

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

UNITED STATES
Appellant

v.

Nathaniel A. CASILLAS, Senior Airman
United States Air Force, Appellee

No. 26-0096
Crim. App. No. 40551

Argued May 20, 2026—Decided September 30, 2026

Military Judges: Matthew D. Talcott (Article 30a proceedings), Jennifer E. Powell (arraignment), Tyler B. Musselman (motions), and Christopher D. James (trial)

For Appellant: *Major Vanessa Bairos* (argued); *Major Allison R. Gish* and *Mary Ellen Payne, Esq.* (on brief).

For Appellee: *Major Frederick J. Johnson* (argued); *Megan P. Marinos, Esq.*

Chief Judge MAGGS delivered the opinion of the Court, in which Judge OHLSON and Judge JOHNSON joined. Judge HARDY filed a separate dissenting opinion, in which Judge SPARKS joined.

Chief Judge MAGGS delivered the opinion of the Court.

A general court-martial found Appellee guilty of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2018). *United States v. Casillas*, No. ACM 40551, 2025 CCA LEXIS 445, at *1-2, 2025 WL 2675840, at *1 (A.F. Ct. Crim. App. Sept. 18, 2025) (unpublished). Evidence at trial established that this child pornography was stored on Appellee's smartphone. *Id.* at *5-6, 2025 WL 2675840, at *2. On appeal to the United States Air Force Court of Criminal Appeals (AFCCA), Appellee argued that these findings violated the Fifth Amendment's prohibition against double jeopardy because a previous court-martial had already found him guilty of possessing and viewing child pornography on the same phone. *Id.* at *23-29, 2025 WL 2675840, at *9-11.

The AFCCA initially concluded that Appellee had affirmatively waived any double jeopardy issue at trial. *Id.* at *19-21, 2025 WL 2675840, at *8. With respect to the possession specification, however, the AFCCA used its authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2018), to review the double jeopardy issue for plain error despite the waiver. *Casillas*, 2025 CCA LEXIS 445, at *21-22, 2025 WL 2675840, at *8-9. Relying on *United States v. Forrester*, 76 M.J. 479 (C.A.A.F. 2017), the AFCCA concluded that a double jeopardy violation had occurred and therefore set aside the finding of guilty with respect to the possession specification. *Casillas*, 2025 CCA LEXIS 445, at *23-29, 2025 WL 2675840, at *9-11. The AFCCA, however, affirmed the finding that Appellee was guilty of viewing child pornography because the issue was waived. *Id.* at *29-32, 2025 WL 2675840, at *11-12. The AFCCA also held that trial defense counsel had not provided ineffective assistance of counsel. *Id.* at *32-38, 2025 WL 2675840, at *12-13.

Major General Mitchel Neurock, performing the duties of the Air Force Judge Advocate General, certified three issues for this Court to review. Certified Issue I is: "Did the [AFCCA] err when it found that [Appellee's] 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?” This certified issue essentially asks whether the AFCCA’s reading of *Forrester* was incorrect. In *Forrester*, this Court held that the government *may* charge an accused with separate specifications of possessing child pornography on *different* devices even if the images on the devices are identical. 76 M.J. at 481, 486-87. Here, the AFCCA concluded that an “apparent corollary” of *Forrester* is that the Government *may not* charge an accused with separate specifications of possessing child pornography for having *different* images on a *single* device. *Casillas*, 2025 CCA LEXIS 445, at *24-25, 2025 WL 2675840, at *9. We answer this issue in the affirmative. The AFCCA should not have set aside the finding that Appellee was guilty of possessing child pornography based on double jeopardy grounds. We hold that if any double jeopardy error occurred, the error was not clear or obvious under current law and therefore does not warrant relief under plain error review. We leave a more complete treatment of this subject to a future case.

Certified Issue II is: “If the [AFCCA] correctly set aside the finding of guilty as to the possession specification based on double jeopardy, did the [AFCCA] err by declining to set aside the finding of guilty as to the viewing specification based on double jeopardy?” We cannot directly answer this question because its predicate is not established. As indicated above, in answering Certified Issue I, we conclude that the AFCCA *did not* correctly set aside the finding of guilty as to the possession specification. But under plain error review, we do reject Appellee’s double jeopardy argument with respect to the viewing specification because any error, if there was an error, was not clear or obvious under current law and therefore does not warrant relief.

Certified Issue III is: “The trial defense counsel failed to assert the prohibitions against double jeopardy in defense of [Appellee]. If trial defense counsel waived this issue, did the [AFCCA] err by declining to find ineffective assistance of counsel?” Agreeing with the AFCCA’s analysis, we

answer this issue in the negative. Given the uncertainty in the law, we cannot say that trial defense counsel's performance was deficient, and therefore we hold that there was no ineffective assistance of counsel.

Based on our answer to Certified Issue I, we set aside the decision of the AFCCA as to the possession specification and as to the sentence. We remand the case for further review under Article 66, UCMJ, and to allow the AFCCA to consider any issues mooted by its decision, consistent with this opinion.

I. Background

Appellee was tried twice by general court-martial. In the first court-martial (hereinafter *Casillas I*), Appellee was charged with numerous offenses. These offenses included one specification of possessing child pornography and one specification of viewing child pornography that are relevant to this appeal. Possessing and viewing child pornography are enumerated offenses under Article 134, UCMJ. *Manual for Courts-Martial, United States* pt. IV, para. 95.b.(1) (2019 ed.) (*MCM*). The *MCM* defines “[c]hild pornography” as “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.” *Id.* para. 95.c.(4).

The possession specification in *Casillas I*, as amended after arraignment, alleged that Appellee:

[d]id, 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 appears to be minors, engaging in sexually explicit conduct, and that said misconduct was of a nature to bring discredit upon the armed forces.

The viewing specification alleged that Appellee:

[d]id, 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 pornography, to wit: a visual depiction

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of minors, or what appear to be minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

Before trial began on these specifications, investigators located thirteen additional images in Adobe portable document file (PDF) format of suspected child pornography on Appellee's iPhone XR. In the light of this discovery, trial counsel initially sought to modify the *Casillas I* possession and viewing specifications to allege "visual depictions" instead of "a visual depiction." Trial defense counsel, however, opposed these modifications as major changes to the specifications. Trial counsel therefore withdrew the request to modify the specifications in *Casillas I*. Trial counsel did attempt to admit the thirteen PDFs under Military Rule of Evidence 404(b). But trial defense counsel opposed this too, and the PDFs were excluded from Appellee's trial as untimely. The court-martial found Appellee guilty of the possession and viewing specifications in addition to other specifications alleging other offenses. Appellee was sentenced to confinement for two years, reduction to the grade of E-4, forfeiture of all pay and allowances, and a reprimand.

The thirteen images that were not addressed in *Casillas I* became the subject of a second court-martial (hereinafter *Casillas II*), which is the court-martial now under review. In *Casillas II*, Appellee was again charged with possessing and viewing child pornography. The possession specification in *Casillas II* alleged that Appellee:

[d]id, within the Republic of Korea, between on or about 1 December 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.

The viewing specification alleged that Appellee:

[d]id, within the Republic of Korea, between on or about 1 December 2019 and on or about 18 March 2020, knowingly and wrongfully view child

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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.

Prior to trial, the military judge confirmed with counsel for both parties that the images of alleged child pornography at issue in *Casillas II* were not introduced into evidence in *Casillas I*. The military judge commented: “[T]he obvious reason I’m asking these questions [is] . . . double jeopardy concerns. 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.” Appellee’s defense counsel did not make any double jeopardy objection at any point during *Casillas II*. The court-martial in *Casillas II* found Appellee guilty of both specifications and sentenced him to four years and eleven months of confinement, reduction to the grade of E-1, and a reprimand.

On appeal to the AFCCA, Appellee argued that the findings of guilty in this case violated the prohibition against double jeopardy. *Casillas*, 2025 CCA LEXIS 445, at *2, 2025 WL 2675840, at *1. As mentioned previously, the AFCCA exercised its authority under Article 66(d), UCMJ, to review this issue with respect to the possession specification for plain error even though the AFCCA concluded that Appellee had waived the issue. *Id.* at *22-29, 2025 WL 2675840, at *9-11. The AFCCA then held that a double jeopardy violation had occurred based on this Court’s decision in *Forrester* and the definition of child pornography in the *MCM*. *Id.* at *24-26, 2025 WL 2675840, at *9-10.

The AFCCA first summarized the reasoning of *Forrester* as follows:

[The Court] in *Forrester* emphasized that the operative definition defines “child pornography” as the “*material that contains*” the illicit images, rather than the images themselves. Thus 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. at *24, 2025 WL 2675840, at *9 (citation omitted). The AFCCA then deduced that an “apparent corollary of this reasoning is that contemporaneous possession of multiple illicit images in the same ‘material’ represents a single offense of possession of child pornography, because ‘child pornography’ is defined as the ‘material’ (*e.g.*, the device containing the images) rather than each image itself.” *Id.* at *24-25, 2025 WL 267840, at *9. Based on this apparent corollary, the AFCCA held that the Government could not charge Appellee with two specifications of possessing child pornography on his iPhone XR (*i.e.*, one specification in *Casillas I* and a second specification in *Casillas II*), even though the specifications concerned different images.¹ *Id.* at *25-26, 2025 WL 2675840, at *10. The AFCCA therefore set aside the finding that Appellee was guilty of possessing child pornography and dismissed the specification. *Id.* at *29, 2025 WL 2675840, at *11. Accordingly, the AFCCA determined that any ineffective assistance of counsel claim with respect to the possession specification was moot. *Id.* at *37, 2025 WL 2675840, at *13.

The AFCCA chose not to disregard Appellee’s waiver of a double jeopardy objection to the viewing specification. *Id.* at *29-32, 2025 WL 2675840, at *11-12. It further determined that this waiver did not amount to ineffective assistance of counsel. *Id.* at *37-38, 2025 WL 2675840, at *13. The AFCCA explained that “*Forrester* does not directly apply, and so far as we can discern has not been applied, to

¹ In reaching this conclusion, the AFCCA recognized that the possession specification in *Casillas II* did not identify the material in which Appellee possessed the images at issue, but stated: “[F]rom the record it is abundantly clear the images at issue were contained on the same iPhone XR . . . alleged in *Casillas I*.” *Casillas*, 2025 CCA LEXIS 445, at *25, 2025 WL 2675840, at *10.

the offense of wrongfully viewing child pornography.” *Id.* at *38, 2025 WL 2675840, at *13. The AFCCA concluded 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 [the viewing specification].” *Id.*, 2025 WL 2675840, at *13. The AFCCA therefore affirmed the finding of guilty for the viewing specification. *Id.* at *74, 2025 WL 2675840, at *25. After considering other issues, the Court reassessed Appellee’s sentence to confinement for two years and reduction to the grade of E-1. *Id.*, 2025 WL 2675840 at *25.

One judge concurred in part and dissented in part. *Id.*, 2025 WL 2675840, at *25 (Mason, J., concurring in part and dissenting in part). He disagreed with the decision to disregard Appellee’s waiver of the double jeopardy issue. *Id.* at *74-75, 2025 WL 2675840, at *25. In addition, he concluded that *Forrester* was inapplicable because *Forrester* answered only the question of whether a single image could be chargeable on multiple devices where all the devices are identified in the specifications. *Id.* at *78-80, 2025 WL 2675840, at *27. He found it significant that the possession specification in this case did not identify a device containing the child pornography. *Id.* at *79, 2025 WL 2675840, at *27.

II. Double Jeopardy and the Possession Specification

Certified Issue I, as noted, asks whether the AFCCA erred when it found that Appellee’s rights against double jeopardy were violated because he was charged at two separate courts-martial for possessing different images of child pornography on the same device.

A. Standard of Review

The parties dispute the standard of review applicable to Certified Issue I. The Government’s principal position is that there never has been any double jeopardy issue, either to waive or to forfeit, because Appellee consented to being tried by separate courts-martial. To support this position, the Government cites Article 44(a), UCMJ, 10 U.S.C.

§ 844(a) (2018), which provides: “No person may, *without his consent*, be tried a second time for the same offense.” (Emphasis added.) Alternatively, the Government asserts that even if trying Appellee in a second court-martial raised a double jeopardy issue, Appellee knowingly and intelligently waived his right to any double jeopardy claim. The Government recognizes that the AFCCA generally has authority to disregard waivers under Article 66(d), UCMJ, but contends that the AFCCA abused its discretion in disregarding the waiver in this case because it had no legitimate reason for doing so. Finally, the Government argues that Appellee cannot show a double jeopardy violation even under a plain error standard of review. Appellee, for his part, argues that his prosecution for possessing child pornography in this case was plain and obvious error.²

Having considered these arguments and the wording of Certified Issue I, we are persuaded that we must review the double jeopardy issue with respect to the possession specification for plain error. Certified Issue I simply asks whether the AFCCA erred in finding that Appellee’s rights against double jeopardy were violated when he was charged at two separate courts-martial for possessing child pornography. The certified issue does not expressly raise the issue of waiver or expressly challenge the plain error standard of review that the AFCCA applied when it decided the double jeopardy issue. And while certified or assigned issues in some cases may contain an implicit challenge to the standard of review applied by a Court of Criminal Appeals (CCA), we are not persuaded that Certified Issue I implicitly invites the kinds of arguments about the standard of review that the Government now makes in

² In his brief, Appellee does not expressly discuss waiver with respect to the possession specification. But with respect to the viewing specification, Appellee argues the AFCCA erred in holding that he affirmatively waived any double jeopardy issue because the record does not establish an intentional relinquishment of a known right. He contends that this Court should apply a plain error standard of review because Appellee merely forfeited his double jeopardy objection.

its briefs. Given the centrality of the standard of review to the AFCCA’s analysis, if Major General Neurock had wanted this Court to reopen the issue, it is reasonable to expect that he would have certified a more specific question on the subject. We therefore will review the double jeopardy issue under the same plain error standard of review that the AFCCA applied.

Under the plain error standard of review, this Court may address an error if it determines (1) that there was error; (2) that the error was clear or obvious; and (3) that the error materially prejudiced a substantial right. *United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018). In *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006), this Court explained that “all three prongs must be satisfied in order to find plain error” and that “the failure to establish any one of the prongs is fatal to a plain error claim.” In some cases, this Court has focused on the second element of plain error review, concluding only that an alleged error was not “clear or obvious.” See, e.g., *United States v. McClour*, 76 M.J. 23, 26 (C.A.A.F. 2017) (finding no plain error because “it cannot be said that any error (if error there were) on the military judge’s part . . . is clear or obvious”); *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008) (finding no plain error because the appellant “failed to establish on appeal that the admission of [certain evidence] was so obviously erroneous, if erroneous at all, that the military judge can be faulted for taking no action”).

B. Discussion

In *Forrester*, a court-martial found the appellant guilty of four specifications of possessing child pornography.³ 76 M.J. at 482. Three specifications alleged that he possessed the child pornography on a different physical device (i.e., a hard drive, another hard drive, and a laptop), and a fourth

³ The court-martial initially found the appellant guilty of six specifications, but the military judge merged two of these specifications into two other specifications. *Forrester*, 76 M.J. at 481-82.

specification alleged that he possessed the child pornography in an email account. *Id.* at 481-82. The images that he possessed in these different devices and in the email account were “visually similar or identical.” *Id.* at 482 n.2. This Court held that the specifications were not multiplicitious based on the definition of child pornography as “*material that contains*” illicit images. *Id.* at 486 (internal quotation marks omitted) (quoting *MCM* pt. IV, 68b.c.(1) (2012 ed.)). The Court reasoned:

Because pt. IV, para. 68b [now *MCM* pt. IV, para. 95.c.(4)] defines “[c]hild [p]ornography” not as images but “material[s]” that contain them, it matters not that the images extant on each material listed in the bill of particulars were visually similar or identical for each count of possession. Under the plain language of [this definition], [a]ppellant completed the offense of possession each time he knowingly possessed, directly or constructively, a distinct “material”—which includes [a]ppellant’s . . . laptop, . . . hard drives, and . . . e-mail account—that contained visual depictions of child pornography.

Id. (second, third, and fourth alterations in original).

The specific holding of *Forrester* does not directly apply to this case. Appellee, unlike the appellant in *Forrester*, was not found guilty of separate specifications of possessing child pornography on *separate devices* containing *identical images*. Instead, Appellee was found guilty of two specifications of possessing child pornography on the *same device*, with each specification addressing *different images*.

Appellee, however, agrees with the AFCCA that a “logical corollary” of *Forrester* is that an accused cannot be found guilty of separate specifications alleging possession of different images on the same device. The Government disagrees, arguing that *Forrester* does not establish that an electronic device must be the unit of prosecution for possession of child pornography offenses. The Government asserts that *Forrester* “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.”

We do not decide in this case which argument is correct. Instead, we decide only that it is not clear or obvious that finding Appellee guilty of the possession specification in *Casillas II* violated the prohibition against double jeopardy. Accordingly, Appellee is not entitled to relief under plain error review.

Several factors lead us to these conclusions. The first factor is that this Court has not specifically addressed the question of whether, or under what circumstances, an accused may be charged with multiple specifications of possessing child pornography on a single device. That was not the issue in *Forrester*. And since deciding *Forrester*, the Court does not appear to have considered any cases that clearly involved multiple specifications of possessing child pornography on the same device. The Court thus has not had an opportunity to decide the issue before now.

A second factor is that *Forrester* itself contains language that points in different directions. On one hand, the Court in *Forrester* states that the offense of possessing child pornography “is tied to ‘material that contains’ illicit visual depictions of child pornography, not the quantity or variety of visual depictions.” 76 M.J. at 481 (citation omitted). This language suggests that there can be only one specification per “material” regardless of how many images or how many *different* images are stored on the “material.” But a countervailing consideration is that the Court in *Forrester* never stated that only a physical device (such as a smartphone) can be a “material” that contains child pornography. On the contrary, the Court in *Forrester* recognized an email account as a “material” and possession was prohibited on “the physical media *or storage location*” containing the child pornography. *Id.* at 486 (emphasis added). The decision thus leaves unclear whether a digital folder or a file also could be a “material.” In addition, the specifications at issue in *Forrester* specifically identified the devices and email account containing the child pornography. *Id.* at 481-82. The *Forrester* opinion did not discuss

specifications, like the possession specification in the present case, that do not expressly identify the material containing the child pornography.

A third factor is that the CCAs have reached somewhat conflicting conclusions about whether the government can charge the accused with multiple specifications of possessing child pornography on a single physical device. Some opinions support Appellee’s view that the government may not do so. The majority opinion of the AFCCA in this case is one example. Similar is the decision of the United States Army Court of Criminal Appeals in *United States v. Mobley*, 77 M.J. 749, 751-52 (A. Ct. Crim. App. 2018), which squarely held, on the basis of *Forrester*, that multiple specifications alleging possession of child pornography on the same device are multiplicitious. *See also United States v. Black*, No. ARMY 20170140, 2018 CCA LEXIS 369, at *1-2, 2018 WL 3493546, at *1 (A. Ct. Crim. App. July 13, 2018) (unpublished) (following *Mobley* on this point); *United States v. Smith*, No. ARMY 20180047, 2019 CCA LEXIS 168, at *1, 2019 WL 1594777, at *1 (A. Ct. Crim. App. Apr. 12, 2019) (unpublished) (same).

Supporting the Government’s position that the “material” containing child pornography need not be a physical device is the AFCCA’s recent decision in *United States v. Coley*, No. ACM 40675, 2026 CCA LEXIS 69, 2026 WL 395909 (A.F. Ct. Crim. App. Feb. 12, 2026) (unpublished). In *Coley*, the appellant pleaded guilty to three specifications of possessing child pornography. *Id.* at *1, 2026 WL 395909, at *1. On appeal to the AFCCA, the appellant argued that two specifications were multiplicitious because “both specifications are based on his possession of the same ‘material’ containing illicit visual depictions—his Samsung tablet.” *Id.* at *12, 2026 WL 395909, at *5. The AFCCA held that the appellant had waived any multiplicity objection by pleading guilty. *Id.* at *14-15, 2026 WL 395909, at *5. The AFCCA then declined to disregard the waiver as it had done in *Casillas*. *Id.* at *21, 2026 WL 395909, at *7. Even though the specifications alleged that the appellant possessed the child pornography on a single device, the

AFCCA found it persuasive that the specifications alleged that the possessions occurred at “distinct times and in different geographic locations.” *Id.*, 2026 WL 395909, at *7. Importantly, the AFCCA emphasized that “neither *Forrester* nor *Casillas* held that the [g]overnment is bound to rely on a physical device as the unit of prosecution, and the specifications at issue in [*Coley*] did not explicitly do so.” *Id.*, 2026 WL 395909, at *7.

Based on these three factors, we cannot say that it was clear or obvious error to find Appellee guilty of multiple separate specifications alleging possession of different images on the same device. The law on this point is not sufficiently settled to make that determination. In reaching this conclusion, however, we emphasize three points. First, nothing in this decision calls into question *Forrester*’s holding that separate specifications may allege possession of the same images on different devices. Second, because this case comes before us on plain error review, and we have concluded only that any error was not clear or obvious, we express no final opinion on whether the government may charge multiple specifications alleging possession of different images on the same device. We will address that issue if it is properly preserved and presented to this Court. Third, the issue does not arise if all images or videos are charged in a single specification of possessing child pornography.

III. Double Jeopardy and the Viewing Specification

Certified Issue II asks a conditional question about the viewing specification: “If the [AFCCA] correctly set aside the finding of guilty as to the possession specification based on double jeopardy, did the [AFCCA] err by declining to set aside the finding of guilty as to the viewing specification based on double jeopardy?” Because we have concluded that the AFCCA did not correctly set aside the findings in this case, the predicate of this question is not met. We therefore cannot answer the certified issue as posed.

Similar to Certified Issue I, however, this Court has not specifically addressed the question of whether, or under

what circumstances, an accused may be charged with multiple specifications of viewing different child pornography images on a single device. That was not the issue in *Forrester*. Consequently, like the AFCCA, we “do not definitively resolve this question one way or the other.” *Casillas*, 2025 CCA LEXIS 445, at *32, 2025 WL 2675840, at *12. And therefore, it was not clear or obvious error to find Appellee guilty of the viewing specification in *Casillas II*.

IV. Ineffective Assistance of Counsel

Certified Issue III asks: “If trial defense counsel waived [the double jeopardy] issue, did the [AFCCA] err by declining to find ineffective assistance of counsel?” To prevail on an ineffective assistance of counsel claim, a party must “demonstrate[] both ‘(1) that his counsel’s performance was deficient, and (2) that this deficiency resulted in prejudice.’” *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)). This Court reviews de novo claims of ineffective assistance of counsel. *Id.*

The AFCCA, as noted above, held that trial defense counsel were not deficient in waiving the double jeopardy issue with respect to the viewing specification given the “current state of the law.” *Casillas*, 2025 CCA LEXIS 445, at *38, 2025 WL 2675840, at *13. The AFCCA emphasized that it was not clear whether *Forrester* applied to viewing specifications or only to possession specifications. *Id.*, 2025 WL 2675840, at *13. We agree with this reasoning and with the AFCCA’s conclusion that trial defense counsel did not provide ineffective assistance.

The AFCCA did not address the question whether trial defense counsel provided ineffective assistance by waiving a double jeopardy objection to the possession specification because the issue was moot after the AFCCA set aside the specification. *Id.* at *37, 2025 WL 2675840, at *13. The situation for us is different; we must decide the issue because we have determined that the possession specification should not be set aside based on double jeopardy. However, again given the current state of the law, where it is not

clear or obvious that *Forrester* prevents the government from charging multiple specifications of possessing different child pornography images on a single device, we cannot say that counsel were deficient for failing to raise a double jeopardy argument. We thus also conclude that trial defense counsel did not provide ineffective assistance with respect to the possession specification.

V. Other Issues

The AFCCA determined the evidence was factually sufficient with respect to the viewing specification. *Id.* at *45, 2025 WL 2675840, at *16. However, because the AFCCA set aside the finding of guilty as to the possession specification, it did not determine the factual sufficiency of the evidence for that specification. As we have concluded that the AFCCA should not have set aside the finding of guilty with respect to the possession specification under plain error review, we remand the case for a factual sufficiency review of this finding.

The AFCCA also reassessed Appellee's sentence in the light of its decision to set aside the findings of guilty with respect to the possession specification. *Id.* at *72-74, 2025 WL 2675840, at *25. We set aside that aspect of the AFCCA's decision. A new review of the sentence is therefore also necessary. Consistent with this opinion, the AFCCA may decide other issues previously mooted by its opinion.

VI. Conclusion

We answer Certified Issue I in the affirmative, we cannot answer Certified Issue II because its predicate is not established, and we answer Certified Issue III in the negative. The decision of the United States Air Force Court of Criminal Appeals is set aside as to Specification 1 of the Charge, is affirmed as to Specification 2 of the Charge, and is set aside as to the sentence. The case is returned to the Judge Advocate General of the Air Force for further review under Article 66, UCMJ, 10 U.S.C. § 866 (2018), and to decide any issues mooted by its previous decision, consistent with this opinion.

Judge HARDY, with whom Judge SPARKS joins, dissenting.

In *United States v. Forrester*, this Court held that the unit of prosecution for the offense of possession of child pornography under the General Article¹ is a “physical media or storage location ‘that contains’ the offensive images.” 76 M.J. 479, 486 (C.A.A.F. 2017) (quoting *Manual for Courts-Martial, United States* pt. IV, para. 68b (2012 ed.) (*Manual* or *MCM*)). Accordingly, a defendant completes the offense each time he knowingly possesses “a distinct ‘material’” that contains visual depictions of child pornography. *Id.*

In this case, the Government charged Appellee with possessing child pornography on a specific physical media—his iPhone XR—at a specific time and place. But after the Government found additional obscene images on the cell phone, the Government charged Appellee with the same offense again—possessing child pornography on the same iPhone XR at the same time and at the same place as the first charge. Because the second charge clearly and plainly violated the Double Jeopardy Clause of the Fifth Amendment, I would affirm the decision of the United States Air Force Court of Criminal Appeals (AFCCA).

I. Background

The relevant facts in this case are straightforward. In March 2020, after the National Center for Missing and Exploited Children contacted the Air Force Office of Special Investigations (AFOSI) about an email account associated with Appellee suspected of trafficking in child pornography, AFOSI seized Appellee’s cell phone—an iPhone XR. AFOSI sent Appellee’s cell phone to the Cyber Crimes Center where a forensic examination confirmed the presence of child pornography.

As relevant here, the Government charged Appellee with two specifications of violating Article 134, UCMJ, one for possessing child pornography on his iPhone XR and one for viewing child pornography on his iPhone XR. In both

¹ Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2018).

specifications, the Government alleged that Appellee's conduct occurred in the Republic of Korea between December 1, 2019, and March 24, 2020, and was of a nature to bring discredit upon the armed forces.

In November 2022, while preparing for Appellee's first court-martial, the Government's forensic analyst discovered thirteen additional images in Adobe portable document file (PDF) format containing child pornography on Appellee's iPhone XR that the analyst had not previously identified. The newly discovered PDF files had been stored on Appellee's iPhone on January 6-7, 2020, squarely within the time period specified by the Government in its Article 134 charges against Appellee. Trial counsel attempted to introduce evidence of the thirteen newly discovered files at Appellee's first court-martial in various ways, but the military judge denied those attempts. In response, in February 2023, and while Appellee's first court-martial was still pending, the convening authority referred a new Article 134 charge with two nearly identical specifications to those from Appellee's pending first court-martial—one for possessing child pornography and one for viewing child pornography—for trial by a second general court-martial.

The following month, in March 2023, a general court-martial composed of officer members convicted Appellee, contrary to his pleas, of a total of four charges and nineteen specifications, including the two specifications of wrongfully possessing and wrongfully viewing child pornography on his iPhone XR. The members sentenced Appellee to confinement for two years, reduction to the grade of E-4, forfeiture of all pay and allowances, and a reprimand.

In the spring of 2023, at a pretrial hearing for Appellee's second court-martial, the military judge queried the parties about "double jeopardy concerns" presented in the case. The military judge informed Appellee's defense counsel that he expected that they would raise "any concerns with any double jeopardy aspects of this court-martial . . . via appropriate motion." Although Appellee's defense counsel later averred that they recognized the double jeopardy issue presented by the Government's decision to prosecute Appellee twice for the same criminal act, they claimed that they made a strategic decision not to raise it. At Appellee's

second court-martial, a panel of officer members found Appellee guilty, contrary to his pleas, of both Article 134 specifications. The members sentenced Appellee to four years and eleven months of confinement, reduction to the grade of E-1, and a reprimand.

On appeal from the second court-martial, Appellee challenged both Article 134 convictions as violating his constitutional and statutory protections from double jeopardy. *United States v. Casillas*, No. ACM, 2025 CCA LEXIS 445, at *2, 2025 WL 2675840, at *1 (A.F. Ct. Crim. App. Sep. 18, 2025) (unpublished). Because Appellee's defense counsel declined the military judge's express invitation to raise any double jeopardy concerns at trial, the AFCCA concluded that Appellee had waived the double jeopardy issue for both specifications. *Id.* at *19-21, 2025 WL 2675840, at *8. Nevertheless, because of the substantial prejudice to Appellee that had resulted from defense counsel's decision not to defend Appellee's double jeopardy rights, the AFCCA decided to exercise its special power under Article 66, UCMJ, 10 U.S.C. § 866(d)(1) (2018), to pierce Appellee's waiver and address the double jeopardy issue with respect to Appellee's conviction for possession of child pornography. *Id.* at *21-23, 2025 WL 2675840, at *8-9. The AFCCA declined to pierce Appellee's waiver of the double jeopardy issue with respect to his conviction for viewing child pornography. *Id.* at *29-32, 2025 WL 2675840, at *11-12.

Applying this Court's decision from *Forrester*, 76 M.J. 479, the AFCCA concluded that Appellee's second court-martial violated his rights against double jeopardy and that the error was clear and obvious. *Casillas*, 2025 CCA LEXIS 445, at *23-30, 2025 WL 2675840, at *9-11. Because the error materially prejudiced Appellee's substantial rights, the AFCCA set aside Appellee's second conviction for possessing child pornography and reassessed his sentence. *Id.* at *29-30, *74, 2025 WL 2675840, at *11, *25.

II. Discussion

A. *Forrester*

This case turns on the meaning of this Court's opinion in *Forrester*, 76 M.J. at 479. In that case, this Court was required to resolve an issue of multiplicity: whether the

government had punished one criminal act of possession of child pornography multiple times under the same statute. *Id.* at 484-85. The Court recognized that if the government had done so, it would have violated both the Double Jeopardy Clause of the Fifth Amendment and its codification in Article 44, UCMJ, 10 U.S.C. § 844. *Forrester*, 76 M.J. at 484-85. We further recognized that to answer this question, the Court “must first determine the ‘allowable unit of prosecution’ ” for the crime of possession of child pornography. *Id.* at 485 (quoting *United States v. Planck*, 493 F.3d 501, 503 (5th Cir. 2007)).

Congress has not expressly criminalized the possession of child pornography under the UCMJ. To fill this gap, the President has declared that the knowing and wrongful possession, reception, or viewing of child pornography is punishable under the General Article, Article 134, UCMJ, when that conduct is either prejudicial to good order or service discrediting. *MCM* pt. IV, para. 95.b.(1)(b) (2019 ed.). In his explanation of the offense, the President defines child pornography as “*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.*” *Id.* para. 95.c.(4) (emphasis added).² The President defines a visual depiction to include:

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.*

Id. para. 95.c.(11) (emphasis added).

Based on these definitions and because the *Manual* defines child pornography “not as images but as ‘material[s]’ that contain them,” *Forrester*, 76 M.J. at 486 (alteration in original) (citation omitted), the *Forrester* Court concluded

² Although the Court in *Forrester* was examining the 2012 edition of the *Manual*, the relevant language is the same in the 2019 edition which applies in this case.

that, for the offense of possessing child pornography under Article 134, UCMJ, the President prohibited the “knowing and conscious possession of the *physical media or storage location* ‘that contains’ the offensive images.” *Id.* (emphasis added) (citation omitted). Accordingly, the *Forrester* Court held that the unit of prosecution for this offense is the “physical media or storage location” that the defendant possessed containing child pornography. *Id.*

The majority contends that “[t]he specific holding of *Forrester* does not directly apply to this case” and attempts to distinguish the facts here from *Forrester*. *United States v. Casillas*, __ M.J. __ (11) (C.A.A.F. 2026). But this disregards the fact that the *Forrester* Court explicitly recognized that the President could have selected a different unit of prosecution, such as “a separate specification for each image or a single specification even where an accused possesses thousands of images on multiple devices”—but had not done so. *Forrester*, 76 M.J. at 487 n.8. Instead, the *Forrester* Court concluded that the President has selected a “per-device/material” unit of prosecution for the Article 134 offense of possession of child pornography. *Id.* As identified then and as can be applied here, the unit of prosecution is not the uniqueness of the images but the number of materials that contain the images. Moreover, no language in *Forrester* (or in any other case) supports the concept of different units of prosecution for different factual scenarios involving the same criminal offense. It is unquestionable that *Forrester* defined the unit of prosecution for the possession of child pornography in violation of Article 134, UCMJ, offenses.³

³ Although not relevant to this case, the majority suggests there is ambiguity about the *Forrester* unit of prosecution because one of the “materials” underlying a specification was a Google email account (instead of a physical device). *Casillas*, __ M.J. at __ (12). This assertion disregards the fact that the *Forrester* Court expressly explained that by sending child pornography through his email account, the appellant had caused those files to be stored on remote physical servers over which the appellant had constructive possession. *Forrester*, 76 M.J. at 486 n.7 (first citing Dena G. McCorry, *With Cloud Technology, Who Owns Your Data?*, 8 Fed. Cts. L. Rev. 125, 129 (2014); and then citing Eric Johnson, Note, *Lost in the Cloud: Cloud Storage*,

B. The Double Jeopardy Violation

The majority’s decision raises another serious double jeopardy concern by endorsing the Government’s argument that the language in the specification has no relevance to the double jeopardy analysis. At Appellee’s first court-martial, the Government charged and convicted Appellee with possession of child pornography as follows:

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 appears to be minors, engaging in sexually explicit conduct, and that said misconduct was of a nature to bring discredit upon the armed forces.

(Emphasis added.) Thus, the “physical media or storage location” containing child pornography that formed the basis of Appellee’s first charge and conviction was his iPhone XR. No other media is mentioned.

The Government insists, however, that the “material” at issue in the first possession charge was not “an iPhone XR” itself—as one might infer from reading the specification—but rather “some other container or ‘storage location’ *within* the iPhone XR.” There is no support for this purely speculative, post-hoc argument anywhere in the record, and the Government cites none. Instead, the Government simply states that there is “no reason to assume” that the iPhone XR was the material at issue at either of Appellee’s courts-martial.⁴

The Government’s argument overlooks the critical role that the specification plays in defining an offense and

Privacy, and Suggestions for Protecting Users’ Data, 69 Stan. L. Rev. 867, 872 (2017)).

⁴ It is worth noting that the Government is the master of the charge sheet, and it drafted the specification incorporating the words “within an iPhone XR.” This would be a very different case if the Government had put its theories about the proper unit of prosecution into practice and attempted to charge Appellee with possession of child pornography within a specific file or folder as it now claims it has the authority to do.

preserving a defendant's double jeopardy rights. As this Court has explained before:

[I]n the military, *the specification*, in combination with the statute, provides notice of the essential elements of the offense. This should not be surprising for the specification is intended to be a plain, concise, and definite statement of the essential facts constituting the offense charged. Its function is to be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and *to protect the accused against double jeopardy*.

United States v. Weymouth, 43 M.J. 329, 333 (C.A.A.F. 1995) (second emphasis added) (citations omitted). Thus, contrary to the Government's argument, we must assume that the "material" at issue at Appellee's first court-martial was the iPhone XR, as expressly specified by the Government on the charge sheet.

C. The Presumption Against Multiple Punishments

A final problem with the majority's analysis is its disregard for the guiding principle that when Congress and the President fail to clearly indicate in plain language the allowable unit of prosecution under the provisions of a specific statute, this Court resolves this lack of clarity in favor of an accused. *United States v. Szentmiklosi*, 55 M.J. 487, 491 (C.A.A.F. 2001). As this Court has stated previously, "[u]nless a statutory intent to permit multiple punishments is stated 'clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses[.]'" *Id.* (alteration in original) (quoting *Bell v. United States*, 349 U.S. 81, 84 (1955)). To whatever extent that the majority finds the holding in *Forrester* to be ambiguous, both our precedent and the Supreme Court's require us to resolve the ambiguity in favor of Appellee, not the Government. The majority's opinion offers no explanation for how the Government could have overcome this limitation.

D. The Government's Clear and Obvious Violation of Appellee's Double Jeopardy Right

The Double Jeopardy Clause "protects against a second prosecution for the same offense after conviction." *Brown*

v. Ohio, 432 U.S. 161, 165 (1977). It provides “a constitutional policy of finality for the defendant’s benefit,” and protects the accused “from attempts to secure additional punishments after a prior conviction and sentence.” *Id.* at 165-66 (internal quotation marks omitted) (citations omitted).

We review the double jeopardy issue under the same plain error standard of review that the AFCCA and the majority applied. Under the plain error standard of review, this Court may address an error if it determines: (1) that there was error; (2) that the error was clear or obvious; and (3) that the error materially prejudiced a substantial right. *United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018). At Appellee’s second court-martial, the Government charged and convicted Appellee with possession of child pornography as follows:

Did, within the Republic of Korea, between on or about 1 December 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.

It is telling that, in its second go-round, the Government declined to identify the material that contained the obscene visual depictions that formed the basis of the second possession of child pornography charge on the charge sheet or in the entry of judgment. Perhaps the Government hoped to avoid the second charge being multiplicitous on its face. The Government concedes, however, that the thirteen PDF files that formed the basis of the second charge were found on Appellee’s iPhone XR—the same device specified in the child pornography specifications at Appellee’s first court-martial. As the AFCCA emphasized, “it is abundantly clear” from the record that the images at issue were from the same iPhone XR that OSI seized from Appellee in *Casillas I*. *Casillas*, 2025 CCA LEXIS 445, at *25, 2025 WL 2675840, at *10. Thus, the second possession specification accused Appellee of possessing child pornography on the same media (Appellee’s iPhone XR), in the same place (the Republic of Korea), during the same time (between

December 2019 and March 2020) for which the Government had already tried and convicted Appellee at his first court-martial. This presents a clear and obvious violation of Appellee’s double jeopardy rights.⁵

The clear and obvious nature of this constitutional error has been recognized at every stage of this case. At a pretrial hearing, the military judge identified the “double jeopardy concerns” looming over the trial. Appellee’s defense counsel recognized that the Government was prosecuting Appellee twice for the same possession offense but asserted that they made a strategic decision not to raise the double jeopardy issue. And on appeal, the AFCCA recognized the problem and concluded that the error was so extraordinary that it merited piercing Appellee’s affirmative waiver, explaining:

[T]his is not a case where the waived error had only a negligible or questionable impact on the results of Appell[ee]’s court-martial. On the contrary, . . . in light of our superior court’s precedent the entire prosecution of Specification 1 represented a violation of Appell[ee]’s constitutional and statutory rights, resulting in substantial prejudice. In our view, such errors present an apt occasion for this court to exercise the “special power” given us to uphold the integrity of the system.

Id. at *21-22, 2025 WL 2675840, at *8.

On the merits, I agree with the AFCCA’s well-reasoned and thorough opinion explaining the clear and obvious violation of Appellee’s double jeopardy rights. *Id.* at *23-29, 2025 WL 2675840, at *9-11. Once the Government charged Appellee with possession of child pornography on a distinct material—his iPhone XR—at a particular time and place, the Constitution prohibited the Government from charging Appellee a second time for possessing child pornography on the same material at the same time and place.

⁵ The dates in the second possession specification (December 1, 2019, to March 18, 2020) are slightly narrower than the dates in the first possession specification (December 1, 2019, to March 24, 2020), but they fall completely within the date range covered by the first possession specification.

Because the second charge clearly and plainly violated the Double Jeopardy Clause of the Fifth Amendment, I respectfully dissent.

III. Conclusion

For the foregoing reasons, I would affirm the decision of the United States Air Force Court of Criminal Appeals.