Filed on July 19, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ALEXANDER L. DRISKILL,
Airman (E-2),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0066/AF

Crim. App. Dkt. No. ACM 39889 (f rev)

REPLY BRIEF ON BEHALF OF APPELLANT

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36147
Appellate Defense Division
1500 West Perimeter Rd, Ste 1100
Joint Base Andrews, MD 20762
(240) 612-4770
kasey.hawkins@us.af.mil

Counsel for Appellant

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Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Airman (Amn) Alexander Driskill, the Appellant, hereby replies to the Government's Brief (hereinafter Gov. Br.), filed on July 12, 2023.

ARGUMENT

THE REPROSECUTION AT ISSUE VIOLATED THE FIFTH AMENDMENT AND ARTICLE 44'S PROHIBITIONS AGAINST DOUBLE JEOPARDY.

The military judge in Amn Driskill's first court-martial (hereinafter *Driskill I*) was correct in finding 18 U.S.C. § 1466A did not apply extraterritorially, however she erred in finding this caused the court-martial to lose jurisdiction over the obscene cartoons specification. Lack of extraterritoriality does not automatically strip a court-martial of jurisdiction, as it is possible the facts could bring the charged conduct into the territorial reach of the statute. The military judge's decision to dismiss the specification meant the facts here were such that the statute did not reach Amn Driskill's conduct. This was a decision on the merits of the case, made after all evidence was presented and both sides delivered argument. Thus, the dismissal was akin to an acquittal and double jeopardy barred reprosecution. Even if this Court finds the dismissal is not the equivalent of an acquittal, double jeopardy still bars reprosecution of the offense as Amn Driskill sought a verdict and raised legal and factual grounds for an acquittal, but the military judge *sua sponte* directed briefing on a motion to dismiss.

The Government controls the charge sheet, and in *Driskill I* the Government chose to pursue a violation of 18 U.S.C. § 1466A under Clause 3 of Article 134, UCMJ. The Government therefore assumed the risk that they would be unable to achieve a conviction—whether based on a lack of extraterritoriality of the statute or additional failure of proof or both. Amn Driskill was subjected to the anxiety, embarrassment, and insecurity associated with a second trial on the same offense (*Driskill II*). That should have never happened. Subjecting Amn Driskill to two trials for the same offense punished him for the charging mistake made by the Government. This Court has an opportunity to correct that mistake.

1. *The extraterritorial reach of the charged federal statute was a merits question.*

The Government first argues that extraterritoriality is a jurisdictional issue in the context of courts-martial. Gov. Br. at 17. The Government claims "the Supreme Court said that the extraterritoriality of a statute might bear on jurisdiction *if the statute being analyzed is jurisdictional in nature*." *Id.* (emphasis added) (citing *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2013)). In *Kiobel*, the Supreme Court found the Alien Tort Statute was "strictly jurisdictional" as it "does not directly regulate conduct or afford relief." 569 U.S. at 116 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004)). The same cannot be said of the statute at issue in Amn Driskill's case, 18 U.S.C. § 1466A, which plainly regulates conduct. The statute prohibits, among other things, knowing possession of obscene visual

depictions of minors engaging in sexually explicit conduct. *See* 18 U.S.C. § 1466A(b)(1). Because the statute is not jurisdictional in nature, the basic premise remains that "[t]he extraterritorial reach of a statute ordinarily presents a merits question, not a jurisdictional question." *United States v. Munoz Miranda* (*Munoz*), 780 F.3d 1185, 1191 (D.C. Cir. 2015) (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 253-54 (2010)).

The Government asserts "whether extraterritoriality is a merits or jurisdictional question turns on the particular statute being analyzed." Gov. Br. at 17. But the Government focused on the wrong statutes in arriving at its conclusion that the extraterritorial application of the federal statute in this case was a question of jurisdiction. The Government exclusively examined the UCMJ and *Manual for Courts-Martial* (*MCM*) but neglected to consider the actual statute being scrutinized for extraterritorial application—18 U.S.C. § 1466A. Gov. Br. at 18-19. There are at least two flaws with the Government's approach. First, the Government relies on the President's explanation of offenses in the *MCM*, which are non-binding persuasive authority for this court's consideration. *See, e.g.*, *United States v. Forrester*, 76 M.J. 389, 396 (C.A.A.F. 2017) (explaining this Court is not bound by the President's interpretation or listing of offenses under Article 134, UCMJ). Second, when military authorities charge a violation of a federal statute via Clause 3 of Article 134, UCMJ, it is the *charged federal statute* which must be analyzed,

not the UCMJ or *MCM*, to determine whether extraterritoriality was a merits or jurisdictional question.

The analysis of whether 18 U.S.C. § 1466A could be applied to Amn Driskill's conduct in Italy necessarily involved consideration of where he was located as a matter of fact; thus, the extraterritorial application of the statute was a merits question. "[T]o ask what conduct [a statute] reaches is to ask what conduct [the statute] prohibits, which is a merits question." *Morrison*, 561 U.S. at 254. In *Driskill I*, the military judge had to consider not only whether the language of 18 U.S.C. § 1466A provided extraterritorial application, but also whether Amn Driskill's conduct fell into a domestic application of the statute. JA at 404-05; *see also United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (explaining that even if a federal statute is not applicable to conduct outside the United States, the Court must still consider whether the nature of the conduct places it within the domestic application of the statute).

The Government concludes that "[b]ecause the 2016 *Manual* establishes that 'for purposes of court-martial jurisdiction,' an overseas violation of a non-extraterritorial federal statute 'may not be punished under Clause 3 of Article 134,' a court-martial lacks jurisdiction to try such an offense." Gov. Br. at 19. That is an oversimplification. The facts of the case could make the federal statute apply, even in Italy. For example, the Government could have presented evidence that Aviano

Air Base was the "special maritime and territorial jurisdiction of the United States," and that Amn Driskill brought his laptop containing the charged images onto base, thus clearing the jurisdictional hurdle. *See United States v. Corey*, 232 F.3d 1166, 1183 (9th Cir. 2000) (finding "special maritime and territorial jurisdiction of the United States" included property inside Yokota Air Base in Japan and a private apartment building rented by the United States embassy in the Philippines). The Government did not do that in this case.

The Government implies that a court-martial lacks jurisdiction to try *any* overseas violation of a non-extraterritorial federal statute charged under Clause 3 of Article 134, UCMJ. Gov. Br. at 19. Such an assertion is simply incorrect, as demonstrated by this Court's analysis in *Martinelli*, which is notably absent from the Government's brief. In *Martinelli*, upon concluding the federal statute did not apply extraterritorially, this Court did not find the court-martial automatically lost jurisdiction over the offense. 62 M.J. at 63. Instead, this Court analyzed the charged conduct and evidence presented at trial to determine whether there was any possible domestic application of the statute. *Id.* This Court's approach in *Martinelli* confirms that the extraterritoriality of a federal statute charged under Clause 3 of Article 134 is a merits question.

2. The military judge necessarily considered the factual elements of the case in arriving at her decision; therefore, the dismissal of the specification was a final judgement barring reprosecution.

The Government argues that the military judge's dismissal of the specification in Amn Driskill's first court-martial was unrelated to factual guilt or innocence. Gov. Br. at 20. However, the military judge's determination that 18 U.S.C. § 1466A did not reach Amn Driskill's conduct in Italy required consideration of the facts of the case. *See* JA at 393. She could not have made this determination *without* considering the facts of the case. The dismissal reflected her understanding that Amn Driskill could not be convicted as charged. The military judge made her decision after hearing all of the evidence in the case and the arguments of counsel, further indicating it was a final judgment. JA at 68, 410. Functionally, this was an acquittal, barring reprosecution.

Contrary to the Government's assertions, Amn Driskill does not conflate the jurisdictional element of the offense with subject matter jurisdiction. Gov. Br. at 23. Amn Driskill's first court-martial never lost subject matter jurisdiction over the offense; the Government failed to present sufficient evidence that Amn Driskill's conduct fell within the territorial reach of the statute, including failing to prove the jurisdictional element.

The word "jurisdiction" is oftentimes used too loosely. The Supreme Court has recognized a "less than meticulous" use of the term "jurisdictional" both in its

own jurisprudence and that of subordinate courts. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Jurisdiction refers to "a court's adjudicatory capacity, that is, its subject matter or personal jurisdiction." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *see also* Rule for Courts-Martial (R.C.M.) 201. On the other hand, jurisdictional *elements* connect a federal criminal statute "to one of Congress's enumerated powers, thus establishing legislative authority." *Luna Torres v. Lynch*, 578 U.S. 452, 467 (2016). The jurisdictional element of the federal statute in this case requires that the conduct be under certain "circumstances" described in 18 U.S.C. § 1466A(d). In this case, the charged jurisdictional element was transportation in foreign commerce. *See* Brief on Behalf of Appellant, filed May 31, 2023, at 20.

The Government could have presented facts to bring Amn Driskill's conduct into the territorial reach of 18 U.S.C. § 1466A, despite being charged as occurring in Italy, but failed to do so. During closing argument, the Defense raised the lack of extraterritoriality of the statute as a "charging defect and an *elements failure* because the Government had put on no evidence of the images movement to, from, or through a State or Territory of the United States." JA at 68 (emphasis added). The Government had the burden to prove the offense *as charged*. The military judge's determination that the statute did not reach Amn Driskill's conduct in Italy reflected the Government's failure to meet this burden. For this reason, too, the military judge's determination was functionally an acquittal.

As opposed to the functional equivalent of an acquittal, the Government posits the military judge's conclusion "that '[t]he lack of extraterritoriality with 18 U.S.C. § 1466A does not foreclose prosecution for the offense alleged, it only forecloses prosecution under the current charging scheme[,]'" (Gov. Br. at 22) reflects a "procedural dismissal" as described in *Evans v. Michigan*, 568 U.S. 313, 319 (2013), and does not bar retrial under the Double Jeopardy Clause. An example of a "procedural dismissal" is a dismissal for preindictment delay, which is completely unrelated to factual guilt or innocence. *Evans*, 568 U.S. at 320 (citing *United States v. Scott*, 437 U.S. 82, 98 (1978)). The dismissal here is readily distinguished and not strictly procedural, as the determination that Amn Driskill's conduct did not fall into the territorial reach of the statute required consideration of, for example, where the images were maintained and whether they were transported or transmitted into the territorial jurisdiction of the United States. *See* JA at 393 (the military judge's written ruling dismissing the obscene cartoons specification included findings of fact regarding where the images were discovered—facts gleaned from the trial on the merits).

The Government further argues that the Government's decision to charge a case under a certain scheme "does not imply that the government did not or could not present evidence at trial sufficient to convict under another scheme." Gov. Br. at 25. This argument presents the precise evil the Double Jeopardy Clause is

designed to prevent. The Government controls the charge sheet. *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). Because the Government has "complete discretion" over how to charge an accused, it accepts the risk that an accused might escape criminal liability due to the chosen charging scheme. *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021). The Government cannot be allowed to choose a charging scheme and then, when it fails, try another charging scheme, making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

3. Amn Driskill did not initiate the motion to dismiss.

Even if the military judge's dismissal "was a legal judgement unrelated to factual guilt or innocence," as the Government argues, the Double Jeopardy Clause still bars reprosecution in this case. Gov. Br. at 26. Without Amn Driskill's consent, the military judge aborted the trial on her own initiative, depriving him of his "valued right to have his trial completed by a particular tribunal." *Scott*, 437 U.S. at 100 (citing *United States v. Jorn*, 400 U.S. 470, 484 (1971)).

The Government avers that "[f]or the first time on appeal, Appellant argues that the dismissal for lack of jurisdiction amounted to a declaration of a mistrial over

defense objection" barring reprosecution without manifest necessity. Gov. Br. at 26. The Government does not acknowledge that it was the Air Force Court of Criminal Appeals (hereinafter "Air Force Court") that first raised the mistrial analogy by applying the Supreme Court's reasoning from *Lee v. United States*, 432 U.S. 23 (1977). JA at 22.

In permitting reprosecution in *Lee*, the Supreme Court placed special importance on the fact that the defendant had consented to, and in fact requested, the termination of the original proceedings, and that the defendant's motion was not prompted by bad faith on the part of the judge or prosecution. *Lee*, 432 U.S. at 33-34. The Air Force Court incorrectly applied these factors to Amn Driskill's case.

First, the Air Force Court mistakenly concluded that Amn Driskill requested the dismissal when in fact, Amn Driskill took every step to get a final verdict on the obscene cartoons specification in his first court-martial. He did not initially file a motion to dismiss for lack of jurisdiction. Instead, he chose to attack the elements in closing argument to show the Government's failure of proof and secure an acquittal. JA at 410. The military judge *sua sponte* ordered the parties to brief the issue as a motion to dismiss, despite Amn Driskill's arguments to the contrary. JA at 172. It was only after being ordered to brief the issue that Amn Driskill argued that the specification should be dismissed. JA at 177. Even then, Amn Driskill argued that the specification should be dismissed *with prejudice* because jeopardy had attached.

Id. Second, the Air Force Court erroneously relied on *Lee* to find that the Double Jeopardy Clause did not bar reprosecution because there was no bad faith on behalf of a judge or prosecutor. JA at 22. This statement shortcuts the full Double Jeopardy analysis—bad faith only comes into play if the defendant requests the termination of proceedings, which, as previously discussed, only occurred in this case after the military judge specifically ordered Amn Driskill's defense counsel to file a motion to dismiss.

The Government next argues "if a defendant brings a motion arguing for acquittal on both a legal and factual basis, and the court dismisses exclusively on the legal ground raised, the double jeopardy [clause] does not bar a retrial." Gov. Br. at 27 (citing *United States v. Neal*, 93 F.3d 219, 222 (6th Cir. 1996)). However, the question in *Neal* was not whether double jeopardy prohibited a retrial, but whether double jeopardy precluded a *government appeal* of the dismissal on exclusively legal grounds. *Neal*, 93 F.3d at 222. As the Supreme Court stated in *Scott*, when a trial judge "terminates the proceedings favorably to the defendant on a basis *not* related to factual guilt or innocence," the prosecution "ordinarily must seek reversal of the decision of the trial court" if it wishes to reinstate the proceedings. 437 U.S. at 94 (emphasis added). The Government's argument on this point not only fails to establish its premise, that retrial is not barred, but raises an additional problem for the Government—the prosecution in this case did not seek reversal of the decision

of the trial court before reprosecuting Amn Driskill. JA at 410. The Government may claim that the resprosecution of Amn Driskill was not a reinstatement of the proceedings, because Amn Driskill was subsequently charged under a different clause of Article 134, UCMJ, but as discussed below, the offenses were the same for double jeopardy purposes.

If, as the Government argues, the military judge's decision to dismiss the obscene cartoons specification was unrelated to Amn Driskill's factual guilt or innocence, then the dismissal was akin to a mistrial over defense objection and double jeopardy still precludes reprosecution. Furthermore, the Government chose not to seek reversal of the military judge's decision to dismiss before reprosecuting Amn Driskill, contrary to the Supreme Court's guidance in *Scott.* Each of these circumstances present a violation of the protection against double jeopardy.

4. For double jeopardy purposes, the Clause 3 offense in Driskill I *and the Clause 2 offense in* Driskill II *are the same.*

The Double Jeopardy Clause bars a successive trial on an offense not charged in the original indictment once jeopardy has already terminated on, what is for double jeopardy purposes, the 'same offense.'" *Brown v. Ohio*, 432 U.S. 161, 166 (1977). The Government argues the specifications in *Driskill I* and *Driskill II* are not the same offense for the purpose of double jeopardy. Gov. Br. at 29. In doing so, the Government misapprehends Amn Driskill's argument. Amn Driskill argues the prosecution in *Driskill I* failed to prove that Amn Driskill's conduct fell within

the territorial reach of the statute *and* the jurisdictional element (transport in foreign commerce by computer). Amn Driskill maintains that the Government was required to prove the jurisdictional element beyond a reasonable doubt to secure a conviction, but that element may be ignored for the purposes of determining what constitutes the same offense pursuant to *Luna Torres*, 578 U.S. at 468, and *United States v. Rice*, 80 M.J. 36, 43 (C.A.A.F. 2020).

The Government attempts to distinguish this case from *Rice*, citing to this Court's caution that its holding "does not reach beyond the 'unusual facts' of [that] case, and thus does not extend to those situations where additional substantive elements distinguish an offense charged under Article 134, UCMJ." Gov. Br. at 31 (quoting *Rice*, 80 M.J. at 40 n.10). However, the specification in *Driskill I* does not present any additional substantive elements. Ignoring the jurisdictional element, as permitted by *Luna Torres* and *Rice*, the specification in *Driskill II* wholly encompasses the specification in *Driskill I*. As greater and lesser offenses, the specifications allege the same offense for double jeopardy purposes.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside and dismiss the Specification of the Charge.

Respectfully Submitted,

Kasey W. Hawk

KASEY W. HAWKINS, Maj, USAF

Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36147
Air Force Appellate Defense Division
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews, MD 20762
(240) 612-4770
kasey.hawkins@us.af.mil

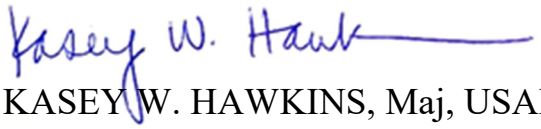
CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on July 19, 2023.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 3,163 words.

This brief complies with the typeface and type style requirements of Rule 37.



KASEY W. HAWKINS, Maj, USAF
U.S.C.A.A.F. Bar No. 36147
Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
kasey.hawkins@us.af.mil