IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY BRIEF ON BEHALF
Appellee,	)	OF APPELLANT
	)	
v.	)	
	)	
Colonel (O-6)	)	
ROBERT J. RICE,	)	
United States Army,	)	Crim. App. No. 20160695
Appellant.	)	USCA Dkt. No. 19-0178/AR

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

ISSUE PRESENTED

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT REQUIRES DISMISSAL OF APPELLANT'S CONVICTIONS.

SUMMARY OF ARGUMENT

Appellant was tried and convicted in successive prosecutions by the same sovereign for possession of the same child pornography on the same electronic media on the same dates. As the Army Court of Criminal Appeals ("Army Court") put it, "[w]hat happened in this case should not happen again. Divvying-up charges in a constitutionally dubious manner imperils the fair and efficient administration of

justice." *United States* v. *Rice*, 78 M.J. 649, 652 (A. Ct. Crim. App. 2018) (J.A. 5).[1] The Army Court nevertheless erred in holding that the *district court*'s decision to dismiss "Count One" of Appellant's civilian conviction (rather than sentence Appellant on it) provided a remedy for the double jeopardy violations arising from his court-martial. But it at least understood that what happened here was a "debacle" requiring *some* appellate court to "clean up the mess caused when military prosecutors pursued charges duplicative of appellant's prior civilian federal conviction." *Id.* at 651–52 (J.A. 2, 4).

The government's brief, in contrast, is an exercise in deflection and misdirection—one that never so much as acknowledges any of the Army Court's concerns; that leads with an argument that the Army Judge Advocate General declined to cross-certify even after this Court granted Appellant's petition for review; that spends multiple pages knocking down a series of straw men; and that includes an eye-opening number of misstatements of both fact and law along the way.

1. As in the opening brief, Appellant cites the Army Court's decision in parallel. *See* Opening Br. at 4 n.2.

These issues aside, the government's brief is also meritless. In belatedly objecting to the Army Court's holding that the possession specifications to which Appellant pleaded guilty violated the Double Jeopardy Clause, the government necessarily ignores longstanding Supreme Court precedent distinguishing between jurisdictional and substantive elements of federal offenses. It also neglects this Court's express holding in the sentencing context that Count One—18 U.S.C. § 2252A(a)(5)—is "*essentially the same offense*[]" as possession of child pornography under "clause 2" of Article 134. *United States* v. *Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014) (quoting *United States* v. *Leonard*, 64 M.J. 381, 384 (C.A.A.F. 2007) (emphasis added)). Indeed, the government has even argued in prior cases that possession of child pornography is *inherently* service-discrediting—such that there is no need to even prove that element at trial. *See United States* v. *Brisbane*, 63 M.J. 106, 117 n.11 (C.A.A.F. 2006). As the Army Court concluded, the terminal element alleged in this case (the service-discrediting nature of Appellant's conduct, which had no other connection to the military) is indistinguishable from the terminal element of a charge

under clause 3, which would have simply alleged a violation of federal law applicable to a civilian.

To turn around and argue that these two factually and legally duplicative charges are nevertheless *not* the "same offense" under *Blockburger* v. *United States*, 284 U.S. 299 (1932), is not only inconsistent with these precedents, but would allow the government to use a combination of jurisdictional elements in federal civilian offenses and the service-discrediting element of Article 134 to render the Double Jeopardy Clause an empty shell for many servicemembers. And because Count One and the possession specifications *are* the "same offense" under *Blockburger*, Count One is also a lesser-included offense of the distribution specification to which Appellant pleaded guilty—which was therefore also a violation of the Double Jeopardy Clause.

As for the proper remedy for the double jeopardy violations in Appellant's case, the government's position essentially reduces to the claim that, once the district court dismissed Count One, it was as if Appellant's first trial never happened. *See, e.g.*, Gov't Br. at 24 ("[L]egally, it is as though the *district court* prosecution for possession of child pornography never occurred."); *see also id.* ("Appellant vindicated

his right against double jeopardy by eliminating the allegedly duplicative convictions.").

This argument fails for two independent reasons. First, it fundamentally misconceives the harm that the Double Jeopardy Clause is meant to prevent—successive *prosecutions* for the same offense, regardless of the *outcome* of either trial. *See Grady* v. *Corbin*, 495 U.S. 508, 518 (1990) ("Successive prosecutions, . . . whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence." (footnote omitted)); *see also Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874). Concerning the Double Jeopardy Clause, the question the Supreme Court asks is not how many convictions remain on the books when all is said and done; it is whether jeopardy had attached to a prior proceeding when the successive prosecution began, *regardless* of what happens thereafter. *See Abney* v. *United States*, 431 U.S. 651, 662 (1977) ("[E]ven if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.").

Second, the government's argument also wholly ignores the fact that the district court could not sentence Appellant on Count One without committing another *distinct* violation of the Double Jeopardy Clause—which may be why the government did not oppose Appellant's motion in the district court (a fact the government's brief omits from its recitation of this case's procedural history). Appellant therefore did not "elect" to obtain his remedy for the double jeopardy violations arising from his court-martial in the district court; he prevented *another* violation in his case. He is still waiting to receive *any* remedy for his unconstitutional court-martial convictions—which, under settled Supreme Court precedent, were not just voidable, but void. The only way to ensure that "[w]hat happened in this case [does] not happen again," *Rice*, 78 M.J. at 652 (J.A. 4), is for this Court to provide that remedy—and dismiss Appellant's court-martial convictions.

ARGUMENT

I. EACH OF THE COURT-MARTIAL SPECIFICATIONS TO WHICH APPELLANT PLEADED GUILTY VIOLATED THE DOUBLE JEOPARDY CLAUSE

The government devotes the heart of its brief on the merits to a claim on which it lost in the Army Court—that, under *Blockburger*, the

specifications to which Appellant pleaded guilty in his court-martial were not the "same offense" as Count One of his district court conviction,[2] and so there was no violation of the Double Jeopardy Clause for the Army Court to "remedy." *See* Gov't Br. 10–20. But the Judge Advocate General of the Army did not certify the Army Court's contrary holding for appeal under Article 67(a)(2) of the UCMJ, 10 U.S.C. § 867(a)(2), despite ample notice of the grounds Appellant raised in the supplement to his petition for review. In that filing, Appellant principally challenged the Army Court's holding that the U.S. District Court for the Middle District of Pennsylvania's post-conviction dismissal of Count One of Appellant's civilian indictment fully remedied the double jeopardy violations arising from his court-martial. *See* Supp. to Pet. at 13–18. The Army Court's double jeopardy holding should therefore be "law of the case" for purposes of this appeal.

2. As in the opening brief, Appellant refers to the two counts on which he was indicted and convicted in the district court as "Count One" and "Count Two," respectively. Count One charged Appellant with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5) (J.A. 32). Count Two charged Appellant with receipt and distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2) (J.A. 33).

But even if the government's failure to appeal the Army Court's holding could somehow be excused, its unpreserved objection to the Army Court's analysis fails on the merits, as well—for reasons Appellant is now compelled to address in this brief. The Army Court correctly concluded that the possession specifications to which Appellant pleaded guilty violated the Double Jeopardy Clause. *See Rice*, 78 M.J. at 653–54 (J.A. 6–8). What is more, the Army Court's analysis compels a separate conclusion, which the court assumed without deciding—that the distribution specification to which Appellant pleaded guilty was also unconstitutionally duplicative. *See id*. at 654 n.10 (J.A. 8 n.10); *see also* Gov't Br. at 18 n.7 ("[A] federal charge for possession under the same statutory scheme would likely constitute a lesser-included offense." (emphasis omitted)). Thus, all three of the specifications to which Appellant pleaded guilty were in violation of the Double Jeopardy Clause, and the central question presented by Appellant's appeal goes to the appropriate remedy for those violations—whether he is therefore entitled to *dismissal* of those convictions.

A. The Government is Precluded from Challenging the Army Court's Holding That the Possession Specifications Violated the Double Jeopardy Clause

In 2006, this Court amended its rules to allow the government an additional 30 days from the date on which a discretionary petition for review is granted to seek cross-certification of legal questions decided below but not presented in the petition. *See* C.A.A.F. R. 19(b)(3). *See generally United States* v. *Clifton*, 71 M.J 489, 493–95 (C.A.A.F. 2013) (Erdmann, J., concurring) (describing the origins and purposes of the rule change). As Judge Erdmann explained in his concurring opinion in *Clifton*, "the process envisioned by the amendment promotes the purpose of Article 67, UCMJ, by requiring that appellate issues not raised by the accused are certified by the Judge Advocate General, rather than raised sua sponte in the course of litigation by appellate government counsel." *Id*. at 495; *see also* U.S. Court of Appeals for the Armed Forces Proposed Rules Changes, 71 Fed. Reg. 64,251, 64,254 (Nov. 1, 2006) ("[I]n some cases, the Judge Advocate General may be reluctant to certify issues and require review by this Court unless the Court will otherwise be reviewing the case at the appellant's request.").

Thus, "[i]n light of the rule change, once an issue has been granted by this court, the government should certify *any issue* upon which it did not prevail at the CCA and which it deems necessary to litigate before this court." *Clifton*, 71 M.J. at 495 (Erdmann, J., concurring) (emphasis added). Otherwise, CCA holdings that neither the Appellant nor government have sought to challenge "remain[] the law of the case," *United States* v. *Evans*, 75 M.J. 302, 304 n.4 (C.A.A.F. 2016) (citing *United States* v. *Ward*, 74 M.J. 225, 227 n.3 (C.A.A.F. 2015)), and cannot be disturbed unless they are "clearly erroneous and would work a manifest injustice" if the parties were to be bound by them. *United States* v. *Simmons*, 59 M.J. 485, 488 (C.A.A.F. 2004) (quoting *United States* v. *Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)).

The government does not suggest that this is such a case, nor could it. Here, the supplement to the petition for review identified a single issue—"whether the Double Jeopardy Clause of the Fifth Amendment requires *dismissal* of Appellant's convictions." Supp. to Pet. 1 (emphasis added). And the supplement made abundantly clear that Appellant was *not* challenging the Army Court's holding that the possession specifications to which he pleaded guilty violated the Double

Jeopardy Clause. *See, e.g.*, *id.* at 7, 11. If the government wished to challenge that holding, the proper procedure was to cross-certify it under Article 67(a)(2)—to put both Appellant and this Court on notice that it intended to contest the Army Court's threshold conclusion.

The clock for filing such cross-certification expired on May 31—thirty days after this Court granted review, and two days after Appellant filed his opening brief. The Army Court's holding that the possession specifications to which Appellant pleaded guilty violated the Double Jeopardy Clause is therefore "law of the case." When the Army Judge Advocate General, for whatever reason, declines to advance an argument directly, this Court should not allow appellate government counsel to sneak it in through the back door. *See, e.g.*, *Wilson* v. *O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (Easterbrook, J.) ("Procedural rules apply to the government as well as to defendants.").[3]

3. This is not a case in which neither the military judge nor CCA ruled on the issue the government belatedly seeks to raise on appeal—in which the "law of the case" doctrine would not apply. *See United States* v. *Perkins*, 78 M.J. 381, 386 n.8 (C.A.A.F. 2019).

B. In Any Event, the Army Court Correctly Held That the Possession Specifications Violated the Double Jeopardy Clause

The government's untimely effort to challenge the Army Court's holding that the possession specifications to which Appellant pleaded guilty violated the Double Jeopardy Clause is also meritless. Not only does the government's argument open by knocking down a straw man of its own invention,[4] but the theory of the Double Jeopardy Clause it

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4. The government devotes six pages to disputing what it describes as the Army Court's "finding" that Appellant was charged under "clause 3" of Article 134 ("crimes not capital"), rather than "clause 2" (service-discrediting conduct). Gov't Br. at 10–15. Not only does Appellant *agree* that the three specifications to which he pleaded guilty were clearly under "clause 2" of Article 134, but the Army Court did not actually "find" to the contrary.

Instead, as even a cursory perusal of the Army Court's ruling makes clear, the court below was suggesting that the double jeopardy violation would have been even more readily apparent *had* Appellant pleaded guilty under "clause 3," bolstering its conclusion that Appellant's guilty plea under "clause 2" raised the same problem:

> *Had* the government subsequently referred charges to court-martial alleging appellant committed a crime not capital based on the same statute and conduct underlying his District Court conviction, it *would* plainly fail *Blockburger* analysis as his District Court conviction is of a crime not capital. The government may not circumvent the Fifth Amendment by choosing to omit that clause of the terminal element that would make its due process violation obvious.

Rice, 78 M.J. at 654 (J.A. 7) (emphases added); *see also infra* at 17–19 (summarizing the Army Court's reasoning).

ultimately endorses is inconsistent with Supreme Court precedent and staggering in its implications.

Essentially, the government's argument is that Count One in the district court and the possession specifications to which Appellant pleaded guilty in his court-martial are not the "same offense" under *Blockburger* because each contains an element missing from the other. As the argument goes, 28 U.S.C. § 2252A(a)(5), the statute Appellant was convicted of violating in Count One,[5] required that the child pornography Appellant possessed have traveled through interstate commerce—something not charged in his court-martial specifications. And Article 134, the statutory authority for all three court-martial specifications, requires proof that Appellant's conduct was "to the prejudice of good order and discipline in the armed forces," "of a nature to bring discredit upon the armed forces," or constituted "crimes and offenses not capital." 10 U.S.C. § 934.

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5. It should be noted that the government's brief repeatedly cites the *wrong* provisions as the basis for Appellant's district court convictions. The government cites 18 U.S.C. § 2252A(a)(**4**) as the basis for Count One. *See, e.g.*, Gov't Br. 6, 17. In fact, Count One charged Appellant with violating 18 U.S.C. § 2252A(a)(**5**) (J.A. 32). And Count Two, which the government cites to **10** U.S.C. § 2252A(a)(**5**), Gov't Br. at 6, in fact charged a violation of **18** U.S.C. § 2252A(a)(**2**) (J.A. 33).

Leaving aside the government's puzzling (and distracting) mischaracterization of the Army Court's ruling, there are two separate substantive problems with its argument. First, it conflates jurisdictional elements and substantive elements for purposes of *Blockburger*—and fails to grapple with the "settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws." *Luna Torres* v. *Lynch*, 136 S. Ct. 1619, 1630 (2016).

It is well established that "interstate commerce" provisos in federal statutes like 18 U.S.C. § 2252A(a)(5) are "jurisdictional elements," as distinct from "substantive elements," which "primarily define[] the behavior that the statute calls a 'violation' of federal law." *Scheidler* v. *Nat'l Org. for Women, Inc.*, 547 U.S. 9, 18 (2006). As the Supreme Court recently reiterated, "[t]he jurisdictional element, by contrast, ties the substantive offense . . . to one of Congress's constitutional powers . . . , thus spelling out the warrant for Congress to legislate." *Luna Torres*, 136 S. Ct. at 1624–25; *see also Rehaif* v. *United States*, No. 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) ("Jurisdictional elements do not describe the 'evil Congress seeks to

prevent,' but instead simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct (normally, as here, through its Commerce Clause power)." (citation omitted)). Thus:

> Both kinds of elements must be proved to a jury beyond a reasonable doubt; and because that is so, both may play a real role in a criminal case. But still, they are not created equal for every purpose. To the contrary, courts have often recognized—including when comparing federal and state offenses—that Congress uses substantive and jurisdictional elements for different reasons and does not expect them to receive identical treatment.

Luna Torres, 136 S. Ct. at 1630.

This distinction is why, in applying the Assimilative Crimes Act, 18 U.S.C. § 13, the Supreme Court has repeatedly held that state and federal offenses punish the same conduct—and, thus, cannot *both* apply to offenses committed on federal enclaves—even when the federal offense includes a federal jurisdictional element and the state offense does not. *See, e.g.*, *Lewis* v. *United States*, 523 U.S. 155, 165 (1998); *see also id.* at 182 (Kennedy, J., dissenting) (agreeing that courts should "look beyond . . . jurisdictional elements," and focus only on substantive ones, in determining whether "the elements of the two crimes are the same").

The government, which does not so much as cite *Luna Torres* (let alone distinguish it), implicitly argues that jurisdictional elements are no different than substantive elements for purposes of *Blockburger*. *See* Gov't Br. at 17–18. Tellingly, the government cites just one case, *United States* v. *Roderick*, 62 M.J. 425, 432 (C.A.A.F. 2006), in support, *see* Gov't Br. at 19—a decision that was handed down a decade before *Luna Torres*.[6] Moreover, if the government could avoid the Double Jeopardy Clause simply by alleging different jurisdictional elements for otherwise identical federal offenses, it could easily—and regularly—sidestep the Double Jeopardy Clause. After all, offenses committed within the "special maritime and territorial jurisdiction of the United States" will

6. *Luna Torres* and *Rehaif* undermine *Roderick*'s cursory suggestion that this Court cannot "disregard a statutory element of a crime during a multiplicity analysis simply because the same element was used by Congress as a jurisdictional hook and the element is readily established." 62 M.J. at 432.

In fact, the cited cases make clear that the Supreme Court routinely disregards jurisdictional elements when comparing otherwise overlapping state and federal offenses, which can be separately prosecuted *without* violating the Double Jeopardy Clause. *See Gamble* v. *United States*, 139 S. Ct. 1960 (2019). It would make little sense if they were nevertheless dispositive in comparing otherwise duplicative *federal* offenses—and thereby allowed multiplicitous charges in a context in which the Double Jeopardy Clause *does* apply.

almost always involve material that traveled through interstate commerce. Thus, if the government were correct, there ought to be numerous examples of such a practice. *Compare, e.g.*, 18 U.S.C. § 2252A(a)(5)(A) (possession of child pornography within the special maritime and territorial jurisdiction of the United States), *with, e.g.*, *id.* § 2252A(a)(5)(B) (possession of child pornography that traveled through interstate commerce).

Second, and relatedly, the government also suggests that Article 134 includes an element that 18 U.S.C. § 2252A(a)(5) does not, because unlike the latter, the former "requires the government to prove the service discrediting nature of Appellant's conduct." Gov't Br. at 17. Again, however, the government simply *assumes* that all elements are created equal—and ignores the substantial case law to the contrary. For instance, this Court has expressly held, for purposes of sentencing, that 18 U.S.C. § 2252A(a)(5) is "*essentially the same offense*[]" as possession of child pornography under "clause 2" of Article 134. *Finch*, 73 M.J. at 148 (quoting *Leonard*, 64 M.J. at 384 (emphasis added)). And the government has even argued in prior cases that possession of child pornography is *inherently* service-discrediting—such that there is no

need to adduce additional evidence for that element at trial. *See Brisbane*, 63 M.J. at 117 n.11. In contrast, when conduct that would not be a criminal offense when committed by a *civilian* is charged under Article 134, additional evidence in support of clauses 1 or 2 may be required—because the element bears a substantive burden. *See Fosler*, 70 M.J. at 226.

All of this explains why the Army Court correctly rejected the government's argument below. Making the same point somewhat differently, Judge Fleming began from the proposition (which the government does not contest) that

> It would . . . be multiplicitous to convict an accused of multiple specifications under Article 134 where the only legal or factual difference between the specifications is which clause of the terminal element is alleged in each. Put differently, the government may not obtain two convictions at the same court-martial on two specifications that are identical save for what clause of Article 134 is alleged. An accused may be convicted only once for possessing child pornography under clauses one, two, or three for the same conduct.

Rice, 78 M.J. at 654 (J.A. 7). And because even the government seems to agree that the possession specifications would have violated the Double Jeopardy Clause had they been charged under "clause 3" of Article 134, *see, e.g.*, Gov't Br. at 18 n.7, Judge Fleming invoked a form of the

transitive property to conclude that the same must follow with regard to specifications charged under "clause 2." *See Rice*, 78 M.J. at 654 (J.A. 8) ("Clause three of Article 134 incorporates the entire federal criminal code. The three clauses of Article 134 are disjunctive, and therefore it does not matter for *Blockburger* purposes which terminal elements are alleged because all three may be alleged and only one need be proven in any given specification.").

In other words, because Appellant could not be convicted of the same offenses under both "clause 2" and "clause 3," and because he could not be convicted of the same offenses under both 18 U.S.C. § 2252A(a)(5) and "clause 3," it followed that he could not be convicted of the same offenses under both 18 U.S.C. § 2252A(a)(5) and "clause 2." *See id*. Ultimately, as the Army Court concluded, the terminal element alleged in this case (the service-discrediting nature of Appellant's conduct, which, at least here, had no other connection to the military) is indistinguishable from the terminal element of a charge under clause 3, which would have simply alleged a violation of federal law applicable to a civilian.

To conclude to the contrary—that these offenses are sufficiently distinct such that they *can* be tried successively without offending the Double Jeopardy Clause—would be to radically constrain the extent to which the Double Jeopardy Clause protects servicemembers. After all, on the government's theory, nothing would stop federal prosecutors from successively prosecuting the same servicemember for the same crimes arising out of the same underlying conduct—where one trial is brought in civilian court based upon a civilian jurisdictional element (*e.g.*, a connection to interstate commerce); and the other is brought in a court-martial and tied to either of the first two clauses of Article 134. Nor would anything prevent the government from separately prosecuting the same servicemember for the same offense under each of the terminal elements of Article 134; each clause, on the government's theory, includes an element not included in the others.

The Army Court therefore correctly concluded that the possession specifications to which Appellant pleaded guilty violated the Double Jeopardy Clause. And even if either the jurisdictional element in § 2252A(a)(5) or the terminal element in "clause 2" of Article 134 were relevant to the double jeopardy analysis, the possession specifications to

which Appellant pleaded guilty would still violate the Double Jeopardy Clause, because the other offense would still be a lesser-included offense.

C. The Distribution Specification Also Violated the Double Jeopardy Clause

The government's brief also knocks down a straw man in purporting to address the double jeopardy problem with the distribution specification to which Appellant pleaded guilty. The government points out, correctly, that "the federal and military distribution offenses refer to different date ranges and therefore could not violate the prohibition against double jeopardy." Gov't Br. at 6 n.2. But as both the supplement to the petition for review and Appellant's opening brief made clear, Appellant's claim is *not* that his civilian *distribution* conviction (Count Two) was for the "same offense" as the military distribution specification; rather, it is that his civilian *possession* conviction (Count One) was a lesser-included offense of the military distribution specification. Opening Br. at 16–19; Supp. to Pet. at 18–20. The government is therefore quite wrong that "Appellant's challenge in this case only applies to the possession offenses." Gov't Br. at 6 n.2.

On the merits, the government's argument for why Count One was not a lesser-included offense of the distribution specification to which Appellant pleaded guilty is effectively a rehash of the same argument addressed above—*i.e.*, that Count One and the distribution specification each included an element that the other did not. Gov't Br. at 18–20. That argument fails for the same reasons outlined above.

Otherwise, the government's brief does not contest the central argument Appellant advanced on this point in his opening brief—that, on the facts of his cases, Count One is indeed a lesser-included offense of the distribution specification to which he pleaded guilty. *See* Opening Br. 17–19. In fact, the government concedes that, but for the jurisdictional elements, the "federal charge for possession under the same statutory scheme would likely constitute a lesser-included offense." Gov't Br. at 18 n.7 (emphasis omitted). If the Army Court correctly concluded that the possession specifications to which Appellant pleaded guilty violated the Double Jeopardy Clause (that is, that Count One and the possession specifications are the "same offense" under *Blockburger*), then the government would not dispute that Count One is also a lesser-included offense of the distribution specification to

which Appellant pleaded guilty. If so, then the distribution specification also violated the Double Jeopardy Clause.

* * *

The government's belated effort to contest whether Appellant's military convictions in fact violated the Double Jeopardy Clause is both procedurally and substantively flawed. The real question this case raises is whether, as the Army Court held and the government now argues, Appellant has already received a *remedy* for those violations—or whether he is entitled to dismissal of his military convictions.

II. THE DOUBLE JEOPARDY VIOLATIONS REQUIRE DISMISSAL OF APPELLANT'S MILITARY CONVICTIONS

Appellant's opening brief explained at length why the double jeopardy violations arising from his court-martial require dismissal of the military convictions. Opening Br. at 19–28. In response, the government offers three principal arguments: (1) "Appellant vindicated his right against double jeopardy by eliminating the allegedly duplicative convictions," Gov't Br. at 24; (2) Appellant "*elected* to seek his remedy for the apparent double jeopardy violation in the district court," *id.* at 20–21 (emphasis added); and (3) even if Appellant had successfully obtained dismissal of the offending specifications from the

military judge presiding over his court-martial, he would still have been tried by court-martial on specifications that did *not* violate the Double Jeopardy Clause. Each of these arguments fails to persuade.

A. The Constitutional Violations in Appellant's Case *Arose* from His Successive Prosecution

The government does not directly address Appellant's contention, made in detail in the opening brief, that a successive prosecution in violation of the Double Jeopardy Clause is not just voidable, but is void. *See* Opening Br. 19–22. Nor could it; the matter has been settled by the Supreme Court since at least 1874, *see Lange*, 85 U.S. (18 Wall.) 163, and reaffirmed as recently as last year. *See Currier* v. *Virginia*, 138 S. Ct. 2144 (2018). Instead, the government tries another tack, suggesting that, once the district court dismissed Count One, "legally, it is as though the *district court* prosecution for possession of child pornography never occurred." Gov't Br. at 24; *see also id.* ("Appellant vindicated his right against double jeopardy by eliminating the allegedly duplicative convictions.").

As the opening brief documented, however, the Supreme Court has made abundantly clear that the right against double jeopardy is not merely a right against the existence of duplicative *convictions*; it is a

right against successive *prosecutions*, regardless of the result. *See, e.g.*, *Abney*, 431 U.S. at 661 ("The guarantee against double jeopardy . . . protects interests wholly unrelated to the propriety of any subsequent conviction."). Indeed, the Double Jeopardy Clause is the archetype of a constitutional "right not to be tried," as distinct from "a right not to be convicted." *Class* v. *United States*, 138 S. Ct. 798, 811–12 (2018). Thus, the question the Supreme Court has interpreted the Double Jeopardy Clause to ask is not how many convictions remain on the books when all is said and done; it is whether jeopardy had attached to a prior proceeding when the successive prosecution began, *regardless* of what happens thereafter. On this point, the government has no response.

B. The Appellant Did Not Receive a "Remedy" from the District Court, Elected or Otherwise

The government also repeats the mistake the Army Court made—asserting that the district court's dismissal of Count One was a remedy for Appellant's unconstitutional successive prosecution by court-martial, as opposed to a means of avoiding a *second* double jeopardy violation in Appellant's case. Like the Army Court, the government does not dispute that Appellant could not have been sentenced on Count One

without separately violating the Fifth Amendment. Indeed, the government's recitation of the procedural background curiously omits that it *did not oppose* Appellant's motion to dismiss or bar sentencing on Count One (J.A. 86).

Nor is there anything to the government's suggestion that Appellant "elected" to receive a remedy from the district court. In contrast to the government's litigation conduct in this case, Appellant has been diligent in pressing his double jeopardy claims at every turn—timely moving to dismiss the overlapping court-martial specifications; agreeing to a conditional plea when that motion was denied; and promptly moving in the district court to bar an unconstitutionally duplicative sentence. *See* Opening Br. at 32 n.9. Appellant did not "elect" to pursue the remedy in district court so much as he was forced to proceed in that forum only *after* first raising his double jeopardy claim at his court-martial; *after* the government opposed that motion; *after* the military judge erroneously denied him relief; *after* he entered a conditional guilty plea; and *while* his appeal of his court-martial convictions was pending before the Army Court.

Startlingly, the government suggests—twice—that Appellant could have pursued an interlocutory appeal of the military judge's denial of his motion to dismiss under *Abney* rather than agreeing to plead guilty to the offending specifications, and that "Appellant declined to do so." Gov't Br. at 21–22, 23; *see also id*. at 24 ("Appellant elected *not* to challenge this alleged constitutional error in the court best-suited to address it; instead, he challenged his conviction and sentence for possession of child pornography under Count One of the federal indictment." (emphasis added)).

But as Appellant explained in his opening brief, *Abney*'s construction of 28 U.S.C. § 1291 to allow civilian criminal defendants to take immediate, interlocutory appeals of denials of double jeopardy-based motions to dismiss has "no parallel . . . in the military." Opening Br. at 21. The government cites no authority to the contrary. In other words, the government's complaint is that Appellant failed to avail himself of a remedy that . . . does not exist.[7]

7. Appellant could theoretically have pursued relief in the form of an extraordinary writ, but counsel could not find a single reported decision by a Court of Criminal Appeals granting such a writ to bar an unconstitutionally duplicative court-martial.

Instead, Appellant did exactly what a military defendant in his position should have done: he promptly objected at each turn in the court-martial. After the military judge rejected his objection, he agreed to a conditional guilty plea, which, unlike the government's imagined interlocutory appeal, actually has a legal basis. *See* R.C.M. 910(a)(2). He timely appealed his military convictions to the Army Court. *But see* Gov't Br. at 24 ("Appellant elected not to challenge this alleged constitutional error in the court best-suited to address it."). And he timely moved in the district court, which was already scheduled to sentence him on Count One, in order to avoid a *second* double jeopardy violation—a motion that otherwise did not benefit him in any way, Opening Br. at 29–32, and to which the government did not object. The government's insinuation that Appellant somehow manufactured what the Army Court rightly described as a "debacle" entirely of the *government*'s making is risible—if not downright offensive.[8]

8. The government parrots the Army Court's conclusion that, in light of the district court's dismissal of Count One, dismissal of Appellant's court-martial convictions would provide him with an "unjustified windfall." Gov't Br. at 22–23. But its brief offers no response to Appellant's detailed argument to the contrary—including why the district court's dismissal of Count One left Appellant no better off than

C. The Possibility That the Government Might Have Pursued Non-Duplicative Charges Does Not Somehow Ameliorate the Constitutional Violations

Finally, the government argues that Appellant suffered no real harm because it *could* have tried him by court-martial for non-duplicative offenses. *See* Gov't Br. at 22 ("Appellant presents this Court with the legal fiction that, but for the Army's decision to charge him with possession of child pornography under Article 134, UCMJ, he would not have faced court-martial at all. This argument ignores the government's stated intent to prosecute Appellant for a range of offenses.").

But the Double Jeopardy Clause is not an all-or-nothing proposition. Appellant freely concedes that a successive prosecution could theoretically include *both* unconstitutionally duplicative charges *and* non-duplicative new charges. In such a case, the presence of non-duplicative charges does not in any way ameliorate the constitutional violation resulting from the successive prosecution on the duplicative charges, nor does it obviate the Appellant's right to dismissal of the

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he would have been if the district court had only declined to sentence him. *See* Opening Br. at 29–32.

duplicative charges *before the trial occurs*. That is to say, the Double Jeopardy Clause is not about whether a criminal defendant can ever be subjected to the pain of multiple trials; one need not look far to find circumstances in which he can. *See, e.g.*, *Flowers* v. *Mississippi*, No. 17-9572, 2019 WL 2552489 (U.S. June 21, 2019) (finding a *Batson* violation in defendant's *sixth* trial on capital murder charges, after the first five trials resulted either in mistrials or reversals unrelated to his guilt or innocence). Rather, the Double Jeopardy Clause is about the pain of successive prosecutions for the same offense *after a conviction or acquittal*. *See, e.g.*, *Green* v. *United States*, 355 U.S. 184, 187–88 (1957) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.").

Whatever else the government might have done in Appellant's case, the relevant point here is what it *did* do—and that is to charge him with a series of specifications, three of which violated the Double Jeopardy Clause. Whether or not the offending specifications were the only ones on which Appellant was convicted, Appellant would be entitled to the same remedy—dismissal of the convictions that resulted

from his unconstitutional successive prosecution. And in any event, the government *itself* agreed to Appellant's conditional plea—in which he agreed to plead guilty to *only* those specifications to which he had objected on double jeopardy grounds.

* * *

At bottom, the government's brief is a thinly veiled effort to sanitize the record, deflect its sole responsibility for "the mess caused when military prosecutors pursued charges duplicative of appellant's prior civilian federal conviction," *Rice*, 78 M.J. at 652 (J.A. 4), and avoid what should be the natural consequences of its unconstitutional conduct in Appellant's case. The misleading conflation in the very last sentence of the government's brief is usefully (if unintentionally) revealing on this point, closing with the observation that Appellant "never suffered a violation of his double jeopardy right *against successive punishment*." Gov't Br. at 25 (emphasis added).

In fact, the Double Jeopardy Clause separately protects against successive *prosecutions* and *multiple* punishments for the same offense. *See North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Appellant did suffer a violation of his right against *successive prosecutions* for the

same offense, and the only reason why he did not suffer a separate violation of his distinct right to be free from *multiple punishments* is because he successfully convinced the district court to not sentence him on Count One—not to take any action to cure his unconstitutionally successive *military* prosecution.[9] To suggest, as the Army Court did and the government now does, that Appellant's effort to avoid the latter violation somehow remedied the former violation is to turn the Double Jeopardy Clause on its head—and to sanction the very "oppressive practices at which the Double Jeopardy Clause is aimed." *Wade* v. *Hunter*, 336 U.S. 684, 688–89 (1949).

As Appellant explained in his opening brief, the Army Court erred in refusing to dismiss Appellant's court-martial convictions. But it, at least, understood that what happened in this case was a "debacle" that "should not happen again." *Rice*, 78 M.J. at 652 (J.A. 4). The

9. The government also offers no response to the Opening Brief's detailed demonstration of how the Supreme Court has distinguished between flexible remedies for multiple-punishment double jeopardy violations and formal remedies for successive-prosecution double jeopardy violations. *See* Opening Br. at 22–24. Instead, for its argument that dismissal is not the only available remedy, it simply relies upon inapposite multiple-punishment cases—without noting the distinction. *See* Gov't Br. at 22–23.

government's brief fails to note (let alone grapple with) the Army Court's well-taken concerns. If this Court were to embrace the position it espouses, it would not only compound those concerns, but it would incentive the very conduct by government prosecutors that the Double Jeopardy Clause exists to prevent.

CONCLUSION

For the foregoing reasons and those previously stated, the specified issue should be answered in the affirmative, and Appellant's military convictions should be dismissed.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 8, 2019, a copy of the foregoing brief in the case of *United States* v. *Rice*, Army Ct. Crim. App. Dkt. No. 20160695, USCA Dkt. No. 19-0178/AR, was electronically filed with the Court (efiling@armfor.uscourts.gov) and contemporaneously served on the Defense and Government Appellate Divisions.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,440 words. This brief complies with the typeface and type-style requirements of Rule 37.

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