

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

<b>UNITED STATES,</b>	)	<b>UNITED STATES' BRIEF</b>
<i>Appellant/Cross-Appellee,</i>	)	<b>IN SUPPORT OF THE</b>
	)	<b>CERTIFIED ISSUES</b>
v.	)	
	)	Crim. App. No. 40551
Senior Airmen (E-4),	)	
<b>NATHANIEL A. CASILLAS,</b>	)	USCA Dkt. No. 26-0096/AF
United States Air Force,	)	
<i>Appellee/Cross-Appellant.</i>	)	18 February 2026

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**UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUES**

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United States Air Force,	)	18 February 2026
<i>Appellee/Cross-Appellant.</i>	)	

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

**CERTIFIED ISSUES**

**I.**

**DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR WHEN IT FOUND THAT SENIOR AIRMAN CASILLAS' RIGHTS AGAINST DOUBLE JEOPARDY WERE VIOLATED WHEN HE WAS CHARGED AT TWO SEPARATE COURTS-MARTIAL FOR POSSESSING DIFFERENT IMAGES OF CHILD PORNOGRAPHY ON THE SAME DEVICE.**

**II.**

**IF THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY SET ASIDE THE FINDING OF GUILTY AS TO THE POSSESSION SPECIFICATION BASED ON DOUBLE JEOPARDY, DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR BY DECLINING TO SET ASIDE THE FINDING OF GUILTY AS TO THE VIEWING SPECIFICATION BASED ON DOUBLE JEOPARDY?**

### III.

**THE TRIAL DEFENSE COUNSEL FAILED TO ASSERT THE PROHIBITIONS AGAINST DOUBLE JEOPARDY IN DEFENSE OF SENIOR AIRMAN CASILLAS. IF TRIAL DEFENSE COUNSEL WAIVED THIS ISSUE, DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR BY DECLINING TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL?**

#### **STATEMENT OF STATUTORY JURISDICTION**

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

#### **RELEVANT AUTHORITIES**

**U.S. Const. amend. V** “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

**Article 44, UCMJ**<sup>1</sup> “No person may, without his consent, be tried a second time for the same offense.”

**Manual for Courts-Martial, United States part IV, para. 95.b.(1)(a)-(b), c.(4), and (c)(11) (2019 ed.) (MCM)**

Article 134, UMCJ – (Child pornography)

b. Elements.

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<sup>1</sup> Unless otherwise stated, all references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) (MCM).

(1) Possessing, receiving, or viewing child pornography.

(a) That the accused knowingly and wrongfully possessed, received, or viewed child pornography; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation.

(4) “Child pornography” means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.

(11) Visual depiction includes any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

### **STATEMENT OF THE CASE**

Appellee was court-martialed twice for two different sets of child pornography, and this was his second court-martial. Contrary to Appellee’s pleas, at a general court-martial, a panel of members found him guilty of possessing and viewing child pornography in violation of Article 134. (JA 44.) The members sentenced Appellee to four years and eleven months of confinement, a reduction in

grade to E-1,<sup>2</sup> and a reprimand. (JA 44-45.) The convening authority took no action on the findings or sentence. (JA 45.) AFCCA set aside and dismissed Appellee's possession conviction for double jeopardy but affirmed his viewing conviction. (JA 39.) AFCCA reassessed the sentence to two years of confinement and reduction E-1. (Id.) The United States petitioned for reconsideration, which AFCCA denied. (JA 466.) The general officer performing the duties of The Judge Advocate General certified this case to this Court for review.

### **STATEMENT OF THE FACTS**

#### *Appellee's Convictions Involving Child Pornography*

In March 2023, at his first court-martial (Casillas I), Appellee was convicted of the following specifications involving child pornography in violation of Article 134:

Did, within the Republic of Korea, between on or about 1 December 2019 and on or about 24 March 2020, within an iPhone XR, knowingly and wrongfully possess child pornography, to wit: a visual depiction of minors, or what appear to be minors, engaging in sexually explicit conduct, and that said misconduct was of a nature to bring discredit upon the armed forces. (Charge I, Specification 2)

Did, at an unknown location, between on or about 1 December 2019 and on or about 24 March 2020, within an iPhone XR, knowingly and wrongfully view child

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<sup>2</sup> At Appellee's first court-martial, the panel reduced Appellee's rank from Master Sergeant (E-7) to Senior Airman (E-4). (JA 443.)

pornography, to wit: a visual depiction of minors, or what appear to be minors, engaging in explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces. (Additional Charge and Specification)

(JA 439, 443.)<sup>3</sup>

In June 2023, at his second court-martial (Casillas II), Appellee was convicted of the following specifications involving child pornography in violation of Article 134:

Did, within the Republic of Korea, between on or about 1 December and 2019 and on or about 18 March 2020, knowingly and wrongfully possess child pornography, to wit: visual depictions of a minor, or what appears to be a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces. (Charge I, Specification 1)

Did, within the Republic of Korea, between on or about 1 December and 2019 and on or about 18 March 2020, knowingly and wrongfully view child pornography, to wit: visual depictions of a minor, or what appears to be a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces. (Charge I, Specification 2)

(JA 44.)

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<sup>3</sup> Although not affected by the double jeopardy claim, in Casillas I, Appellee was also convicted of possessing child pornography within his Yahoo.com email account. (JA 439.)

*Preparing for Casillas I – Discovery of 13 PDF files*

During his initial search of Appellee’s iPhone XR, in summer 2020, IA, the digital forensic expert, discovered two image files of suspected child pornography found within the Safari web browser temporary directory. (JA 123-24; 169-70.) One of those images, a png image file, constituted the charged image in the possession and viewing specifications in Casillas I. (JA 82, 111.)

During preparation for the Casillas I court-martial, in September 2022, IA and trial counsel reviewed together the iPhone XR digital extraction to establish primary ownership of who used the iPhone XR. (JA 50<sup>4</sup>, 126-27, 133.) While searching the temporary directory to determine if other users used the iPhone XR, they found several PDF files containing suspected child pornography embedded within those PDFs. (JA 129-30, 135.)

*Casillas I*

After discovery of the PDF files, the prosecution in Casillas I immediately provided notice of the newly discovered PDF child pornography files to the defense. (JA 50.) The prosecution moved to make a change to the viewing and possession specifications that only charged “a visual depiction,” substituting instead the words, “visual depictions.” (JA 50-52.) Trial defense counsel objected

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<sup>4</sup> During Article 66 review, the United States successfully moved to attach excerpts from Casillas I to the record of Casillas II (JA 4, 50-81.)

that this was a major change made after arraignment. (JA 53-54.) Because the prosecution could not make a major change over the objection of the defense, the prosecution withdrew its request to make a change to the specifications. (JA 56.) Next, the prosecution offered the PDF files as Mil. R. Evid. 404(b) evidence. (Id.) Trial defense counsel objected. (JA 69.) The military judge in Casillas I excluded the PDF files under Mil. R. Evid. 404(b) based on untimely notice. (JA 350-51.)

While Appellee was pending his first court-martial, charges in Casillas II were preferred and referred – charging Appellee with possessing and viewing the 13 newly discovered PDF files embedded with child pornography. (JA 48-49.) Appellee was not charged with possessing or viewing child pornography on any particular device in Casillas II. In Casillas I, Appellee was convicted of possessing and viewing child pornography within his iPhone XR. (JA 439, 443.)

*The Military Judge asks about Double Jeopardy in Casillas II*

In Casillas II, the government offered evidence under Mil. R. Evid. 404(b), including an uncharged image of child pornography that was the charged png image file in Casillas I. (JA 402.) During the Mil. R. Evid. 404(b) hearing in Casillas II, the military judge noted double jeopardy concerns and asked whether the images charged in Casillas II were encompassed by the specifications in Casillas I. (JA 111-113.) In response, both parties agreed that the images charged in Casillas II were not introduced in evidence, “either in findings or sentencing” in

Casillas I. (JA 113.) The military judge invited the parties to raise the double jeopardy issue if warranted: “My understanding is if the parties have any concerns with any double jeopardy aspects of this court-martial they’ll bring it to my attention via appropriate motion.” (Id.) After further discussion with the parties, the military judge stated, “Okay, this is all the part of me just getting my facts straight and understanding what images we’re looking at in charged and uncharged misconduct. Okay. So that answers that.” (JA 113-115.) The defense did not raise the issue of double jeopardy during the remainder of the Casillas II trial.

*Evidence admitted in Casillas II*

In Casillas II, the government admitted 13 PDF files containing depictions of child pornography in support of Specification 1 (possessing child pornography) and Specification 2 (viewing child pornography). (JA 339.) The government also admitted under Mil. R. Evid. 404(b) an uncharged png image file of child pornography, which the record makes clear was the sole image charged in Casillas I for both possession and viewing specifications mentioning the iPhone XR. (JA 82, 100, 111.)

The military judge’s Mil. R. Evid. 404(b) ruling in Casillas II identified D72C4019-5F41-41E3-A488-79D86140392A.png as the image of suspected child pornography that the government was offering under Rule 404(b). (JA 408) The png file was found in Appellee’s iPhone XR Safari temporary directory file, had

created, accessed, and modified dates of 22 December 2019, and depicted two young girls, with one performing oral sex on the other. (JA 399.)

During the motion hearing on the 404(b) evidence in Casillas II, the military judge confirmed, and the parties agreed, that the “iPhone image that is uncharged in this case . . . was charged in the first case.” (JA 113.) Trial counsel identified this one uncharged image in Casillas II as having the last four characters “392A” and being a png file. (JA 82, 100.) Thus, the Casillas II record establishes that D72C4019-5F41-41E3-A488-79D86140392A.png was the charged image from Appellee’s iPhone XR in Casillas I.

The charged image in Casillas I was distinct from the charged images in Casillas II. The charged depiction of child pornography in Casillas I, was a png image file and had a created, modified, and accessed date of 22 December 2019. (JA 367.) Conversely, the depictions in Casillas II were embedded in PDF files – and, as IA testified, PDFs are document files, not picture files. (JA 154-55.) And each PDF file had a created, modified, and accessed date of either 6 or 7 January 2020 – meaning Appellee accessed the PDF files more than two weeks after he accessed the image charged in Casillas I. (JA 363-65.)

In his testimony on the merits in Casillas II, IA explained that the created, modified, and accessed date reflected the dates and specific times the image file and PDFs were saved to the temporary directory. (JA 218.) Specifically, the

created date was the date and time the file was created in the temporary directory. (JA 260.) And the modified date was when the files were finished writing to the temporary directory.

IA also explained if a user “went to a website one time and all [] PDFs’ were contained on that website,” he would expect them to all have the same created, modified, and accessed date within a few seconds or minutes of each other. But the PDF files IA found in Appellee’s temporary directory had created, accessed, and modified dates “dispersed throughout a 24-hour period,” which indicated the PDFs may have come from multiple sources. (JA 262.)

IA explained how files end up in the Safari temporary directory:

Temporary directory is utilized by the application to preload data on the pages that you are viewing as well as any kind of documents that you had opened up within the browser. This is done to help make the user experience easier. So that way, as you scroll through the page the image is already loaded for you, as I’ve tried to wait and have to wait for the image to load like we used to back in the day.

(JA 219.) Attaching an image, or a file, to an email within the Safari browser is another method by which a file ends up in the temporary directory. (JA 219-20.)

The government introduced evidence and testimony from IA that the uncharged image in Casillas II, D72C4019-5F41-41E3-A488-79D86140392A.png,

was stored in the Safari temporary directory on 22 December 2019 at 2308 UTC, and Appellee was using his email account around the same time. (JA 223-27, 358, 367.)

IA also discussed Prosecution Exhibit 8 outlining a summary of events that occurred on Appellee's iPhone, as well as the events associated with Appellee's Yahoo e-mail account, on 6-7 January 2025. (JA 360-61.) The summary revealed Appellee accessed his Yahoo.com email account around the times on 6-7 January when the 13 PDF files were saved in the temporary directory. (Id.) The government also had evidence that on or about 7 January 2020, Appellee's girlfriend, AC, sent different images of child pornography from her Yahoo email account to Appellee's Yahoo account. (JA 399-400.)

The government's theory in Casillas II regarding possession of child pornography was:

The accused was doing something on his phone, like viewing on a webpage or he had them saved to his phone and he was getting ready to send them off to someone else, or that he was accessing them in some manner using the Safari browser. . .The fact that there are breaks in time between the PDF's are showing up in the temporary directory, that demonstrates that this was not some isolated visit to some website that was uninvited or unwanted by the accused.

(JA 316-17.) When trial counsel mentioned circumstantial evidence, he highlighted the uncharged image of child pornography:

The judge explained that there's a few specific uncharged acts that you're allowed to consider as it relates to demonstrating whether or not the accused knowingly a possessed child pornography. . . there are images of child pornography [and child erotica] that are on the accused's iPhone from December of 2019, *those in the image files not the PDF document files*. But the fact that you have those that he was knowingly - - that he was possessing and viewing child pornography back in December tends to prove that this was not the same accident or mistake in January 2020. It tends to show that he did, in fact, knowingly possess and view child pornography in January 2020.

(JA 314-15) (emphasis added).

In rebuttal, trial counsel argued:

If [Appellee] had those PDF's on this phone and was sending them via the web browser, or had downloaded them from the Safari web browser on his phone, and then finds out oh, [AC] is now being investigated . . . Well, of course, he deletes and removes that from his phone, and then he had it on his phone. He was possessing it. He was exercising possession and control, even though he can't actually access what's on the temporary directory. So, it's not that he could manipulate what was in the temporary directory. [IA] explained that he couldn't himself have gone in, and you know, access those files. But its how those files got there that demonstrate that he was possessing them.

(JA 343.)

*Military Judge's Instructions and Findings Announcement*

In his written instructions in Casillas II, the military judge listed 13 PDF files, by PDF file name, that the panel needed to determine whether the depictions contained therein met the definition of child pornography. (JA 310-11; 433.) None of these images referenced in the written instructions named the png image file charged in Casillas I. Thus, in Casillas II Appellee was only charged with possessing and viewing the PDF files.

The military judge also instructed the members that they could consider other acts as evidence – the uncharged images of child pornography and child erotica – “for the limited purpose of its tendency, if any, to prove the accused knowingly and wrongfully possess and/or viewed child pornography. . . and, its tendency, if any to show the accused did not accidentally or mistakenly possess and/or view child pornography . . . .” (JA 434-35.)

The panel found Appellee guilty of the Charge and its Specifications – possessing and viewing child pornography. (JA 348.)

*AFCCA Found That Appellee Waived Double Jeopardy*

On appeal, Appellee alleged he was tried twice for possessing and viewing child pornography contained within the same “material” – the iPhone XR. (JA 2.) AFCCA found Appellee “waived his double jeopardy argument by failing to file a motion or raise an objection on that basis at his second court-martial.” (JA 12.)

First, AFCCA highlighted that the preferral and referral of the Charge and Specifications in Casillas II raised the issue of whether the 13 PDF images of child pornography were included in the misconduct charged in Casillas I. (Id.) AFCCA stated, “[the] procedural history raised an obvious question for the parties as to whether the possession and viewing of the 13 images were covered by the specifications prosecuted in Casillas I.” (Id.)

Second, AFCCA discussed that, during a pretrial hearing in Casillas II, the military judge stated his expectation that “‘any concerns with any double jeopardy aspects of this court-martial’ would be brought up to his ‘attention via appropriate motion.’” (Id.) Still, despite the judge’s invitation, trial defense counsel never raised double jeopardy during Casillas II. (Id.)

Third, AFCCA found that the declarations from Maj AM and Maj JB – submitted in response to Appellee’s ineffective assistance of counsel claims – showed that they made “a deliberate decision not to challenge the Charge and Specifications in Casillas II on double jeopardy grounds.” (Id.)

*AFCCA’s Opinion Regarding Double Jeopardy*

Although AFCCA found that Appellee waived his double jeopardy claim, the court nonetheless pierced waiver, and reviewed for plain error whether Appellee’s second prosecution and conviction for possessing child pornography violated his rights against double jeopardy. (JA 13.) AFCCA believed that in light of United

States v. Forrester, 76 M.J. 479 (C.A.A.F. 20217), “the entire prosecution [of the possession offense] represented a violation of [Appellee’s] constitutional and statutory rights, resulting in substantial prejudice.” (Id.)

The critical question was whether Appellee was tried and punished twice for the same “act or transaction,” which required a determination of the “allowable unit of prosecution” for the possession offenses. (JA 14.) As AFCCA noted, Forrester explained the MCM defined “child pornography” as the “material that contains” the illicit images rather than the images themselves:

In Forrester it was permissible for the Government to prosecute separate specifications for each of the appellant’s devices that contained illicit images, regardless of whether those images were the same or different from device to device, because it was the possession of the “material” containing the images (i.e., the device) that represented each offense.

(Id.) AFCCA then stated, “Although the specification in Casillas II did not allege a specific device within which Appell[ee] possessed child pornography, the record is abundantly clear the images at issue were contained on the same iPhone XR that OSI seized from Appell[ee] as had been alleged in Casillas I.” (Id.) AFCCA said, “[p]ut another way, the 13 images from Appellant’s phone that were at issue in Casillas II were additional evidence that Appellant committed the same offense of possession charged in Casillas I, rather than a different offense.” (JA 15.) Thus,

AFCCA found plain and obvious error that Appellee was tried twice for the same offense – possessing child pornography contained within the iPhone XR. AFCCA set aside and dismissed the possession specification. (JA 39.)

Judge Mason filed a separate opinion, concurring in part and dissenting in part, concluding, “Where the parties at trial are of the same mindset, that the conduct at issue in a second trial is separate and apart from the conduct prosecuted at a first trial, I cannot agree that there is a Double Jeopardy violation.” (JA 39.) The dissent also discussed that “Forrester’s interpretation of the definition of child pornography,” viewing the device as the “material,” yields absurd results – e.g., if an accused looked at a phone he knew to contain child pornography “(even if the screen was turned off), that would meet the legal definition of viewing child pornography.” Judge Mason therefore believed Forrester “should be strictly limited to the unique facts of that case.” (JA 42.)

AFCCA later clarified its Casillas II opinion in a subsequent case, United States v. Coley, No. ACM 40675, 2026 CCA LEXIS 69 (A.F. Ct. Crim. App. 12 February 2026) (unpub. op.). AFCCA said that the holding in Casillas II was “not based on any requirement that the material *must* be a physical device,” because “Forrester itself contradicts such a conclusion.” Coley, unpub. op at \*20. AFCCA explained that its Casillas II opinion held “that where the Government *has* convicted an accused for possessing illicit images on a physical device as the unit

of prosecution, as at Casillas’s first trial, the prohibition on double jeopardy prohibits subsequent prosecution for different illicit images contained within that same physical device, the unit of prosecution, *during the same time period and in the same geographical location as previously alleged.*” Id. But AFCCA also clarified that Casillas II did not hold “that an accused cannot be guilty of separate offenses of possessing of child pornography involving the same device where the acts of possession were committed at distinct times and in different geographic locations.” Id. at \*21.

*AFCCA did not Pierce Waiver to Review the Viewing Specification  
for Double Jeopardy*

AFCCA did not pierce Appellee’s waiver with respect to the viewing specification. (JA 17.) AFCCA reasoned that Forrester did not address permissible units of prosecution for viewing child pornography. (JA 17-18.) AFCCA recognized that possession and viewing offenses were subject to the same definition of child pornography but was not aware of any decision that expanded the rational of Forrester to viewing. (JA 17.) Further, given the “inherent differences between the act of possession and the act of viewing, [AFCCA] [found] some reason to question whether the applicable units of prosecution would necessarily be the same.” (Id.)

## **SUMMARY OF ARGUMENT**

### *Issue I*

AFCCA erred by finding that the child pornography possession specification in Casillas II clearly and obviously violated double jeopardy. Preliminarily, AFCCA erred by piercing waiver and addressing Appellee's double jeopardy claim in the first place. Article 44 only prohibits a person being tried twice for the same offense "without his consent." Even if Appellee was being tried twice for possessing child pornography found on his iPhone XR, he consented to it, consistent with what Article 44 allows. Thus, there was no error to correct, and AFCCA had no grounds to pierce waiver to override Appellee's decision.

AFCCA then erred on the merits by finding a plain and obvious double jeopardy violation for two primary reasons: (1) Individual files are an allowable unit of prosecution under Article 134 and Appellee was tried for possessing different files at each of his two courts-martial; and (2) Appellee acquired and possessed the png file from Casillas I and the 13 PDF files from Casillas II at distinct times, supporting two separate offenses.

Forrester does not hold that an electronic device *must* be the unit of prosecution for child pornography offenses. And the plain language of the Article 134 child pornography offense and federal and state cases interpreting similar language all support that individual files can be the unit of prosecution.

The specifications at issue do not plainly and obviously designate Appellee’s iPhone XR as the unit of prosecution. The specification in Casillas II mentioned no device at all. The specification in Casillas I charged that Appellee did “within an iPhone XR, knowingly and wrongfully possess child pornography, to wit: a visual depiction of minors . . . engaging in sexually explicit conduct . . .” This specification literally reads that the child pornography was possessed “within an iPhone XR,” not that the child pornography/“material” *was* the iPhone XR. The child pornography/material cannot simultaneously *be* the iPhone and be possessed *within* the iPhone. If Forrester says that the “material” is the unit of prosecution, here, it makes more sense to consider the file (within the iPhone) that contained the visual depiction to be the “material” and therefore, the unit of prosecution at each trial. Since AFCCA erred in identifying the applicable unit of prosecution, it also erred in finding Appellee was tried twice for the same conduct.

In other contexts, federal courts have typically found that items acquired at different times can support multiple possession offenses. *See* United States v. Olmeda, 461 F.3d 271 (2d Cir. 2006) and cases cited therein. AFCCA failed to consider the entire record, which shows that Appellee acquired the png file from Casillas I and the PDF files from Casillas II on separate occasions, two weeks apart. (JA 362-367.) These separate acts of acquisition and possession reflect different actus reuses and impulses, which support Appellee being tried for two

separate offenses. There was no clear and obvious double jeopardy violation, and AFCCA erred in finding otherwise. Therefore, this Court should reverse AFCCA's decision setting aside Appellee's possession conviction in Casillas II.

*Issues II and III*

In contrast, AFCCA correctly affirmed Appellee's conviction for viewing child pornography in Casillas II. AFCCA properly found that Appellee affirmatively waived his double jeopardy claim related to the viewing specification and appropriately declined to pierce waiver – a choice well within its discretion under Article 66. For the same reasons explained in Issue I, Appellee's iPhone XR was not the applicable unit of prosecution for the viewing specifications in Casillas I and Casillas II, so Appellee was not plainly and obviously tried twice for the same conduct. For each specification, Appellee viewed different images, contained in different files types, at different time periods, separated by two weeks. And whatever Forrester may say about child pornography possession offenses, its holding does not plainly and obviously extend to viewing offenses too.

Since there was no plain and obvious double jeopardy violation with respect to the viewing specifications, trial defense counsel in Casillas II were not ineffective for failing to raise the issue. And trial defense counsel rightly feared that they would appear unethical and lose credibility, by alleging in Casillas II that Appellee had already been tried for viewing the 13 PDF files. (JA 457, 459-60.)

Such a position would be directly contradictory to the argument they espoused in Casillas I to successfully prevent Appellee from being tried for viewing 13 PDF files in that court-martial. (Id.) Trial defense counsel were not ineffective for declining to advance contradictory arguments. In light of the above, this Court should affirm AFCCA's decision upholding Appellee's viewing conviction in Casillas II.

## **ARGUMENT**

### **I.**

#### **AFCCA ERRED BY FINDING THAT APPELLEE WAS TRIED TWICE FOR POSSESSING DIFFERENT DEPICTIONS OF CHILD PORNOGRAPHY CONTAINED WITHIN THE SAME DEVICE.**

#### ***Standard of Review***

Double jeopardy is a question of law that appellate courts review de novo. United States v. Driskill, 84 M.J. 248, 252 (C.A.A.F. 2024). A constitutional right can be waived if it was “clearly established that there was an intentional relinquishment of a known right.” United States v. Sweeney, 70 M.J. 296, 303-04 (C.A.A.F. 2011).

A claim that is forfeited is reviewed for plain error, and the appellant has the burden to prove: 1) was there error; 2) was the error plain or obvious; and 3) did

the error materially prejudice a substantial right. United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018).

### *Law and Analysis*

The double jeopardy Clause protects criminal defendants against three things: (1) “a second prosecution for the same offense after acquittal,” (2) “a second prosecution for the same offense after conviction,” and (3) “multiple punishments for the same offense.” North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Our jurisprudence does not prohibit the government from charging different acts under the same statute. “The double jeopardy prohibition applies only where ‘the same act or transaction’ is involved.” United States v. Rice, 80 M.J. 36, 40 (C.A.A.F. 2020) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

In Forrester, 76 M.J. at 484-85, this Court stated the Double Jeopardy Clause prohibits “multiplicitous prosecutions . . . [i.e.,] when the government charges a defendant twice for what is essentially a single crime.” (internal quotation omitted). This Court continued, “One instance of multiplicity, the kind theoretically implicated in this case, occurs when ‘charges for multiple violations of the same statute are predicated on arguably the same criminal conduct.’” Id. at 485 (citations omitted). This Court explained, “To resolve this ‘species’ of

multiplicity, the Court ‘must first determine the ‘allowable unit of prosecution,’ . . . which is the *actus reus* of the defendant.’” Id. at 485 (citations omitted).

This Court further stated, “if possession under the circumstances is a ‘distinct or discrete-act offense, separate convictions are allowed in accordance with the number of discrete acts.’” Id. at 486 (quoting United States v. Neblock, 45 M.J. 191, 197 (C.A.A.F. 1996)). The Double Jeopardy Clause protects against second punishment “*on same facts*; for same statutory offense.” Id. at 196 (citing generally Ex Parte Lange, 85 U.S. 163 (1874)) (emphasis added).

To this point, in Blockburger, the Supreme Court stated, “‘when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.’” 284 U.S. at 301-302 (quoting Wharton’s Criminal Law, 11th Ed.).

**A. AFCCA abused its discretion by piercing waiver because there was no error to correct where Appellee consented to be tried for possessing child pornography in Casillas II.**

First, this Court should find that AFCCA abused its discretion by piercing waiver and addressing the double jeopardy issue with respect to the possession specification in Casillas II. Article 44 states, “No person may, *without his consent*, be tried a second time for the same offense.” (emphasis added). This Court recently ruled that counsel can waive a multiplicity claim on behalf of their client,

citing federal courts that “have specifically allowed an accused’s counsel to waive double jeopardy claims.” United States v. Malone, 2026 CAAF LEXIS 62 at \*11 (C.A.A.F. 20 January 2026). Thus, Appellee’s counsel could convey Appellee’s consent to be tried for the possession offense in Casillas II, even if being tried would normally violate the double jeopardy prohibition. Here, Appellee’s counsel did just that. Despite the military judge flagging the issue and inviting counsel to raise double jeopardy if they desired, Appellee’s counsel declined to do so.

Appellee’s trial defense counsel later explained that, in consultation with Appellee, they made a strategic decision in Casillas I to keep the 13 PDF files out of that court-martial because they believed it offered “the best hope of obtaining an acquittal” in that case. (JA 459.) Trial defense counsel acknowledged that they made that decision with the understanding that it might result in a second court-martial for the other 13 PDF files. (Id.) Thus, in essence, Appellee consented to be tried for the 13 PDF images at a separate court-martial, because he and his counsel thought that strategy might lead to a better outcome for him. Even if Appellee was “tried a second time for the same offense” in Casillas II, he consented to it, meaning there was no double jeopardy violation at all.

Article 44 is somewhat unique to other provisions in the Code, in that it makes express allowance for an accused to forego its protections. Given the plain language of Article 44, which allows the accused to consent to being tried twice for

the same offense, there could not have been a requirement for the military judge to step in and override the accused's decision to allow the prosecution to go forward. As a result, there was no error for AFCCA to correct on appeal. A Court of Criminal Appeals (CCA) has "authority to determine the circumstances, if any, under which it would apply waiver or forfeiture to [a] type of error" in a particular case. United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001). But, as seen in Quiroz, the ability to pierce waiver depends on there being an error in the first place. Even if the possession specification in Casillas II did violate double jeopardy, AFCCA exceeded its authority by finding that Appellee's own personal decision to be tried for it was error. AFCCA's circumvention of Appellee's personal decision amounts to disapproving a finding "based on pure equity," rather than on the legal standard from Article 44. *See* United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2009). And this Court has held that a CCA may not "disapprove a finding based on pure equity." *Id.* Therefore, AFCCA abused its discretion, and this Court should reverse AFCCA's decision.

Even if AFCCA had the ability to pierce waiver, AFCCA erred in doing so because there was no double jeopardy violation, especially under a plain error standard. AFCCA erred for two main reasons: (1) Individual files are an allowable unit of prosecution under Article 134 and Appellee was tried for possessing different files at each of his two courts-martial; and (2) Appellee acquired and

possessed the png file from Casillas I and the 13 PDF files from Casillas II at distinct times, supporting two separate offenses.

**B. Individual files are an allowable unit of prosecution under Article 134, so it was not a plain and obvious double jeopardy violation to prosecute Appellee for possessing a png file in Casillas I, and then possessing 13 different PDF files in Casillas II.**

This Court should clarify that an individual file can be an allowable unit of prosecution in child pornography cases prosecuted under Article 134. As AFCCA agreed in Coley, the allowable unit of prosecution for a child pornography offense under Article 134 is *not* limited to the device on which the child pornography is found. AFCCA noted that its Casillas II opinion did not hold that the ““material”” containing the illicit images must be physical rather than electronic in nature.” Id.

*1. Forrester does not hold that the unit of prosecution must be the device containing the child pornography.*

AFCCA’s clarification in Coley correctly interprets this Court’s decision in Forrester. Forrester never said nor implied that an electronic device containing child pornography is the only allowable unit of prosecution for possession cases under Article 134. Forrester involved four different charged devices that each contained “visually similar or identical images.” 76 M.J. at 481 n.2. This Court explained that child pornography under Article 134 is defined, not as the images themselves, but the “materials” that contain the visual depictions. Id. at 486.

Thus, Article 134 prohibits the “possession of the physical media or storage location” that contains the offensive images. Id. This Court explained that, even though the images on each device were the same, the appellant “completed the offense of possession each time he knowingly possessed, directly or constructively, a distinct ‘material’ – *which includes* [his] HP laptop, Seagate hard drives, and Google email account – that contained visual depictions of child pornography.” Id. (emphasis added). But, at most, this Court’s language can be interpreted to mean that an electronic device *could be* a unit of prosecution – not that it must always be the unit of prosecution in child pornography possession cases. The opinion leaves open the possibility that a different “storage location” for a visual depiction, such as an individual computer file, could be the applicable unit of prosecution. As a result, even under Forrester, it was not plain and obvious error for the parties at trial to treat the files as the unit of prosecution and not Appellee’s iPhone XR.

*2. The plain language of the Article 134 child pornography offense does not suggest that an electronic device could or should be the applicable unit of prosecution.*

Further, nothing in the plain meaning of the word “material” as used in Article 134, would suggest that it only refers to an electronic device containing child pornography; so it was not plain error for the parties and judge in Casillas II to apply a different interpretation. In fact, the Manual specifically mentions a “computer file,” when it explains that the accused’s awareness of the nature of the

images of child pornography “may be inferred from circumstantial evidence, such as the name of a computer file or folder . . .” MCM, pt. IV. para. 93.c.(5). Thus, the Manual itself indicates that a computer file could be a “material that contains” an illicit visual depiction.

3. *Federal and state courts have interpreted the words “material that contains” to include a computer file, and their reasoning should apply here.*

As federal and state courts have recognized, under the common sense understanding of the words “material” and “contains,” a computer file can be a “material that contains” a visual depiction. Thus, a computer file is an allowable unit of prosecution under Article 134, which criminalizes possessing “material that contains” a visual depiction of a minor engaging in sexually explicit conduct.

MCM, pt. IV, para 95.c.(4).

Analyzing 18 § 2252A(a)(2)(B), the federal child pornography statute which also uses the language “material that contains,” the Fifth Circuit Court of Appeals found that “computer files themselves are plainly *material containing* child pornography.” United States v. Knowlton, 993 F.3d. 354, 357 (5th Cir. 2021) (emphasis added). The court considered the “ordinary meaning” of “material that contains,” and defined “material” as a “basic unit of storage” or a “medium.” Id. at 358 (internal citation omitted). The court then went on to explain that computer files can “contain” contraband because the computer files “comprise the data

within them.” Id. (citing Contain, *The American Heritage Dictionary Second College Edition* 315 (1982) (defining “contain” as “to have within; enclose;” or “to have as component parts; comprise; include”). The Fifth Circuit also cited a list of cases from other circuits where the alleged “material” in child pornography cases was the computer files themselves. Id.

The Ninth Circuit reinforced this understanding of a computer file as a container in United States v. Fellows, 157 F.3d 1197, 1201 (9th Cir. 1998). The court explained that “the graphics file is the container used for compiling and storing visual depictions in a computer . . . .” The court then went on to highlight that “[v]isual depictions in a computer are compiled and stored on graphic files, much like photographs are compiled and stored in books or magazines . . . the computer user can separately view, copy, delete, or transmit each discrete graphics file.” Id. This understanding of computer files reinforces that they can contain visual depictions with the meaning of “material that contains” in Article 134. And since a user can separately exercise control over each discrete file, each file can represent a separate unit of prosecution.

Even more directly on point, the Court of Appeals of North Carolina has interpreted the language “material that contains a visual representation . . . .” in North Carolina’s child pornography statute to support charging individual image file as the unit of prosecution. State v. Howell, 609 S.E.2.d 417 (N.C. Ct. App.

2005). Howell is particularly instructive because the North Carolina statute banning possession of child pornography is similar to the Manual's definition of child pornography under Article 134. The North Carolina statute, N.C. Gen. Stat. § 14-190.17A, third degree sexual exploitation of a minor, punishes possession of "material that contains *a* visual representation . . . ." (emphasis added). In the Manual, "child pornography means "material that contains either *an* obscene visual depiction . . . or *a* visual depiction . . . ." MCM, pt. IV. para. 93.c.(4) (emphasis added).

In Howell, the court found no double jeopardy violation when the defendant was charged with 43 counts of third-degree possession of material that contained a visual representation of a minor engaging in sexual activity. 609 S.E.2.d at 418, 421. The defendant possessed 43 images found on a single hard drive and contained within five zip files. Id. at 419. Each zip file contained "multiple compressed files with child pornography images." Id. The court rejected the defendant's argument that he should have been charged with only one count for the hard drive or, alternatively, only five counts for each zip file. Id.

The North Carolina statute, like Article 134, defines child pornography in the singular by using the term "a." Howell noted that the reference to "a" visual depiction allows separate charges and punishments for each individual depiction possessed because using the singular "a," rather than the word "any," indicates a

“clear expression of legislative intent to punish separately and cumulatively for each and every . . . item.” Id. at 420.

Other courts have noted the distinction between “a” and “any” in determining the unit of prosecution. *See e.g. United States v. Vargas-Castillo*, 329 F.3d 715, 721 (9th Cir. 2003) (“Unlike ‘any,’ the article ‘a’ cannot be said to fully encompass plural activity. [] Rather, it encompasses singular, individualized activity and unambiguously defines the unit of prosecution in singular terms.”) Prefacing the object of the offense with the word “any” has led many courts to “conclude[] that no clear intent to impose cumulative punishment has been expressed by Congress. . . . ‘Seemingly this is because “any” may be said to fully encompass (i.e., not necessarily include any part of) plural activity, and thus fails to unambiguously define the unit of prosecution in singular terms.’” United States v. Chilaca, 909 F.3d 289, 295 (9th Cir. 2018) (citing cases finding the word “any” ambiguous).

The concerns expressed by the federal courts do not apply to Appellee because Article 134 defines child pornography with reference to “a” visual depiction— not “any” visual depiction. Thus, the Manual, like the North Carolina statute in Howell, defines the unit of prosecution in child pornography offenses in singular terms that can correspond to individual files containing child pornography. With this understanding, it was not plain and obvious error for the military judge

and the parties to assume that the different files at issue constituted different units of prosecution and that double jeopardy did not apply.

In sum, under the plain meaning of “material that contains,” an individual computer file can be a “material that contains” a visual depiction, and thus, can be a separate unit of prosecution. Accordingly, it was not plain and obvious error to try Appellee twice for possession of child pornography because each court-martial addressed distinct materials – a png image file (Casillas I) and PDF files (Casillas II) – all of which contained illicit visual depictions.

**C. The iPhone XR was not plainly and obviously the unit of prosecution in either Casillas I or Casillas II; based on the plain language of the specifications, the files containing the images made more sense as the units of prosecution.**

AFCCA erred by concluding that Appellee’s iPhone XR was the unit of prosecution in Casillas I. A logic reading of the possession specification in Casillas I does not support that the iPhone XR was the “material” or the unit of prosecution. In Casillas I, the specification alleged that Appellee did “within an iPhone XR, knowingly and wrongfully possess child pornography, to wit: a visual depiction of minors engaging in sexually explicit conduct . . . .” (JA 439.) Since child pornography is “material that contains a visual depiction,” this specification literally alleges that Appellee possessed, within an iPhone XR, material that contains a visual depiction. Under this reading, the “material” cannot both *be* the iPhone and simultaneously be located *within* the iPhone. Instead, the “material”

must be some other container or “storage location” *within* the iPhone XR that contains the visual depiction. The png file containing the visual depiction of minors engaged in sexually explicit conduct, which was found “within” the iPhone XR, fits that description.

Further, since the specification in Casillas II made no reference to a device at all, there was no reason to assume that the iPhone XR was the unit of prosecution. Thus, it was not plain and obvious error for the parties in Casillas II to treat the individual files as the units of prosecution.

Although the form of the specifications in Forrester was similar to those here,<sup>5</sup> that merely demonstrates the shortcomings of that opinion, and why, as Judge Mason said, Forrester should be limited to its facts. (JA 42.) The alleged “material” cannot both be the electronic device and be located on the electronic device. Thus, Forrester is better viewed as holding that when an accused possesses multiple, distinct copies of the same files across different devices, each set of *files* from each device can be a separate unit of prosecution, because transferring or creating each copy/set of files on each device supports a discrete act of possession.

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<sup>5</sup> The specifications alleged, for example, that the appellant in Forrester, did “knowingly and wrongfully possess, on a black in color Seagate External Hard Drive, child pornography, to wit: digital images of a minor, or what appears to be a minor, engaging in sexually explicit conduct. . . .” 76 M.J. at 481-28.

Forrester's holding should not be extended to situations, like here, where different files are at issue.

All in all, given the absurdities in considering the “device” to be the “material” in the definition of child pornography, it was not plain and obvious error for the parties here to treat the files, not the device, as the unit of prosecution.

**D. For possession offenses, federal courts have typically found that items acquired at different times can support multiple offenses. The same logic should apply here.**

The evidence in the record shows that Appellee acquired the png file from Casillas I and the PDF files from Casillas II at different times, two weeks apart. (JA 363-67.) For other federal possession offenses, federal courts have found that items acquired at different times can support charging multiple offenses. Following that logic, it was not plain and obvious error for the parties in Casillas II not to litigate a double jeopardy issue.

“For federal firearm possession statutes, courts have generally agreed that items acquired at separate times or stored in separate spaces can constitute separate units of prosecution, and therefore can support separate convictions.” Christina M. Copsey, *Comment: How Many Is “Any”? : Interpreting § 2252a’s Unit Of Prosecution For Child Pornography Possession*, 62 Am. U.L. Rev. 1675, 1700 (2013). “Units of prosecution for possession offenses can be particularly difficult

to determine because ‘possession’ is a passive act that is not easily broken up into discrete units.” Id.

In Olmeda, the Second Circuit noted that a felon’s receipt of firearms, “may be properly prosecuted as multiple violations of the same statute if the evidence showed the felon received certain of the items on separate occasions.” 461 F.3d at 280. The Olmeda court cited seven cases from other circuits upholding this same principle. Id. (collecting cases).

Olmeda reasoned that charging multiple offenses when the evidence shows the felon acquired possession of his firearms “on different occasions,” would be warranted because “[a]ny other determination would allow convicted felons and terrorists to establish armories where all of their weapons would be kept. The person in custody of the armory would then be subject to only a single charge of possession, although thousands of illegal and dangerous weapons were received and stockpiled at different times.” Id. (internal citations omitted).

The same logic from Olmeda and the cases it cites can be applied to the possession of child pornography under Article 134. Prohibiting the government – as AFCCA did here – from prosecuting multiple acts of possession, allows pedophiles to stockpile thousands depictions of child sexual abuse over the course of many years within the same device, yet only face a single charge of possession. Even if the perpetrator possessed files of hundreds of different child victims, all

acquired at different times, he would be subject to punishment for only a single offense. As with firearm possession offenses, such a result would be untenable and cannot be what the President intended in enacting the Article 134 child pornography offense. *See United States v. Sainz*, 827 F.3d 602, 604 (7th Cir. 2016) (recognizing ongoing harm possession inflicts on the victim because “every viewing of child pornography is a repetition of the victim’s abuse”) (internal citation omitted).

Interpreting Article 134 to allow multiple specifications for child pornography obtained at different times even complies with the overall tenor of Forrester. There, this Court highlighted “if possession under the circumstances is a ‘distinct or discrete-act offense, separate convictions are allowable in accordance with the number of discrete acts.’” 76 M.J. at 487 (quoting Neblock, 46 M.J. at 197). Just as other federal courts have recognized, contraband acquired on separate and distinct occasions supports distinct and discrete acts of possession under Article 134.

In line with our own jurisprudence and federal practice, it was not plain and obvious error to try Appellee twice for possessing illicit images acquired and possessed on two different sets of dates. The single png image file Appellee possessed in Casillas I was created, modified, and accessed on 22 December 2019. (JA 358, 367.) Over two weeks later, Appellee possessed 13 PDF files containing

child pornography – each PDF file was created, modified, and accessed by Appellee over a 24-hour period. (JA 360-61, 363-65.) *Cf. Howell*, 609 S.E.2d at 421 (allowing separate charges for each discrete image of child pornography where the evidence showed the defendant opened each individual image and saved it on his hard drive).

In short, this was not an instance where Appellee acquired and possessed all visual depictions from Casillas I and Casillas II at a single time. This is evident not only from the digital forensic data but also from the motions practice in Casillas II. The military judge found the image file charged in Casillas I admissible under Mil. R. Evid. 404(b) to show Appellee’s knowledge, as well as lack of mistake or accident, of possessing the PDF files charged in Casillas II. (JA 409.) The fact that the png image file was used as Mil. R. Evid. 404(b) evidence to support a separate charge demonstrated that the possession of that png file was a different offense. Logically, the two possessions on different dates were distinct *actus reuses* and impulses and different offenses – thus acquisition and possession of the png file was relevant to show that Appellee’s later acquisition and possession of the PDF files was not a mistake or accident.

Between the ambiguities of Forrester itself and federal case law interpreting possession offenses, it was far from clear that prosecuting Appellee separately for the png image file and the PDF files, all found on Appellee’s iPhone XR,

constituted a double jeopardy violation. An “error cannot be plain or obvious if the law is unsettled on the issue at the time of trial and remains so on appeal.” United States v. Nieto, 66 M.J. 146, 151 (C.A.A.F. 2008) (Stuckey, J. concurring). Since no existing precedent plainly and obviously established a double jeopardy violation, AFCCA erred in overturning Appellee’s conviction.

**E. AFCCA failed to consider the entire record and therefore erroneously found that Appellee was tried twice for the same offense.**

The entire record supports the conclusion that Appellee possessed the png file from Casillas I and the PDF files from Casillas II as separate and discrete acts. Yet, according to Coley, AFCCA found a double jeopardy violation in Casillas II because the government charged images on the same device during the same time frame. Unpub. op. at \*17. AFCCA incorrectly put too much emphasis on the charge sheet, rather than the entire record. Emphasis on the entire record supports discrete acts of possession given that the png file and the PDF files were acquired at different times, more than two weeks apart.

It is well-established that “[w]hen a Double Jeopardy bar is claimed, the court must examine not just the indictment from the prior proceeding but the entire record.” United States v. Am. Waste Fibers Co, 809 F.2d 1044, 1047 (4th Cir. 1987) (citing Russell v. United States, 369 U.S. 749, 764 (1962)). The Supreme

Court has also highlighted the importance of reviewing the entire record in evaluating double jeopardy claims:

Our prior cases and common sense require that the reviewing court consider the record in determining whether the claim of double jeopardy is sufficient to bar the second prosecution. It may be that in most cases the issue can be determined by reference to the record alone. Statements made at the plea hearing or other pretrial proceeding may be sufficient to clarify any ambiguity, or may constitute an express waiver of any double jeopardy challenge.

United States v. Broce, 488 U.S. 563, 587 (1989). This Court has also upheld the principle that appellate courts should examine the entire record of trial to determine double jeopardy protection. United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994).

AFCCA here had a definitive record that proved Appellee possessed child pornography at different times. (JA 359-367.) AFCCA recognized the legal concept that charges are not multiplicitous when acts occurred at different times and based on discrete acts. (JA 11.) Still, the court failed to apply the law to the facts because it did not consider the entire record that established distinct dates associated with each possession offense charged.

In essence, AFCCA looked to the record only when it supported their ultimate conclusion. On one hand, to find a double jeopardy violation, AFCCA

had to look to the entire record, rather than just the charge sheet, to conclude that the PDF files were found within the iPhone XR. But at the same time, AFCCA disregarded the record by looking only at the overlapping time frames on the charge sheet, rather than the record in its entirety that showed that Appellee acquired the png file from Casillas I and the PDF files from Casillas II on different dates.

In effect, AFCCA's analysis seemed to embrace the Blockburger test for double jeopardy by looking at the charged time frame on the charge sheets, but then overlooked the inherent differences in the charged specifications themselves. Yet even under Blockburger, there were important differences in the two possession specifications. The Casillas II specification did not mention the iPhone XR, while the Casillas I specification did. The Casillas II specification referred to multiple "visual depictions," while the Casillas I specification referred to only one "visual depiction." And, most importantly, on its face, the Casillas II specification referred to "a visual depiction of *a minor*, engaging in sexually explicit conduct, while the Casillas I specification referred to "a visual depiction of *minors*, engaging in sexually explicit conduct." (JA 44, 439.) Thus, in Casillas I, the government had to prove that the one image at issue depicted more than one minor, whereas, in Casillas II, the government had to prove that the charged images each

depicted one minor.<sup>6</sup> On their faces, the specifications at issue were unmistakably referring to different images. The specifications were not facially duplicative, despite the seemingly overlapping charged time frames.

In sum, AFCCA erred by not considering the entire record to determine whether double jeopardy existed. The evidence revealed that Appellee possessed the file image charged in Casillas I and the PDF files charged in Casillas II at different times. The two weeks separating the two possession dates demonstrate that Appellee did not act simultaneously to obtain all the child pornography found in the Safari Temporary directory. Appellee was tried on different facts at each court-martial. For these reasons, it was not plain and obvious error for the government to prosecute Appellee twice. This Court should overturn AFCCA's opinion that found a double jeopardy violation and reinstate Appellee's conviction for possessing child pornography.

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<sup>6</sup> Each PDF file in Prosecution Exhibit 6 from Casillas II contains a depiction of *one* minor engaging in sexually explicit conduct, while the png file from Casillas I contains a depiction of *two* minors engaging in sexually explicit conduct. (JA 399.)

## II.

### **AFCCA DID NOT ERR BY APPLYING WAIVER TO THE VIEWING SPECIFICATION AND OTHERWISE DECLINING TO FIND A DOUBLE JEOPARDY VIOLATION.**

#### *Standard of Review*

CCAs have plenary review authority granted by the previous reiteration of Article 66 to decide whether to apply the waiver or forfeiture doctrine. United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991). CCAs are “well within its authority to determine the circumstances, if any, under which it would apply waiver or forfeiture to the type of error at issue in the present case.” United States v. Hardy, 77 M.J. 438, 443 (C.A.A.F. 2018) (quoting Quiroz, 55 M.J. at 338). Affirmative waiver means the issue is permanently waived and will not be reviewed for plain error. Hardy, 77 M.J. at 441 (citing United States v. Swift, 76 M.J. 210 (C.A.A.F. 2017)).

#### *Law and Analysis*

Given the CCA’s plenary authority to apply waiver or to pierce waiver and apply the forfeiture doctrine, AFCCA did not abuse its discretion when finding Appellee waived his double jeopardy claim for the viewing specification in Casillas II.

AFCCA correctly found that Appellee affirmatively waived his double jeopardy claim with respect to the viewing offense in Casillas II. (JA 12.) In

Casillas II, the military judge raised the issue of double jeopardy. (JA 113.) Both trial counsel and trial defense counsel agreed that the PDF files in Casillas II were not introduced in any fashion in Casillas I. (JA 111.) Trial defense counsel never claimed double jeopardy, despite being afforded the opportunity. As AFCCA noted, post-trial declarations by trial defense counsel confirmed that this was a purposeful decision. (JA 12.) Thus, there was affirmative waiver. Hardy, 77 M.J. at 441.

As argued in Issue I, the plain language of Article 44 allows an accused to consent to be tried twice for the same offense. Where the accused so consented, as he did here, there is no error for a CCA to correct on appeal. Thus, AFCCA had no authority in Casillas II, to pierce waiver with respect to the uncontested possession or viewing specifications and did not err by failing to do so.

But otherwise, the CCA's ability to pierce waiver is a highly discretionary authority based on its statutory power in Article 66 to only affirm such findings as it determines, on the basis of the entire record, should be approved. Quiroz, 55 M.J. at 338. Nothing requires a CCA to pierce waiver. *See* Hardy, 77 M.J. at 441 (noting that it is procedurally proper for a CCA to find waiver and then decline to pierce it). Here, AFCCA reasoned that Forrester did not dictate that a double jeopardy violation occurred with respect to the viewing offense and made a calculated decision to apply waiver to Specification 2 – a decision well within their

statutory authority. (JA 18.) There was nothing arbitrary, fanciful or clearly unreasonable about AFCCA’s decision not to pierce waiver here. *See* United States v. Nerad, 69 M.J. at 142 (noting that a CCA abuses its discretion when it acts “arbitrarily, capriciously, or unreasonably – as a matter of law”).

Furthermore, even if AFCCA should have reviewed this issue, Appellee cannot prevail under a plain error standard. Following the same analysis as in Issue I, Appellee was not plainly and obviously tried twice for viewing child pornography. Forrester does not plainly and obviously require the government to charge an electronic device as the unit of prosecution – for either possession or viewing offenses. And, based on the plain language of the viewing specifications in Casillas I and Casillas II, the government did not plainly and obviously charge the iPhone XR as the unit of prosecution. The viewing specification in Casillas II made no mention of the iPhone XR, and the viewing specification in Casillas I alleged that the viewed child pornography was located “within an iPhone XR,” not that the child pornography/“material” *was* the iPhone XR.

Even if an electronic device can theoretically be the unit of prosecution for possession offenses, using an electronic device as the unit of prosecution for viewing offense makes little sense. Unlike possession, which can be viewed as an ongoing offense, viewing each individual image of child pornography is a discrete act that occurs at a discrete time. Here, the evidence showed that Appellee viewed

the png file from Casillas I and the PDF files from Casillas II at different times, two weeks apart. (JA 363-67.) Each charged act of viewing involved a distinct and discrete actus reus (opening each file and viewing it) and a distinct and discrete impulse. Such discrete acts of viewing support separate convictions. Neblock, 46 M.J. at 197. It was not a plain and obvious double jeopardy violation to try Appellee separately for discrete viewing acts, perpetrated two weeks apart, even if Appellee used his iPhone XR to perpetrate all the viewings. Thus, this Court should affirm AFCCA’s decision with respect to the viewing specification in Casillas II.

### III.

**AFCCA CORRECTLY FOUND THAT APPELLEE’S TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE.**

#### *Additional Facts*

At AFCCA, Appellee claimed he “received ineffective assistance of counsel when his trial counsel failed to move to dismiss on double jeopardy grounds in light of Forrester.” (JA 20.) In response to an order by AFCCA, Appellee’s trial defense counsel provided declarations. (JA 7.)

Although he did not represent Appellee in Casillas I, Maj AM explained that Appellee objected in the first court-martial to the PDF files that were the subject of his second court-martial. (JA 457.) Maj AM understood that the admission of the

PDF files in the first trial would have undercut the defense's theory, and that the objection was a tactical decision made by Appellee's counsel. Maj AM stated that this objection in the first court-martial precluded the prosecution from using the PDF files as evidence in that case. (Id.)

Maj AM recognized that “[w]hile not judicially estopped from making the argument, I viewed objecting to the joinder of the PDFs to Casillas I (on the grounds that they were legally distinct from the rest of the contraband) only to object to the same PDFs in Casillas II (on the grounds that they were covered by the charging scheme in Casillas I) as dangerously close to misleading the Court.” (Id.) Maj AM believed an objection to PDF files in Casillas II – without a change in factual circumstances – “felt deceptive towards the court, which precluded me from ethically filing such a motion.” (Id.)

Maj AM further explained that he was familiar with the “unit of prosecution” issue and cases such as Forrester, but did not believe, based on Forrester, that Appellee would “insulate[d] from a subsequent charge of viewing contraband material – only possessing it.” (Id.)

Maj JB provided insight into Appellee's own thinking. Maj JB highlighted, “To fully understand Casillas II, it is important to consider the complex case posture and the investigative timeline that both cases originated from.” (JA 459.) Maj JB explained why the defense objected to the PDFs in the first trial, stating

that “it would have added 13 additional images on a separate day from the single image from [Appellee’s] cell phone and a wholly different file type in the form of PDFs.” (Id.) Maj JB stated that the defense team specifically detailed to Appellee “the options of forgoing our objection to allowing the images to enter the trial or maintaining our objection which the Government threatened would result in a second court-martial, exposing him to additional penalties.” Maj JB continued, “We explained to [Appellee] that the best hope of obtaining an acquittal in Casillas I, if he wanted to proceed with trial, was to keep the additional images out of Casillas I.” (Id.)

As his counsel predicted to Appellee when they discussed the objection option with him, the Government referred the new charge to a second court-martial. Maj JB then explained the dilemma he and Maj AM faced, stating, “There was a concern that in Casillas II, if we filed a motion to dismiss for double jeopardy, we would lose all credibility with the Judge after we had proffered with the Government in a Joint Status Update (JSU) that we would object to the joinder.” (JA 459-60.) Maj JB noted that a position that “the Government was unable to proceed with the charge in Casillas II due to double jeopardy” was “incongruent to our position in objecting to the joinder in Casillas I.” (JA 460.)

Maj JB noted that Forrester “only referenced a unit of prosecution for possession, not viewing.” He added, “In the context of Casillas II especially, in

order to view each alleged child pornography image, the user had to open up each PDF file as it was not obviously apparent what the PDF files contained since there is no thumbnail preview of PDF files. Thus, the *actus reus* of viewing each image is different than simply possessing a collection of images.” (Id.)

#### *AFCCA’s Opinion*

Because it overturned Appellee’s conviction for possession in Specification 1, AFCCA only reviewed Appellee’s ineffective assistance of counsel claims related to the viewing specification. (JA 20.) Finding Appellee did not overcome “the strong presumption that trial defense counsel’s performance was within the wide range of reasonable professional assistance,” AFCCA found that there was a “reasonable explanation as to why trial defense counsel did not challenge Specification 2 on double jeopardy grounds, and their performance with respect to Specification 2 did not fall measurably below the level of performance ordinarily expected of fallible lawyers.” (Id.) AFCCA noted trial defense counsel “explained to some extent in their declarations” why “Forrester [did] not directly apply, and so far as we can discern has not been applied, to the offense of wrongfully viewing child pornography.” (Id.) Although AFCCA noted that it “[did] not hold that Forrester does not apply to viewing child pornography,” it still held that “given the current state of the law, we do not find trial defense counsel’s performance measurably below the standard expected of reasonably competent but imperfect

counsel with respect to Specification 2,” and that Appellee had “failed to demonstrate he is entitled to relief for ineffective assistance of counsel.” (JA 21.)

### ***Standard of Review***

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Metz, 84 M.J. 421, 428-29 (C.A.A.F. 2024).

### ***Law and Analysis***

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI. In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronin, 466 U.S. 648, 658 (1984).

“In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel’s performance was deficient, and (2) that this deficiency resulted in prejudice.” United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698).

Military courts apply a three-part test in assessing whether the presumption of competence has been overcome: (1) are the allegations true, and if so, “is there a reasonable explanation for counsel’s actions”; (2) if the allegations are true, did defense counsel’s level of advocacy “fall measurably below the performance...[ordinarily expected] of fallible lawyers”; and (3) if defense counsel

were ineffective, is there a “reasonable probability that, absent the errors,” there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

Trial defense counsel were not ineffective for two reasons. First, trial defense counsel could have reasonably believed that Forrester’s fact-specific rationale regarding the allowable unit of prosecution for possession of child pornography did not extend to viewing child pornography and therefore filing a double jeopardy motion would have been futile. Second, trial defense counsel rationally feared that advancing an opposite position in Casillas II from what they espoused in Casillas I, would be unethical, misleading, and deceptive.

**A. Trial defense counsel were not ineffective, because, given the ambiguities of Forrester, it was reasonable to believe that filing a motion to dismiss the viewing specification in Casillas II for double jeopardy would have been unsuccessful.**

There were reasonable explanations for trial defense counsel’s failure to make a double jeopardy motion with respect to the viewing specification in Casillas II. Trial defense counsel did not believe that Forrester would apply to viewing offenses. As Maj JB pointed out, viewing each of the PDFs in Casillas II would require opening each file individually, which supports the notion that the viewing of each file is a separate actus reus. (JA 460.)

Trial defense counsel’s logic was sound. To begin, the United States contests that the unit of prosecution for the possession *or* viewing specifications in Casillas I and Casillas II was the iPhone XR, rather than the individuals files, meaning there was no double jeopardy issue at all. As argued in Issue I, Forrester does not require the government to charge the device as the unit of prosecution for child pornography offenses under Article 134. And further, based on the plain language of the specifications, the government did not charge the iPhone XR as the unit of prosecution; the specifications in Casillas I merely alleged that the “material that contains” the visual depiction – in that case, the png file – was located *within* the iPhone XR. The specifications in Casillas II cited no device at all. Based on the plain language of the specifications, it would have been reasonable for any trial defense counsel to conclude that the unit of prosecution in both courts-martial was the files, and that Appellee was not tried twice for the same possession or viewing offenses.

But even if the iPhone XR was the unit of prosecution in both Casillas I and Casillas II, the Forrester opinion does not purport to extend its reasoning to viewing offenses. There is “no precedent that clearly establishes” the unit of prosecution for viewing offenses can or must be the device on which the images are viewed; thus, “a trial defense counsel could reasonably decide that seeking” dismissal of the viewing specification in Casillas II for double jeopardy would be

“futile.” See United States v. Harborth, 85 M.J. 469, 481-82 (C.A.A.F. 2025)

(Maggs, J., concurring in part and in the judgment). Trial defense counsel’s decisions and understanding of the law did not fall measurably below that expected of fallible lawyers. Appellee has not met his burden of overcoming the presumption of competence. His trial defense counsel were not ineffective.

**B. It was reasonable for trial defense counsel to decline to file a double jeopardy motion in Casillas II because they likely would have been judicially estopped from doing so.**

Trial defense counsel also declined to file a double jeopardy motion in Casillas II for fear of appearing unethical, deceptive, and misleading, after the defense had taken a contrary position in Casillas I. (JA 457, 459.) Although Maj AM did not believe that they would have been “judicially estopped” from filing the double jeopardy motion (JA at 457), an analysis of the judicial estoppel doctrine suggests otherwise. “Judicial estoppel precludes a party from successfully asserting a position in a proceeding and then asserting an inconsistent position later.” United States v. Augspurger, 61 M.J. 189, 193 (Crawford, J., dissenting in part and concurring in part) (citing Lowery v. Stovall, 92 F.3d 219, 223 (4th Cir. 1996)). The doctrine serves to “protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (internal citations omitted). The Supreme Court has listed several factors that will

“typically inform . . . whether to apply the doctrine:” (1) whether the party’s later position is “clearly inconsistent with its earlier position;” (2) “whether the party has succeeded in persuading a court to accept that party’s earlier position,” and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” Id. at 750-751. Courts may also consider other factors that may “inform the doctrine’s application in specific factual contexts.” Id.

Trial defense counsel very well may have been judicially estopped from raising double jeopardy at Casillas II. As both trial defense counsel recognized, arguing that double jeopardy applied in Casillas II because the 13 PDF images were encompassed by the possession and viewing specifications in Casillas I would have been “clearly inconsistent” with the defense’s position in Casillas I that the 13 PDF images could not be joined with the possession and viewing specifications because those PDFs were legally distinct – in time and file type – from the one charged image on the charge sheet.

Trial defense counsel in Casillas I argued that changing the possession specification to read “visual depictions,” rather than the singular “visual depiction” was a major change. (JA 6, 53.) A “major change” includes a change that adds “an offense . . . or a substantial matter not fairly included in the preferred . . . specification.” R.C.M. 603(b)(1). Trial defense counsel said that, regarding

expansion of the specification to include “as many as 12 or 13 additional file names, representing additional images . . . when looking at just about every one of the factors related to what’s considered a major change; that would be exactly it.” (JA 54.)

In his declaration, Maj AM noted that the PDF files in Casillas II were “legally distinct” from contraband charged in Casillas I, because the date associated with the PDF files was inconsistent with the download and upload dates of the charged contraband from Casillas I. (JA 57.) Maj JB likewise described that they objected to adding the PDF files because “it would have added 13 additional images on a separate day from the single image from [Appellee’s] cell phone and a wholly different file type in the form of PDFs.” (JA 459.) Trial defense counsel believed that their best hope of obtaining an acquittal on the one image charged in Casillas I was to keep the 13 PDF files out of the trial. (Id.) Maj AM thought that it was inconsistent to claim on one hand that the PDF files were legally distinct from the image in Casillas I, such that they could not be joined together under one specification, and then to turn around and claim in Casillas II that the PDF files were covered by the same charging scheme in Casillas I after all. (JA 457.) Maj AM explained that he did not believe he could ethically make that argument. (Id.) Maj JB had similar concerns that the defense would lose

credibility, if after objecting to joinder in the first court-martial, they then argued double jeopardy in Casillas II. (JA 459.)

Trial defense counsel's concerns were well-founded. The argument in Casillas I that viewing the 13 PDF files was a *different* offense, and therefore could not be added to the charged viewing of the png file, would have been "clearly inconsistent" with an argument in Casillas II that viewing the 13 PDF files was actually the *same* offense as viewing the png file from Casillas I, and thus barred by double jeopardy. The first New Hampshire factor was met.

As for the second New Hampshire factor – whether the defense persuaded a court to accept its earlier position – the test may be modified slightly to account for the facts of this case. New Hampshire, 532 U.S. at 750-51. Here, trial defense counsel's objection successfully influenced trial counsel, rather than the trial court, to withdraw their motion to amend the charge sheet to encompass the 13 PDF files. As trial counsel said, "We withdraw the requests *pursuant to the defense's objection.*" (JA 56) (emphasis added). In short, the defense benefitted from the position they took in Casillas I.

And finally, regarding the third New Hampshire factor, the defense would have derived an unfair advantage from taking an inconsistent position on double jeopardy at Casillas I. After successfully preventing the government from prosecuting him for possessing or viewing 13 PDF files at his first court-martial

because those 13 PDFs were allegedly *not* encompassed by the original specifications, the defense would be taking the opposite position at his second court-martial. If not estopped from claiming double jeopardy, Appellee could now entirely prevent his prosecution for possessing and viewing the 13 PDF files by claiming that the 13 PDFs *were* encompassed by the original specifications from Casillas I after all. Such an unfair advantage to Appellee and detriment to the government and society is the type of result the judicial estoppel doctrine seeks to avoid. Since a strong argument can be made that trial defense counsel would have been judicially estopped from raising double jeopardy at Casillas II, it was reasonable for them to decline to do so. Trial defense counsel were correct to fear acting unethically, misleading the court, and losing credibility with the military judge.

In sum, trial defense counsel's actions did not fall measurably below what is expected of fallible lawyers. It was reasonable for trial defense counsel to believe that it would be unethical, deceptive, and misleading to argue double jeopardy in Casillas II, when they had benefitted from advancing the contrary argument in Casillas I. “[I]neffective-assistance claims predicated on failure to make wholly frivolous or *unethical* arguments will generally be dispensed with under Strickland's first prong.” Lockhart v. Fretwell, 506 U.S. 364, 382 (1993) (emphasis added). It was not ineffective for trial defense counsel to decline to

make what they perceived to be an unethical argument. Appellee cannot meet his burden to show ineffective assistance of counsel, and AFCCA correctly affirmed Appellee's conviction for viewing child pornography.

### CONCLUSION

This Court should reverse AFCCA's decision to overturn Appellee's conviction for possessing child pornography and should uphold AFCCA's decision to affirm his conviction for viewing child pornography.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 18 February 2026.

A handwritten signature in blue ink, appearing to read "Vanessa Bairos". The signature is fluid and cursive, with a long horizontal stroke at the end.

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**CERTIFICATE OF COMPLIANCE WITH RULE 24(b)**

This brief complies with the type-volume limitation of Rule 24(b) because:

This brief contains 12,884 words. This brief complies with the typeface and type style requirements of Rule 37.

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