IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Colonel (O-6) **ROBERT J. RICE**, United States Army, Appellant	BRIEF ON BEHALF OF APPELLEE Crim. App. No. 2016-695 USCA Dkt. No. 19-0178/AR

ALLISON L. ROWLEY
Captain, Judge Advocate
Appellate Attorney, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0773
Allison.l.rowley.mil@mail.mil
U.S.C.A.A.F. Bar No. 36904

CATHARINE M. PARNELL
Major, Judge Advocate
Branch Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Room 2016
Fort Belvoir, VA 22060
(703) 693-0793
Catharine.m.parnell.mil@mail.mil
U.S.C.A.A.F. Bar No. 36626

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0774
Wayne.h.williams.mil@mail.mil
U.S.C.A.A.F. Bar. No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0746
Steven.p.haight.mil@mail.mil
U.S.C.A.A.F. Bar No. 36151

Index of Brief

Table of Authorities

Other Authorities

Issue Presented

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2016). This Court exercised its Article 67, UCMJ, 10 U.S.C. § 867, authority to grant review of the Army Court's decision on May 1, 2019.

Statement of the Case

On September 17, 2015, the convening authority referred one specification alleging a violation of Article 133, UCMJ, and six specifications alleging violations of Article 134, UCMJ, to a general court-martial. (JA 25). On October 25, 2016, a military judge convicted Appellant, pursuant to his pleas, of two specifications of possessing child pornography and one specification of distribution of child pornography. (R. at 193). The military judge sentenced Appellant to five years of confinement and a dismissal. (R. at 328). Pursuant to a pretrial agreement,

the convening authority approved the dismissal and four years' confinement. (Action).

Statement of Facts

The charges in this case arise from Appellant's assignment to the U.S. Army War College in Carlisle Barracks, Pennsylvania. (JA 47). In February 2013, Appellant's wife reported to law enforcement that she suspected her husband of viewing and trading child pornography. (JA 48). During the subsequent investigation, law enforcement recovered over 10,000 images of child sexual exploitation from several digital storage devices, including a Hewlitt-Packard (HP) Pavilion laptop and a Seagate hard drive ("Rocketfish"). (JA 49). Law enforcement also recovered numerous real-time screen shots showing that Appellant engaged in viewing and trading child pornography. (JA 50).

The Army preferred and referred charges against Appellant in 2015. (JA 25).[1] Meanwhile, Appellant also faced a federal indictment in the U.S. District

[1] The relevant charges and specifications alleged as follows: (1) that Appellant distributed child pornography on an HP Pavilion laptop between November 30, 2010-December 6, 2010 (Charge II, Specification 2); (2) that Appellant possessed child pornography on an HP Pavilion laptop between November 25, 2010-January 11, 2012 (Charge II, Specification 3); (3) that Appellant possessed child pornography on November 14, 2010, on a Seagate hard drive (Charge II, Specification 4); (4) that Appellant possessed child pornography on an HP Pavilion laptop between January 12, 2012-February 7, 2013 (Charge II, Specification 5); and, (5) that Appellant distributed child pornography on an HP Pavilion laptop between January 5, 2013-January 24, 2013 (Charge II, Specification 6). (JA 26-

Court for the Middle District of Pennsylvania for the possession and distribution of child pornography. (JA 32-33).[2] On May 6, 2016, the district court convicted Appellant of one count of knowing possession of child pornography and one count of knowing distribution or receipt of child pornography under 18 U.S.C. § 2256(8)(A). (App. Ex. XXII, encl. 1, p. 8). Count One of the federal indictment alleged that Appellant possessed child pornography transported in interstate commerce from on or about August 2010 until 29 January 2013 in violation of 18 U.S.C. § 2252A(a)(4). (App. Ex. XXII, encl. 1, p. 8). Count Two alleged that Appellant knowingly received or distributed child pornography transported in interstate or foreign commerce from on or about 23 January 2013 to 28 January 2013 in violation of 10 U.S.C. § 2252A(a)(5). (App. Ex. XXII, encl. 1, p. 8).

After his conviction in federal district court, Appellant filed a motion to dismiss the charges and specifications in his court-martial for double jeopardy. (JA

---

27). The government dismissed Charge II, Specification 6, and the remaining offenses on the charge sheet following Appellant's guilty plea on October 24, 2016, to Specifications 2, 3, and 4 of Charge II. (R. at 113).

[2] Count One of the federal indictment alleged that Appellant possessed child pornography between August 2010 and January 29, 2013. (JA 32). Count Two of the federal indictment alleged that Appellant distributed child pornography between January 23, 2013, and January 28, 2013. (JA 33). At the outset, this Court should note that the distribution alleged by Charge II, Specification 2 does not overlap with any federal offense. (JA 26). Thus, Appellant's challenge in this case only applies to the possession offenses—the federal and military distribution offenses refer to different date ranges and therefore could not violate the prohibition against double jeopardy.

55). The military judge denied Appellant's motion to dismiss on October 11, 2016.[3] (JA 61). The military judge later convicted and sentenced Appellant according to his conditional guilty pleas on October 24, 2016. (JA 82).

Following his court-martial conviction, Appellant moved the district court to dismiss his convictions for possession and distribution of child pornography for double jeopardy based on his court-martial conviction. (JA 69). Pursuant to Appellant's motion, the district court dismissed Count One, the possession offense, and sentenced him on Count Two, the distribution offense. (JA 63). The district court sentenced Appellant to one hundred and forty-two months of confinement. (JA 64).

On appeal under Article 66, UCMJ, Appellant challenged his court-martial conviction as a violation of the Fifth Amendment protection against Double Jeopardy. *United States v. Rice*, 78 M.J. 649, 652 (A. Ct. Crim. App. Dec. 18, 2018). The Army Court found Appellant's military conviction for possession of child pornography both legally and factually duplicative of his conviction in the district court. *Id*. at 654-55. The Army Court found that "Appellant's conviction at

[3] In his ruling, the military judge found that the military charges did not violate the Double Jeopardy Clause because they alleged possession and distribution of different images. At the Army Court, the government conceded that the military judge employed erroneous reasoning in light of *United States v. Forrester*, 76 M.J. 479 (C.A.A.F. 2017) and *United States v. Mobley*, 77 M.J. 749 (A. Ct. Crim. App. Jun. 22, 2018).

the District Court of possessing child pornography necessarily proved every element of being a crime not capital under clause three of Article 134, UCMJ." *Id*. at 654. Thus,

> 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 [the test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932)] 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.

Id. In a footnote, the Army Court also declined to address the question of whether "jurisdictional elements" qualify for purposes of the *Blockburger* analysis, stating that its holding "does not extend to those situations where additional substantive elements distinguish an offense charged under Article 134, UCMJ, from another criminal offense." *Id.* at 654, n. 7. The Army Court concluded:

> Clause three of Article 134 incorporates the entire federal 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.

Id. (citing *United States v. Williams*, 78 M.J. 543, 546-47 (A. Ct. Crim. App. Aug. 21, 2018)).

Although finding that the government placed Appellant in jeopardy twice, the Army Court declined to grant Appellant relief. The Army Court reasoned that because Appellant sought—and obtained—relief in the district court, he could not also obtain relief from the service court without profiting from a windfall. *Id.* at 656. The Army Court reasoned that Appellant "is not simultaneously entitled to a second remedy for a single wrong." *Id.* at 655. This Court granted review pursuant to Article 67, UCMJ, on May 1, 2019.

Summary of Argument

This Court should find that the Army Court erred when it found that Appellant's convictions for possession of child pornography violated the Double Jeopardy Clause of the Fifth Amendment because the Army Court erroneously analyzed Appellant's convictions under clause 3 of Article 134, UCMJ, rather than clause 2. The Army Court erred because the reference to the definitions section of the Child Pornography Protection Act (CPPA) in Appellant's court-martial charges does not transform the offenses into clause 3 offenses; rather, the incorporation of the federal definition of child pornography served to provide appellants with fair notice before the President enumerated a separate offense for the possession of child pornography under Article 134, UCMJ. Applying the "same elements" test of *Blockburger* to charges under Article 134, UCMJ, and 18 U.S.C. § 2252A, each offense alleges an element not present in the others. Accordingly, the military and

federal courts did not prosecute Appellant for the "same offense." Finally, even if the government violated Appellant's right against double jeopardy, Appellant elected to seek his remedy from the district court and is therefore not entitled to further relief.

Argument

I. The Army Court erred when it found that Appellant's convictions for child pornography violated the Double Jeopardy Clause of the Fifth Amendment.

The Army Court erred when it found that Appellant's convictions violated the Double Jeopardy Clause because it erroneously analyzed the charges and specifications under clause 3, Article 134, UCMJ—"crimes not capital"—rather than as "service-discrediting" conduct under clause 2, Article 134, UCMJ. Because the government charged Appellant under clause 2, Article 134, UCMJ, and the court-martial charges do not contain the "same elements," the Army Court erred when it found that Appellant's court-martial violated the Double Jeopardy Clause.

A. The Army Court erred when it found that the government charged Appellant under clause 3 of Article 134, UCMJ.

This Court should find the Army Court erred when it analyzed Appellant's convictions under clause 3, Article 134, UCMJ, because the government actually charged Appellant under clause 2 of that statute. Article 134, UCMJ, prohibits three kinds of offenses: (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces;" (2) "all conduct of a nature to bring

discredit upon the armed forces; and (3) "crimes and offenses not capital." Article 134, UCMJ. A charge under Article 134, UCMJ, fails to state an offense if it does not allege one of these terminal elements. *United States v. Fosler*, 70 M.J. 225, 226 (C.A.A.F. 2011). Because the three clauses of Article 134, UCMJ, state separate offenses, the violation of one clause does not necessarily lead to a conviction under the other clauses. *Id.* at 230 (citing *United States v. Martinelli*, 62 M.J. 52, 66-67 (C.A.A.F. 2005) (discussing the relationship between clauses 1, 2, and 3 of Article 134, UCMJ, and the extraterritorial prosecution of offenses under the CPPA). The distinct nature of the offenses penalized under each clause of Article 134, UCMJ, led this Court to determine in *United States v. Fosler* that the failure to allege a terminal element violated the constitutional principle of fair notice. *Id.* The same conclusion also led this Court to conclude in *United States v. Martinelli*, 62 M.J. at 66-67, and *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008), that an offense charged under clause 1 or 2 does not necessarily constitute a lesser-included offense of a charge under clause 3.

The Army Court's opinion turns on the government's charging scheme in Appellant's case. In its opinion, the court stated:

> Appellant's conviction at the District Court of possessing child pornography necessarily proved every element of being a crime not capital under clause three of Article 134, UCMJ. 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 (emphasis in original). Further, the Army Court held that:

> 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.

Id. (citations omitted).

The Army Court's decision thus contains both legal and factual errors; it not only errs by failing to apply this Court's precedent interpreting Article 134, UCMJ, but also by relying upon an incorrect factual premise. Turning to the charges and specifications in this case, the government charged Appellant with possession and distribution of child pornography in violation of Article 134, UCMJ, "such conduct being of a nature to bring discredit upon the armed forces." (JA 26-27). The charges and specifications do not state a clause 3 offense because they neither incorporate the Federal Assimilated Crimes Act, 18 U.S.C. § 13 (2012), nor do they employ the language required to allege an offense not capital. *See* Article 134(c)(6)(b), UCMJ, discussion (2016); *see also* Article 134(c)(6)(b), UCMJ

(2019) ("When alleging a clause 3 violation, each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. § 13, each element of the assimilated State, Territory, Possession, or District law) must be alleged expressly or by necessary implication, and the specification must allege that the conduct was 'an offense not capital.'").[4] Accordingly, the Army Court erred when it analyzed Appellant's case under clause 3 of Article 134, UCMJ.

B. The fact that the military charges reference the CPPA does not transform them into clause 3 offenses.

This Court should find that the Army Court erred because even though both the federal and military indictments reference the CPPA, the incorporation of the definition of child pornography from that statute does not transform a clause 2 offense into a clause 3 offense under Article 134, UCMJ. Before the UCMJ contained an enumerated offense for the receipt and distribution of child pornography, military justice practitioners often adopted the definition of child pornography in the CPPA to describe prohibited images. *See e.g. United States v.*

[4] Further, both Appellant's providence inquiry and the stipulation of fact admitted at his guilty plea acknowledge that Appellant "[agreed] that the distribution of child pornography videos brings discredit upon the armed forces." (JA 51); (R. at 166). Neither the stipulation of fact nor the providence inquiry discuss Appellant's guilt or innocence under a clause 3, Article 134, UCMJ, theory of liability. Consequently, it is evident that all parties to the court-martial understood the nature of the charges were under clause 2 rather than clause 3 because the providence inquiry failed to establish that Appellant committed an act charged under clause 3.

Forney, 67 M.J. 271, 275 (C.A.A.F. 2009) (discussing the application of the definitions section of the CPPA, 18 U.S.C. § 2256(8), in instructions on findings); *United States v. Navrestad*, 66 M.J. 262, 265 (C.A.A.F. 2008) (analyzing the definitions section of the CPPA in a case prosecuted under Article 134, UCMJ); *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006) (discussing the relationship between the definitions provided by 18 U.S.C. § 2256 and the related federal crime enumerated in 18 U.S.C. § 2252A). During that period, this Court often upheld convictions prosecuted under clauses 1 and 2 while overturning similar convictions under clause 3. *See United States v. Mason*, 60 M.J. 15, 18 (C.A.A.F. 2004) (overturning a conviction under the CPPA prosecuted under clause 3, Article 134, UCMJ, in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002)); see also *United States v. Brisbane*, 63 M.J. 106, 116-17 (C.A.A.F. 2006) (upholding a conviction under clauses 1 and 2 of Article 134, UCMJ, because the possession of virtual child pornography may bring discredit upon the armed forces or prejudice good order and discipline).[5]

[5] Prosecuting child pornography offenses under clauses 1 and 2 also permitted the military to court-martial servicemembers for violating the CPPA outside of the United States, *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005) (holding that the CPPA does not apply extraterritorially when charged under clause 3, Article 134, UCMJ), and allowed military prosecutors to avail themselves of the federal maximum punishment. *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011) (declining to apply the maximum punishment available under the CPPA when

Appellant's court-martial charges alleged that he possessed and distributed images of child pornography "as defined by 18 U.S.C. § 2256" in violation of Article 134, UCMJ, and that his conduct brought discredit upon the armed forces. (JA 26-27). The federal indictment alleged that he possessed and distributed child pornography "as defined in Title 18, United States Code, Section 2256(8)(A), that had been shipped or transported in or affecting interstate commerce" in violation of 18 U.S.C. § 2252A(a)(2) and (5). (JA 32-33). While 18 U.S.C. § 2256 appears in both indictments, the incorporation of the definitions section of the CPPA does not also incorporate its criminal provisions; the definitions section of the statute does not provide either the elements of the federal crime or describe its punishments and limitations. *Compare* 18 U.S.C. § 2256(8)(A) (defining "child pornography") *with* 18 U.S.C. § 2252A(a)(2) (prohibiting the knowing receipt and distribution of child pornography using interstate commerce). Thus, the Army Court erred when it analyzed Appellant's charges under clause 3, Article 134, UCMJ, because the reference to a federal statute did not transform Appellant's clause 2 offenses into "crimes not capital" under the code.

---

military prosecutors did not write an "analogous" charge under Article 134, UCMJ).

C. Because the government charged Appellant under Clause 2, Article 134, UCMJ, Appellant's court-martial for possession of child pornography did not violate the Double Jeopardy Clause.

1. Under Blockburger, the possession of child pornography under Article 134, UCMJ, does not constitute the "same offense" as a violation of 18 U.S.C. § 2252A.

This Court should find that Appellant's successive prosecutions for the possession of child pornography did not violate the Double Jeopardy Clause of the Fifth Amendment because, after applying the *Blockburger* elements test, the possession of child pornography under Article 134, UCMJ, does not constitute the "same offense" as a violation of 18 U.S.C. § 2252A. The government may prosecute Appellant for multiple crimes arising from the same conduct so long as Congress intended such a result. *United States v. Roderick*, 62 M.J. 425, 432 (C.A.A.F. 2006) (citing *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). To analyze Congressional intent, this Court applies the strict elements test articulated by the Supreme Court in *Blockburger v. United States*. *Teters*, 37 M.J. at 377. The *Blockburger* test centers on the statutory elements as defined by Congress, not the proof offered by the government to prove its case. *Id.* Notably, the "same elements" test applies in both cases where an appellant alleges a violation of his right against multiple prosecutions and those in which he asserts a bar to multiple prosecutions. *United States v. Dixon*, 509 U.S. 688, 696 (1993) ("In

both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or cannot survive the 'same elements' test, the double jeopardy bar applies.").

In order to prove a violation of Article 134, UCMJ, the government must show that: (1) appellant knowingly and wrongfully possessed, received, or viewed child pornography as defined by 18 U.S.C. § 2256; and (2) that, under the circumstances, appellant's conduct prejudiced the good order and discipline of the armed forces or was of a nature to bring discredit upon the armed forces. Article 134, UCMJ, 10 U.S.C. § 934 (2008).[6] When prosecuting an appellant under 18 U.S.C. § 2252A(a)(4), the government must show that: (1) the appellant knowingly possessed one or more materials containing child pornography; and (2) that the materials have been mailed, or have been shipped or transported using any means or facility of interstate commerce or in or affecting interstate or foreign commerce. 18 U.S.C. § 2252A(a)(4). While Article 134, UCMJ, requires that the government prove the service discrediting nature of Appellant's conduct, 18 U.S.C. § 2252A requires the government to show that the prohibited materials traveled in interstate

[6] The President added an enumerated offense for the possession and distribution of child pornography via Executive Order 13593, which took effect on January 16, 2012. Exec. Order No. 13,593, 76 C.F.R. 242 (December 16, 2011). The government charged Charge II, Specification 5 under that enumerated offense and then dismissed it following Appellant's guilty plea. (JA 26); (R. at 328).

or foreign commerce. Thus, applying the "strict elements" test of *Blockburger*, the military and federal offenses each contain an element the other does not. Accordingly, the government did not violate Appellant's right against double jeopardy when it prosecuted him under two different statutes criminalizing the possession of child pornography.

2. Appellant's convictions in federal court do not constitute lesser-included offenses for purposes of double jeopardy.

This Court should affirm Appellant's convictions because the district court did not find him guilty of lesser-included offenses. Appellant argues that Count One of the federal indictment—possession of child pornography—alleged a lesser-included offense of Charge II, Specification 2, distribution of child pornography. (Appellant's Br. 17). While this argument might prevail if the government had charged Appellant under clause 3, Article 134, UCMJ, it cannot succeed where the government alleges a violation of clause 2, Article 134, UCMJ.[7]

[7] Had the government charged Appellant under clause 3, Article 134, it would have had to allege the following elements: (1) the appellant knowingly distributed one or more materials containing child pornography; (2) that the materials had been mailed, or had been shipped or transported using any means or facility of interstate commerce or in or affecting interstate or foreign commerce; (3) that such conduct violated 18 U.S.C. § 2252A; and (4) that such violation constitutes a "crime not capital." Article 134(3), UCMJ. Thus, a federal charge for possession under the *same statutory scheme* would likely constitute a lesser-included offense.

First, this Court's precedent regarding lesser-included offenses applies an "elements" tests to determine whether an offense is "necessarily included" in the offense charged. *See United States v. Gonzales*, 2019 CAAF LEXIS 396 at *11-12 (C.A.A.F. 2019); *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018); *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010). Under this line of precedent, a lesser-included offense must contain all of the elements of the greater offense, minus one. *Jones*, 68 M.J. at 470. This cannot occur when the offenses contain distinct elements based on a textual comparison of different statutes. *Gonzales*, 2019 CAAF LEXIS 396 at *11. Second, this Court does not disregard statutory elements when analyzing for violations of the Double Jeopardy Clause whether based in multiplicity, unreasonable multiplication of charges, or the analysis of lesser-included offenses. *See* Article 44(a), UCMJ; *Roderick*, 62 M.J. at 432 ("[Appellant] has not, however, identified any authority which would allow this court to 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.").[8] Because violations of clause 2, Article

[8] As the government noted in its brief below, the terminal element of Article 134, UCMJ—like the "interstate commerce" element of 18 U.S.C. § 2252A—requires separate pleading and proof. *See Fosler*, 70 M.J. at 230-31. If the government must allege and prove an element in order to proceed to verdict and survive a motion under Rule for Court-Martial 917, such an element is not "purely jurisdictional."

134, UCMJ, and 18 U.S.C. § 2252A require the government to prove different elements and those elements do not nest with one another as required by this Court's precedent on lesser-included offenses, Appellant's conviction for distribution of child pornography does not constitute a greater offense of his conviction for possession.

II. Even if this Court determined that Appellant's prosecutions violated the Double Jeopardy Clause, Appellant already obtained his remedy from the Middle District of Pennsylvania.

Absent a violation of the Double Jeopardy Clause, this Court should not award Appellant relief from his court-martial convictions. However, if this Court determines that Appellant's military prosecution violated the prohibition against double jeopardy, this Court should not award Appellant any additional relief because he already obtained his desired remedy from the district court. When the government violates an appellant's right against double jeopardy, courts may employ several remedies, including dismissing the offending charges and affirming only non-offending convictions. *See Morris v. Mathews*, 475 U.S. 237, 246-47 (1986) (holding that a court may remedy a double jeopardy violation by affirming a lesser-included offense that does not violate the bar against double jeopardy); *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969) (providing a remedy for double jeopardy in credit for time served). In this case, the Army Court found that when Appellant elected to seek his remedy for the apparent double jeopardy

violation in the district court, he effectively corrected the error in the proceedings. *Rice*, 78 M.J. at 655. In his brief, Appellant argues that the Army Court could not reasonably reach this conclusion because it conflated the remedy for multiple punishments with the remedy for successive prosecutions. (Appellant's Br. at 22). Further, Appellant argues that nothing the district court did could have any effect on the Army's double jeopardy violation because the only remedy for successive prosecutions is the dismissal of the later charges. (Appellant's Br. at 24-25).

First, the government notes that as Appellant's plea of guilty to Charge II, Specification 2 does not violate the Double Jeopardy Clause, this Court should decline Appellant's invitation to dismiss his military convictions in their entirety. (Appellant's Br. at 35). The presence of purportedly-barred charges in Appellant's court-martial does not render that court-martial automatically unconstitutional—especially not in a case where constitutionally-viable charges remain. *Morris*, 475 U.S. at 249 (finding that the bar to successive prosecutions does not "automatically" render any conviction resulting from a second trial "unconstitutional" even where an appellant argues that the second trial itself is the violation of the Double Jeopardy Clause) (Blackmun, J., concurring). Second, the government recognizes that the Double Jeopardy Clause ideally protects an appellant against the ordeal, anguish, and expense of a second prosecution for the "same offense." *Abney v. United States*, 431 U.S. 651, 662 (1977). This principle

allows an appellant to file an interlocutory appeal from a military judge's ruling rejecting the claim of double jeopardy. *Id*. Turning to the facts and procedural posture of this case, this Court should not invalidate Appellant's military convictions because he already sought—and obtained—his remedy from a parallel court.

Assuming Appellant's claim that the Double Jeopardy Clause barred the Army's prosecution for possession of child pornography, this Court should consider that Appellant's requested relief will not make him "whole" within the meaning of the law. *Morris*, 475 U.S. at 250. (Blackmun, J., concurring) ("As a consequence, it is also true that reducing respondent's sentence does not make him 'whole' for the violation: it does not compensate him, for example, for any mental anguish inflicted upon him by the prosecution for the aggravated offense."). 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, including conduct unbecoming an officer in violation of Article 133, UCMJ, and the distribution of child pornography in violation of Article 134, UCMJ. (JA 26-27). Simply put, Appellant faced trial by court-martial irrespective of whether the government charged him with possession of child pornography. Thus, this Court

cannot provide Appellant with a remedy for an alleged double jeopardy violation so inextricably linked to a valid prosecution on other grounds without granting him a windfall. *See Jones v. Thomas*, 491 U.S. 396, 387 (1989) ("[N]either the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls."). This Court should not grant Appellant relief from his second trial based on the legal fiction that the court-martial would never have taken place; to the extent that Appellant suffered anxiety and unease attendant to criminal prosecution, that harm would exist whether or not the Army prosecuted Appellant for possession of child pornography in addition to distribution of child pornography and conduct unbecoming an officer.

Further, even if Appellant's Army prosecution violated the Double Jeopardy Clause, he elected his remedy when he pursued dismissal of his conviction for possession in the district court. When the military judge denied Appellant's double jeopardy motion, he had the option to pursue interlocutory relief and prevent the Army from proceeding with prosecution. (JA 61); *see Abney*, 431 U.S. at 661-62 (finding that an appellant may vindicate his right against successive prosecution via interlocutory appeal). Appellant declined to do so. Instead, Appellant entered a conditional guilty plea that preserved his ability to raise the double jeopardy error on appeal. (JA 42-43). Had Appellant pleaded guilty and simply raised the double

jeopardy error to the Army Court, it may have granted his requested relief.[9] 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. (JA 71). He prevailed and the district court vacated Appellant's conviction for possession of child pornography. (JA 88). In so doing, Appellant vindicated his right against double jeopardy by eliminating the allegedly duplicative convictions; legally, it is as though the district court prosecution for possession of child pornography never occurred. To the extent that Appellant argues that he deserves relief for being twice "put in jeopardy" for the same offense, the district court's remedy reduces double jeopardy to single jeopardy and eliminates any error. In short, logic and policy dictate that the remedy for double jeopardy should not be *no jeopardy at all*.

Given the procedural posture of this case, Appellant now stands convicted of one distribution offense and three possession offenses in violation of the UCMJ. (JA 21-22). He also stands convicted of one distribution offense in the Middle District of Pennsylvania. (JA 63-64). None of these offenses overlap and Appellant never received multiple punishments for the same offense. Because the district

[9] Assuming that the Army Court did not in fact err when it found that Article 134, UCMJ, and 18 U.S.C. § 2252A constitute the "same offense."

court vacated Appellant's conviction for possession of child pornography and never sentenced him, he never suffered a violation of his double jeopardy right against successive punishment.

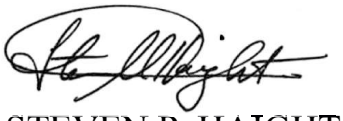
Conclusion

WHEREFORE, the government respectfully requests that you affirm the findings and sentence in Appellant's case.

ALLISON ROWLEY
Captain, Judge Advocate
Appellate Government Counsel
U.S.C.A.A.F. Bar No. 36904

CATHARINE M. PARNELL
Major, Judge Advocate
Branch Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 36626

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 37060



STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 36151

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 5,896 words and 695 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

CATHARINE M. PARNELL
Major, Judge Advocate
Attorney for Appellee
June 24, 2019

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 28 June 2019 and electronically filed to Defense Appellate on June 28, 2019.

Angela Riddick

ANGELA R. RIDDICK
Paralegal Specialist
Office of The Judge Advocate General, United States Army
Appellate Government Counsel
9275 Gunston Road, Room 1209
Fort Belvoir, VA 22060
703-693-0823