Dismiss Specification 3 of the Charge for [F]ailure of Jurisdiction is GRANTED." (JA at 405.)

After the military judge provided her ruling to the parties, the senior trial counsel requested clarification on the ruling by asking, "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 - -." (JA at 412.) The military judge responded, "The Court did not find that. The Court found it had no jurisdiction and dismissed it as that." (Id.)

Then, the military judge acquitted Appellant of two other specifications that alleged the possession and viewing of child pornography. (JA at 406, 412.) The Report of Result of Trial stated Specification 3 of the Charge was "dismissed without prejudice after arraignment." (JA at 406.)

At the second court-martial ("Driskill II"), the case currently under appeal, the government charged Appellant with wrongful possession of obscene cartoons under Clause 2 of Article 134. The specification read:

> 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.

(JA at 64.)

Appellant moved to dismiss the Driskill II specification on double jeopardy grounds. (JA at 66.) In his motion, Appellant claimed the first "court-martial *did* have jurisdiction over the person and the offense." (JA. at 68) (emphasis added). Appellant added:

> When evidence of that offense was introduced, jeopardy attached, despite the fact the Government used the wrong clause of Article 134 to charge it (which is why we did not raise this issue as a jurisdictional defect, but rather as 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, as required by 18 USC §1466A(b)(1).

(Id.)

During the motions hearing at Driskill II, the military judge asked circuit defense counsel to clarify what the military judge in the first trial ruled:

> MJ: What was the finding, though?

CDC: The finding was *lack of jurisdiction*.

MJ: Okay, so there was no finding entered as to the - -

CDC: Yes, sir. It was dismissed before findings.

(JA at 447) (emphasis added).

The military judge held that jeopardy attached to the Driskill I specification, but jeopardy terminated when the Driskill I military judge dismissed the specification for "failure of jurisdiction." (JA at 427-428.) The Driskill II military judge denied Appellant's motion to dismiss for former jeopardy because jeopardy had terminated. (JA at 428.)

After motions practice, Appellant unconditionally pleaded guilty to the Specification of the Charge in violation of Clause 2, Article 134, UCMJ, pursuant to a pretrial agreement. (JA at 467.) During Appellant's plea inquiry and discussion with the military judge about his pretrial agreement, the military judge asked Appellant's trial defense counsel about the "waive all motions which may be waived" provision. (JA at 501.) When asked specifically about the double jeopardy motion, Appellant's counsel stated, "I think that it would not be waived . . . [b]ased on the fact that it's a jurisdictional issue."[2] (JA at 502.)

[2] Despite trial defense counsel's claim, Appellant's motion was, in fact, based on double jeopardy and not whether the court-martial in Driskill II had jurisdiction. Double jeopardy motions are waivable. Gladue, 67 M.J. at 314; R.C.M. 907(b)(2)(C). But neither the military judge nor trial counsel addressed the discrepancy between the pretrial agreement and Appellant's statement about the

At the AFCCA, Appellant argued the "court-martial did have jurisdiction over the offense," that the government was required "to prove movement to, and from, or through a State or Territory of the United States," and that the "Defense made sure to attack the conviction by arguing the government had not proven this portion of the charge, given [Appellant] was in Italy at the time of the offense." (JA at 38.) Appellant argued, "This is not a jurisdictional defect, but rather, a charging defect." (Id.)

In finding against Appellant's double jeopardy claim, AFCCA found (1) "jeopardy terminated when the specification alleging that Appellant possessed obscene cartoons was dismissed without prejudice;" (2) "no evidence of bad faith on behalf of the judge of trial counsel;" and (3) "the specification was dismissed for lack of jurisdiction – grounds wholly unrelated to Appellant's guilt or innocence – and that the dismissal came before Appellant was acquitted of the remaining specifications." (JA at 22.)

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motion. Before this Court, the United States does not argue that Appellant waived the double jeopardy motion, because this case bears similarities to United States v. Day, 83 M.J. 53 (C.A.A.F. 2023). In Day the military judge erroneously advised the appellant that a motion to dismiss for failure to state an offense was not waivable, and this Court concluded the appellant could raise the claim on appeal because she relied on the erroneous advice of the military judge. Id. at 57. Similarly, here the military judge did not correct Appellant's erroneous understanding that a waive all waivable motions clause would not waive his double jeopardy claim.

SUMMARY OF THE ARGUMENT

Appellant's claim that his right against double jeopardy under the Fifth Amendment and Article 44, UCMJ, was violated fails for four reasons. First, the military judge dismissed the obscene cartoons specification from Driskill I on jurisdictional grounds, which allowed for retrial. *See* R.C.M. 907(b)(2)(C)(iv) (2016 ed.). The military judge found that 18 USC § 1466A did not apply extraterritorially to conduct outside the United States and specifically to Appellant's misconduct in Italy that made up the specification in Driskill I. At the time of Appellant's courts-martial, the Manual for Courts Martial (2016 ed.) specifically prohibited the prosecution of overseas violations of non-extraterritorial federal statutes under Clause 3, Article 134, UCMJ. MCM ¶60.c (4)(c)(i). Thus, charging Appellant under 18 USC § 1466A via Clause 3 for conduct that occurred in Italy created a jurisdictional issue, and not a merits issue.

Second, the military judge's decision to dismiss the offense in Driskill I for lack of subject matter jurisdiction was a legal judgment unrelated to factual guilt or innocence. The military judge limited the scope of her analysis to the purely legal question of jurisdiction and the way the specification was charged. She never made any findings on the substantive factual issues or evidence presented. Thus, her dismissal did not equate to a final judgment on the facts or an acquittal.

Third, even if the military judge's dismissal was akin to a mistrial, reprosecution was not barred, because the dismissal was not granted over defense objection. Appellant raised the legal issue of lack of jurisdiction while giving his closing argument. It was appropriate for the military judge to rule on an issue of law raised by the defense before providing her findings.

Fourth, and finally, Appellant cannot have it both ways. If Appellant is correct that, in Driskill I, the government needed to prove and failed to prove that Appellant's possession took place in the United States, then he was tried for different offenses at his first and second courts-martial. The specification in Driskill I would have required proof that (1) the possession occurred in the United States and (2) that the cartoons at issue had been transported in foreign commerce. In contrast, the specification in Driskill II required the government to prove neither of those things, but instead required proof that Appellant conduct was service discrediting. Since each offense required proof of at least one fact that the other did not, under the test from United States v. Blockburger, 284 U.S. 299, 304 (1932), the offenses were not the same for purposes of double jeopardy.

In sum, Appellant's second court-martial did not violate the Fifth Amendment or Article 44, UCMJ. The obscene cartoons specification in Driskill I was dismissed on purely legal ground that did not bar retrial, and, in any event, he was tried for a different offense in Driskill II.

ARGUMENT

THE GOVERNMENT'S REPROSECUTION OF APPELLANT DID NOT VIOLATE THE FIFTH AMENDMENT AND ARTICLE 44'S PROHIBITION AGAINST DOUBLE JEOPARDY.

Standard of Review

Interpretation of a statute and its history are questions of law reviewed de novo. United States v. Falk, 50 M.J. 385, 390 (C.A.A.F. 1999). Questions of jurisdiction are reviewed de novo. United States v. Kuemmerle, 67 M.J. 141, 143 (C.A.A.F. 2009). "Whether a prosecution violates double jeopardy is a question of law that this Court reviews de novo." United States v. Rice, 80 M.J. 36, 40 (C.A.A.F 2020).

Law

Court-Martial Jurisdiction

"[B]efore a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged." Grafton v. United States, 206 U.S. 333, 345 (1907). For a court-martial to have jurisdiction in a case, five criteria must be met. R.C.M. 201(b). The court-martial must be properly (1) convened, (2) composed, and (3) referred. R.C.M. 201(b)(1-3). Then "(4) the accused must be a person subject to court-martial jurisdiction; and (5) the offense must be subject to court-martial jurisdiction." R.C.M. 201(b)(4-5). "'Jurisdiction' means the power to hear a case

and to render a legally competent decision." R.C.M. 201(a)(1), Discussion. "The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect." Id.

Article 134, UCMJ

The General Article of Article 134, UCMJ, criminalizes three categories of "disorders and neglects": (1) those prejudicial to good order and discipline in the armed forces; (2) those of a nature to bring discredit upon the armed forces; and (3) offenses not capital.

For crimes and offenses of local application, meaning those "punishable only if committed in areas of federal jurisdiction," the Manual states:

> 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.

See MCM, ¶60.c.(4)(c) (2016 ed.).

Extraterritorial Application of Federal Statutes

Congress has the authority to apply and enforce its federal criminal statutes beyond its territorial boundaries. United States v. Bowman, 260 U.S. 94, 98-103 (1922). But whether Congress exercised that authority is a question of statutory

interpretation. Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco), 499 U.S. 244, 248 (1991). "Absent any evidence of a contrary intent, Congressional legislation is ordinarily presumed to apply only intraterritorially." United States v. Gladue, 4 M.J. 1, 4-5 (C.M.A. 1977) (citing United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968), *cert. denied* 392 U.S. 936 (1968); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)). Unless the "affirmative intention" of Congress to give extraterritorial effect to a statute is "clearly expressed," it is presumed that the statute is "primarily concerned with domestic conditions." Aramco, 499 U.S. at 248 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) and Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

18 USC § 1466A

Title 18 of the United States Code, section § 1466A criminalizes "[a]ny person who, in a circumstance described in subsection (d), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that depicts a minor engaging in sexually explicit conduct; and is obscene." 18 USC § 1466A(b)(1). Subsection (d) provides those 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 USCS § 1466A(d).

Double Jeopardy

The Fifth Amendment of the United States Constitution states, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. And Article 44, UCMJ, codifies the prohibition against double jeopardy for miliary members: "no person may, without his consent, be tried a second time for the same offense." 10 USC § 844(a) (2016 ed.).

"No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed." 10 USC § 844(b).

"[O]nce jeopardy has attached, an accused may not be retried for the same offense without consent once jeopardy has terminated." United States v. Easton, 71 M.J. 168, 172 (C.A.A.F. 2012) (citing Richardson v. United States, 468 U.S. 317, 325 (1984)). "Once double jeopardy has attached, it precludes retrial under a variety of scenarios including an acquittal, discharge of the jury in the absence of manifest necessity, or dismissal of the charges in the absence of manifest necessity. It does not preclude subsequent proceedings, inter alia, where there is 'manifest necessity' for declaring a mistrial or otherwise discharging the jury." Easton, 71 M.J. at 172 (citing United States v. Perez, 22 U.S. 579, 580 (1824)).

The analysis of whether a prosecution is barred by double jeopardy includes two temporal components, "first, that jeopardy attaches, and second, that it terminates." United States v. McMurrin, 72 M.J. 697, 704 (N.M. Ct. Crim. App. 2013). "In a nonjury trial, jeopardy attaches when the court begins to hear evidence." Serfass v. United States, 420 U.S. 377, 388 (1975). "[T]he conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." Id. at 390 (quoting Illinois v. Somerville,

410 U.S. 458, 467 (1973)). Jeopardy can terminate when there is no final judgment on the matter, when a charge is withdrawn and dismissed without prejudice upon a defense motion, even after the presentation of evidence. *See, e.g.*, Lee v. United States, 432 U.S. 23 (1977); United States v. Dinitz, 424 U.S. 600 (1976).

Analysis

The crux of Appellant's argument is that extraterritoriality is a merits question, not a jurisdictional issue. (App. Br. at 21-22.) Thus, according to Appellant, when the military judge said she was dismissing the case for lack of jurisdiction because 18 USC §1466A does not apply extraterritorially, she was really acquitting Appellant based on a failure of proof, which would preclude him from being retried for the same conduct. (Id.)

Appellant bases his argument on United States v. Miranda Munoz, 780 F.3d 1185, 1191 (D.C. Cir. 2015) which, citing the Supreme Court's decision in Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010), says, "[t]he extraterritorial reach of a statute ordinarily presents a merits question, not a jurisdictional question." Appellant's argument fails on two levels. First, Appellant has not shown that Miranda Munoz and Morrison apply in the context of military courts-martial and the Uniform Code of Military Justice. Second, the entirety of

the military judge's ruling in Driskill I shows that she ruled only on legal grounds unrelated to factual guilt or innocence.

A. In the context of courts-martial, extraterritoriality is a jurisdictional issue.

Miranda Munoz and Morrison do not apply to courts-martial under the UCMJ. To begin, Morrison was a civil case involving the right to bring a cause of action in United States district court under the Securities Exchange Act. 561 U.S. at 250. The opinion does not address the extraterritorial application of federal criminal statutes charged under the UCMJ, so this Court should question how far its holding extends. Indeed, in a case after Morrison, the Supreme Court said that the extraterritoriality of a statute might bear on jurisdiction if the statute being analyzed is jurisdictional in nature (e.g. the Alien Tort Statute). Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108 (2013). Congress retains the power to make the extraterritorial reach of a statute an issue of subject matter jurisdiction. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 515 n.11 (2006) ("Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the merits of a case."). In the end, under Supreme Court precedent, whether extraterritoriality is a merits or jurisdictional question turns on the particular statute being analyzed.

Although Miranda Munoz was a criminal case, as a federal circuit court decision, it is not binding on this Court. Like Morrison, it does not discuss

extraterritoriality and jurisdiction under the UCMJ. Instead, it interpreted the Maritime Drug Law Enforcement Act. And even courts within the D.C Circuit have acknowledged after Miranda Munoz that extraterritoriality is not necessarily a merits question in all circumstances. *See* Nakhid v. Am. Univ., 2021 U.S. Dist. LEXIS 173805, at *10 n.1 (D.D.C. Sep. 14, 2021) ("The law in this Circuit is unclear whether the question of extraterritoriality is a matter of subject matter jurisdiction or a merits inquiry.") Again, the takeaway is that courts must make a case-by-case determination on whether the extraterritorial reach of a statute presents a merits or a jurisdictional question.

Examining the UCMJ and Manual for Courts-Martial confirms that, under military law, extraterritoriality is a jurisdictional question, just as the military judge found. Article 18, UCMJ, states that general courts-martial have "jurisdiction to try persons subject to this chapter *for any offense made punishable under this chapter*." (emphasis added). The President has further clarified in R.C.M. 201(b)(5) that "for a court-martial to have jurisdiction . . .[t]he offense must be subject to court-martial jurisdiction." As far as what constitutes "[j]urisdiction over the offense," the President has said, "[t]o the extent permitted by the Constitution, courts-martial may try any offense under the code." R.C.M. 203.

In discussing "the laws which may be applied under Clause 3 of Article 134," the Manual in effect at the time of Driskill I specifically characterizes the

issue as one of jurisdiction. It states that "*[f]or the purpose of court-martial jurisdiction*," those laws which may be applied under Clause 3 "are divided into two groups," one of which is "crimes and offenses of local application (crime which are punishable only if committed in areas of federal jurisdiction)." MCM ¶60.c (4)(a) (2016 ed.) (emphasis added). A subsequent paragraph then explains that if a federal law "of local application" does not apply extraterritorially, then conduct violating that law committed outside the United States cannot be punished under Clause 3 of Article 134, UCMJ. MCM ¶60.c (4)(c)(i) (2016 ed.) ("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 does not apply.") Thus, a reading of subparagraphs (a) and (c) together makes clear that, at the time of Appellant's trial, the extraterritorial application of a federal law was a matter of "court-martial jurisdiction."

As was its prerogative to do, *see* Arbaugh, 546 U.S. at 515, n.11, Congress chose through Article 18, UCMJ to limit the subject matter jurisdiction of general courts-martial to only those offenses "made punishable under" the UCMJ. Because the 2016 Manual establishes that "for purposes of court-martial jurisdiction," an overseas violation of a non-extraterritorial federal statute "may not be punished under Clause 3 of Article 134," a court-martial lacks jurisdiction to try such an offense. This solidifies that under the UCMJ and the 2016 Manual, the

extraterritoriality of a federal statute is a matter bearing directly on subject matter jurisdiction. Looking at the statutory scheme of the UCMJ as a whole, it is simply different from the statutes at issue in Miranda Munoz and Morrison. Thus, this Court should decline to apply those cases to courts-martial and should find that the military judge correctly assessed the issue as jurisdictional.

B. The military judge's dismissal of the specification in Driskill I was a legal judgment unrelated to factual guilt or innocence.

In Driskill I, the military judge did not make a factual finding or find the accused not guilty, and she did not acquit Appellant. To determine whether a judge's ruling constitutes an acquittal, courts "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Substantive rulings on factual elements are distinct from procedural dismissals. "Procedural dismissals include rulings on questions that are unrelated to factual guilt or innocence, but which serve other purposes, including a legal judgment that a defendant, although criminally culpable, may not be punished because of some problem like an error with the indictment." Evans v. Michigan, 568 U.S. 313, 319 (2013) (internal citations omitted). Other federal courts have found that when a case is dismissed based on a defective charging instrument, double jeopardy does not bar a retrial. *See* Schlang v. Heard, 691 F.2d 796, 798 (5th Cir. 1982) (failure to allege a

required mental state in a charging instrument was a fatal defect that deprived the trial court of jurisdiction; retrial was not barred by double jeopardy); United States v. Affinito, 873 F.2d 1261, 1265 (9th Cir. 1989) (government could retry defendant when his initial convictions were reversed after an intervening Supreme Court decision rendered the indictment and jury instructions defective).

The judge was focused solely on making a legal ruling, not an evidentiary one. Contrary to Appellant's claim, by dismissing the specification for lack of jurisdiction, the military judge did not make a ruling on the sufficiency of the evidence the government presented. Instead, she focused solely on the way the specification was charged. She also made clear that her ruling was a legal judgment. Just before issuing her ruling, the military judge noted on the record that the "Court, as a trier of fact, is very different than the Court when it rules on issues of law." (JA at 408.) She then highlighted that "the issue before [the] Court" was "jurisdiction, the ability to hear the matters before it." (JA at 409.) At no point did the military judge say she was about to rule on any of the factual elements of the offense charged – in fact, she emphasized that she was not acting as the trier of fact at that moment.

The judge's ruling turned on the words as drafted in the specification. In paragraph 48 of her ruling, the military judge identified that the issue was that "the offense alleges the conduct at issue occurred in Italy" which cast doubt on whether

"the offense *as alleged* is subject to court-martial jurisdiction." (JA at 405.) (emphasis added). In her analysis section, she did not discuss any of the evidence presented on the merits. She ultimately concluded that "[t]he lack of extraterritoriality within 18 USC §1466A does not foreclose prosecution for the offense alleged, it only forecloses prosecution under the current charging scheme." (Id.) This is exactly the type of procedural dismissal the Supreme Court described in Evans, 568 U.S. at 319. The military judge's ruling was a legal judgment that Appellant could not be punished because of an error in the charging scheme. Even if a dismissal "is granted for an error or defect thought to present an absolute barrier to conviction on the offense charged," that is not the same thing as a resolution of the factual elements of the offense charged and does not bar retrial under the double jeopardy clause. United States v. Kennings, 861 F.2d 381, 386, n.9 (3d. Cir. 1988) (quoting W. LaFavre & J. Israel, *Criminal Procedure* §24.2 (1984)). Thus, in Appellant's case, even if erroneously being charged under Article 134, Clause 3 "was an absolute barrier to conviction," that did not preclude Appellant being retried after that specification was dismissed.

Indeed, a ruling that the specification *as charged* cannot be prosecuted at a court-martial under Clause 3 of Article 134 says nothing about the evidence that was actually produced at trial. Even if evidence had come out at trial that the devices on which Appellant possessed the obscene cartoons had, at one point, been

carried back to the United States by Appellant while he was on leave, the military judge could have reached the same conclusion based on the way the specification was alleged on the charge sheet.

Appellant claims that the "lack of extraterritoriality caused the Government to be unable to prove the offense as charged." (App. Br. at 26.) But this is inaccurate. No one ever disputed that the government could prove the offense as charged on the charge sheet– that the possession occurred in Italy. The problem was that the Manual prohibited prosecuting Appellant under the charging scheme on the charge sheet. The issue was a failure in charging, not a failure in proof.

The subject matter jurisdiction requirements of the UCMJ exist on top of the federal statute's requirement that the crime occur "in foreign commerce." The military judge did not even examine whether the crime included "transportat[ion] in foreign commerce." Appellant conflates the so-called "jurisdictional element" of the offense – in this case, that the obscene cartoons "were transported in foreign commerce" – with the fact that Appellant's possession of obscene cartoons was only alleged on the charge sheet to have occurred in Italy. (App. Br. at 9). The military judge's ruling made no mention of whether the cartoons at issue were ever transported in foreign commerce.[3] Even if the government had presented evidence

[3] The plain language of 18 USC §1466A(d)(4) only requires that the "visual depiction involved in the [possession] offense" had been transported in foreign

that the cartoons had, for example, been downloaded to Appellant's devices in Italy from a server in the United States, the military judge still could have dismissed the specification, because the specification alleged that Appellant had committed *possession* only in Italy. To be a punishable offense under Article 134, Clause 3, according to MCM ¶60.c (4)(c)(i), the conduct at issue – possession – must have occurred in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.[4] The military judge's ruling merely reflected this unmet requirement without needing to address the sufficiency of the separate element of whether the cartoons were ever transported in foreign commerce. So, in sum, the dismissal based on the way the offense was alleged in no way signaled that the military judge found a deficiency in the government's proof or made a ruling on any factual element.

Appellant cannot transform the military judge's legal ruling into a ruling on the sufficiency of the evidence, even by calling extraterritoriality a "merits" issue. If the fact that Appellant committed the offense in the United States essentially constitutes another required element of the offense (as Appellant appears to claim),

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commerce, including by computer, at some point. The government theoretically could meet this element, even if the possession itself only occurred overseas.

[4] For the sake of brevity, this brief will, going forward, refer to "in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States" as "in the United States."

then by only alleging that the possession occurred in Italy, the specification on the charge sheet failed to state a required element. That would still be grounds for a legal judgment of dismissal. *See* R.C.M. 307(3); 907(b)(2)(E). And it is a separate question from whether the government presented enough evidence to convict if the conduct had been properly charged as occurring in the United States. That the government charged a case under a certain scheme does not imply that the government did not or could not present evidence at trial sufficient to convict under another scheme. As a result, even if the military judge actually dismissed the specification for omitting a necessary "merits" element, she still never reached the issue of sufficiency of the evidence.

Since the military judge in Driskill I did not rest her dismissal on the sufficiency of the evidence presented, it is not within this Court's purview to determine now whether the military judge could have theoretically acquitted Appellant based on a lack of evidence presented at trial.[5] In holding that a defendant had no double jeopardy claim after a mistrial resulting from a hung jury, the Supreme Court found that the defendant could be retried "[r]egardless of the sufficiency of the evidence" at his first trial. Richardson v. United States, 468 U.S.

[5] In any event, the record before this Court is inadequate for it to evaluate the sufficiency of the evidence in Driskill I. Despite having the burden of persuasion under R.C.M. 905(c)(2) on the double jeopardy motion during Driskill II, Appellant did not delineate all of the evidence that had and had not been presented on the merits during Driskill I.

317, 325-326 (1984). In doing so, the Court implicitly recognized it was inappropriate for it to assess the sufficiency of evidence presented on the merits, when a trier of fact had not yet reached that determination. So too here. Regardless of the evidence presented during Driskill I, the United States was "entitled to resolution of the case by verdict from" the trier of fact. Id. at 326. Under the circumstances here, where the military judge dismissed the first case on a legal basis unrelated to factual guilt or innocence, it did not violate the double jeopardy clause to retry Appellant for possessing obscene cartoons.

C. If the military judge's dismissal is akin to a mistrial, then reprosecution is not barred because Appellant brought the motion.

For the first time on appeal, Appellant argues that the dismissal for lack of jurisdiction amounted to a declaration of a mistrial over defense objection, and reprosecution was barred absent manifest necessity. (App. Br. at 26.) Appellant focuses on the fact that, in his closing argument in Driskill I, trial defense counsel argued for an acquittal and not a dismissal. (App. Br. at 28.) Appellant's argument fails because it ignores trial defense counsel's admission to the military judge that he waited to raise "both an elements issue and also *the jurisdictional issue*" until closing argument to try to ensure Appellant "was not subject to re-preferral and referral of that charge." (JA at 410) (emphasis added). That statement demonstrated trial defense counsel's strategic attempt to dismiss the offense on legal, not factual, grounds.

A military judge rules on issues of law. R.C.M. 801(a)(4). The Supreme Court has determined that "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented . . . and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety." Gonzalez v. Thaler, 565 U.S. 134, 141 (2012).

Further, if a defendant brings a motion arguing for acquittal on both a legal and factual basis, and the court dismisses exclusively on the legal ground raised, the double jeopardy does not bar a retrial. United States v. Neal, 93 F.3d 219, 222 (6th Cir. 1996). As in Neal, the military judge here addressed only the legal question of jurisdiction. (JA at 405). She made no rulings on the substantive evidence and its application to the elements of the offense. (JA at 393-405). The military judge did "re-style" Appellant's argument at trial only in so far as she focused on the legal issue raised by trial defense counsel and not his factual elements argument. The military judge was not prohibited from focusing only on a legal matter, and she was required to do so for a jurisdictional question arising at any time during a court-martial. Gonzalez, 565 U.S. at 141. She dismissed the offense without prejudice based on the legal argument articulated in trial defense counsel's closing argument. (JA at 405, 410). If Appellant wanted a final judgment on the sufficiency of the evidence, then he could have simply focused on

the facts and argued that the government had not proved the elements of the specification on the charge sheet. Instead, he chose to also make a legal argument citing case law. After doing so, he cannot now convincingly claim that the military judge "thwarted" his effort to secure a final judgment by ruling on his legal argument. (App. Br. at 28.) Moreover, Appellant never voiced any objection to the ultimate result of a dismissal. Appellant cannot now argue that the dismissal was granted over his objection, and therefore reprosecution is barred.

Appellant argues that the government should not be granted a windfall and permitted to perfect their charging scheme after the specification has been fully litigated and is found to be insufficient on the evidence presented. (App. Br. at 30.) As discussed above, when examining the military judge's order as a dismissal, the military judge did not make any rulings on the sufficiency of the evidence, and she focused only on the charging scheme of the offense and the court's "jurisdiction, the ability to hear the matters before it." (JA at 409).

Instead, it is Appellant who should not gain a windfall because he waited to point out a jurisdictional issue – a question of law, not fact – that formed the foundation of the court-martial until the last possible moment. (JA at 410). Allowing Appellant to do so creates "a perverse incentive for the defense to withhold meritorious legal arguments until after an unnecessary trial." United States v. Petrykievicz, 1994 U.S. App. LEXIS 27744 *3 (9th Cir. 1994) (unpub.

op.) The double jeopardy issue would not have arisen but for Appellant withholding a motion on a question of law until closing arguments. If it had been made before the presentation of evidence on the merits, jeopardy would have never attached in the first place. Appellant created his own double jeopardy claim, which should not be permitted. Id.

D. Even if Appellant were acquitted at Driskill I, Appellant was properly tried for a different offense at Driskill II.

If this Court accepts Appellant's argument that extraterritoriality is a merits question and that the military judge actually acquitted Appellant, then Appellant was still properly tried for a different offense at his second court-martial. Appellant contends the government was prohibited from retrying him under a different statute without his consent because the offenses in Driskill I and Driskill II stemmed from the same conduct. (App. Br. at 30.) But "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304. The courts use the test set out in Blockburger to determine whether offenses charged under two statutes are the same offense for the purpose of double jeopardy. United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849 (1993). In this case, on its face, the charged § 1466A offense required proof of an element that the Clause 2, Article 134, UCMJ, offense did not: that the obscene

material was transported in foreign commerce. (JA at 71). The charged offense under Clause 2 of Article 134, UCMJ, required proof of an element that the charged § 1466A offense did not: that Appellant's conduct was service discrediting. (JA at 64).

Appellant asserts that under Rice, "when comparing elements to determine what constitutes the same offense, the jurisdictional elements may be ignored," and that "[t]he only difference between the specifications in Driskill I and Driskill II is that the former required proof of the jurisdictional element." (App. Br. at 31.) But Appellant has just gone to great lengths to argue that the extraterritorial reach of a statute is a merits question; not a jurisdictional one. According to Appellant, the government needed to prove 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." (App. Br. at 22.) If this element is unrelated to subject matter jurisdiction, as appellant claims, then the specification from Driskill I had an additional non-jurisdictional element that was not included in the specification in Driskill II.

Appellant relies heavily on Rice for the proposition that "when comparing elements to determine what constitutes the same offense the jurisdictional elements may be ignored." (App. Br. at 31.) Indeed, in Rice this Court found a second prosecution to be barred by double jeopardy despite the fact that the charged Title

18 offense required proof of a federal jurisdictional element, while the other offense charged under Article 134 instead required proof that the conduct was service discrediting. But this Court emphasized the narrow scope of Rice's fact-specific holding. Id. at 40 n.10. This Court stated its holding "does not reach beyond the 'unusual facts' of this case, and thus does not extend to those situations where additional substantive elements distinguish an offense charged under Article 134, UCMJ, from another criminal offense." Id. Appellant's case is one such situation. If the Clause 3 offense, as charged, required the government to prove the possession occurred in the United States, then that distinguishes it from the Clause 2 offense which contained no such requirement.

Although Rice can be distinguished from Appellant's case, this Court could also reconsider Rice's holding and adopt the reasoning of the dissenting opinion. Rice, 80 M.J. at 49 (Maggs, J., dissenting). There is no persuasive reason for disregarding the service discrediting element of Article 134 in the Blockburger test. *See* Id. at 50. This Court has rejected the proposition that the terminal element under Article 134, UCMJ, can be ignored when the government is proving their case at trial. United States v. Phillips, 70 M.J. 161 (C.A.A.F. 2011). *See also* United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) (the terminal element was a required element and without its inclusion in the charge appellant did not receive proper notice of the offense). Just last term in United States v. Richard, 82 M.J.

473 (C.A.A.F. 2022), this Court again emphasized the importance of the government proving the terminal element of Article 134 beyond a reasonable doubt and that the terminal element cannot be conclusively presumed. This Court should not on one hand extol the importance of proving the terminal element, and then, on the other hand find it to be irrelevant. Consistent with its precedent, this Court should consider the terminal element when comparing statutes in a double jeopardy analysis under Blockburger.

The offenses charged in Driskill I and Driskill II arose from the same misconduct. But, as charged, they were not the same offense because each specification required an element that the other did not require. The Clause 3 specification required the government to prove a foreign commerce element and – according to Appellant's argument – an element that the possession occurred in the United States. In contrast, Clause 2 required proof of the service discrediting element. Thus, the two offenses are different, and the government did not violate the prohibition against double jeopardy in Driskill II by prosecuting Appellant for his possession of obscene cartoons.

CONCLUSION

The UCMJ and the Manual establish that the extraterritorial application of a statute is an issue that bears directly on the court-martial's subject matter jurisdiction over the offense. The military judge's decision to dismiss the offense in Driskill I for lack of subject matter jurisdiction was supported by the Manual, and it was a legal judgment unrelated to factual guilt or innocence. The military judge never made any findings on the substantive evidentiary issues before the court and limited the scope of her analysis to a purely the legal question of jurisdiction. Thus, her dismissal did not equate to a final disposition on the facts or an acquittal, and the ruling was not issued over defense objection. Rather, the dismissal was a response to a legal issue raised by the defense. Under those circumstances, the government could lawfully retry Appellant.

Finally, even if this Court accepts Appellant's argument that extraterritoriality is a merits question and that the military judge actually acquitted Appellant, Appellant was still properly tried for a different offense at his second court-martial. The obscene cartoon specifications in Driskill I and Driskill II each required proof of a fact that the other did not under Blockburger.

No relief is warranted because no violation of the Fifth Amendment double jeopardy clause or Article 44, UCMJ, occurred. For these reasons, the United

States respectfully requests that this Honorable Court deny Appellant's claims and affirm the opinion of the Air Force Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means with the consent of the counsel being served via email to kasey.hawkins@us.af.mil on 12 July 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because:

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/s/ Jocelyn Q. Wright, Capt, USAF

Attorney for the United States (Appellee)

Dated: 12 July 2023

APPENDIX

Nakhid v. Am. Univ.

United States District Court for the District of Columbia

September 14, 2021, Decided; September 14, 2021, Filed

Case No. 19-cv-3268 (APM)

Reporter
2021 U.S. Dist. LEXIS 173805 *; 2021 WL 4169355

DAVID NAKHID, Plaintiff, v. AMERICAN UNIVERSITY, Defendant.

Subsequent History: Appeal dismissed by *Nakhid v. Am. Univ., 2022 U.S. App. LEXIS 8954 (D.C. Cir., Apr. 4, 2022)*

Affirmed by, in part, Judgment entered by *Nakhid v. Am. Univ., 2022 U.S. App. LEXIS 19212, 2022 WL 2678742 (D.C. Cir., July 12, 2022)*

Prior History: *Nakhid v. Am. Univ., 2020 U.S. Dist. LEXIS 49608, 2020 WL 1332000 (D.D.C., Mar. 23, 2020)*

Counsel: **[*1]** For DAVID NAKHID, Plaintiff: Eden J. Brown Gaines, BROWN GAINES, LLC, Washington, DC.

For AMERICAN UNIVERSITY, Defendant: Susanne Harris Carnell, LEAD ATTORNEY, Christine Michalopoulos Burke, LORENGER & CARNELL PLC, Alexandria, VA.

Judges: Amit P. Mehta, United States District Court Judge.

Opinion by: Amit P. Mehta

Opinion

MEMORANDUM OPINION

I. INTRODUCTION

In the fall of 2018, Defendant American University's Athletic Department undertook a search for a new men's soccer coach. Plaintiff David Nakhid—who identifies as a Black man and is not a U.S. citizen—submitted his application from Lebanon, where he lived at the time, but he did not receive an interview. Defendant instead selected Zach Samol, a white man, to fill the role. Plaintiff alleges that the university failed to hire him because of his race, ethnicity, and national origin in violation of *Title VII of the Civil Rights Act of 1964* and *42 U.S.C. § 1981*. Defendant has moved for summary judgment, arguing that (1) Plaintiff's Title VII and *section 1981* claims fail as a matter of law because these statutes do not reach him as a noncitizen applicant who was not present in the United States at the time of the relevant events, and (2) Plaintiff has not established evidence from which a reasonable jury could conclude that Defendant discriminated **[*2]** against him on the basis of race, ethnicity, or national origin in deciding not to hire him for the head coach position. For the reasons that follow, Defendant's motion for summary judgment is granted in full as to both claims.

II. BACKGROUND

A. Factual Background

1. The Coaching Search

Defendant American University is a private university located in Washington, D.C. Def.'s Mot. for Summ. J., ECF No. 29 [hereinafter Def.'s Mot.], Statement of Undisputed Facts, ECF No. 29-2 [hereinafter Def.'s SOF], ¶ 1. Its men's soccer team competes at the National Collegiate Athletic Association ("NCAA") Division 1 level. *Id.* ¶¶ 2-3. In the fall of 2018, the Athletic Department, which oversees the men's soccer team, decided not to renew the employment contract of the team's then—head coach. *Id.* ¶ 8. Shortly after Thanksgiving, the Department made that decision public and initiated its search for a replacement, with the goal of filling the position by January 2019, just a few months later. *Id.* ¶¶ 9-10. At the helm of the hiring process was Andrew Smith, the Associate Athletic Director for Compliance and Internal Operations, who supervised the men's soccer team. *Id.* ¶¶ 6-7, 10. The remaining members of **[*3]** the committee to select the new hire were Dr. William Walker, the Athletic Director; Josephine Harrington, the Deputy Director of Athletics; and David Bierwirth, the Associate Director of Athletics for External Affairs. *Id.* ¶¶ 4, 20.

The process went as follows: Smith and the University's human resources department prepared to post, and eventually posted, the position on both internal and external websites. *Id.* ¶ 11. Amidst those preparations, members of the Athletic Department reached out to several potential candidates about the position, though they did not offer any of them the role before the official interviewing process began. *Id.* ¶¶ 14-17. Around 100 people applied to the position. *Id.* ¶ 18. Smith conducted an initial review of the applications. *Id.* ¶ 19. The members of the selection committee met to discuss which of the applicants would be selected for preliminary screening interviews in early December, and they chose eight applicants. *Id.* ¶¶ 20-21. After conducting the eight initial screening interviews, members of the committee conducted follow-up interviews with five candidates via Skype. *Id.* ¶ 23. Next, the committee invited two of those five applicants, along with the **[*4]** then—assistant coach for the soccer team, to participate in an on-campus final-round interview involving various stakeholders in mid-December. *Id.* ¶¶ 25, 32-33. Finally, the committee met to discuss the finalists and ultimately decided to hire Zach Samol. *Id.* ¶¶ 34-35.

Each of the applicants selected for the various interview stages—phone, Skype, and on campus—had previous collegiate coaching experience. *Id.* ¶ 22. Defendant asserts that this was not by coincidence: members of the selection committee uniformly testified that the "relevant experience" they sought in their job postings was collegiate coaching experience. Def.'s Mot., Ex. 2, ECF No. 29-6 [hereinafter Smith Decl.], ¶¶ 9, 39; Def.'s Mot., Ex. 6, ECF No. 29-10 [hereinafter Smith Dep.], at 24-25; Def.'s Mot., Ex. 1, ECF No. 29-5 [hereinafter Walker Decl.], ¶ 14; Def.'s Mot., Ex. 8, ECF No. 29-12 [hereinafter Harrington Decl.], ¶ 7; Def.'s Mot., Ex. 9, ECF No. 29-13 [hereinafter Bierwirth Decl.], ¶ 6. More specifically, they state that they sought collegiate coaching experience with a proven track record of success at a school like American: a private postsecondary institution "with a good academic program." Smith Decl. ¶ 11. **[*5]**

2. Plaintiff Applies but Is Not Selected

Plaintiff is one of the nearly 99 unsuccessful applicants for the coaching position. He identifies as "Black or of the African diaspora." Compl., ECF No. 1 [hereinafter Compl.], ¶ 7. He learned of the open position and, on December 4, 2018, wrote to Dr. Walker and Smith to express his interest. Def.'s SOF ¶ 37. He was directed to the online application and completed it around December 12, 2018. *Id.* He was not selected for an initial screening interview or any subsequent interview. *Id.* ¶ 41.

Plaintiff's career in and around soccer is extensive. In the 1980s, he played on the American University men's soccer team and was, by all accounts, a standout player. Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J., ECF No. 31 [hereinafter Pl.'s Opp'n], Pl.'s Statement of Material Facts [hereinafter Pl.'s SOMF], ¶ 2; Def.'s Reply in Supp. of Def.'s Mot. for Summ. J., ECF No. 32 [hereinafter Def.'s Reply], Def.'s Reply Statement of Undisputed Facts & Resp. to Pl.'s Statement of Material Facts, ECF No. 32-1 [hereinafter Def.'s Reply SOF], 19 ¶ 2. After that,

he played professionally, both in the United States and internationally, including on teams in **[*6]** Switzerland, Belgium, and Lebanon. Pl.'s SOMF ¶ 3. He also played on the national team for Trinidad and Tobago. *Id.* After retiring from professional play, he transitioned to coaching. *Id.* ¶¶ 4-5. He coached professional teams in Lebanon, was an assistant coach to a Trinidadian national team in the World Cup, and eventually established his own soccer academy, where he developed young players for professional and collegiate play. *Id.* But he has never worked as a coach for a collegiate soccer team in the United States. Def.'s SOF ¶ 38. When he applied for the head coach position at American, Plaintiff, a citizen of Trinidad and Tobago, was living and working in Lebanon. *Id.*; Def.'s SOF ¶¶ 45-46 (citing Def.'s Mot., Ex. 16, ECF No. 29-20 [hereinafter Nakhid Dep.], at 8:18-9:5, 9:9-10:17).

B. Procedural Background

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 26, 2019. Compl. ¶ 5. The EEOC issued a Notice of Rights to Plaintiff on August 2, 2019, after which he timely filed this action, bringing claims under Title VII of the Civil Rights Act of 1964 and *42 U.S.C. § 1981*. *Id.* ¶¶ 6, 22, 26. Defendant moved to dismiss, arguing that Plaintiff had not alleged any facts rendering it plausible **[*7]** that discrimination motivated Defendant's failure to hire him. Def.'s Mot. to Dismiss, ECF No. 7, at 1. This court denied that motion, holding that Plaintiff had "readily satisfie[d] the *[Federal Rule of Civil Procedure] 8(a)* standard." *Nakhid v. Am. Univ., No. 19-cv-03268 (APM), 2020 U.S. Dist. LEXIS 49608, 2020 WL 1332000, at *1 (D.D.C. Mar. 23, 2020)*. After that, Defendant answered the Complaint. Answer to Compl., ECF No. 11. Following discovery, Defendant filed this motion for summary judgment.

III. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A "genuine dispute" of a "material fact" exists when the fact is "capable of affecting the substantive outcome of the litigation" and "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Elzeneiny v. District of Columbia, 125 F. Supp. 3d 18, 28 (D.D.C. 2015)*.

In assessing a motion for summary judgment, the court looks at the facts in the light most favorable to the nonmoving party and draws all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. To defeat a motion for summary judgment, the nonmoving party must put forward "more than mere unsupported allegations or denials"; its opposition must be "supported by affidavits, declarations, or other competent evidence, setting forth specific facts **[*8]** showing that there is a genuine issue for trial" and that a reasonable jury could find in its favor. *Elzeneiny, 125 F. Supp. 3d at 28* (citing *Fed. R. Civ. P. 56(e)*); *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

IV. DISCUSSION

A. *Section 1981* Claim

The court begins with Plaintiff's claim under *42 U.S.C. § 1981*. Plaintiff alleges that Defendant failed to hire him based on his race, ethnicity, and national origin, thwarting his contract opportunities and equal enjoyment of the rights, privileges, and benefits enjoyed by white citizens in violation of *section 1981*. Compl. ¶¶ 25-28. Defendant seeks judgment as a matter of law as to that claim on the ground that Plaintiff, an individual at all relevant times physically outside the United States, cannot avail himself of *section 1981*'s protections. Def.'s Mot., Br. in Supp. of Def.'s Mot. for Summ. J., ECF No. 29-1 [hereinafter Def.'s Br.], at 6. A straightforward application of the statute's plain language resolves this question in favor of Defendant.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). By its terms, section 1981 does not protect those who are not "within the jurisdiction of the United States." *Id.* In the context **[*9]** of this statutory provision, being "within the jurisdiction of the United States" means being physically present within the United States. *See, e.g.*, Ofori-Tenkorang v. Am. Int'l Grp., Inc., 460 F.3d 296, 303-04 (2d Cir. 2006) (concluding that the language of section 1981 "only protects persons within the United States' territorial jurisdiction"). Plaintiff was not physically present in the United States at any time relevant to the challenged employment action, *see* Nakhid Dep. at 8:18-9:5, 9:9-10:17, and so he cannot assert rights under the statute.

Plaintiff attempts to save his claim by arguing that "[j]urisdiction, within the meaning of the statute, actually means sufficient contacts with the United States so as to justify the application of its laws." Pl.'s Opp'n at 18. Plaintiff's reading of the statute erroneously conflates the concept of personal jurisdiction with section 1981's territorial jurisdiction. Because Plaintiff is not within section 1981's reach, the court grants Defendant's motion for summary judgment with respect to Plaintiff's section 1981 claim.

B. Title VII Claim

1. Whether Title VII Reaches Plaintiff

The court next considers Plaintiff's Title VII claim. Plaintiff alleges that when Defendant failed to select him for the head coach position, it subjected him to discrimination based on **[*10]** his race and national origin in violation of Title VII of the Civil Rights Act of 1964. Compl. ¶¶ 21-24. As with Plaintiff's section 1981 claim, Defendant seeks judgment as a matter of law on this claim on the basis that Title VII does not reach him. Def.'s Mot. The court must decide whether Title VII applies to a noncitizen applying for employment in the United States when he is physically located outside the United States—that is, whether Plaintiff seeks an impermissible extraterritorial application of Title VII.[1] This question is not so straightforward.

"Courts presume that federal statutes 'apply only within the territorial jurisdiction of the United States.'" WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136, 201 L. Ed. 2d 584 (2018) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 69 S. Ct. 575, 93 L. Ed. 680 (1949)). The Supreme Court has articulated a "two-step framework for analyzing extraterritoriality issues." RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 136 S. Ct. 2090, 2101, 195 L. Ed. 2d 476 (2016). First, the court must "ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* The court "must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction." *Id.* If a statute does not apply extraterritorially, at the second step the court **[*11]** must "determine whether the case involves a domestic application of the statute, and [does] this by looking to the statute's 'focus.'" *Id.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *Id.*

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[1] The law in this Circuit is unclear whether the question of extraterritoriality is a matter of subject matter jurisdiction or a merits inquiry. Baloun v. Tillerson, No. 16-cv-0111 (KBJ), 2017 U.S. Dist. LEXIS 47229, 2017 WL 6271267, at *1 n.2 (D.D.C. Mar. 30, 2017) ("The D.C. Circuit has not spoken directly to the question of whether a Title VII claim brought by an alien regarding oversees employment is *jurisdictionally* deficient[] . . . ."); *see also* United States v. Miranda, 780 F.3d 1185, 1191, 414 U.S. App. D.C. 305 (D.C. Cir. 2015) ("The extraterritorial reach of a statute ordinarily presents a merits question, not a jurisdictional question."); Alipio v. Winter, 631 F. Supp. 2d 29, 29 (D.D.C. 2009) (concluding that "an alien to whom Title VII does not apply" has "fail[ed] to state a claim upon which relief can be granted"). *But see* Shekoyan v. Sibley Int'l Corp., 217 F. Supp. 2d 59, 68 (D.D.C. 2002) (finding that "a permanent resident alien, who was employed extraterritorially," is "outside the scope of the protections of Title VII" and thus the court "lacks subject matter jurisdiction" over his Title VII claim), *aff'd*, 409 F.3d 414, 366 U.S. App. D.C. 144 (D.C. Cir. 2005). The court need not decide this issue for present purposes, as Defendant's motion is granted in full whether the extraterritoriality inquiry is a merits or subject matter jurisdiction question.

However, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

In this case, the answer to the first inquiry—whether the presumption against extraterritoriality is rebutted—is plainly no. Nothing on the face of Title VII suggests that its substantive provisions and remedial scheme reach a noncitizen, nonresident applicant for domestic employment. The substantive provisions of Title VII make it "an unlawful employment practice for any employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The statute contains certain express provisions regarding its extraterritorial reach: it does "not apply to an employer with respect to the employment **[*12]** of aliens outside any State," 42 U.S.C. § 2000e-1(a), but it *does* apply to U.S. citizens employed abroad, 42 U.S.C. § 2000e(f). The former provision is known as the "alien-exemption clause," and Congress added the latter provision only after the Supreme Court, gleaning no "contrary intent" from the statute, held that Title VII did not apply extraterritorially to reach such individuals. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 259, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991). Congress thus plainly knew how to both limit and apply Title VII's territorial reach. It is therefore notable that the statute does not contain any explicit language extending its protections to noncitizens living abroad. *See* id. at 258 ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").

In *Aramco*, the Court held that "the statute's definitions of jurisdictional terms" and the alien-exemption clause, 42 U.S.C. § 2000e-1, without more, "fall[] short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders."[2] 499 U.S. at 248-49; *contra* Pl.'s Opp'n at 15. The same is true here. Although Congress later amended Title VII to expand its reach to U.S. **[*13]** citizens employed abroad by U.S. employers, *see* 42 U.S.C. § 2000e(f), the statute continues to contain no affirmative expression of extraterritorial application to those in Plaintiff's circumstances—a noncitizen, nonresident who applies for domestic employment from abroad. Ultimately, "[t]he question is not whether [a court] think[s] 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has *affirmatively* and *unmistakably* instructed that the statute will do so." RJR Nabisco, 136 S. Ct. at 2100 (emphasis added). It did not here. The court therefore must find that Title VII does not have extraterritorial application with respect to individuals in Plaintiff's position. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

Having found that the statute does not rebut the presumption against extraterritoriality, the court proceeds to step two of the *RJR Nabisco* framework. At this point, the court's task is to "determine whether the case involves a *domestic* application of the statute[] . . . by looking to the statute's 'focus.'" RJR Nabisco, 136 S. Ct. at 2101 (emphasis added). "The focus of a statute is 'the object **[*14]** of its solicitude,' which can include the conduct it 'seeks to regulate,' as well as the parties and interests it 'seeks to protect' or vindicate." WesternGeco LLC, 138 S. Ct. at 2137 (cleaned up) (quoting Morrison, 561 U.S. at 267). Once the court has determined the statute's focus, it measures the conduct underlying this action against that statutory focus. "If the conduct relevant to the statute's focus occurred . . . in a foreign country, then the case involves an impermissible extraterritorial application . . . ." RJR Nabisco, 136 S. Ct. at 2101.

Aramco provides a useful starting point for the focus inquiry in this case. In *Aramco*, the plaintiff had been hired in the United States, and he was a U.S. citizen, but the employment at issue was in Saudi Arabia. 499 U.S. at 247.

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[2] Plaintiff argues that "Defendant's reliance on [*Aramco*] is misplaced because . . . [it] was expressly overruled by legislative action," and that "[t]he subsequent amendment by Congress actually supports the view that Congress intended to broaden the scope and applicability of Title VII." Pl.'s Opp'n at 16. But Plaintiff fails to recognize that the Supreme Court has continued to cite *Aramco*, with approval, for its treatment of the presumption against extraterritoriality. *E.g.*, Bond v. United States, 572 U.S. 844, 857, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); Hernandez v. Mesa, 140 S. Ct. 735, 747, 206 L. Ed. 2d 29 (2020). The court is unwilling to disregard *Aramco* as extant guiding precedent.

The version of the statute under which the plaintiff brought his claim contained no express provision for extraterritorial application to U.S. citizens working abroad. The Court "concluded . . . that neither [the] territorial event [of hiring] nor [the citizenship] relationship was the 'focus' of congressional concern, but rather domestic employment." *Morrison, 561 U.S. at 266* (citation omitted) (discussing *Aramco*); *see also Aramco, 499 U.S. at 255* (noting that "elements in the statute suggest[] a purely domestic focus"). The employment practice the *Aramco* plaintiff **[*15]** challenged occurred while he was working for the defendant, *499 U.S. at 259*, and so the "conduct relevant to the statute's focus," *RJR Nabisco, 136 S. Ct. at 2101*, was his employment in Saudi Arabia. Of course, Congress responded to *Aramco* by explicitly amending the statute to reach U.S. citizens employed abroad, and U.S. citizens employed abroad can now claim Title VII's protections. *42 U.S.C. §2000e(f)*. But the thrust of *Aramco* remains viable precedent.

Against that backdrop, the court turns to Plaintiff's assertion of Title VII's protections. Title VII confers a right not to be discriminated against in employment, and it effectuates that right by prohibiting employer conduct that violates it. The statute's substantive guarantees are aimed toward stamping out discriminatory employer conduct. *See 42 U.S.C. § 2000e-2* (proscribing discriminatory "employment practice[s]"); *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)* ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."). But that does not mean that the "relevant conduct" for extraterritoriality purposes is necessarily the employer's allegedly discriminatory **[*16]** conduct. As an illustration, in *RJR Nabisco*, the Supreme Court noted that it had previously "rejected [the] view" that "the presumption [against extraterritoriality] is primarily concerned with the question of what *conduct* falls within a statute's purview." *136 S. Ct. at 2106*. Accordingly, in that case the Court analyzed RICO's private right of action separately from its "substantive prohibitions." *RJR Nabisco, 136 S. Ct. at 2106*. It reached the conclusion that the former, unlike the latter, did not apply extraterritorially, reasoning that "[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not." *Id.* (internal quotation marks omitted) (quoting *Sosa v. Alvarez-Machain, 542 U.S. 692, 727, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2001)*).

The D.C. Circuit took a similar approach in *Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F.3d 904, 434 U.S. App. D.C. 326 (D.C. Cir. 2018)*, a case involving the *Copyright Act*. There, the court framed the inquiry as "asking what components of an otherwise actionable statutory violation must occur within the United States to bring it within the Act's domestic sweep." *Id. at 914*. The court began by identifying "precisely what it is that the Act regulates," but it did not end there. "[T]he Act grants copyright holders several 'exclusive rights' . . . and effectuates those rights by prohibiting 'infringement,' **[*17]** or the 'violat[ion] of those 'exclusive rights.'" *Id.* (second alteration in original). The court determined that "[t]he Copyright Act 'focuses[]' . . . on policing infringement or, put another way, on protecting the exclusivity of the rights it guarantees." *Id.* Critically, merely inquiring about whether and where substantively prohibited conduct occurred, as the defendant urged, was inadequate in terms of this focus—"[u]nder [defendant's] reading, a broadcaster would commit an infringing performance merely by transmitting a copyrighted work into the void, regardless of whether those transmissions ever result in the work's images being shown to even a single viewer." *Id. at 915* (cleaned up). The court concluded that an actionable Copyright Act claim instead requires that the "infringing performances—and consequent violation of [the complainant's] copyrights—occur[] . . . in the United States." *Id. at 914*.

Thus, the focus of a statute "can include the conduct it 'seeks to regulate," but it can also include "the parties and interests it 'seeks to protect or vindicate.'" *WesternGeco, 138 S. Ct. at 2137*; *see also id.* ("When determining the focus of a [particular] statute, [courts] do not analyze the provision at issue in a vacuum. If the **[*18]** statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions." (citation omitted)). Title VII is clear as to whose interests it seeks to protect or vindicate. It protects all employees working domestically for covered employers. *42 U.S.C. § 2000e(f)*; *see, e.g., Iweala v. Operational Techs. Servs., Inc., 634 F. Supp. 2d 73, 80 (D.D.C. 2009)*. It now also provides relief for U.S. citizens working abroad for covered U.S. employers. *See 42 U.S.C. § 2000e(f)* ("With respect to employment in a foreign country, [the] term [employee] includes an individual who is a citizen of the United States."). But Title VII expressly excludes from its protections noncitizens working abroad for U.S. employers, *see id. § 2000e-1(a)*, and exempts from its

coverage "the foreign operations of an employer that is a foreign person not controlled by an American employer," *id.* § 2000e-1(c)(2). The scope of these protections makes clear that the private right of action in Title VII is, at heart, concerned with "vindicat[ing] *domestic* interests." WesternGeco, 138 U.S. at 2138 (emphasis added); *see also* Aramco, 499 U.S. at 255 (emphasizing Title VII's "domestic focus"). That is, the statute's private right of action seeks to protect only the interests of U.S. citizens and U.S. residents. Its "focus" does not include the interests of a noncitizen, **[*19]** nonresident who submits his application from abroad. Here, Plaintiff applied for, and was not selected for, the head coach position while he was a citizen of Trinidad and Tobago living in Lebanon. Def.'s SOF ¶¶ 45-46. He therefore cannot assert a permissible domestic application of Title VII.

Holding otherwise would yield an incoherent interpretation of Title VII. The statute would protect foreign nationals who merely submit an application for a job in the United States from abroad even as it excludes foreign nationals who are actually employed by U.S. employers abroad. 42 U.S.C. § 2000e-1; *id.* § 2000e(f). Moreover, such a holding would effect a massive expansion of Title VII's protections. *Cf.* Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 866 (4th Cir. 2001) ("Expanding the ADEA to cover millions of foreign nationals who file an overseas application for U.S. employment could exponentially increase the number of suits filed and result in substantial litigation costs. If such a step is to be taken, it must be taken via a clear and unambiguous statement from Congress rather than by judicial fiat."). If Congress had thought that the statute reached discriminatory-hiring claims brought by noncitizen applicants outside the United States, it surely would have made that clear. *See* ***[*20]*** *id.* Because it has not, Plaintiff cannot avail himself of Title VII's protections. The court grants Defendant's motion with respect to Plaintiff's Title VII claim.

2. Whether Plaintiff Has Offered Evidence from Which a Reasonable Jury Could Conclude that Defendant Discriminated Against Him

Even if the court were to conclude Plaintiff had stated a cognizable claim under Title VII, Defendant raises multiple arguments why, if the court were to reach the merits, summary judgment should be entered in its favor. The court agrees with one: on the record presented, no reasonable factfinder could find that Plaintiff was not hired for the head coach position on the basis of race, ethnicity, or national origin.[3]

At the outset, Defendant argues that Plaintiff cannot establish a prima facie case of discriminatory failure to hire for two reasons: (1) he is unqualified as a matter of law because he did not possess authorization to work in the United States at the time of his application, and (2) he is unqualified because he "lacked the requisite relevant experience." Def.'s Br. at 7-8. The court assumes without deciding that Plaintiff was in fact qualified for the head coach position and so can establish **[*21]** a prima facie case of discrimination on the basis of race, ethnicity, or national origin. *See* Brady v. Office of Sergeant at Arms, 520 F.3d 490, 493 n.1, 380 U.S. App. D.C. 283 (D.C. Cir. 2008) ("In a refusal-to-hire . . . discrimination case, the *McDonnell Douglas* prima facie factors are that: (i) the employee 'belongs to a racial minority' or other protected class; (ii) the employee 'applied and was qualified for a job for which the employer was seeking applicants'; (iii) despite the employee's qualifications, the employee 'was rejected'; and (iv) after the rejection, 'the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.'" (quoting McDonnell Douglas Corp., 411 U.S. at 802)).

The burden therefore shifts to Defendant to "articulate some legitimate, nondiscriminatory reason" for failing to hire Plaintiff. McDonnell Douglas Corp., 411 U.S. at 802. At the summary judgment stage, "once the employer asserts a legitimate, non-discriminatory reason, the question whether the employee actually made out a prima facie case is no longer relevant and thus disappears and drops out of the picture." Brady, 520 F.3d at 493 (cleaned up). Rather, the "central question" becomes: "Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason **[*22]** and that the employer

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[3] The same analysis applies to Plaintiff's section 1981 claim, if he can raise it. *See* Ladson v. George Wash. Univ., 204 F. Supp. 3d 56, 62-63 (D.D.C. 2016) ("The legal standards applicable to [plaintiff's Title VII and section 1981] claims are the same . . . .").

intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" *Id. at 494*.

Defendant has come forward with a legitimate, nondiscriminatory reason for failing to hire Plaintiff. It asserts that "he was not qualified for the Position" because "he had no experience coaching for any college or university." Def.'s Br. at 8-9 (emphasis omitted). Defendant argues that Plaintiff cannot meet his burden of showing that Defendant's stated reason for failing to hire him was "a pretext." *Brady, 520 F.3d at 495*. Plaintiff's case of pretext can be distilled as follows: (1) the head coach job description and job posting do not support Defendant's stated reason, and this disjunction shows pretext, Pl.'s Opp'n at 23-24; (2) his qualifications were "far superior" to those of the ultimate selectee for the head coach role, showing discrimination was the reason for Defendant's decision, *id.* at 24-25; and (3) Defendant's "circumvention" of its internal affirmative action and recruiting policies and the all-white composition of its Athletic Department leadership "evince discrimination," *id.* at 25. The court will discuss each of these three arguments in turn.

First, while **[*23]** the job descriptions posted online for the head coach position can reasonably be read not to strictly require collegiate coaching experience, that is not enough to establish pretext. As Plaintiff notes, the two job descriptions do not contain an explicit requirement of collegiate coaching experience. Pl.'s Opp'n at 23; *see also* Def.'s Mot., Ex. 3, ECF No. 29-7 (requiring "5-8 years of relevant experience," "[d]emonstrated knowledge and success in coaching at the collegiate *or* professional level," "[t]he *ability* to work within NCAA and Patriot League regulations," and "[t]he *ability* to work successfully with male college student-athletes" (emphasis added)); Def.'s Mot., Ex. 4, ECF No. 29-8 (similar). Indeed, the court is skeptical that the job descriptions themselves automatically disqualified any applicant who, for instance, possessed significant professional coaching experience but no college experience. *See Nakhid v. Am. Univ., No. 19-cv-03268 (APM), 2020 U.S. Dist. LEXIS 49608, 2020 WL 1332000, at *1 (Mar. 23, 2020)* (finding that "the job posting did not require actual [collegiate coaching] experience").[4]

The salient point for pretext, however, is not whether the asserted nondiscriminatory reason is accurate but whether it is sincerely held. *Fischbach v. D.C. Dep't of Corr., 86 F.3d 1180, 1183, 318 U.S. App. D.C. 186 (D.C. Cir. 1996)* ("The issue is not the correctness or desirability **[*24]** of the reasons offered but whether the employer honestly believes in the reason it offers." (cleaned up)); *see also Brady, 520 F.3d at 494* (plaintiff must show employer's asserted reason "was not the *actual* reason" (emphasis added)). There is no factual dispute that the decisionmakers involved in the hiring process understood the position to be one that required collegiate coaching experience and that they made their decisions with an eye toward that criteria. Smith Decl. ¶¶ 9, 11, 39; Smith Dep. at 24-25; Walker Decl. ¶ 14; Harrington Decl. ¶ 7; Bierwirth Decl. ¶ 6. That honest belief is corroborated by the undisputed fact that all eight candidates selected for a screening interview, two of whom were Black Americans, "had significant experience coaching collegiate soccer." Def.'s SOF ¶ 22. Plaintiff has offered no evidence refuting that Smith—who was responsible for the initial review of applicants—or the other members of the selection committee honestly held the belief that prior collegiate coaching experience was a job requirement.

Plaintiff cites two unreported, out-of-Circuit district court opinions in support of his argument that "[d]iversion from the requirements in a job posting or description creates **[*25]** a genuine issue of fact as to qualification and is sufficient evidence from which to deny summary judgment." Pl.'s Opp'n at 23. But these cases do not stand for that proposition. First, the portion of *Eichelberger v. Champion Aero., Inc., No. 8:08-2990, 2010 U.S. Dist. LEXIS 1956, 2010 WL 97770 (D.S.C. Jan. 11, 2010)*, that Plaintiff cites concerns qualification in the context of the prima facie case, not pretext. Pl.'s Opp'n at 23 (citing *Eichelberger, 2010 U.S. Dist. LEXIS 1956, 2010 WL 97770, at *6*). The defendant's diversion from the job description in that case sufficed to establish an issue of material fact as to the plaintiff's qualification only as an element of his prima facie case of discrimination. *Eichelberger, 2010 U.S. Dist. LEXIS 1956, 2010 WL 97770, at *6*. It did not factor significantly into the pretext analysis. *2010 U.S. Dist. LEXIS 1956, [WL] at *7-8* (emphasizing that the job posting was "a source of substantial confusion and misdirection" in large part because the job posting was removed after plaintiff was rejected and then reposted under a different job title). Here, the court has assumed that Plaintiff was qualified for the head coach role for purposes of establishing a

[4] The court doubts that if Pep Guardiola or Zinedine Zidane had applied for the head coach position he would have been deemed not qualified because of a lack of U.S. collegiate coaching experience.

prima facie case of discriminatory failure to hire, and the other "suspicious" "irregularities" that led the court in *Eichelberger* to find that pretext posed a jury question do not appear here. *See id.*

In the second case Plaintiff cites, *Ziegler v. Steelton-Highspire School* **[*26]** *System*, the defendant's diversion from its job posting created a jury question on pretext because the alleged job qualification at issue, "computer proficiency," was not "an inherently obvious requirement for the position, which involve[d] primarily the handling of student disciplinary issues." No. 1:04-cv-0788, 2005 WL 2030440, at *1 (M.D. Pa. Aug. 3, 2005). "Indeed, the other applicants for the job were not even asked about their computer skills during the interview process." *Id.* That was certainly not the case here, where even if not explicitly listed in the job description, collegiate coaching experience is reasonably related to the head coach position, and where every applicant for the head coach position that was selected for an interview did in fact have "significant experience coaching collegiate soccer." Smith Decl. ¶ 20. Plaintiff's argument about the disconnect between the qualifications listed in the job postings and Defendant's stated reason for not selecting him is therefore unavailing; this disconnect, without more, is insufficient to create a jury question on pretext.

Next, Plaintiff has not established the requisite "wide and inexplicable gulf," *Lathram v. Snow, 336 F.3d 1085, 1091, 357 U.S. App. D.C. 413 (D.C. Cir. 2003)*, in qualifications between him and Zach Samol (the successful job **[*27]** applicant) to establish pretext. Plaintiffs in failure-to-hire cases can demonstrate pretext by comparing their own qualifications with those of the successful applicant. *See Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294, 332 U.S. App. D.C. 256 (D.C. Cir. 1998)* ("If a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture."). But cases in this Circuit make clear that a plaintiff must be "substantially," "significantly," and "markedly more qualified" than the selectee to raise an inference of pretext. *Hamilton v. Geithner, 666 F.3d 1344, 1352, 399 U.S. App. D.C. 77 (D.C. Cir. 2012)*. For example, one prevailing plaintiff, who was not selected for a pharmacy technician position, had nineteen years of experience as a hospital assistant and both bachelor's and master's degrees, while the successful applicant's work experience amounted to one year in the hospital laundry and two months as a pharmacy volunteer, and he had no college education. *Aka, 156 F.3d at 1295-97*.

Here, the relative qualifications are not so glaringly disparate. Both Plaintiff **[*28]** and Samol possessed a form of professional licensure—while Samol's was, in Plaintiff's account, lower than Plaintiff's, it was one of the certifications explicitly sought in the job description. Smith Decl. ¶ 36; Pl.'s SOMF ¶ 20. Samol and Plaintiff alike had both collegiate and professional playing experience. Def.'s Mot., Ex. 10, ECF No. 29-14 [hereinafter Samol Resume], at 3; Pl.'s SOMF ¶¶ 2-3. Plaintiff had, according to his resume, ten years of coaching experience, with both professional teams and his youth soccer academy, Def.'s Mot., Ex. 15, ECF No. 29-19, at 3; Samol had eighteen years of collegiate coaching experience at institutions of a similar profile to American University (Georgetown, Yale, and Boston College), Samol Resume at 2-3. Any "qualifications gap" that may exist is simply not "great enough to be inherently indicative of discrimination." *Hamilton, 666 F.3d at 1352* (internal quotation marks omitted).

Finally, the circumstantial evidence regarding Defendant's affirmative action hiring program and the demographics of its staff do not raise an inference of discrimination sufficient to carry Plaintiff's burden at summary judgment. Plaintiff argues that "the hiring manager and committee's purposeful **[*29]** circumvention" of the affirmative action policy raises an inference of discriminatory intent. Pl.'s Opp'n at 25. The court assumes for present purposes that an employer's violation of its own affirmative action policy could possibly give rise to an inference of pretext. *See Gonzales v. Police Dept., San Jose, 901 F.2d 758, 761 (9th Cir. 1990)* ("[E]vidence that the employer violated its own affirmative action plan may be relevant to the question of discriminatory intent."). But Plaintiff has not established a violation here. The only evidence he offers of a purported deviation from the affirmative action policy is the absence of a close-out form that hiring managers are meant to sign at the end of the recruitment process; that form "includ[es] a certification that the hiring manager complied with American's Affirmative Action and anti-discrimination policies throughout the process." Pl.'s SOMF ¶¶ 8, 15. Plaintiff has not offered any evidence that the mere failure to submit a close-out form constitutes a violation of the university's affirmative action policy—certainly,

no witness so testified. *See* Def.'s Reply SOF ¶ 42. Moreover, the evidence of what did occur in the hiring process undercuts Plaintiff's argument that the affirmative action policy was **[*30]** flouted to avoid consideration of Black candidates: two of the eight candidates selected for a screening interview were Black, and one of those two was selected for a follow-up interview. Smith Decl. ¶ 28; Def.'s SOF ¶¶ 22-23.

Plaintiff also points to the demographic make-up of Defendant's coaching staff. Pl.'s Opp'n at 25. If in some cases an all-white coaching staff might give rise to an inference of pretext, it does not do so in this case without more. For instance, there has been no evidence on the length of coaches' and Athletic Department members' tenures, who was involved as decisionmakers in their hiring, and whether any Black applicants were in the candidate pool for those positions. Absent such evidence, a reasonable trier of fact could only speculate that race, national origin, or ethnicity played a role in the decision not to interview or hire Plaintiff.

In sum, none of Plaintiff's theories for pretext succeed in rebutting Defendant's legitimate, nondiscriminatory reason for failing to hire Plaintiff, and so—even if Plaintiff can avail himself of Title VII's protections—he has not established sufficient facts from which a reasonable jury could conclude that Defendant discriminated **[*31]** against him on the basis of race, ethnicity, or national origin.

V. CONCLUSION

For the foregoing reasons, the court grants Defendant's motion for summary judgment in full as to all claims.

A final, appealable Order accompanies this Memorandum Opinion.

/s/ Amit P. Mehta

Amit P. Mehta

United States District Court Judge

Dated: September 14, 2021

ORDER

For the reasons set forth in the court's Memorandum Opinion, ECF No. 33, the court grants Defendant's Motion for Summary Judgment.

This is a final, appealable Order.

/s/ Amit P. Mehta

Amit P. Mehta

United States District Court Judge

Dated: September 14, 2021

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United States v. Petrykievicz

United States Court of Appeals for the Ninth Circuit

September 15, 1994, Argued, Submitted, Seattle, Washington ; October 4, 1994, Filed

No. 93-30272, No. 93-30311

Reporter
1994 U.S. App. LEXIS 27744 *

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OLIVER STEFAN PETRYKIEVICZ, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. OLIVER STEFAN PETRYKIEVICZ, Defendant-Appellee.

Notice: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

Subsequent History: Reported in Table Case Format at: *36 F.3d 1104, 1994 U.S. App. LEXIS 33819*. Certiorari Denied April 17, 1995, Reported at: *1995 U.S. LEXIS 2759*.

Prior History: Appeal from the United States District Court for the Western District of Washington. D.C. No. CR-93-00232-TSZ. Thomas S. Zilly, District Judge, Presiding

Disposition: The district court's refusal to dismiss counts I-III is AFFIRMED, and its dismissal of count IV is REVERSED.

Judges: Before: BROWNING and CANBY, Circuit Judges, and HUFF, ** District Judge

Opinion

MEMORANDUM *

The *Double Jeopardy Clause* is potentially applicable to this case only if the district court's ruling on the first indictment was the functional equivalent of an acquittal. *See United States v. Affinito, 873 F.2d 1261, 1264 (9th Cir. 1989)* **[*2]** (that a government appeal in a criminal case would not violate the *Double Jeopardy Clause* if "the trial court's ruling was unrelated to factual guilt or innocence"). To decide whether Petrykievicz was acquitted of the charges in the first indictment, "we must determine whether the ruling of the judge, whatever its label, actually represented a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged. *United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977)*.

Under this standard, the district court's ruling in the original case against Petrykievicz did not constitute an acquittal. The court did not resolve any of the factual elements of the offense charged or rely on any of the evidence introduced at trial. Rather, the court looked to the language and legislative history of the statute in order to decide a purely legal question: the breadth of a statutory exception.

** Honorable Marilyn L. Huff, District Judge, United States District Court for the Southern District of California, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *9th Cir. R. 36-3*.

Because the issue was strictly one of law, Petrykievicz could have successfully challenged the first indictment before the jury was empaneled. Had he done so, **[*3]** the possibility of double jeopardy would not have arisen. Petrykievicz's strategic choice to delay his challenge until the prosecution had presented its case cannot create an issue of double jeopardy. To hold otherwise would create a perverse incentive for the defense to withhold meritorious legal arguments until after an unnecessary trial.

Because the district court's ruling with regard to the first indictment did not function as an acquittal, the *Double Jeopardy Clause* does not bar any of the counts in the second indictment. Accordingly, the district court's refusal to dismiss counts I-III is AFFIRMED, and its dismissal of count IV is REVERSED.

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