IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 202300290
Steven G. FLORES, Missile Technician Petty Officer First Class (E-6) U.S. Navy Appellant	)	USCA Dkt. No. 26-0005/NA

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO LAW ENFORCEMENT AFTER HE HAD INVOKED HIS RIGHT TO COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT AND [MIL. R. EVID.] 305(c)(3).

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), because Appellant's sentence included a bad-conduct discharge and confinement for two or more years. 10 U.S.C. § 866(b)(3) (2022). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of two specifications of rape of a child who had not attained the age of twelve years, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The Members sentenced Appellant to confinement for life with the possibility of parole and a dishonorable discharge, which further resulted in automatic forfeiture of all pay and allowances and reduction to pay grade E-1. The Convening Authority took no action on the Findings and approved the Sentence as adjudged, which the Military Judge entered into the Record.

The lower court affirmed the Findings and Sentence. *United States v. Flores*, 85 M.J. 611 (N-M. Ct. Crim. App. 2025).

Statement of Facts

A. Appellant was caught naked in bed on top of his nine-year-old daughter, who was also naked from the waist down.

On July 19, 2022, the Victim's mother, Ms. Flores, walked into the master bedroom to find her husband, Appellant, naked in bed on top of their nine-year-old daughter. (J.A. 415–16, 513–16.) Ms. Flores got the Victim dressed and took her to the local hospital for medical examination and treatment, and the hospital notified law enforcement of the situation. (J.A. 416.)

B. Civilian law enforcement arrested and booked Appellant in jail for felony rape and incest under the Georgia penal code, but the military assumed jurisdiction before the state commenced adversarial proceedings.

Military authorities apprehended Appellant on July 19, 2022, and then turned him over to the St. Mary's Police Department where he was questioned by questioned by Detective Crews.[1] (J.A. 34–35.) Civilian law enforcement arrested Appellant for felony rape and incest under the Georgia penal code and booked Appellant at the Camden County Detention Center that evening. (J.A. 35–36.)

On July 21, 2022, Appellant appeared at his bond hearing, where the magistrate explained the right to a preliminary hearing and the right to have

[1] The transcript misspells Detective Crews as Detective Cruz. (J.A. 35.)

counsel present at the preliminary hearing. (J.A. 73.) Appellant affirmatively waived his right to counsel for the preliminary hearing. (J.A. 73, 210.) The magistrate judge denied bond, finding Appellant posed "a significant threat or danger," and Appellant was returned to the detention center pending indictment. (J.A. 74, 196–97.)

Despite Appellant's waiver, defense attorney Mr. Gough filed a motion on August 5, 2022, for a preliminary hearing on Appellant's behalf. (J.A. 74, 223–24.) The magistrate ordered the preliminary hearing to be held on August 24, 2022. (J.A. 74, 228.) The preliminary hearing was never held because the District Attorney's Office agreed to release Appellant to the Navy and the military assumed jurisdiction on August 23, 2022, "to proceed with prosecution of [Appellant] *prior* to any state prosecution." (J.A. 74, 99–100 (emphasis added).)

C. Special Agents assumed custody of Appellant, and Appellant initiated conversation with the Agents during the car ride.

The morning of August 23, 2022, Naval Criminal Investigative Service (NCIS) Special Agents Coop and Wright picked up Appellant from the detention center and transported him to the NCIS Kings Bay Field Office. (J.A. 37.) During the car ride, Appellant—without prompting—made repeated comments to the Special Agents about his time at the detention facility. (J.A. 37, 253–54.) The Agents gave Appellant terse responses and did not ask him about the investigation. (J.A. 254.)

At the field office, Appellant continued to initiate conversation with the Agents. (J.A. 102–08, 434–35.) Appellant asked Special Agent Coop, "So what's next?" (J.A. 108, 434.) Special Agent Coop explained they would complete paperwork and Appellant would be taken to the hospital to get checked out. (J.A. 108.) Appellant responded with "Okay," then immediately initiated further conversation about working out. (J.A. 108–17.)

D. Appellant waived his right to counsel then admitted to being naked in bed with the Victim.

1. Appellant waived his rights under Article 31(b).

After conversation on multiple topics unrelated to the investigation, Special Agent Coop asked if Appellant would be willing to tell them his side of the story, to which Appellant replied, "Well sure." (J.A. 131.) Special Agent Coop told Appellant that "It's up to you," and then read Appellant his Article 31(b) rights and provided him with NCIS Form 5580/19, "Military Rights Cleansing Waiver." (J.A. 132, 190.) Special Agent Coop stated "This is the most important thing. I want you to be completely informed about talking to us." (J.A. 132.) He then double-checked that Appellant fully understood these rights. (J.A. 133.)

Appellant read the form and said he understood his rights. (J.A. 133.) Appellant read the waiver portion out loud, and Special Agent Coop asked Appellant if he had read his rights. (J.A. 133.) Appellant affirmed he had read them, asked no questions, and expressed no need for clarification. (J.A. 133, 421.)

2. Appellant admitted to being naked in bed with the Victim before invoking his right to counsel.

During the NCIS interview, Appellant admitted that on July 19, 2022, he was naked in bed with his daughter when his wife unlocked the door and walked into the room. (J.A. 174–75.) After further discussion, Appellant invoked his right to counsel, and the Special Agents stopped the interview. (J.A. 183.)

3. The United States preferred charges against Appellant under Article 120b for rape of a child who had not attained the age of twelve years.

On September 28, 2022, the United States preferred charges against Appellant for four specifications of violating Article 120b for rape of a child who had not attained the age of twelve years, and withdrew one specification before trial. (J.A. 30–32.) Specification 1 accused Appellant of penetrating the Victim's vulva with his penis on or about July 19, 2022, and Specification 2 accused Appellant of the same conduct on divers occasions between April 20, 2021, and July 9, 2022. (J.A. 30.) Specification 3 accused Appellant of penetrating the Victim's vulva with his finger with intent to gratify his sexual desire. (J.A. 32.)

E. Appellant moved to suppress his statements to law enforcement, alleging they violated the Fifth and Sixth Amendments because he invoked his right to counsel and did not reinitiate discussion with the Special Agents.

Appellant filed a Motion to suppress his statements to law enforcement from both July 19, 2022, and August 23, 2022, alleging both Georgia law enforcement

and NCIS Agents violated his Fifth and Sixth Amendment rights. (J.A. 57–69.) Appellant argued that the July 19, 2022, statements to Detective Crews from the St. Mary's Police Department were inadmissible because he unambiguously invoked his Fifth Amendment right to counsel and the interview did not immediately end. (J.A. 66–67.) Appellant also argued that the August 23, 2022, statements to the Special Agents were inadmissible because he was already represented by counsel, he did not reinitiate discussion with the Agents, and counsel was not notified of the interview. (J.A. 67.) Thus, he alleged his waiver of the Fifth and Sixth Amendment right to counsel was invalid. (J.A. 67.)

The Government responded, arguing: (1) Appellant's invocation of his Fifth Amendment right to counsel with Detective Crews was ambiguous; (2) Appellant reinitiated conversation with the Special Agents; (3) the formation of an attorney-client relationship does not trigger the Sixth Amendment right to counsel; (4) Mil. R. Evid. 305(e) imposes no duty to notify Mr. Gough of the NCIS interview; (5) no adversarial proceeding had commenced in Georgia; and, (6) even if Georgia had initiated adversarial proceedings, the dual sovereignty doctrine applies, and the Sixth Amendment right had not attached for the military prosecution. (J.A. 70–86.)

The Government filed a Bench Brief on the dual sovereignty doctrine's application to the Sixth Amendment right to counsel, arguing it informs the

meaning of the word "offense" under the Sixth Amendment—such that even if the Sixth Amendment right had attached in Georgia state proceedings, the right had not attached in the military proceedings. (J.A. 87–92.)

F. The Military Judge ruled that the interview with Detective Crews violated Appellant's Fifth Amendment right to counsel, but the NCIS interview did not violate Appellant's Fifth or Sixth Amendment rights and was therefore admissible.

The Military Judge ruled that the July 19, 2022, statements to Detective Crews were inadmissible because though Appellant was read his *Miranda* rights, Detective Crews did not immediately terminate the interview after Appellant stated he "would like to talk to a lawyer." (J.A. 425.) The Military Judge concluded this violated Appellant's Fifth Amendment right to counsel. (J.A. 427.)

In contrast, the Military Judge ruled that the August 23, 2022, statements to the NCIS Special Agents were admissible under the Fifth and Sixth Amendments. (J.A. 438.) She concluded that Appellant voluntarily waived his Fifth Amendment right to counsel because a preponderance of the evidence demonstrated that Appellant initiated the conversation, not the Agents. (J.A. 434.) She further determined that his specific questions to the Agents demonstrated a willingness to engage in a discussion about the investigation. (J.A. 434–35.)

The Military Judge also found the waiver knowing and intelligent, given that the Agents ensured Appellant understood his rights and that Appellant "did not ask

any questions, express a need for clarification, or otherwise indicate lack of comprehension." (J.A. 421.)

The Military Judge further found the August 23, 2022, statements were admissible under the Sixth Amendment and Mil R. Evid. 305(c)(3). (J.A. 439.) She ruled that adversarial proceedings had not commenced in the state prosecution, but even if they had, the dual sovereignty doctrine applies and "invoking the right in a state or federal proceeding does not limit or otherwise color any prosecution under an identical charge subsequently initiated by a separate sovereign." (J.A. 432, 439.)

G. At trial, the United States presented evidence from multiple witnesses that Appellant was naked in bed with his nine-year-old daughter and medical evidence to corroborate the reported assault.

1. Ms. Flores testified she found Appellant naked in bed with their nine-year-old daughter, who was naked from the waist down.

Ms. Flores testified that on July 19, 2022, she unlocked the master bedroom door and walked in to find Appellant, her then-husband, naked in bed on top of their nine-year-old daughter. (J.A. 513–16.) She unlocked the master bedroom door using a clipboard as she would often do and found Appellant rolling off the top of the Victim, who was also naked from the waist down. (J.A. 513, 516.)

Ms. Flores immediately got the Victim out of the room, and the Victim told Ms. Flores that "daddy put his pee pee in me." (J.A. 517.) Ms. Flores then drove the Victim to the hospital, where she was transferred to a child advocacy center

and underwent a forensic examination and an interview with a Sexual Assault Nurse Examiner (SANE). (J.A. 519–534.)

2. The Victim testified that Appellant raped her.

The Victim's testimony corroborated Ms. Flores's testimony. The Victim explained that when she first came into the master bedroom the door was unlocked, but Appellant locked it afterwards. (J.A. 464–65.) When Appellant heard Ms. Flores trying to unlock the door, and just before Ms. Flores came in the room, he told her to "get [her] underwear and pants on." (J.A. 468.)

The Victim further testified that Appellant did "nasty stuff" and "sex" to her. (J.A. 465.) Appellant put "his front part" or his "dick" inside "[her] front part" or "vagina." (J.A. 469–70, 484.) She described it as "painful" and "smell[ing] disgusting" and that it made her vagina feel "slimy" and "wet." (J.A. 465, 467, 485.) Appellant also used his finger to rub her vagina. (J.A. 469–70, 484.) The Victim further testified that Appellant had done "nasty stuff" to her multiple times before and described these instances in detail. (J.A. 470–73, 477–78, 481.)

3. The Sexual Assault Nurse Examiner testified to the Victim's rape report, and that she found abnormal injuries to the Victim's vagina.

During the sexual assault examination, the SANE asked the Victim about what happened earlier that day and any prior experiences. (J.A. 3, 522.) When the SANE asked the Victim if anyone put his penis in her vagina, she said her father

had. (J.A. 522, 524.) The Victim, "without prompting," also told the SANE that "he put his finger inside my vagina." (J.A. 3, 524.)

The SANE noted during the physical examination that the Victim had an "abraded" labia majora, "a lot of redness" of the labia minora, "discolored purple bruising to t[he] area of the clitoral hood," "bruis[ed]" and "swollen" "periurethral tissue," "abnormalit[ies] in the "hymen tissue," an "extremely painful" "red laceration of the perianal," and an "abraded" rectal area. (J.A. 537–43.)

4. The DNA expert testified male seminal DNA, that could not exclude Appellant, was found in the Victim's vaginal vestibule.

The SANE collected DNA swabs from the Victim and testing found the Victim's vaginal vestibule swab positive for Y-STR—male—DNA. (J.A. 544.) The DNA Expert testified that the DNA profile from the Victim's vaginal vestibule could not exclude Appellant, most likely came from seminal fluid, and would be present in only one out of every 6,172 randomly selected samples of males in the United States. (J.A. 550–51.)

She explained that this number was "one of the largest numbers or random match probabilities" she or her colleagues had ever seen, with the larger the number being the greater the probability it came from Appellant. (J.A. 551–52.) The DNA Expert further stated she could rule out, with confidence, the Victim's brother as the contributor to the profile. (J.A. 551–52.)

H. Appellant was convicted of two specifications of rape of a child.

The Members convicted Appellant of two specifications of violations of Article 120b, for rape of a child who had not attained the age of twelve years: one for penile penetration and the other for digital penetration. (J.A. 641–42.) They sentenced him to life with the possibility of parole and a dishonorable discharge. (J.A. 644.)

I. The lower court held the Military Judge did not err in applying the dual sovereignty doctrine and finding Appellant's Sixth Amendment right to counsel was not violated.

On review, the lower court first found the Military Judge did not err concluding that Appellant voluntarily reinitiated communication with the Special Agents. (J.A. 18.) The court then explained that under Mil. R. Evid. 305(e)(3)(B), "Appellant's Sixth Amendment claim is disposed of by our decision that the military judge did not err in concluding that Appellant voluntarily reinitiated communication with [the Special Agents" because the reinitiation "made his statement admissible even if he was represented, and the right to counsel had attached under the Sixth Amendment."[2] (J.A. 18–19.) However, because the Military Judge did not decide Appellant's Sixth Amendment claim under Mil. R.

[2] This Court declined to grant review of the reinitiation issue. *United States v. Flores*, No. 26-0005/NA, 2026 CAAF LEXIS 48 (C.A.A.F. Jan. 15, 2026) (Order Granting Review).

Evid. 305(e)(3)(B), they also considered her rationale in admitting Appellant's interview.[3] (J.A. 19.)

The lower court explained that while they were "skeptical" of the Military Judge's holding that the Sixth Amendment right to counsel had not attached "based on Mr. G[ough] having been retained and having filed a motion for a preliminary hearing with the Georgia State Court[,]" they agreed with her that the dual sovereignty doctrine permitted the introduction of Appellant's interview. (J.A. 19–20.) The court found "the reasoning of the majority of federal circuits' application of the dual sovereignty doctrine convincing" and confirmed that "[t]he Supreme Court's jurisprudence is clear that the Sixth Amendment right to counsel is *offense* specific, not *investigation* specific." (J.A. 20 (emphasis in original).)

The lower court stated, "We must take the Supreme Court at its word when it pronounces that there is 'no constitutional difference between the meaning of the term offense in the contexts of double jeopardy and of the right to counsel.'" (J.A. 20 (internal citations and quotation marks omitted).) The court held, "As a result, [Appellant's] interrogation without the presence of his counsel was not a violation

[3] Mil. R. Evid. 305(e)(3)(B) provides that "If an accused or suspect interrogated after preferral of charges as described in subdivision (c)(3) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver."

given the fact that he was prosecuted by a separate sovereign and validly waived his right to counsel[.]" (J.A. 21.)

Summary of Argument

The Military Judge did not abuse her discretion in holding that Appellant's statements to NCIS were admissible because his right to counsel under the Sixth Amendment and Mil. R. Evid. 305(c)(3) had not attached in the military prosecution. The Military Judge correctly determined that regardless of whether the right attached in the Georgia state prosecution, the dual sovereignty doctrine applies the same to the Sixth Amendment right to counsel as it does to the Fifth Amendment right to counsel, such that identical underlying conduct is not the same offense when prosecuted by separate sovereigns. The Military Judge thus correctly found Appellant's Sixth Amendment rights were not violated, given that Mil. R. Evid. 305(c)(3) provides that the Sixth Amendment right to counsel attaches at the preferral of charges, and charges were not preferred against Appellant by the military until over a month after the interview.

Argument

THE JUDGE CORRECTLY DENIED APPELLANT'S SUPPRESSION MOTION. APPELLANT'S SIXTH AMENDMENT AND MIL. R. EVID. 305(c)(3) RIGHTS TO COUNSEL WERE NOT VIOLATED: IDENTICAL CONDUCT IS NOT THE SAME OFFENSE IF PROSECUTED BY SEPARATE SOVEREIGNS, NO MILITARY CHARGES HAD BEEN PREFERRED, AND GEORGIA HAD NOT INITATED ADVERSARIAL PROCEEDINGS. REGARDLESS, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. The standard of review is abuse of discretion.

Appellate courts review a military judge's denial of a motion to suppress evidence for an abuse of discretion. *United States v. Hernandez*, 81 M.J. 432, 437 (C.A.A.F. 2021). "An abuse of discretion occurs when a military judge's decision is based on clearly erroneous findings of fact or incorrect conclusions of law." *Id.*

This "standard is a strict one, calling for more than a mere difference of opinion." *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014). "The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019).

In reviewing the rulings of a trial judge, appellate courts consider evidence "in the light most favorable to the party that prevailed on the motion." *United States v. Blackburn*, 80 M.J. 205, 211 (C.A.A.F. 2020).

B. The Sixth Amendment right to counsel, codified in Mil. R. Evid. 305(c)(3), attaches after preferral of charges.

"The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (internal citation omitted). This right to counsel does not attach until a prosecution is commenced, "that is, at or after the initiation of adversary judicial criminal proceedings." *Id*.

"In the military, the Sixth-Amendment right to counsel does not attach until preferral of charges." *United States v. Harvey*, 37 M.J. 140, 141 (C.A.A.F. 1993); *accord United States v. Gouveia*, 467 U.S. 180, 187–88 (1984) ("It has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."). Service members have no rights beyond the "panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM." *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013).

Within the Manual for Courts-Martial, the Sixth Amendment right to counsel is codified in Mil. R. Evid. 305(c)(3), which provides:

> If an accused against whom charges have been preferred is interrogated on matters concerning the preferred charges by anyone acting in a law enforcement capacity . . . any statement made in the interrogation . . . is inadmissible unless counsel was present for the interrogation.

C. The right is offense-specific and cannot be invoked once for all future prosecutions.

The Sixth Amendment right to counsel "is offense specific," and as such, it "cannot be invoked once for all future prosecutions." *McNeil*, 501 U.S. at 175. "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id*. Indeed, the Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *Id.* at 182, n.3.

D. The dual sovereignty doctrine in the double jeopardy context recognizes that an accused may be prosecuted twice for identical underlying conduct because the same conduct is not the same "offense" when defined by separate sovereigns.

The Fifth Amendment's Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const., amend V. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Accordingly, the Supreme Court has "long held" that because an "'offence' is defined by a law, and each law is defined by a sovereign[,]" "where there are two sovereigns, there are two laws, and two 'offences.'" *Gamble v. United States*, 587 U.S. 678, 681, 683 (2019).

Known as dual sovereignty, this doctrine recognizes that an accused may be prosecuted twice for identical underlying conduct without violating the Fifth Amendment because the conduct is not the "same offense" when defined by separate sovereigns. *Denezpi v. United States*, 596 U.S. 591, 597–98 (2022) ("Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign . . . even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign.") (internal citations omitted)).

In *Gamble*, the Supreme Court noted that the dual sovereignty doctrine is justified by historical understandings of the Fifth Amendment's Double Jeopardy Clause. 587 U.S. at 708–10. The Court explained that "offence" does not merely stand "for the same conduct or actions," but rather a discrete transgression of one sovereign's laws. *Id*. at 683. The Court emphasized that "fidelity to the Double Jeopardy Clause's text does more than honor the formal difference between two distinct criminal codes. It honors the substantive differences between the interests that two sovereigns can have in punishing the same act." *Id.* at 685.

E. The Supreme Court has held that "no constitutional difference" exists for what an "offense" is between double jeopardy and the right to counsel.

In *Texas v. Cobb*, 532 U.S. 162 (2001), the respondent was charged, indicted, and represented by counsel for a burglary offense and then later brought in for questioning about a murder that occurred during the burglary. *Id.* at 165. The respondent was advised of his rights and subsequently confessed to murder. *Id.* The respondent argued that the questioning related to the murder violated his right to counsel, which had attached for the burglary offense. *Id*. at 166–67.

The Court noted that the Sixth Amendment right to counsel was offense specific. *Id*. at 164. The Court recognized that it has previously applied the *Blockburger* analysis "to delineate the scope of the Fifth Amendment's Double Jeopardy Clause" as to when acts constitute the "same offence." *Id*. at 173. The Court then found that there is "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Cobb*, 532 U.S. at 173. Accordingly, because burglary and murder were separate offenses under the *Blockburger* test, the respondent's right to counsel did not attach. *Id*. at 174.

F. Most federal circuits interpret *Cobb* to mean that dual sovereignty extends beyond double jeopardy to the Sixth Amendment right to counsel context.

The First, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuit Courts of Appeals hold that the Supreme Court in *Cobb* "'incorporated all of its double jeopardy jurisprudence (including the dual sovereignty doctrine)' into its Sixth Amendment right-to-counsel jurisprudence." *Turner v. United States*, 885 F.3d 949, 954 (6th Cir. 2018) (en banc) (quoting *United States v. Coker*, 433 F.3d 39, 43 (1st Cir. 2005)).[4] This majority view holds that when a criminal defendant's conduct violates both state and federal law, the defendant commits two separate offenses under the dual sovereignty doctrine, regardless of whether the offenses are

[4] *See United States v. Warrington*, 78 F.4th 1158, 1165 (10th Cir. 2023) ("In light of *Cobb,* we agree with the majority of circuits that" "dual sovereignty doctrine has equal application in the right to counsel context"); *Turner*, 885 F.3d at 954–55 ("we join majority view" that dual sovereignty extends beyond double jeopardy to the "Sixth Amendment right-to-counsel context"); *United States v. Burgest*, 519 F.3d 1307, 1311 (11th Cir. 2008) ("We hold that where conduct violates laws of separate sovereigns, the offenses are distinct for purposes of the Sixth Amendment right to counsel."); *United States v. Alvarado*, 440 F.3d 191, 196, 198 (4th Cir. 2006) (applying *Cobb* to hold "we join those circuits that have employed the dual sovereignty doctrine in the Sixth Amendment context."); *Coker*, 433 F.3d at 44-45 (rejecting minority view, applying *Cobb* and holding absent "one sovereign controlling the prosecution of another . . . to circumvent the . . . Sixth Amendment," "we conclude that . . . dual sovereignty . . . applies for the purposes of what constitutes the same offense in the Sixth Amendment right to counsel context"); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002) ("the Supreme Court [in *Cobb*] has incorporated double jeopardy analysis, including the dual sovereignty doctrine, into its Sixth Amendment jurisprudence.").

identical under the *Blockburger* test.[5] These courts thus hold that invocation of the right to counsel with one sovereign has no effect on the right to counsel in the other sovereign.[6]

G. The minority view of the Second and Eighth Circuits reads *Cobb* to incorporate only the *Blockburger* analysis, but not dual sovereignty, into the Sixth Amendment right to counsel context.

Two circuits have read *Cobb* to incorporate only *Blockburger*, and not dual sovereignty, into the Sixth Amendment right to counsel context. *United States v. Mills*, 412 F.3d 325 (2d Cir. 2005); *United States v. Red Bird*, 287 F.3d 709 (8th Cir. 2002).

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[5] *Turner,* 885 F.3d at 954; *Coker,* 433 F.3d at 43–35; *United States v. Holness,* 706 F.3d 579, 590–91 (4th Cir. 2013); *Burgest,* 519 F.3d at 1310; *Avants,* 278 F.3d at 519.

[6] *Warrington*, 78 F.4th at 1164–65 (defendant's Sixth Amendment right to counsel not violated where represented by counsel in state proceedings and federal agents interviewed him during transport); *Turner*, 885 F.3d at 955 (Sixth Amendment right had not attached in federal proceedings despite indictment in state prosecution for same conduct); *Burgest,* 519 F.3d at 1311 (denying motion to suppress, holding "prior invocation of his right to counsel for the state drug charge did not attach to the uncharged federal drug offenses"); *Alvarado*, 440 F.3d at 195–96 (rejecting argument that formal proceedings on state charges caused Sixth Amendment to attach to federal charges, even if they were same conduct); *Coker,* 433 F.3d at 45 ("Therefore, because [appellant] was properly subject to a later federal prosecution, it follows from the Court's statement [in *Cobb*] that the Sixth Amendment did not prevent discussion of the uncharged federal offense."); *Avants*, 278 F.3d at 512 ("We hold that the federal and state murder prosecutions in this case, although identical in their respective elements, are separate offenses for purposes of the Sixth Amendment because they were violations of the laws of two separate sovereign . . . .").

In *Mills*, the Second Circuit held that "[n]owhere in *Cobb,* either explicitly or by imputation, is there support for a dual sovereignty exception to its holding that when the Sixth Amendment right to counsel attaches, it extends to offenses not yet charged that would be considered the same offense under *Blockburger*." 412 F.3d at 330. The Second Circuit affirmed the suppression of statements in a federal prosecution, previously made to local police in violation of the right to counsel, where the underlying conduct was identical under *Blockburger*. *Id*. at 328, 331. The *Mills* court held that *Cobb* was intended to prevent "one sovereign . . . question[ing] a defendant whose right to counsel had attached, . . . in the absence of counsel and then . . . shar[ing] the information with the other sovereign." *Id.* at 330.

In *Red Bird*, the Eighth Circuit similarly found that a tribal rape charge had identical elements to later federal charges and was thus the same offense under *Blockburger*, and held that "pursuant to the test set forth in *Texas v. Cobb*, the federal and tribal complaints charge the same offense for Sixth Amendment purposes." *Red Bird,* 287 F.3d at 715. The Eighth Circuit rejected the United States' argument that dual sovereignty made the tribal and federal criminal complaints different offenses under different sovereigns, holding it was not "appropriate to fully rely on double jeopardy analysis," and instead applied *Blockburger* to find them the same offense. *Red Bird,* 287 F.3d at 714–15.

H. Applying the dual sovereignty doctrine, the United States did not violate Appellant's Sixth Amendment right to counsel. Appellant's conduct constituted separate offenses because the military and the state of Georgia are separate sovereigns.

1. This Court should follow the majority of federal circuits and hold that dual sovereignty applies to the Sixth Amendment right to counsel.

In *Cobb*, the Court recognized that the Sixth Amendment right to counsel is "offense specific" *Id; see also supra* Section I.E. The Court then noted that there is "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Id*. And in *Gamble*, the Court recognized in the Fifth Amendment Double Jeopardy Clause context, that two offenses are not the "same offence" if "prosecuted by different sovereigns." 587 U.S. at 683–85.

Accordingly, because there is "no constitutional difference" in the meaning of "offense," two offenses are not the same offense when prosecuted by different sovereigns in the right to counsel context. Otherwise, as the First Circuit explained: "If the Court intended to incorporate only the *Blockburger* test into Sixth Amendment jurisprudence, then its statement in *Cobb* would make no sense, as there would be a difference in the meaning of the term 'offense' in the contexts of double jeopardy and the right to counsel." *Coker*, 433 F.3d at 44.

Thus, Appellant's conduct constituted two offenses as they were prosecuted by Georgia and the military, two different sovereigns. The Military Judge did not

abuse her discretion in finding Appellant's Sixth Amendment right to counsel had not attached and was not violated.[9]

2. This court should decline to follow the Second and Eighth Circuits. *Red Bird* and *Mills* ignore that the Court in *Cobb* found no constitutional difference in the meaning of "offense" in Double Jeopardy and Sixth Amendment contexts.

Nothing supports that the Supreme Court intended that offenses could be different for Double Jeopardy purposes—but the same for Sixth Amendment purposes. As demonstrated above, while dual sovereignty was not explicitly imported into the Sixth Amendment context, the Court's precedent interpreting what "offenses" are under the Constitution compels that dual sovereignty likewise should apply in the Sixth Amendment context.

Further, in *Mills*, the court failed to reconcile its position with the Supreme Court's declaration in *Cobb* that there is "no constitutional difference" in the meaning of "offense" between the right to counsel and double jeopardy clause. *See Mills*, 412 F.3d at 330. Moreover, unlike *Mills*, Appellant's military prosecution did not use statements from another sovereign that were taken in

[9] While courts-martial do not fall under their geographic federal judicial circuits for precedential purposes, Mil. R. Evid. 305(f)(1) specifically directs the court to look to "the principles of law generally recognized" in United States district court criminal trials. Notably, if Appellant were to file for collateral relief in the nature of habeas corpus, he would have to file in the federal district court with jurisdiction over his place of confinement. *See* 28 U.S.C. § 2241. Here, Appellant is confined in Leavenworth, Kansas—the Tenth Circuit—which applies dual sovereignty to Appellant's Sixth Amendment right to counsel under *Warrington*.

violation of his constitutional rights. *See also United States v. Worjloh*, 546 F.3d 104, 109 (2d Cir. 2008) (*Mills*' holding limited to prosecutors seeking to admit evidence obtained by state, local prosecutors in violation of Sixth Amendment). In fact, the Military Judge suppressed the interview with Detective Crews that she found violated Appellant's Fifth Amendment right to counsel. (J.A. 427.) Because *Mills* fails to reconcile its position with Cobb's pronouncement and is based on a different factual posture, this Court should decline to adopt its minority view.

And in *Red Bird*, the court declined to apply the dual sovereignty doctrine based partly on the dual nature of the investigation and the fact that "tribal sovereignty [is] 'unique and limited' in character." *Id.* at 715. But unlike *Red Bird*, here there were no law enforcement officials from another sovereign that had already initiated proceedings against Appellant present at the NCIS interview. *See* 287 F.3d at 715. Thus, because *Red Bird* adopts its position in part because of the "unique and limited" nature of tribal sovereignty, this Court should decline to extend its minority view to this case.

3. Even a joint investigation and subsequent cooperation does not prevent dual sovereignty application.

Dual sovereignty still applies even in joint investigations. *See Heath v. Ala*, 474 U.S. 82 (1985). In *Heath*, the Supreme Court found that under the dual sovereignty doctrine, the Fifth Amendment did not prohibit two convictions in two

different states for the same murder—despite the convictions resulting from an "initial joint investigation" and subsequent cooperation in the prosecution of the case. 474 U.S. at 93, 102; *see also United States v. Hughes*, 799 F. App'x 794, 795–96 (11th Cir. 2020) (same; successive prosecutions for same underlying conduct by Georgia and federal government); *United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984) (joint investigation does not preclude dual sovereignty doctrine absent one sovereign working as "tool" or "sham" of other).

Regardless, the Record is devoid of evidence that the state of Georgia was actively involved in the military's investigation once physical custody and prosecutorial authority was turned over to the military on August 22, 2022. (*See* J.A. 251.) The NCIS Agents conducted their own interview with Appellant, without any other law enforcement present, over a month after Appellant's initial interview with the St. Mary's Police Department. (*See* J.A. 102–190.) Thus, the initial joint investigation ceased before Appellant's interview. (*See* J.A. 251–52.) The Military Judge therefore did not abuse her discretion in holding that the dual sovereignty doctrine applied.

I. Even if dual sovereignty does not apply, the right to counsel never attached because Georgia never commenced adversarial proceedings.

1. Neither the United States Supreme Court nor the Georgia Supreme Court have held that a bond hearing is an adversarial proceeding.

The Sixth Amendment right to counsel attaches after the initiation of formal "adversarial judicial proceedings," applies to all "critical stages" of a prosecution, and is "offense specific." *McNeil*, 501 U.S. at 175. The Supreme Court has held that critical stages are those that are necessary "to secure the defendant's trial rights" or which may "settle the accused's fate." *United States v. Wade*, 388 U.S. 218, 224–25 (1967). In essence, "critical stages" are those stages at which counsel must be present to preserve the fairness of the trial. *United States v. Ash*, 413 U.S. 300, 322 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 239 (1973)). *Ash* further defined a critical stage as that which is "sufficiently trial-like." 413 U.S. at 312. The Supreme Court has never recognized a bond hearing as a "critical stage."

Following this reasoning, the Georgia Supreme Court has held that a "critical stage" of a criminal proceeding is "one in which the defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way." *Brewner v. State*, 804 S.E.2d 94, 99 (Ga. 2017) (quoting *Fortson v. State*, 532 S.E.2d 102, 103–04 (Ga. 2000)). The Georgia Supreme Court has not addressed the question of

whether a bond hearing is a "critical stage." *See O'Kelley v. State*, 604 S.E.2d 509, 511 (Ga. 2004) (declining to decide if bond hearings are critical stages.).

2. The military assumed jurisdiction before any adversarial proceeding in the Georgia state system.

Here, Appellant's bond hearing in the Camden County Magistrate Court on July 21, 2022, determined only whether the Appellant would remain in detention and cannot be considered a "critical stage" because it did not implicate his trial rights. (J.A. 198.) The magistrate informed Appellant of his right to have counsel at his *next* hearing, which was the preliminary hearing or "commitment" hearing set for August 24, 2022.[10] (J.A. 198–201, 228.) The Record contains no evidence that Appellant had a right to counsel at his bond hearing, which was his only appearance in front of the state court. In fact, at the bond hearing, Appellant then waived his Sixth Amendment right to have counsel present at his future preliminary hearing. (J.A. 195.)

The magistrate then ordered the preliminary hearing to be held on August 24, 2022, but the preliminary hearing never occurred because the military assumed jurisdiction on August 23, 2022, "to proceed with prosecution of [Appellant] *prior* to any state prosecution." (J.A. 99–100, 128 (emphasis added).)

[10] Under Georgia Code § 17-7-23, the preliminary hearing is "to determine whether there is sufficient reason to suspect the guilt of the accused and to require him to appear and answer before the court competent to try him."

Here, the Military Judge explained that the notice of appearance by Mr. Gough did not initiate an adversarial judicial proceeding because a preliminary hearing was never held in Georgia state court. (J.A. 439)*; see Moran v. Burbine*, 475 U.S. 412, 430 (1986) ("[T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel."). Because adversarial proceedings never commenced against Appellant in Georgia state court, the Military Judge did not err concluding Appellant's Sixth Amendment right to counsel had not yet attached "regardless of the dual sovereignty doctrine." (J.A. 439.)

J. Even if dual sovereignty does not apply and Georgia initiated adversarial proceedings, the right had not attached under Mil. R. Evid. 305(c)(3) because the military had not preferred charges.

Even if this Court found that the dual sovereignty doctrine does not apply and then determined that a bond hearing in Georgia superior court constitutes a critical proceeding, Appellant cannot escape the plain language of Mil. R. Evid. 305(c)(3). The rule provides that the Sixth Amendment right to counsel attaches only when "an accused against whom charges have been preferred is interrogated on matters concerning the preferred charges[.]" Preferral is a term of art unique to military justice, and therefore Mil. R. Evid. 305(c)(3) concerns only charges brought under the Uniform Code. *See* R.C.M. 307(a) ("[P]referral is the act by

which a person subject to the UCMJ formally accuses another person subject to the UCMJ of an offense. Any person subject to the UCMJ may prefer charges.").

The NCIS interview took place on August 23, 2022, and concerned Appellant's suspected violations of Article 120b, UCMJ. (J.A. 190.) The United States did not prefer Charges against Appellant for violating Article 120b until September 28, 2022, more than a month after the interview. (J.A. 30.) The Sixth Amendment right to counsel therefore had not attached, and the plain language of Mil. R. Evid. 305(c)(3) is enough for this Court to hold Appellant's right to counsel was not violated.

Finally, the question of whether Appellant was represented by Mr. Gough is not relevant here. In *United States v. Finch*, 64 M.J. 118 (C.A.A.F. 2006), this Court considered whether military investigators were required, pre-preferral, to notify an accused's retained counsel before questioning the accused. *Id*. at 123–25. This Court clarified that, "[Mil. R. Evid.] 305(e) does not require an investigator to notify an accused's or suspect's counsel prior to initiating an interview," even when the investigator "knows or reasonably should know" the accused is represented by counsel. Therefore, because notification was not "constitutionally required under the Fifth or Sixth Amendments" and no right to counsel had attached, there was no error in failing to notify the accused's retained counsel.

Here, like *Finch*, Appellant's right to counsel had not attached in the military, and notification of Mr. Gough was not required under the Constitution or the Military Rules of Evidence. Thus, Appellant wrongly asserts that representation by Mr. Gough "should have prevented the NCIS agents from engaging with [Appellant] again until counsel was made available to him." (Appellant Br. at 17.) The Military Judge did not abuse her discretion. (J.A. 439.)

K. If this Court finds the Sixth Amendment right to counsel was violated, the error was harmless beyond a reasonable doubt because the fact Appellant was naked in bed with his daughter was already obvious from the Record.

1. An error is harmless beyond a reasonable doubt when it is unimportant in relation to everything else the jury considered on the issue.

Where constitutional right implicated, error must be harmless beyond reasonable doubt. *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007). To find an error harmless beyond a reasonable doubt is "to find the error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* "When a 'fact was already obvious from . . . testimony at trial' and the evidence in question 'would not have provided any new ammunition,' the erroneous admission of the evidence is likely to be harmless." *United States v. Jones*, 85 M.J. 80, 85–86 (C.A.A.F. 2024) (quoting *United States v. Harrow,* 65 M.J. 190, 200 (C.A.A.F. 2007)).

2. In *Aguilar*, this Court affirmed the lower court's holding that the erroneously admitted testimony was harmless beyond a reasonable doubt where there was strong DNA evidence and corroborating testimony that the appellant sexually abused his daughter.

In *United States v. Aguilar*, this Court affirmed the Army Court of Criminal Appeals' decision holding that improperly admitted testimony was harmless beyond a reasonable doubt where the appellant was convicted of incest with his daughter. *United States v. Aguilar*, No. 07-0519/AR, 2008 CAAF LEXIS 1078, at *1 (C.A.A.F. Sept. 25, 2008). There, the Army court determined that while the military judge abused her discretion in permitting the SANE to testify concerning statements the appellant's sixteen-year-old daughter made to her after an allegation of sexual abuse, the error was harmless because the "evidence against appellant was so overwhelming as to make the inadmissible testimony inconsequential." *United States v. Aguilar*, ARMY 20021439, 20008 CCA LEXIS 598, at *3–5 (A. Ct. Crim. App. Apr. 22, 2008).

The court emphasized that the SANE testified she took vaginal swabs from the victim immediately after the reported sexual abuse, and the DNA expert testified those swabs contained semen which indicated a genetic match to the appellant. *Id*. at *3. An expert in statistical genetics then testified to the high

probability that it came from the appellant rather than someone else.[11] *Id*. at *3–4. The court further explained that the inadmissible portion of the SANE's testimony "was cumulative with other evidence properly admitted at trial" where testimony from the appellant's wife, who was also the victim's mother, "largely duplicated" the SANE's testimony regarding the report of sexual assault and the identification of the appellant as the perpetrator. *Id*. at *4.

3. Appellant's interview was harmless beyond a reasonable doubt because of the overwhelming evidence he was naked in bed with the Victim.

There are five reasons Appellant's interview was harmless beyond a reasonable doubt: (1) the Victim testified that Appellant raped her, (2) Ms. Flores testified she caught Appellant naked in bed with the Victim, (3) the DNA expert testified to the high probability it was Appellant's DNA on the Victim's vaginal vestibule swab, (4) the SANE testified the Victim's injuries were consistent with rape, and (5) the Victim's reports to the SANE and Ms. Flores were consistent.

Here, Appellant's only "incriminating" statement—that he never raped his daughter but that she got into his bed even though he told her not to because he was naked under the covers following a shower—was harmless beyond a

[11] *See also United States v. Mason*, 59 M.J. 416, 425 (C.A.A.F. 2004) (affirming rape conviction in spite of constitutional error given the "overwhelming" strength of the DNA evidence).

reasonable doubt because all the other evidence and testimony showed he was naked in bed with the Victim. (*See* J.A. 176, 600–01.)

The Victim testified to Appellant being naked in bed with her when he raped her. (J.A. 469–70, 484–85, 605–10.) Ms. Flores further testified to walking into the bedroom and seeing Appellant naked in bed and rolling off the top of the Victim. (J.A. 513–16, 603.) Ms. Flores also testified that the Victim told her "daddy put his pee pee in me." (J.A. 517.)

Moreover, the DNA testing found seminal fluid in the Victim's vaginal vestibule, and the DNA expert testified that it was one of the highest probabilities she had seen in her twenty-year career that the seminal fluid came from Appellant. (J.A. 551–54, 598.)

The Sexual Assault Forensic Examination Report also showed the Victim suffered injuries consistent with rape. The SANE testified that the Report included the Victim having abrasions, lacerations, abnormalities, bruising, swelling, and redness to her vulva, vaginal, and rectal areas. (J.A. 537–43, 593–95.) The Victim's statements to the SANE also matched the Victim's statements to Ms. Flores. (*See* J.A. 517, 522–25.)

The alleged error was unimportant in relation to the overwhelming evidence that separately and collectively showed Appellant was naked in bed with his daughter. (*See* J.A. 605.) Appellant's statement was cumulative evidence and did

not provide the factfinder any new information or ammunition. It was therefore harmless beyond a reasonable doubt.

Conclusion

The United States respectfully requests this Court uphold the Findings and Sentence as adjudged.

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I certify that I delivered a copy of the foregoing electronically to the Court and opposing counsel, Mr. Frank Spinner and Lieutenant Commander Meggie KANE-CRUZ, JAGC, U.S. Navy, on March 24, 2026.

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