IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant, v. **Nathaniel A. CASILLAS,** Senior Airman (E-4) United States Air Force, Appellee.	**BRIEF ON BEHALF OF APPELLEE** Crim. App. Dkt. No. ACM 40551 USCA Dkt. No. 26-0096/AF

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

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STATEMENT OF STATUTORY JURISDICTION

Senior Airman (SrA) Nathaniel A. Casillas's approved sentence includes a confinement for 2 years or more. Accordingly, the Air Force Court of Criminal Appeals (AFCCA) had jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction to review this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

RELEVANT AUTHORITIES

The Fifth Amendment states, in relevant part, "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

The Sixth Amendment states, in relevant part, "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Article 44(a), UCMJ, 10 U.S.C. § 844(a) (2018), states, "No person may, without his consent, be tried a second time for the same offense."

Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018) states,

> CASES APPEALED BY ACCUSED.—In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Rule for Courts-Martial (R.C.M.) 603(b)(1) states, "*Major changes*. A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged."

R.C.M. 603(d)(1) states, "After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew."

R.C.M. 905(e)(1) states, in relevant part, "Failure by a party to raise defenses or objections or to make motions or requests which must be made before

pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver."

R.C.M. 907(b)(2)(C) states that grounds for dismissal include "[t]he accused has previously been tried by court-martial or federal civilian court for the same offense."

R.C.M. 1002(d)(1) states, in relevant part, "*Sentencing by members*. In a general or special court-martial in which the accused has elected sentencing by members in lieu of sentencing by military judge under paragraph (b)(1), the members shall determine a single sentence for all of the charges and specifications of which the accused was found guilty."

The *Manual for Courts-Martial, United States (MCM)* (2019 ed.), pt. IV, ¶ 95.c.(4) states, "'Child pornography' means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct."

The *MCM* (2019 ed.), pt. IV, ¶ 95.b.(1) states,

> b. *Elements*.
>
> (1) *Possessing, receiving, or viewing child pornography*.
>
> (a) That the accused knowingly and wrongfully possessed, received, or viewed child pornography; and
>
> (b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed

> forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

The *MCM* (2019 ed.), pt. IV, ¶ 95.d.(1), which indicates maximum sentences, states "*Possessing, receiving, or viewing child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years."

The *MCM* (2019 ed.), pt. IV, ¶ 95.e states,

> *Sample specification*.
> In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ knowingly and wrongfully (possess) (receive) (view) (distribute) (produce) child pornography, to wit: a (photograph) (picture) (film) (video) (digital image) (computer image) of a minor, or what appears to be a minor, engaging in sexually explicit conduct (with intent to distribute the said child pornography), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

STATEMENT OF THE CASE

A panel of officer members sitting as a general court-martial convicted Appellee, SrA Nathaniel Casillas, United States Air Force, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. JA at 348. The members sentenced him to a reprimand, reduction to the grade of E-1, and confinement for four years and eleven months. JA at 001. The Convening

Authority took no action on the findings or the sentence but deferred automatic forfeitures and reduction in grade until the military judge signed the entry of judgment (EOJ) and waived automatic forfeitures for six months for the benefit of Appellee's dependents. JA at 002.

On September 18, 2025, the lower court set aside and dismissed the finding as to the specification for possessing child pornography due to double jeopardy. JA at 013–17, 039. The AFCCA also affirmed the findings as to the specification for viewing child pornography and the charge and affirmed the sentence as reassessed. JA at 039. On November 12, 2025, the lower court denied the Government's motion for reconsideration and reconsideration en banc. JA at 466. The officer performing the duties of The Judge Advocate General then certified three issues for review by this Court. *United States v. Casillas*, No. 26-0096/AF, 2026 CAAF LEXIS 42 (C.A.A.F. Jan. 12, 2026).

STATEMENT OF FACTS

In a previous court-martial, the Government charged Appellee with knowingly and wrongfully possessing and viewing child pornography "within an iPhone XR." JA at 439, 443. While preparing for that trial, the Government identified additional images of suspected child pornography in the temporary directory of the same iPhone XR. JA at 378. The military judge in the prior court-martial did not allow the Government to add this evidence to that case because the

Government was past the time that was scheduled for turning over evidence to the Defense. JA at 350. Instead, the Government preferred new specifications for possessing and viewing child pornography during the same charged timeframe, and the convening authority referred them to a second court-martial. JA at 048, 377.

The prior court-martial convicted Appellee of viewing and possessing child pornography within his iPhone XR, along with other charges. JA at 439–43. A few months later, the instant case proceeded to trial. JA at 008. This second court-martial convicted him of possessing and viewing child pornography on the same iPhone XR during charged timeframes that were encompassed by those from the prior trial. JA at 048, 348.

SUMMARY OF ARGUMENT

The AFCCA correctly held that the prosecution for the possession specification in this case violated the prohibitions against double jeopardy. It acted within its discretion to pierce waiver, although doing so was unnecessary because Appellee merely forfeited, as opposed to waived, double jeopardy. The Government chose a charging scheme in the prior court-martial that made the iPhone XR the unit of prosecution because the illicit images were contained within it. It is clear from the record that the images introduced in this case were found on the same device. The AFCCA correctly applied the operative definition and this

Court's precedent. Its decision regarding the possession specification should be affirmed.

In contrast, the AFCCA erred when it declined to consider whether the viewing specification violated the prohibitions against double jeopardy. It did not need to pierce waiver to do so because the record does not clearly establish that Appellee voluntarily relinquished his known right, meaning there was no waiver. Piercing waiver as to the possession specification but not the viewing one was also an arbitrary, capricious, and unreasonable exercise of the AFCCA's discretion. The same definition that designates the material that contains illicit images as the unit of prosecution applies to both possession and viewing. This Court's past analysis on the matter should be applied equally to all offenses subject to that definition. Doing so results in the conclusion that the viewing specification also constituted prohibited double jeopardy. The remaining findings and sentence must be set aside and the specification dismissed.

If this Court concludes that Appellee did waive double jeopardy, it should also find he received ineffective assistance of counsel. There is no doubt that trial defense counsel failed to assert the prohibitions against double jeopardy in Appellee's defense. This failure has no reasonable explanation. Trial defense counsel's concerns about losing credibility or misleading the Court were unfounded because none of the arguments in the prior case—including opposing a

major change to a specification and challenging the admission of untimely disclosed evidence—were inconsistent with a double jeopardy motion here. The military judge even seemed to be expecting a double jeopardy motion, but none ever came. Had trial defense counsel raised double jeopardy, there is at least a reasonable likelihood that it would have resulted in dismissal of all specifications—a markedly better outcome. Failing to raise double jeopardy in this case constitutes ineffective assistance of counsel, and this Court should consequently set aside the findings and the sentence.

ARGUMENT

I. The Air Force Court of Criminal Appeals did not err when it set aside the conviction for possessing child pornography because this prosecution violated the prohibitions against double jeopardy.

A. Standard of review.

Double jeopardy is a question of law that this Court reviews de novo. *United States v. Driskill*, 84 M.J. 248, 252 (C.A.A.F. 2024) (citing *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019)).

B. The Air Force Court of Criminal Appeals correctly concluded that the second prosecution for possession was plain and obvious error because it constituted double jeopardy.

As an initial matter, the AFCCA did not err by analyzing the possession offense for double jeopardy despite its finding of waiver. *See* JA at 012. As explained below in section II.B, Appellee did not waive double jeopardy

protections in this case, contrary to the AFCCA's finding. But, in any event, the AFCCA decided to exercise its "special power" under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018), to pierce waiver and address this issue. JA at 012 (quoting *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018)). The AFCCA was "well within its authority" when it determined that, under these circumstances, it would pierce waiver. *Hardy*, 77 M.J. at 443 (quoting *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)).

"No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Article 44(a), UCMJ, 10 U.S.C. § 844(a) (2018), and R.C.M. 907(b)(2)(C) provide similar prohibitions against double jeopardy. *Driskill*, 84 M.J. at 252. To identify a violation of the double jeopardy prohibitions, a court must determine both whether an accused was tried twice and whether those trials were for the same offense. *Id.* As the AFCCA noted, there is no doubt that Appellee was tried twice, as he was convicted at two separate courts-martial. JA at 013. Likewise, it is clear that the offenses at the two courts martial had the same elements because they alleged violations of the same provision. JA at 013–14. The key question for determining whether the two trials were for the same offense is whether they were for the same "act or transaction." JA at 014 (quoting *United States v. Rice*, 80 M.J. 36, 40 (C.A.A.F. 2020)).

The AFCCA reached the correct conclusion when it held that Appellee was tried twice for the same offense: possessing the same iPhone XR that contained child pornography. JA at 013–017. Its reasoning was based on the definition of child pornography that applies to offenses under the UCMJ. Part IV, paragraph 95.c.(4) of the *MCM* (2019 ed.) defines child pornography as the "material that contains" illicit images. Based on that definition, this Court held in *United States v. Forrester* that the *MCM* prohibits the possession of "the physical media or storage location" containing the offending images. 76 M.J. 479, 486 (C.A.A.F. 2017). Thus, this Court held that when the Government charges possession of child pornography, the unit of prosecution is the material that contains the images, not the images themselves. *Id.* In *Forrester*, this approach allowed separate specifications for possession of separate devices containing identical images. *Id.* The AFCCA identified the logical corollary "that contemporaneous possession of multiple illicit images in the same 'material' represents a single offense of possession of child pornography, because 'child pornography' is defined as the 'material' (e.g., the device containing the images) rather than each image itself." JA at 014.

When it applied this analysis to Appellee's case, the AFCCA concluded that both courts-martial tried him for possessing the same device—the iPhone XR—that contained child pornography. JA at 014–16. The specification in the first

court-martial explicitly alleged possession "within an iPhone XR," and the evidence in the record makes it "abundantly clear" that the images at issue in the second court-martial were "contained on the same iPhone XR." JA at 014, 439. The inclusion of the same geographic location and completely overlapping charged timeframes in both specifications further supported the conclusion that both specifications were for the same offense. JA at 014. Since Appellee was tried twice for the same offense—including the same elements and the same act or transaction—the prosecution in this case was plain and obvious error because it violated the prohibitions against double jeopardy. *Rice*, 80 M.J. at 40. The AFCCA's conclusion is sound and grounded in this Court's precedent and the definition found in part IV, paragraph 95.c.(4) of the *MCM*. This Court has no reason to upset that holding.

C. The Government's arguments that the second prosecution did not constitute double jeopardy are unpersuasive and invite this Court to consider issues beyond the scope of this case.

The Government's primary theory as to why there was no double jeopardy violation here requires a departure from the circumstances of this case. It contends that the individual files should be treated as the unit of prosecution, rather than the device. United States' Br. in Support of the Certified Issues (Gov. Br.) at 26–28. But this Court need not reach the question of whether a file could be the material that contains child pornography because the Government chose to make the iPhone

XR the unit of prosecution at the first court-martial. JA at 439 (listing the specification from the first court-martial, which includes the phrase "within and iPhone XR"). Furthermore, none of the specifications in either court-martial listed specific files, undermining the Government's later efforts to claim that the files could be the unit of prosecution. JA at 048, 439, 443. The specification language and the evidence further support the AFCCA's conclusion that the images at issue in this case "were additional evidence that [Appellee] committed the same offense" charged in the first case, "rather than a different offense." JA at 015.

The particular charging scheme utilized by the Government was key to the AFCCA's analysis. JA at 016 ("[W]here an accused is charged with possessing a device containing child pornography, possession of the device constitutes the offense."). In fact, the AFCCA clarified this point in a later case. *United States v. Coley*, No. ACM 40675, 2026 CCA LEXIS 69, at *17–18 (A.F. Ct. Crim. App. Feb. 12, 2026). In the *Coley* opinion, the AFCCA emphasized that "the Government had elected to charge the [appellee's] phone as the material containing the illicit images" at the first trial. *Id.* at *18. The Government's charging decision places the question of whether a file could be the material that contains child pornography beyond the scope of Appellee's case.

The Government attempts to counter the AFCCA's holding by advancing a flawed view of its own specification language. It claims that the AFCCA's

interpretation is not supported by "a logic [sic] reading of the possession specification" from the first court-martial. Gov. Br. at 32. According to the Government, the iPhone XR could not be the material containing the illicit image because the specification alleged that the child pornography—which is itself defined as material containing illicit images—was possessed within the iPhone XR. Gov. Br. at 32–33. The problem with the Government's argument is that it contradicts this Court's holding in *Forrester*. The specifications in *Forrester* used very similar language, alleging possession of child pornography on several electronic storage devices. 76 M.J. at 481–82. If the Government's reasoning were correct, the same logical fault would have arisen in *Forrester*. But it did not. Instead, this Court held that the electronic devices were the units of prosecution. *Id.* at 486. Reading the specification in accordance with that holding shows that the Government charged Appellee with possessing an illicit image within the iPhone XR, making that device the material that contains the image.

The Government also points to a number of federal and state cases interpreting other statutes to support its position. This raises the obvious problem that none of these cases are interpreting the *MCM* definition or this Court's holding in *Forrester*, as the AFCCA already pointed out when rejecting the Government's reliance on federal civilian cases. JA at 015–16. But the Government's errors run deeper than that. The civilian case law is not as settled as the Government asserts

in its brief. For instance, the Government cites a Fifth Circuit case that stated that computer files are material containing child pornography. Gov. Br. at 28 (quoting *United States v. Knowlton*, 993 F.3d. 354, 357 (5th Cir. 2021)). But in a more recent case, the same court wrote, "[18 U.S.C. § 2252A(a)(5)(B)] criminalizes possession of material containing child pornography. The phone was that 'material,' no matter whether it contained one image or twenty thousand." *United States v. Bopp*, 79 F.4th 567, 572 (5th Cir. 2023). At least one other circuit has followed this reasoning. *United States v. Thomas*, No. 24-1183, 2025 U.S. App. LEXIS 463, at *4–5 (7th Cir. Jan. 7, 2025) (finding two disks to be the material containing child pornography). There is no consensus among civilian courts that should be considered persuasive when applying the military-specific definition and precedent at issue here.

Taken in total, the Government's faulty arguments underscore a core problem with its approach to this Court's decision in *Forrester*. The Government wants to reap the benefit of multiple interpretations, allowing its charging schemes to always be interpreted in a manner that prejudices the accused. Under *Forrester*, the Government can convict an accused of multiple specifications for possessing multiple devices that contain the same illicit images. 76 M.J. at 486. But if the Government's arguments here were correct, then it could also convict an accused of multiple specifications at multiple courts-martial for possessing multiple images

on the same device, even though the Government used equivalent charging language to that in *Forrester*.

"[W]hat is good for the goose is good for the gander." *Diaz v. United States*, 602 U.S. 526, 551 (2024) (Gorsuch, J., dissenting). *Forrester*, like all legal authorities, must apply equally to all parties. Its holding is especially compelling here because the Government chose to draft a specification that made the device the unit of prosecution in the first court-martial. The AFCCA recognized this and reached the correct conclusion that the possession specification must be dismissed for violating the prohibitions against double jeopardy. JA at 017. This Court should affirm that holding.

II. The Air Force Court of Criminal Appeals erred by declining to set aside the finding of guilty as to the viewing specification because the same definition that applied to possession also applies to viewing.

A. Standard of review.

Double jeopardy is a question of law that this Court reviews de novo. *Driskill*, 84 M.J. at 252 (citing *Hutchins*, 78 M.J. at 444). This Court reviews forfeited issues for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)).

B. Appellee merely forfeited, but did not waive, the double jeopardy issue.

Contrary to the AFCCA's opinion, the record does not reflect waiver of the double jeopardy issue. "[W]aiver is the intentional relinquishment or abandonment of a known right." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *Glaude*, 67 M.J. at 313). When the issue is of a constitutional dimension, there is "a presumption against finding a waiver of constitutional rights." *United States v. Bench*, 82 M.J. 388, 392 (C.A.A.F. 2022) (quoting *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)). "A waiver of a constitutional right is effective if it '*clearly established* that there was an intentional relinquishment of a known right.'" *Jones*, 78 M.J. at 44 (emphasis added) (quoting *United States v. Sweeney*, 70 M.J. 296, 303–04 (C.A.A.F. 2011)).

Since the Fifth Amendment provides a constitutional prohibition against double jeopardy, waiving this right requires clearly establishing the intentional relinquishment of a known right. U.S. Const. amend. V; *Jones*, 78 M.J. at 44. The Government seems to largely disregard this dimension of the issue, focusing instead on the double jeopardy prohibition in Article 44(a), UCMJ, 10 U.S.C. § 844(a). Gov. Br. at 23–25, 43. While Article 44(a), UCMJ, provides an additional prohibition against double jeopardy, the constitutional right established in the Fifth Amendment dictates the standard for finding waiver. *Jones*, 78 M.J. at

44. The Government overlooks this when it does not focus on the constitutional right.

The record here falls well short of clearly establishing an intentional relinquishment of a known right. Trial defense counsel did not address this issue directly with the court. *See* JA at 113 (trial defense counsel does not address the issue after the military judge mentions double jeopardy concerns). But their statements suggest this was not a *known* right, at least to them. For example, the trial defense counsel's statement that the Government is allowed to have two different courts-martial for two different sets of pictures establishes that they did not appreciate the importance of the charging scheme and having all of the images come from the same device. JA at 357. Their explanations after the fact are unconvincing in light of such demonstrated misunderstanding. *Contrast* JA at 357 (expressing the view that the Government can charge Appellee twice for images contained in the same material), *with* JA at 457–62 (describing, after Appellee raised ineffective assistance of counsel, why trial defense counsel chose not to raise double jeopardy, even in light of *Forrester*). Despite being aware generally that the circumstances could raise double jeopardy concerns, trial defense counsel did not appreciate the impact of applicable legal authorities on the specific facts at issue. Appellee could not have intentionally relinquished a known right when his trial defense counsel did not even realize how the right affected his case.

The military judge's brief discussion of double jeopardy concerns does not clearly establish intentional relinquishment of a known right. Both the AFCCA and the Government point to this when arguing for waiver. JA at 012; Gov. Br. at 43. While both note that trial defense counsel did not raise double jeopardy after the military judge expressed concerns, neither recognized this as a forfeiture. JA at 012; Gov. Br. at 43. Failure to raise an objection merely forfeits that objection absent an affirmative waiver. R.C.M. 905(e)(1). Saying nothing about a matter is just failing to raise an objection—the very definition of forfeiture. The fact that this occurred after the military judge expressed concerns did not create an affirmative waiver. The exchange emphasized by the AFCCA and the Government shows only forfeiture, and neither it nor anything else in the record clearly establishes the voluntary relinquishment of a known right.

C. If this Court concludes that Appellee waived double jeopardy, the Air Force Court of Criminals Appeals erred by declining to pierce such a waiver.

Even if the record did clearly establish the waiver of this constitutional right, the AFCCA abused its discretion when it declined to pierce waiver as to viewing after doing so for possession. The decision to pierce waiver for possession was within the AFCCA's discretion. *Hardy*, 77 M.J. at 443. But having exercised that discretion, it should have done the same for the viewing specification because it is subject to the same *MCM* definition. *MCM* (2019 ed.), pt. IV, ¶ 95.c.(4); *see MCM*

(2019 ed.), pt. IV, ¶ 95.b.(1) (listing the elements of possessing and viewing offenses in the same subparagraph). The AFCCA's explanation for this difference was that *Forrester* only addresses possession, not viewing. JA at 017–18. While there was no viewing specification at issue in *Forrester*, this Court's opinion explained the impact of the child pornography definition in part IV, paragraph 95 of the *MCM*. 76 M.J. at 486. That definition should apply uniformly to all offenses within its scope. This is especially true when, as here, the charged possession and viewing offenses concern a single set of images contained on one device. By declining to recognize that the meaning of this definition is the same for all offenses to which it applies, the AFCCA abused its discretion because its decision was arbitrary, capricious, and unreasonable as a matter of law. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010) (citing *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994)).

D. The second prosecution for viewing violated the prohibitions against double jeopardy in the same manner as the prosecution for possession.

The same definition that this Court analyzed in *Forrester* applies to viewing just as it applies to possession. 76 M.J. at 486; *MCM* (2019 ed.), pt. IV, ¶ 95.c.(4). When an accused is charged with viewing child pornography, "'[c]hild pornography' means material that contains" an illicit visual image. *MCM* (2019 ed.), pt. IV, ¶ 95.c.(4). Indeed, the *MCM* uses the same list of elements for possessing and viewing, changing only the action itself. *MCM* (2019 ed.), pt. IV, ¶

95.b.(1). They also have the same maximum punishment and use the same sample specification. *MCM* (2019 ed.), pt. IV, ¶¶ 95.d.(1), 95.e. Other than the difference between the actions of possessing and viewing, there is no difference between these offenses in part IV, paragraph 95 of the *MCM*.

Just as these two offenses have no significant differences in the punitive articles part of the *MCM*, the charging schemes chosen by the Government are the same for both. As with possession, the Government charged Appellee with viewing child pornography "within an iPhone XR" at the first court-martial. JA at 443. Although the viewing specification in the second court-martial did not identify the device, it is again "abundantly clear" that the images at issue in the second court-martial were "contained on the same iPhone XR." JA at 014. This is because they are the same images as in the possession specification. JA at 048. The charged timeframe in the first viewing specification completely encompasses that in the second, and the geographic location is only different because the first specification alleges viewing illicit images "at an unknown location." *Compare* JA at 048, *with* JA at 443. As with possession, the Government made the iPhone XR the unit of prosecution for viewing, meaning the evidence in the second court-martial was evidence of the same offense, rather than a different one. JA at 015, 443. The viewing specification from the second court-martial violated the prohibitions against double jeopardy just like the possession specification did, and the AFCCA

should have set aside the finding and dismissed the specification as it did with possession. JA at 016–17.

Although it acknowledged that possession and viewing employ the same definition, the AFCCA declined to take the same action on the viewing specification that it took for the possession specification. JA at 017. It rested this different treatment largely on the fact that *Forrester* involved possession offenses but not viewing offenses. *Id.* But this Court was analyzing a definition in *Forrester*, not a specific offense, and the effects of that definition should apply equally to viewing. 76 M.J. at 486. The fact that the AFCCA was not aware of any decisions applying *Forrester* to viewing is not reason to avoid the simple conclusion that the same definition means the same thing in this context. *See* JA at 017. The AFCCA's other explanations also fell flat. For example, it described a potential absurdity that could mean an accused commits a new offense every time they look at their phone, regardless of what is on the screen. *Id.* But the AFCCA itself quickly noted that there may be a "valid distinction" between an act that constitutes an offense and an allowable unit of prosecution. *Id.* It was careful to note that it was not resolving the question of whether the reasoning in *Forrester* applies to viewing. JA at 017–18. Given the closeness of these two offenses and the fact that the same definition applies to both, the AFCCA should have

concluded that the same reasoning, and thus the same outcome, applies to the viewing specification.

It is important to note that the Government had other, viable options for including all the evidence in its possession in a single prosecution for these offenses. It could have prevented this issue at the outset by recognizing the evidence that had seemingly been in its possession all along. Once it discovered additional evidence of offenses with referred specifications, it was too late in the first court-martial to make a major change over Appellee's objection or introduce previously undisclosed evidence. JA at 350, 378; R.C.M. 603(d)(1). At that point, the Government could have withdrawn the specifications and referred new ones that accounted for this additional evidence, along with timely disclosing such evidence. R.C.M. 603(d)(1); *see United States v. Patterson*, 86 M.J. 24, 30 (C.A.A.F. 2025) (describing options for the Government to address problems with specifications). What the Government could not do is refer new specifications to a second court-martial based on additional evidence of the same offenses it already prosecuted, violating the prohibitions against double jeopardy. This is a problem of the Government's own making, and the solution it chose violates the constitutional prohibition against double jeopardy.

Appellee was convicted twice for viewing the same material—the iPhone XR. This was plain and obvious error because it violated the prohibitions of double

jeopardy, just as the second prosecution for possession did. This Court should hold that the AFCCA erred by not setting aside the finding as to viewing and dismissing that specification when it did so for possession.

III. If trial defense counsel waived double jeopardy, that was ineffective assistance of counsel because failing to vindicate Appellee's constitutional right falls well below the performance reasonably expected of fallible lawyers.

A. Additional facts.

Trial defense counsel declined to raise the prohibitions against double jeopardy in Appellee's defense at trial, despite knowing the details of the previous court-martial and being asked about double jeopardy by the military judge. JA at 113. Trial defense counsel later explained that they thought arguing for double jeopardy was "incongruent" with the arguments that kept evidence out of the first court-martial and was "dangerously close to misleading the [c]ourt." JA at 018–19. Additionally, they thought the court-martial would proceed on the viewing specification anyway because *Forrester* only related to possession offenses. *Id.* One trial defense counsel also expressed concern that the first court-martial might be "re-open[ed]" if they made a double-jeopardy argument. JA at 018 (alteration in original). This led trial defense counsel to assess that "it was riskier to file the motion than not." JA at 019.

B. Standard of review.

"Allegations of ineffective assistance of counsel are reviewed de novo." *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

C. Trial defense counsel failed to raise double jeopardy without a reasonable explanation for doing so.

Trial Defense Counsel should have moved to dismiss both specifications for violating the prohibitions against double jeopardy, and failing to do so constitutes ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, an appellant must demonstrate "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* at 288 (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)). This test comes from the seminal case *Strickland v. Washington*, which also notes an appellant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. 668, 689 (1984). This Court uses a three-part test to determine whether this presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?

> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Palik, 84 M.J. at 289 (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)).

Here, it is clear that trial defense counsel did not move to dismiss the specifications due to former jeopardy, despite the military judge expressing concern. JA at 113. There was no reasonable explanation for this decision. Contrary to trial defense counsel's explanation, it was unreasonable to think this would be an incongruent argument, and moving to dismiss for double jeopardy would not have misled the court. JA at 018–19.

The first and second courts-martial presented separate issues. In the prior case, the question was ultimately one of timing, and the Government was not allowed to present the additional images as evidence because it was after the deadline for disclosing evidence to the Defense. JA at 350. Having prevailed on that issue, the Defense should have opposed the Government's effort to respond by bringing a second court-martial in violation of the prohibitions against double jeopardy.

The Government's argument that the Defense's assertion of a major change later precluded a double jeopardy motion is unpersuasive. At the first court-martial, trial counsel attempted to change the possession specification to say "visual

depictions" instead of "visual depiction," and trial defense counsel objected to this as a major change. JA at 005, 053. It is unclear whether this was, in fact, a major change because the Government withdrew its request before the military judge ruled. JA at 056. But arguing that it was a major change is not the same as concluding that it would have added additional offenses. As the Government notes, "[a] 'major change' includes a change that adds 'an offense . . . *or a substantial matter* not fairly included in the preferred . . . specification.'" Gov. Br. at 53 (emphasis added) (quoting R.C.M. 603(b)(1)). It could have been a major change because it added substantial new allegations as part of the same offense, not a new offense. Objecting to a major change in one case and then later raising double jeopardy in a subsequent case are not inherently inconsistent, and they would not have been inconsistent here.

Trial defense counsel also would not have been judicially estopped from raising double jeopardy. The Government claims otherwise, despite one of the trial defense counsel specifically denying that they were judicially estopped. JA at 457; Gov. Br. at 52–57. "Judicial estoppel precludes a party from successfully asserting a position in a proceeding and then asserting an inconsistent position later." *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005) (Crawford, J., dissenting in part and concurring in the result). Neither objecting to a major change nor objecting to evidence as untimely is inconsistent with later asserting the

prohibitions against double jeopardy in a subsequent court-martial. Even the military judge thought these circumstances reasonably raised double jeopardy concerns, calling that "the obvious reason" for his questions on the matter. JA at 113. Asserting double jeopardy as a defense against this subsequent prosecution is not the sort of "litigatory shenanigans" from which judicial estoppel is meant to shield the courts. *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 915 (7th Cir. 2005). It would have been no obstacle to trial defense counsel had they raised double jeopardy.

A double jeopardy motion also had very little downside. If the Defense lost that motion, the trial would have proceeded just as it did without the motion. And if it won, the Charge and its Specifications would have been dismissed. Trial defense counsel's concern that the first court-martial might be re-opened is unfounded. JA at 018. Even if it wanted to, the Government cannot re-open a court-martial in which it already secured convictions on the specifications in question. And even if it could, Appellee would at least have been subject to only a single, unitary sentence,[1] rather than separate sentences adjudged by consecutive courts-martial. "[T]here was tremendous upside and virtually no downside" for the Defense to file a double jeopardy motion, so deciding not to file one was an

[1] At both trials, Appellee was sentenced by members, and sentencing by members results in a single sentence for all offenses of which the accused was found guilty. JA at 044, 439; R.C.M. 1002(d)(1).

unreasonable choice. *Palik*, 84 M.J. at 291.

D. Trial defense counsel's deficient performance prejudiced Appellee because there is a reasonable likelihood that a double jeopardy motion would have led to dismissal of all specifications.

Trial defense counsel's level of advocacy fell measurably below the performance expected of fallible lawyers. *See id.* at 289. Basic research would have told trial defense counsel that a double jeopardy motion had a strong prospect of success for both specifications. Both trial defense counsel and the AFCCA point to the fact that *Forrester* only addressed possession as a reason to not challenge the viewing specification. JA at 018–20. This reasoning is flawed for two reasons. First, this reasoning would have only stopped them from challenging the viewing specification, but trial defense counsel did not challenge either the possession or the viewing specification under double jeopardy. JA at 018. Second, it should have been apparent to trial defense counsel that the reasoning in *Forrester* should also apply to viewing offenses. A plain reading of part IV, paragraph 95 of the *MCM* shows that the same definition that drove the outcome in *Forrester* also applies to viewing. *Forrester*, 76 M.J. at 481; *MCM* (2019 ed.), pt. IV, ¶ 95.c.(4); *see MCM* (2019 ed.), pt. IV, ¶ 95.b.(1) (listing the elements of possessing and viewing offenses in the same subparagraph). Basic legal reasoning would lead counsel to the conclusion that the effect of this definition should also be the same.

The idea that trial defense counsel's deficient advocacy can be excused

because a key case was not an identical match for this situation sets an intolerably low bar for effective assistance of counsel. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Trial defense counsel engaged in such unreasonable performance by failing to engage in the basic research and simple analysis that should have led them to file a double jeopardy motion. Despite their later assertions, trial defense counsel's statements at the time of trial evince a lack of understanding of the controlling legal principles around this double jeopardy issue. JA at 357 (trial defense counsel asserting that the Government is allowed to have two different courts-martial for two sets of illicit images found within the same device).

There is a strong possibility that, absent trial defense counsel's substandard performance, the Charge and its Specifications would have been dismissed, a strikingly different result. *See Palik*, 84 M.J. at 289. The AFCCA already found that it was plain error to not dismiss the possession specification for double jeopardy. JA at 016. It did not opine as to whether it was likewise error to not dismiss the viewing specification. JA at 017–18. But the fact that the same definition applies to both offenses creates at least a "reasonable probability" that the viewing specification would have been dismissed as well. *Palik*, 84 M.J. at

289; *MCM* (2019 ed.), pt. IV, ¶ 95.c.(4). The failure to raise double jeopardy therefore prejudiced Appellee.

Trial defense counsel failed to raise a powerful motion—double jeopardy—that would have likely led to the dismissal of all specifications. This constitutes ineffective assistance of counsel. Consequently, this Court should set aside the findings and the sentence.

CONCLUSION

Appellee requests that this Court answer the first granted issue in the negative and the second and third granted issues in the affirmative. This Court should affirm the AFCCA's decision to set aside the findings as to possession and dismiss that specification. But it should reverse the rest of the AFCCA's decision and set aside the remaining findings and sentence and dismiss the remaining specification.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(b) because it contains 7,047 words. This brief complies with the typeface and style requirements of Rule 37.

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I certify that a copy of the foregoing was delivered via electronic mail to the Court and electronically served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on March 25, 2026.

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