IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,
Appellee

v.

Colonel (O-6)
RICHARD J. RICE,
United States Army,
Appellant

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

Crim. App. Dkt. No. 20160695

USCA Dkt. No. 19-0178/AR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	Crim. App. Dkt. No. 20160695
Colonel (O-6) ROBERT J. RICE, United States Army, Appellant	USCA Dkt. No. 19-0178/AR

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

Issue Presented

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On October 6, 2015, and January 5, August 25, and October 24, 2016, at Fort McNair, District of Columbia, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of

possession of child pornography and one specification of distribution of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). The military judge sentenced appellant to confinement for five years and dismissal from the service. Under a pretrial agreement, the convening authority approved the dismissal and four years' confinement.

On November 28, 2018, the Army Court affirmed the findings and sentence. (App'x C). On December 7, 2018, appellant moved for reconsideration and, on that same day, the Army Court granted its own motion for reconsideration. On December 11, 2018, the court denied the defense motion, but asserted it would "consider appellant's reasons for requesting reconsideration in the course of our already granted reconsideration of this matter." (App'x B).

On December 18, the Army Court on reconsideration again affirmed the findings and sentence. (App'x A). Appellant was notified of this decision and, in accordance with Rules 19 and 30 of this Court's Rules of Practice and Procedure, filed a Petition for Grant of Review on February 14, 2019, together with a motion for leave to file this supplement separately. On February 19, this Court granted the enlargement of time until March 11, 2019. The Judge Advocate General of the Army designated the undersigned military counsel to represent appellant, who hereby enter their appearance, joined by the undersigned civilian counsel, and file this Supplement to the Petition under Rule 21.

Summary of Argument

This case presents a textbook violation of the Fifth Amendment's Double Jeopardy Clause. Appellant was tried and convicted in federal district court, and then at court-martial, for overlapping criminal offenses arising out of his possession and distribution of child pornography. The Army Court of Criminal Appeals agreed: "What happened in this case should not happen again. Divvying-up charges in a constitutionally dubious manner imperils the fair and efficient administration of justice." *United States* v. *Rice*, 78 M.J. 649, 652 (A. Ct. Crim. App. 2018). But despite its acknowledgment that appellant should never have been subjected to court-martial for offenses for which he had already been convicted in civilian court, the Army Court refused to dismiss his overlapping military convictions. Instead, the court held that appellant received a complete "remedy" for this double jeopardy violation when the *district court*, rather than sentencing him on the overlapping offenses, dismissed the part of his civilian conviction it found to be duplicative. To also dismiss the offending parts of appellant's court-martial conviction, the Army Court concluded, would be to provide appellant with an "unjustified windfall." *Id*. at 656.

The Double Jeopardy Clause, however, not only prohibits multiple *punishments* of the same defendant for the same offenses; it prohibits multiple *trials*. *See, e.g.*, *Abney* v. *United States*, 431 U.S. 651, 661 (1977) ("[The Clause]

protects interests wholly unrelated to the propriety of any subsequent conviction."); *see also, e.g., Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874) ("The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."). Thus, no action of the district court could have remedied the double jeopardy violations in appellant's military case; to the extent the court-martial convicted him for duplicative offenses, those convictions were not just voidable, but *void*.

But even if the district court's actions at sentencing could somehow have obviated, *nunc pro tunc*, the constitutional violation arising from appellant's trial and conviction for duplicative offenses by court-martial, dismissal of appellant's duplicative military offense would not be an "unjustified windfall." As the Army Court itself conceded, because the court-martial sentenced appellant first, the district court would have committed a *second* double jeopardy violation had it then sentenced appellant on the overlapping possession conviction. *See Rice*, 78 M.J. at 656 & n.12. Thus, the district court *dismissal* of appellant's civilian possession conviction had no more effect than merely not sentencing him; either way, appellant received the same sentence that the Constitution would allow in his civilian case, and no redress for the double jeopardy violation in his military case.

The Army Court thus failed to vindicate appellant's double jeopardy rights. More fundamentally, though, the Army Court's decision will promote the very mischief going forward that it criticized here. Although the court insisted that "[n]othing in this opinion should be perceived as an endorsement of the charging scheme in this case," *id*. at 652, its decision incentivizes similar unconstitutional behavior in the future—allowing the government to conduct sequential civilian and military trials of the same defendant for the same offenses so long as it can ultimately benefit from the results of one of them. *See, e.g., id*. at 657 (Wolfe, J., concurring) ("[A]s long as the results of one trial go away, the Constitution is not offended."). This Court's review is warranted not only to correct the Army Court's serious constitutional error in this case, but to ensure that it does not happen again.

Statement of Facts

In 2013, appellant was assigned to the staff of the U.S. Army War College, Carlisle, Pennsylvania, where he resided with his spouse. (Pros. Ex. 1). His spouse believed he was cheating on her using computer dating sites, so she purchased a computer program called Spector Pro and installed it on his HP Pavilion computer. (Pros. Ex. 1). Using this program, she acquired information that she provided to local police, who obtained a search warrant for appellant's HP Pavilion computer. (Pros. Ex. 1). A subsequent warrant also obtained a Seagate external hard drive, in a search conducted by local, military, and federal law enforcement. (Pros. Ex. 1).

The United States government simultaneously pursued criminal charges against appellant in two court systems. On September 17, 2015, a general court-martial convening authority referred charges that included the three specifications on which appellant was arraigned on October 6, 2015, and to which appellant later pleaded guilty in accordance with a pretrial agreement. (R. at 1-9, 171).

While the military charges were pending, however, the U.S. District Court for the Middle District of Pennsylvania empaneled a jury which, on May 6, 2016, found appellant guilty of two counts:

> (Count One) "knowing possession of child pornography transported in interstate or foreign commerce, from on or about August 2010[*] to January 29, 2013," and
>
> (Count Two) "knowing receipt or distribution of child pornography transported in interstate or foreign commerce, from on or about January 23, 2013 to January 29, 2013."

(App. Ex. XXIII, Encl. 1).

In proving Count One in the civilian trial, the government used material from both the HP Pavilion computer and the Seagate external hard drive as substantive evidence. (App. Ex. XXXII (undisputed finding of fact by the military judge); *see also* App. Ex. XXXI (disc containing evidence admitted at the civilian trial)).

[*] The day of the month was specified only for the end of the period.

On June 20, 2016, at the court-martial, appellant's counsel moved for dismissal of the three pornography specifications, because all the charged conduct fell within the date range covered by appellant's conviction on Count One in federal district court. (App. Ex. XXII). The military judge denied this motion, (App. Ex. XXXII), and appellant pleaded guilty subject to the right to appeal the issue of double jeopardy, (R. at 99-101, 181).

Following appellant's conviction and same-day sentencing in the court-martial, appellant's counsel in federal district court filed a "Motion to Dismiss Count One or Otherwise to Bar Sentencing on Count One for Violation of Double Jeopardy." (Def. App. Ex. A, attached here as App'x D). On November 22, 2016, the district court granted that motion, which was not opposed by counsel for the United States. (App'x D). For the remaining count, appellant was sentenced to 142 months' imprisonment. (Def. App. Ex. B, attached here as App'x E).

Additional facts pertinent to the assignments of error are included below.

Reasons to Grant Review

The Army Court found that appellant's court-martial convictions for possession of child pornography violated the Double Jeopardy Clause. *Rice*, 78 M.J. at 653. Relying on cases in which double jeopardy occurred *within a single prosecution*, the Army Court nevertheless held that the district court's post-conviction but pre-sentencing dismissal of the overlapping count from the civilian

prosecution remedied the double jeopardy violation in the military prosecution, and that any further relief would be an "unjustified windfall." *Id*. at 653.

The Supreme Court, however, has stated explicitly that the Double Jeopardy Clause provides "three separate constitutional protections":

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

The Army Court's erroroneous assertion that appellant now seeks "a second remedy for a single wrong," 78 M.J. at 655, impermissibly curtailed appellant's right to this panoply of double jeopardy protections provided by the Constitution and trampled by overreaching prosecutors. When appellant invoked the third of these protections ("against multiple punishments for the same offense") in federal district court, he asked that court not to commit *another* double jeopardy violation. He did not waive his right to maintain his properly preserved challenge in the military case against his "second prosecution for the same offense."

Thus, although the Army Court was right that "[t]he remedy for a violation of the Double Jeopardy Clause varies based on the nature of the violation," *Id*. at 655, in cases of subsequent prosecution for the same offense, the remedy has *always* inured to the second trial. By departing from this settled understanding,

and opening the door to similar jurisdictional shenanigans by the government in future cases, the Army Court decided a question of law in a way in conflict with applicable decisions of the U.S. Supreme Court, and adopted a rule of law materially different from that generally recognized in the trial of criminal cases in the United States district courts. *See* C.A.A.F. R. 21(b)(5)(B) and (C). Put simply, when a criminal defendant is subjected to successive prosecutions by the same sovereign for the same offense, it has never previously been the case that, "as long as the results of one trial go away, the Constitution is not offended." 78 M.J. at 657 (Wolfe, J., concurring).

Appellant also argued to the Army Court that "his District Court conviction for possessing child pornography was a lesser-included offense of his court-martial conviction for distributing child pornography." *Id*. at 654, n.10 (majority opinion). If so, then that conviction violated the Double Jeopardy Clause as well. Calling it "a close question," the Army Court opined that it "need not" decide this question, as it was rendered moot by its resolution of appellant's challenge to his possession conviction:

> Even assuming appellant's District Court conviction for possession was a lesser-included offense of his court-martial conviction for distribution, appellant received his remedy when the possession count of his District Court indictment was dismissed on appellant's motion.

78 M.J. at 654, n.10.

This is a question of law which has not been, but should be, settled by this Court. C.A.A.F. R. 21(b)(5)(A). "The Fifth Amendment protection against double jeopardy provides that an accused cannot be convicted of both an offense and a lesser-included offense." *United States v. Hudson*, 59 M.J. 357, 358 (C.A.A.F. 2004). The Army Court's cited federal circuit court opinions that have flirted with the idea that, in electronic media, distribution may not always presuppose the dominion and control necessary for possession. Yet in hypothetical distribution without possession of the same material, there is invariably an aider or abettor, whose actions may rightly be attributed to the person who acted with a guilty mind. The law of vicarious liability has long accounted for such situations. In any event, in the present case, there was no distribution apart from possession, and so the possession was necessarily a lesser-included offense. Therefore, because the Army Court was mistaken in finding that dismissal was not the necessary remedy for the double jeopardy violation by the second prosecution, whether the distribution specification must also be dismissed has not been rendered moot.

Standard of Review

Double jeopardy is a question of law reviewed de novo. *United States v. Easton*, 71 M.J. 168, 171 (C.A.A.F. 2012). The military judge's findings of fact stand unless clearly erroneous. *Id.* Federal circuit courts review de novo a motion to dismiss on double jeopardy grounds. *United States v. Olmeda*, 461 F.3d 271,

278 (2d Cir. 2006) ("[B]ecause Olmeda's motion to dismiss the Southern District indictment on double jeopardy grounds raises a question of law, or, at most, a mixed question of law and fact, we review the denial of that motion *de novo*").

Law and Argument

A. The Double Jeopardy Clause forbids a second prosecution for the same offense after conviction.

Jeopardy attached in the federal civilian trial when the jury was empaneled on May 2, 2016. (App. Ex. XXX; *Crist v. Bretz*, 437 U.S. 28, 35 (1978)). That trial considered evidence of possession of child pornography on the same devices, during a time period that completely encompassed the possession (and distribution) specifications in appellant's subsequent court-martial. (App. Ex. XXXI, XXXII).

As noted above, Double Jeopardy Clause provides three protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Pearce, 395 U.S. at 717.

Appellant was first put in jeopardy for these crimes on May 2, 2016, so his right not to be twice placed in jeopardy was violated the moment he was placed in jeopardy again by the same sovereign for the same crimes—at the outset of his court-martial. The Army Court agreed, as it had to, holding that Appellant's court-martial conviction for possession was unconstitutional.

B. The Double Jeopardy Clause also forbids multiple punishments for the same offense.

The sequencing of appellant's cases almost created a *second* double jeopardy violation—as he was tried, convicted, and sentenced by court-martial after his civilian trial and conviction but before his sentencing in federal district court. Thus, by the time he was to be sentenced in the district court, he had already been sentenced by the court-martial. For the district court to *also* sentence him on the same charges would have violated the third of the protections the Supreme Court enumerated in *Pearce*. Appellant therefore asked the district court to dismiss the possession conviction "or otherwise to bar sentencing" on that count, and the district court opted for the former approach—and then sentenced appellant to 142 months' imprisonment on the remaining count. (App'x D, App'x E). The Assistant United States Attorney acknowledged the basis for appellant's motion to dismiss the count "*or otherwise bar sentencing* on that count on double jeopardy grounds." (App'x D) (emphasis added). The Army Court agreed that, at a minimum, appellant had a right to not be sentenced on the possession count by the district court—because of that court's "inability to render a lawful sentence." *Rice*, 78 M.J. at 656. Despite having been first to convict, the federal district court could not impose a sentence after one had been announced by the military court during the intervening period. To do so would have constituted a *second* offense against the Constitution.

C. The Army Court conflated the distinct rights conferred by the Double Jeopardy Clause.

The Army Court's opinion found a single violation of a single right: "appellant sought and received a remedy for *the* double jeopardy violation by gaining dismissal of the possession count at the District Court." *Rice*, 78 M.J. at 655 (emphasis added). In fact, appellant's motion was styled, argued, and decided as a mechanism to prevent a violation of the Double Jeopardy Clause's protection against multiple punishments. (App'x D). To that end, appellant's brief in support of this motion in district court concluded:

> For the foregoing reasons, this Court is prohibited by the Double Jeopardy Clause from imposing any judgment of sentence on Count One of the indictment. That count must therefore be dismissed.

(App'x D).

The Army Court interpreted this invocation of a constitutional right as a "choice to obtain relief at the District Court," thereby distinguishing this case from *United States v. Sabella*, 272 F.2d 206 (2d Cir. 1959). *See Rice*, 78 M.J. at 655. In truth, this case is parallel to *Sabella* in every material respect.

In *Sabella*, the eponymous defendant and his codefendant could not be sentenced because Congress had not authorized a sentence for the offense of which they had been convicted, and the district court resolved this confusion by setting aside their convictions. 272 F.2d 208. When the government sought to try Sabella

and his codefendant again for the same conduct, the subsequent prosecution was barred by the Double Jeopardy Clause, notwithstanding the general rule that if a defendant seeks and obtains reversal of his conviction, the government may (*then*, not while the conviction stands) seek to try his again for the same offenses. *See United States v. Ball*, 163 U.S. 662, 672 (1896) ("[A] defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted.").

The Army Court found it "critical" that, in *Sabella*, "only the sentence *and not the judgment of conviction* was unlawful and was attacked," while appellant in this case proposed dismissal of the offending count as a possible remedy. *Rice*, 78 M.J. at 656 (quoting *Sabella*, 272 F.2d at 208 (emphasis added by the Army Court)). The Army Court conceded that but for this supposed distinction, *Sabella* would be directly on point: "Had appellant *only* requested the District Court impose no punishment for his possession conviction, this case would be functionally indistinguishable from *Sabella*." *Id*. at 656, n.12.

The rest of the paragraph from *Sabella* quoted by the Army Court, however, shows that the *Sabella* court did not know or rely on the particulars of his habeas petition, and the outcome in that case turned on *the fact of former jeopardy*, not the mechanism by which the first-in-time conviction was disturbed.

As Judge Friendly explained:

> Here only the sentence and not the judgment of conviction was unlawful and was attacked. While the petitions for habeas corpus are not before us, it seems that these assailed only the unlawful sentence. So, for that matter, did not government's motion in the Eastern District. Only the order on the motion purported to vacate the conviction and dismiss the indictment. The order thus went beyond the motion, and both were the government's doing, not the defendants'. *Yet, as we hold below, it was exposure to a valid judgment of conviction that constituted defendants' initial jeopardy*.

272 F.2d at 208 (emphasis added).

In other words, *Sabella*'s analysis did not turn in any way on the legally irrelevant distinction manufactured by the Army Court—that is, whether the second double jeopardy violation is avoided by refusing to sentence on the overlapping count or by dismissing that count altogether. As relevant here, *Sabella* is squarely on point.

But even on a blank slate, appellant's sequential federal prosecutions, which the Army Court rightly called a "debacle" that "should not happen again," *Rice*, 78 M.J. at 651-52, created not one but two different double jeopardy problems. By not sentencing appellant on the overlapping possession conviction, the district court avoided a second double jeopardy violation. It did not, in the process, retroactively remedy the first one—because it could not have done so—and appellant remains entitled to relief for the subsequent prosecution.

D. Only dismissal of the second convictions can vindicate the right not to be tried a second time for the same offense.

The Army Court's fundamental constitutional error is encapsulated in its assertion that the federal district court "granted appellant relief by dismissing the *offending* possession count of his civilian indictment after findings but before sentencing." *Rice*, 78 M.J. at 651 (emphasis added). Sentencing on that count would have been an offense against the Constitution, had that occurred, but only because of the subsequent unconstitutional trial by court-martial. The *offending* charges were the military charges. All the district court accomplished in that moment was to avoid a *second* double jeopardy violation. The only "relief" appellant could have received for the double jeopardy violation in his case was dismissal of the offending court-martial convictions.

Were it otherwise, and the first-in-time charge could be transmogrified on appeal into the *offending* charge such that its dismissal would cure a violation of the protections against double jeopardy, the government is free to charge anyone repeatedly for the same conduct, see which charges lead to conviction, and then choose the best conviction on which to sentence the defendant: "That is, as long as the results of one trial go away, the Constitution is not offended." *Rice*, 78 M.J. at 657 (Wolfe, J., concurring). It is hard to imagine a result more fundamentally inconsistent with the settled purpose of the Double Jeopardy Clause. As the Supreme Court explained over six decades ago,

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. 184, 187–88 (1957).

To support its novel assertion that dismissal is not a necessary remedy, the Army Court cited *Morris v. Mathews*, 475 U.S. 237 (1986), and *Jones v. Thomas*, 491 U.S. 376 (1989). *See Rice*, 78 M.J. at 655. Both of those cases discussed the appropriate remedy for unconstitutional multiplicity within a single prosecution, *not* the remedy for an unconstitutional second prosecution after a conviction. Indeed, in a passage not quoted by the Army Court here, the Supreme Court explained in *Jones* the defendant's more limited protection against multiplicity at trial compared to the greater dangers posed by subsequent prosecutions:

> Our cases establish that in the multiple punishments context, that interest is "limited to ensuring that the total punishment did not exceed that authorized by the legislature."

491 U.S. at 381 (quoting *United States* v. *Halper*, 490 U.S. 435, 450 (1989)).

The Supreme Court has been so emphatic that the Double Jeopardy Clause bars the second *trial*, and not just conviction or sentencing, that it has recognized double jeopardy claims as protecting the kind of "right not to be tried" the denial of

which is subject to immediate interlocutory appeal in civilian courts under the "collateral order doctrine." *See, e.g.*, *Olmeda*, 461 F.3d at 278 ("[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." (quoting *Abney*, 431 U.S. at 662)).

Abney and its progeny make clear that when the Double Jeopardy Clause is violated by a subsequent prosecution, the constitutional offense begins and ends with the trial itself. And if the second trial court wrongly denies a motion to dismiss, such a ruling can be immediately appealed—at least in the civilian courts—so that the error can be corrected before the harm occurs. Where such an avenue is not available, the only appropriate remedy on post-conviction appeal is vacatur and dismissal of the void convictions.

E. Prosecution for an encompassed lesser-included offense precludes subsequent prosecution for a greater offense.

Finally, jeopardy for the same offense or a lesser-included offense bars subsequent prosecution by the same sovereign for the same or a greater offense for the same conduct in the same date range. "This conclusion merely restates what has been [the Supreme] Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen* was decided in 1889." *Brown v. Ohio*, 432 U.S. 161, 168 (1977) ("[W]here, as in this case, a person has been tried and convicted for a crime

which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." (citing *In re Nielsen*, 131 U.S. 176, 188 (1889))).

The distribution specification in the military charges addressed six images apparently distributed in November or December 2010 from appellant's HP Pavilion computer. (Charge sheet, Pros. Ex. 1). The United States government had used the same contraband from the HP Pavilion computer as substantive evidence in obtaining a conviction for possession of child pornography in the civilian trial. (App. Ex. XXXII, App. Ex. XXXI).

The Army Court declined to resolve whether appellant's civilian conviction for possession was a lesser-included offense of his court-martial conviction for distribution, in reliance on its erroneous denial of a remedy, as discussed above. *See Rice*, 78 M.J. at 655, n.10. The Army Court called it a "close question," citing cases involving multiplicity, *not* subsequent prosecution.

In the context of multiplicity, appellant concedes that the unit of prosecution differs between possession and distribution, and that someone could distribute an image electronically multiple times. *See United States v. Forrester*, 76 M.J. 479, 486-87 (C.A.A.F. 2017). That analysis does not, however, undermine the long-standing constitutional protections against *subsequent prosecution* for greater or lesser offenses. Notably, appellant has never asserted that he could not be

prosecuted for both possession and distribution within a single prosecution. His assertion has been and remains that the United States was not allowed to prosecute him repeatedly for the same offenses, in violation of the Double Jeopardy Clause.

Conclusion

WHEREFORE, the appellant respectfully requests that this honorable Court grant his petition for review.

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Appendix A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WOLFE, SALUSSOLIA, and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Colonel ROBERT J. RICE
United States Army, Appellant

ARMY 20160695

U.S. Army Military District of Washington
Tyesha L. Smith and Andrew J. Glass, Military Judges
Lieutenant Colonel Jacqueline Tubbs, Acting Staff Judge Advocate (pretrial)
Colonel John P. Carrell, Staff Judge Advocate (post-trial)

For Appellant: Lieutenant Colonel Christopher D. Carrier, JA (argued); Lieutenant Colonel Tiffany M. Chapman, JA; Major Todd W. Simpson, JA; Lieutenant Colonel Christopher D. Carrier (on brief); Lieutenant Colonel Christopher D. Carrier, JA; Captain Cody D. Cheek, JA (on reply brief and brief on specified issue).

For Appellee: Captain Catharine M. Parnell, JA (argued); Colonel Tania M. Martin, JA; Major Cormac M. Smith, JA; Captain Catharine M. Parnell, JA (on brief); Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Catharine M. Parnell, JA (on brief on specified issue).

18 December 2018

OPINION OF THE COURT ON RECONSIDERATION

FLEMING, Judge:

Colonel Robert J. Rice was convicted of possessing and distributing child pornography in both civilian federal court and at a court-martial.[1]

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[1] A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of possessing child pornography and one specification of distributing child pornography, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2006). The military judge sentenced appellant to a dismissal from service and five years of confinement. Pursuant to appellant's pretrial agreement, the convening authority approved only a

(continued . . .)

Both at the Federal District Court for the Middle District of Pennsylvania and at his court-martial, appellant contended he was tried twice on the same charges in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution. Before the District Court, the government agreed. Accordingly, that court granted appellant relief by dismissing the offending possession count of his civilian indictment after findings but before sentencing. Appellant now further contends he is entitled to have those military charges that duplicate the subject-matter of his dismissed District Court conviction set aside as well. We disagree.

BACKGROUND

The circumstances that brought appellant's misconduct to light are sordid and largely irrelevant to the issue now before us. In broad terms, appellant's wife suspected him of infidelity. Her suspicion was well-founded.[2] Investigating appellant's suspected unfaithfulness, she stumbled across his collection of child pornography. She reported it to police.

Appellant possessed numerous sexually explicit images of children on his laptop computer from about August 2010 to about 29 January 2013. He also distributed sexually explicit images of children on his laptop computer between about 30 November 2010 and about 6 December 2010 and again between about 23 January 2013 and about 28 January 2013. Appellant further possessed sexually explicit images of children on an external hard drive on or about 14 November 2010.

For unknown reasons, the government elected to divide various child pornography charges between military prosecutors and prosecutors with the U.S. Attorney's Office for the Middle District of Pennsylvania. Thus ensued the debacle which we are now compelled to review.

On 6 May 2016, in District Court, appellant was convicted of one count of possessing child pornography "from on or about August 2010 to January 29, 2013," and one count of receiving or distributing child pornography "from on or about

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(. . . continued)
dismissal from service and four years of confinement. Appellant's plea was conditioned upon appellate review of the military judge's denial of appellant's motion to dismiss the charges as a violation of double jeopardy. Appellant's case is now before us for review under Article 66, UCMJ.

[2] Among other things, it came to light appellant offered another man his services as a fetishistic sexual submissive who desired "to be caged, controlled, and service a Master [sic]."

January 23, 2013 to January 28, 2013." Evidence was offered at appellant's trial that he possessed sexually explicit images of children on both his laptop computer and his external hard drive. Appellant was not sentenced on the date of his civilian trial.

Based on his civilian convictions, appellant moved to dismiss his military charges as a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution. The military judge denied appellant's motion. Then, on 24 October 2016, appellant pleaded guilty to two specifications of possessing child pornography and one specification of distributing child pornography. Appellant's guilty plea was conditioned on his ability to appeal the military judge's denial of his double jeopardy motion.

The first specification of possessing child pornography to which appellant pleaded guilty alleged he possessed sexually explicit images of children on his laptop computer "between on or about 25 November 2010 and on or about 11 January 2012." The second specification of possessing child pornography to which appellant pleaded guilty alleged he possessed sexually explicit images of children on his external hard drive "on or about 14 November 2010." The distribution specification to which appellant pleaded guilty alleged he distributed sexually explicit images of children "between on or about 30 November 2010 and on or about 6 December 2010." Appellant was sentenced by the military judge as discussed at the beginning of this opinion.

After being sentenced by the court-martial, appellant filed a motion in the District Court to dismiss the count of his civilian indictment for possessing child pornography. Appellant argued the Double Jeopardy Clause prohibited his sentencing by the District Court for conduct he had already been sentenced for by the court-martial. The government, represented by the U.S. Attorney for the Middle District of Pennsylvania, did not oppose appellant's motion. Accordingly, on 22 November 2016, the District Court dismissed the count of appellant's indictment for possessing child pornography. The District Court subsequently sentenced appellant to 142 months of imprisonment for his remaining conviction of receiving or distributing child pornography.

Appellant now appeals his court-martial convictions, asserting the military judge erred by denying his motion to dismiss the charges against him based on double jeopardy.

LAW AND DISCUSSION

What happened in this case should not happen again. Divvying-up charges in a constitutionally dubious manner imperils the fair and efficient administration of justice. Nothing in this opinion should be perceived as an endorsement of the charging scheme in this case. Indeed, had the District Court not already set aside appellant's civilian conviction for possession of child pornography and dismissed that count of his indictment, our resolution of this case would be different. Put another way, the intervention of the federal judge was necessary to clean up the mess caused when military prosecutors pursued charges duplicative of appellant's prior civilian federal conviction.

The Constitution provides that no person shall "be twice put in jeopardy" "for the same offence." U.S. Const. amend. V. This portion of the Fifth Amendment is commonly referred to as the Double Jeopardy Clause. To determine whether the Double Jeopardy Clause is violated by the prosecution of two different statutes the Supreme Court has explained, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See also United States v. Dixon*, 509 U.S. 688, 704 (1993); *United States v. Roderick*, 62 M.J. 425, 432 (C.A.A.F. 2006).[3]

Appellant contends he is entitled to relief because the offenses of which he was convicted before the District Court subsume the offenses to which he pleaded guilty at court-martial. We find merit in some, but not all of appellant's claims of double jeopardy. We shall first address appellant's receipt or distribution offenses, followed by his possession offenses, and finally, to what remedy he is entitled.

[3] On our own motion, we granted reconsideration of our opinion issued on 28 November 2018 in this case to clarify that *Blockburger* provides the proper test for double jeopardy in cases involving successive prosecutions. In our 28 November 2018 opinion, we outlined a second test for whether double jeopardy is violated by successive prosecutions. We originally relied on *Jordan v. Virginia*, 653 F.2d 870, 873-74 (4th Cir. 1980) and *United States v. Sabella*, 272 F.2d 206, 211-12 (2d Cir. 1959) for this proposition. Several other cases from other circuit courts of appeals between the 1930s and the 1990s conducted similar tests. Our reliance was misplaced because the Supreme Court overruled this line of cases by necessary implication in 1993. *See Dixon*, 509 U.S. at 704 (overruling *Grady v. Corbin*, 495 U.S. 508 (1990), and adopting the *Blockburger* test for successive prosecution cases as well as multiplicity cases).

A. Appellant's Distribution Convictions did not Violate Double Jeopardy

The unit of prosecution for receiving or distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)—the statute at issue in the District Court receipt or distribution count—is the "transaction" of receiving or distributing child pornography. *See United States v. Pires*, 642 F.3d 1, 16 (1st Cir. 2011); *United States v. Polouizzi*, 564 F.3d 142, 158 (2d Cir. 2009); *United States v. Buchanan*, 485 F.3d 274, 281-82 (5th Cir. 2007). For example, if ten sexually explicit images of children are received in a single transaction, the receiving party is guilty of only one count of receiving child pornography. Similarly, if one sexually explicit image of a child is distributed ten times in ten separate transactions, the distributing party is guilty of ten counts of distributing child pornography, even though only a single image is involved.

Appellant was convicted in District Court of one count of receiving or distributing child pornography between about 23 and 28 January 2013. Appellant's conviction of that offense requires he engaged in at least one transaction of receiving or distributing child pornography between those dates. Appellant's act of receiving or distributing child pornography in January 2013 was more than a year removed from any of the acts underlying any specification to which he pleaded guilty at court-martial. Thus, the acts of receipt or distribution underlying appellant's District Court conviction are factually distinct from the acts underlying appellant's convictions at court-martial, even if the child pornography received or distributed in 2013 was the same as the child pornography possessed and distributed from 2010 to 2012.[4]

In other words, the receipt or distribution offense required proof of an act—the transaction in 2013—not alleged in any specification to which appellant pleaded

[4] It is worth noting that an individual may distribute the same contraband multiple times, and each act of distribution constitutes a distinct offense. Consider, for example, a drug-dealer who sells a buyer cocaine. If the dealer later steals his own product back surreptitiously, his original buyer may return to him to purchase more contraband. The dealer-turned-thief may then sell the same cocaine back to the same buyer without his customer realizing the scheme. In this situation, the dealer has committed two offenses—disregarding the theft—because he engaged in two separate acts of distribution even though the contraband and the buyer are exactly the same. The proliferation of digital contraband makes repeated distribution of the same contraband particularly likely in the modern age.

guilty at court-martial.[5] Likewise, every specification to which appellant pleaded guilty at court-martial required proof of an act—possessing and distributing in 2010 to 2012—not alleged in the receipt or distribution count of which appellant was convicted at the District Court. Further, proof of the 2013 receipt or distribution offense would not have proved any of the offenses to which appellant pleaded guilty at court-martial. *See United States v. Dudeck*, 657 F.3d 424, 430 (6th Cir. 2011) (surveying cases affirming both receipt and possession charges where "separate conduct is found to underlie the two offenses.")

B. Appellant's Possession Convictions Violated Double Jeopardy

While appellant's District Court conviction for receipt or distribution of child pornography does not implicate double jeopardy for any of his court-martial convictions, the same cannot be said for his District Court conviction for possession. The parties now agree the government offered evidence of both appellant's laptop and appellant's external hard drive before the District Court.[6] Appellant's resulting conviction for possession of child pornography between about August 2010 and on or about 29 January 2013 wholly subsumes appellant's possession of the self-same child pornography between about 25 November 2010 and about 11 January 2012, and on or about 14 November 2010. *See United States v. Forrester*, 76 M.J. 479, 486-87 (C.A.A.F. 2017); *United States v. Mobley*, 77 M.J. 749, 751-52 (Army Ct. Crim. App. 2018). In other words, appellant's possession conviction in the District Court is *factually* duplicative of his possession convictions at court-martial. The remaining question is whether appellant's district court conviction is also *legally* duplicative of his convictions at court-martial. We conclude it is.

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[5] Even if all distribution includes possession, not all possession includes distribution.

[6] In its brief on the specified issues, the government admirably conceded that evidence of both appellant's laptop, and his external hard drive—which was also referred to as a "Seagate" and "Rocketfish" hard drive—was offered at his trial before the District Court. The government further conceded that under the recent precedent of *Forrester* and *Mobley*, the military judge erred when he found the court-martial possession charges were factually distinguishable from appellant's District Court conviction for possession. While the law is clear in hindsight, we fully acknowledge that the correct unit of prosecution for possession of child pornography was not spelled-out in military jurisprudence until our superior court did so in *Forrester*. At the time he ruled on appellant's motion, the military judge did not have the benefit of those cases that now guide our analysis.

Article 134, UCMJ permits prosecution of three kinds of offenses: (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces[;]" (2) "all conduct of a nature to bring discredit upon the armed forces[;]" and (3); "crimes and offenses not capital." UCMJ art. 134, UCMJ. Specifications charged under Article 134 must allege one or more of these clauses as the "terminal element." *United States v. Fosler*, 70 M.J. 225, 226 (C.A.A.F. 2011). As we discussed in *United States v. Williams*, disjunctive clauses of an offense may be charged conjunctively and proved disjunctively in a single specification. *See* 78 M.J. 543, 546-47 (Army Ct. Crim. App. 2018). It would, however, be multiplicitous to convict an accused of multiple specifications under Article 134 where the only legal or factual difference between the specifications is which clause of the terminal element is alleged in each. Put differently, the government may not obtain two convictions at the same court-martial on two specifications that are identical save for what clause of Article 134 is alleged. An accused may be convicted only once for possessing child pornography under clauses one, two, or three for the same conduct.

There is no reason to find the government may do in separate trials that which it is prohibited from doing in one. Appellant's conviction at the District Court of possessing child pornography necessarily proved every element of being a crime not capital under clause three of Article 134, UCMJ. Had the government subsequently referred charges to court-martial alleging appellant committed a crime not capital based on the same statute and conduct underlying his District Court conviction, it would plainly fail *Blockburger* analysis as his District Court conviction *is* of a crime not capital. The government may not circumvent the Fifth Amendment by choosing to omit that clause of the terminal element that would make its due process violation obvious.[7]

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[7] Our decision in this case is necessarily narrow. Our holding is limited to the unusual facts before us. Our holding does not extend to those situations where additional substantive elements distinguish an offense charged under Article 134, UCMJ, from another criminal offense. For example, an accused may properly be charged with both rape and adultery, because rape has an element adultery does not—unlawful force—and adultery has elements rape does not—that one of the parties is married to a different person. We are mindful there is currently a split between federal circuit courts of appeals as to whether jurisdictional elements of federal offenses—such as the use of interstate commerce—are considered when comparing offenses under *Blockburger*. *Compare United States v. Gibson*, 820 F.2d 692, 698 (5th Cir. 1987) (holding jurisdictional elements do not distinguish statutes under *Blockburger*), *with United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995) (holding jurisdictional elements do distinguish statutes under *Blockburger*). We need not wade into this debate to decide the issue before us because appellant's

(continued . . .)

Our conclusion in this matter is bolstered by a majority of the justices in *Dixon*, who held it was a violation of double jeopardy when Mr. Dixon was convicted of both possessing cocaine and violating a court order to not commit any criminal offense. Mr. Dixon's two convictions violated double jeopardy because the court order, "incorporated the entire governing criminal code," and therefore any criminal offense was necessarily a lesser-included offense of the court order. *Dixon*, 509 U.S. at 698. Two justices[8] came to this conclusion through *Blockburger* analysis, and three others[9] would have applied a more expansive test. *Id.* at 731. In any event, the Court held the possession offense was a lesser-included offense of criminal contempt under the circumstances. This case presents much the same circumstances.

Clause three of Article 134 incorporates the entire federal criminal code. The three clauses of Article 134 are disjunctive, and therefore it does not matter for *Blockburger* purposes which terminal elements are alleged because all three may be alleged and only one need be proven in any given specification. *See Williams*, 78 M.J. at 546-47. Thus, under the unique circumstances of appellant's two prosecutions, the elements of his District Court conviction for possession of child pornography were duplicated in each of his court-martial convictions for possession of child pornography. The government placed appellant in jeopardy twice.[10]

(. . . continued)
conviction in District Court fully satisfied the elements of an Article 134, clause three offense.

[8] Justice Scalia, who authored the leading opinion, and Justice Kennedy.

[9] Justice White, Justice Stevens, and Justice Souter.

[10] Appellant urges us to also find his District Court conviction for possessing child pornography was a lesser-included offense of his court-martial conviction for distributing child pornography. This is a close question. *See, e.g., Dudeck*, 657 F.3d at 429-30 (surveying cases). *But see, e.g., United States v. McElmurry*, 776 F.3d 1061, 1064-65 (9th Cir. 2015). We need not, however, decide this question in appellant's case. Even assuming appellant's District Court conviction for possession was a lesser-included offense of his court-martial conviction for distribution, appellant received his remedy when the possession count of his District Court indictment was dismissed on appellant's motion. We discuss this further below.

C. Remedy

Having decided the possession offenses to which appellant pleaded guilty at court-martial were wholly subsumed within the possession offense of which appellant was convicted in District Court, we must decide what remedy is required.

The Double Jeopardy Clause protects against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969). It is the second of these prohibitions that concerns us in this case.

The remedy for a violation of the Double Jeopardy Clause varies based on the nature of the violation. Dismissal of the offending charge is a common remedy. *See, e.g., United States v. Basciano*, 599 F.3d 184, 215 (2d Cir. 2010). Other remedies may also be appropriate, such as affirming the conviction of a lesser-included offense that is not jeopardy-barred. *See Morris v. Mathews*, 475 U.S. 237, 246-47 (1986).

An accused is not, however, entitled to relief on *both* charges, when two charges cannot coexist without offending the Double Jeopardy Clause. *See Jones v. Thomas*, 491 U.S. 376, 387 (1989) ("neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls.").

In this case, appellant elected to raise his double jeopardy challenge not just at his court-martial, but also before the District Court. Appellant received the relief he sought at the District Court when that court dismissed the count of his indictment relating to possession of child pornography from August 2010 through 29 January 2013. Appellant now asserts that because the possession count before the District Court was duplicative of the specifications to which he pleaded guilty at his court-martial, he is entitled to dismissal of the court-martial specifications as well. We disagree.

While appellant's possession offense before the District Court was duplicative of the two possession offenses—but not the distribution offense—to which he pleaded guilty at court-martial, appellant sought and received a remedy for the double jeopardy violation by gaining dismissal of the possession count at the District Court. Appellant was entitled to such relief, but he is not simultaneously entitled to a second remedy for a single wrong.

Appellant's choice to obtain relief at the District Court distinguishes this case from *Sabella*, which—though nonbinding—is highly persuasive on this point.[11] In *Sabella*, two men, Sabella and LaCascia, were convicted of narcotics offenses that, due to a congressional oversight, lacked a lawful punishment. 272 F.2d at 207. Both men challenged their sentences as unlawful. The government agreed that no punishment was authorized and moved the trial court to set aside Sabella and LaCascia's sentences. *Id.* at 207-08. The government's motion was granted, and the trial court not only set aside the sentences, but also dismissed Sabella and LaCascia's convictions despite the fact Sabella and LaCascia had not requested their convictions be set aside. *Id.* at 208.

After the trial court sua sponte set aside Sabella and LaCascia's convictions, the government pursued new charges against both men under a slightly different theory, proof of which would also have proved-up the dismissed charges. *See id.* Setting aside the resulting second convictions, the Court of Appeals for the Second Circuit found it critical that Sabella and LaCascia only originally challenged their sentences, and did not seek dismissal of their first convictions. *See id.* The court found this crucial because "it has been 'quite clear that a defendant, who procures a judgement against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.'" *Id.* (quoting *United States v. Ball*, 163 U.S. 662, 672 (1896)). In *Sabella*, the court found that the rule expressed in *Ball* did not apply because "only the sentence *and not the judgement of conviction* was unlawful and was attacked." *Id.* (emphasis added).

Unlike the facts in *Sabella*, appellant sought and received dismissal of the District Court possession count that caused a double jeopardy violation. Appellant's motion to the District Court was predicated on the court's inability to render a lawful sentence. Appellant, however, went beyond asking merely that no sentence be imposed,[12] and sought dismissal of the possession count entirely. Once appellant

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[11] In the years since it was published, *Sabella* has been cited on the topic of double jeopardy by several other federal circuit courts of appeals. *See, e.g., United States v. Rosenberg*, 888 F.2d 1406, 1411-12 (D.C. Cir. 1989). The Supreme Court also favorably cited *Sabella* on the general topic of successive prosecutions. *See Sanabria v. United States*, 437 U.S. 54, 71-72 n.28 (1978). Although part of the reasoning underlying *Sabella* was overruled by necessary implication in *Dixon*, the distinction between remedies sought by an appellant, and remedies imposed without an appellant's request remains sound.

[12] Had appellant *only* requested the District Court impose no punishment for his possession conviction, this case would be functionally indistinguishable for *Sabella*.

secured dismissal of the possession count on grounds unrelated to his factual guilt or innocence, the United States was free to pursue other charges based on the same course of conduct. *See United States v. McClain*, 65 M.J. 894, 900-01 (Army Ct. Crim. App. 2008) (citing *United States v. Scott*, 437 U.S. 82, 98-99 (1978); *Lee v. United States*, 432 U.S. 23, 26 (1977)). *See also Ball*, 163 U.S. at 672.

Thus, while we agree appellant was subjected to jeopardy twice, we conclude he has already received his remedy and is not entitled to what the Supreme Court has described as an "unjustified windfall[]." *Thomas*, 491 U.S. at 387.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge SALUSSOLIA concurs.

WOLFE, Senior Judge, concurring:

I concur with both the reasoning and result of the majority opinion. I write separately to address an issue not directly raised in the briefs.

Appellant's guilty plea at the court-martial was a conditional plea. A conditional plea may be entered only with the agreement of the government. Rule for Courts Martial (R.C.M.) 910(a)(2). Before appellant's court-martial, the trial counsel represented to the military judge that the government—and specifically the convening authority—agreed to the conditional nature of appellant's plea. Under Army regulations, the government may only agree to a conditional plea after consultation with the Chief of the Criminal Law Division of the Office of the Judge Advocate General (OTJAG-CLD). Army Reg. 27-10, Legal Services: Military Justice, para. 5-26(b). Although the record is silent on whether OTJAG-CLD approved of the government's agreement to appellant's conditional plea, we presume administrative regulations were followed absent evidence to the contrary. *See United States v. Masusock*, 1 C.M.R. 32, 35 (C.M.A. 1951).[13]

The rule for conditional pleas provides that such a plea reserves "the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion." R.C.M. 910(a)(2). Put differently, a conditional plea preserves an issue for appeal, which might otherwise be waived by pleading guilty. The preserved issue in this case is appellant's motion to dismiss based on double jeopardy. The

[13] We should not blink twice before granting appellant relief when the government so knowingly accepts the risk of upsetting a plea—but only if this is where the law leads us.

rule for conditional pleas also provides, "[i]f the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty." R.C.M. 910(a)(2).

The ruling of the military judge that denied appellant's motion to dismiss the charges against him based on double jeopardy was incorrect—at least in part—at the time it was made.[14] At first blush, this might seem to trigger appellant's ability to withdraw from his plea. Close consideration of R.C.M. 910(a)(2), however, demonstrates otherwise, at least on the facts of this case. Accordingly, I agree with the result reached by the majority for two reasons.

First, appellant's requested relief is *not* to withdraw his plea. Instead, appellant seeks the greater remedy of dismissal of the affected specifications. Indeed, withdrawing the plea could carry significant risk. Appellant's agreement reduced his adjudged confinement from five years to four. Also, as a part of the plea agreement, the government dismissed charges and specifications alleging additional misconduct. It is conceivable the misconduct underlying these additional charges and specifications could be brought again if appellant withdraws from his plea. Further, as we find the District Court's dismissal of the possession count of appellant's civilian indictment remedied the double jeopardy violation, the government would still be able to pursue the possession charges against appellant even if he withdrew from his plea and lost all benefits thereof. *See United States v. Ball*, 163 U.S. 662, 672 (1896) (allowing successive prosecutions when the defendant successfully challenges a conviction on appeal). While Article 66(c), UCMJ, requires a de novo review of the entire record, I do not believe that necessitates forcing an appellant to receive unrequested relief that may carry unwanted risk. Also, R.C.M. 910(a)(2) states the accused "shall be allowed to" withdraw from a plea if he or she prevails on appellate review. The rule does *not* state an appellant "must" withdraw from such a plea.

Second, and perhaps more importantly, R.C.M. 910(a)(2) allows an appellant to withdraw from a conditional plea only if he or she "prevails on further review or appeal." Under the plain language of the rule, an appellant must "prevail" on appeal in order to withdraw from a conditional plea. While we find today that the military judge erred when he denied appellant's motion to dismiss the charges against him—at least with respect to the possession specifications—we also conclude appellant received sufficient relief for the double jeopardy violation from the District Court. Accordingly, we affirm the findings and sentence in appellant's case. Clearly,

[14] Although, to be fair, the double jeopardy issue was only made clear when our superior court decided *United States v. Forrester*, 76 M.J. 479 (C.A.A.F. 2017).

appellant has not "prevailed" on appeal. Thus, R.C.M. 910(a)(2) does not allow appellant to withdraw from his guilty plea in this case.

Today we determine that the remedy for wrongful successive prosecutions can be found in dismissing, at appellant's request, the guilty determination at either tribunal. That is, as long as the results of one trial go away, the Constitution is not offended.

However, let us assume we have erred and that the proper remedy is to amputate the results from the offending—i.e. the second—trial. Here, that would mean the court-martial convictions for possession of child pornography must go. But if appellant's arguments are correct, then his request for the dismissal of the indictment in civilian federal court should have been denied as the first trial did not violate double jeopardy. Appellant specifically requested, and received, a dismissal of the civilian charges for possession of child pornography because of a double jeopardy claim. Having asked for and received relief in one court—which, under appellant's logic was an improper forum—appellant now argues that the same relief is due in our court—which he now contends is the proper forum. Whether looked at as invited error, waiver, or as a choice of remedies issue, I arrive at the same place.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

Appendix B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WOLFE, SALUSSOLIA, and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Colonel ROBERT J. RICE
United States Army, Appellant

ARMY 20160695

ORDER

WHEREAS:

On 28 November 2018, this Court issued an opinion in this case. On 7 December 2018 we sua sponte ordered reconsideration of our opinion on our own motion. The same day, appellant filed a motion for reconsideration of our opinion.

NOW, THEREFORE, IT IS ORDERED:

As we shall consider appellant's reasons for requesting reconsideration in the course of our already granted reconsideration of this matter, appellant's motion for reconsideration is DENIED as moot.

DATE: 11 December 2018

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CCZ
JALS-CR4

Appendix C

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WOLFE, SALUSSOLIA, and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Colonel ROBERT J. RICE
United States Army, Appellant

ARMY 20160695

U.S. Army Military District of Washington
Tyesha L. Smith and Andrew J. Glass, Military Judges
Lieutenant Colonel Jacqueline Tubbs, Acting Staff Judge Advocate (pretrial)
Colonel John P. Carrell, Staff Judge Advocate (post-trial)

For Appellant: Lieutenant Colonel Christopher D. Carrier, JA (argued); Lieutenant Colonel Tiffany M. Chapman, JA; Major Todd W. Simpson, JA; Lieutenant Colonel Christopher D. Carrier (on brief); Lieutenant Colonel Christopher D. Carrier, JA; Captain Cody D. Cheek, JA (on reply brief and brief on specified issue).

For Appellee: Captain Catharine M. Parnell, JA (argued); Colonel Tania M. Martin, JA; Major Cormac M. Smith, JA; Captain Catharine M. Parnell, JA (on brief); Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Catharine M. Parnell, JA (on brief on specified issue).

28 November 2018

OPINION OF THE COURT

FLEMING, Judge:

Colonel Robert J. Rice was convicted of possessing and distributing child pornography in both civilian federal court and at a court-marital.[1]

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[1] A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of possessing child pornography and one specification of distributing child pornography, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2006). The military judge sentenced appellant to a dismissal from service and five years of confinement. Pursuant to appellant's pretrial agreement, the convening authority approved only a

(continued . . .)

Both at the Federal District Court for the Middle District of Pennsylvania and at his court-martial, appellant contended he was tried twice on the same charges in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution. Before the District Court, the government agreed. Accordingly, that court granted appellant relief by dismissing the offending possession count of his civilian indictment after findings but before sentencing. Appellant now further contends he is entitled to have those military charges that duplicate the subject-matter of his dismissed District Court conviction set aside as well. We disagree.

BACKGROUND

The circumstances that brought appellant's misconduct to light are sordid and largely irrelevant to the issue now before us. In broad terms, appellant's wife suspected him of infidelity. Her suspicion was well-founded.[2] Investigating appellant's suspected unfaithfulness, she stumbled across his collection of child pornography. She reported it to police.

Appellant possessed numerous sexually explicit images of children on his laptop computer from about August 2010 to about 29 January 2013. He also distributed sexually explicit images of children on his laptop computer between about 30 November 2010 and about 6 December 2010 and again between about 23 January 2013 and about 28 January 2013. Appellant further possessed sexually explicit images of children on an external hard drive on or about 14 November 2010.

For unknown reasons, the government elected to divide various child pornography charges between military prosecutors and prosecutors with the U.S. Attorney's Office for the Middle District of Pennsylvania. Thus ensued the debacle which we are now compelled to review.

On 6 May 2016, in District Court, appellant was convicted of one count of possessing child pornography "from on or about August 2010 to January 29, 2013," and one count of receiving or distributing child pornography "from on or about

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(. . . continued)
dismissal from service and four years of confinement. Appellant's plea was conditioned upon appellate review of the military judge's denial of appellant's motion to dismiss the charges as a violation of double jeopardy. Appellant's case is now before us for review under Article 66, UCMJ.

[2] Among other things, it came to light appellant offered another man his services as a fetishistic sexual submissive who desired "to be caged, controlled, and service a Master [sic]."

January 23, 2013 to January 28, 2013." Evidence was offered at appellant's trial that he possessed sexually explicit images of children on both his laptop computer and his external hard drive. Appellant was not sentenced on the date of his civilian trial.

Based on his civilian convictions, appellant moved to dismiss his military charges as a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution. The military judge denied appellant's motion. Then, on 24 October 2016, appellant pleaded guilty to two specifications of possessing child pornography and one specification of distributing child pornography. Appellant's guilty plea was conditioned on his ability to appeal the military judge's denial of his double jeopardy motion.

The first specification of possessing child pornography to which appellant pleaded guilty alleged he possessed sexually explicit images of children on his laptop computer "between on or about 25 November 2010 and on or about 11 January 2012." The second specification of possessing child pornography to which appellant pleaded guilty alleged he possessed sexually explicit images of children on his external hard drive "on or about 14 November 2010." The distribution specification to which appellant pleaded guilty alleged he distributed sexually explicit images of children "between on or about 30 November 2010 and on or about 6 December 2010." Appellant was sentenced by the military judge as discussed at the beginning of this opinion.

After being sentenced by the court-martial, appellant filed a motion in the District Court to dismiss the count of his civilian indictment for possessing child pornography. Appellant argued the Double Jeopardy Clause prohibited his sentencing by the District Court for conduct he had already been sentenced for by the court-martial. The government, represented by the U.S. Attorney for the Middle District of Pennsylvania, did not oppose appellant's motion. Accordingly, on 22 November 2016, the District Court dismissed the count of appellant's indictment for possessing child pornography. The District Court subsequently sentenced appellant to 142 months of imprisonment for his remaining conviction of receiving or distributing child pornography.

Appellant now appeals his court-martial convictions, asserting the military judge erred by denying his motion to dismiss the charges against him based on double jeopardy.

LAW AND DISCUSSION

What happened in this case should not happen again. Divvying-up charges in a constitutionally dubious manner imperils the administration of justice. Nothing in this opinion should be perceived as an endorsement of the charging scheme in this case. Indeed, had the District Court not already set aside appellant's civilian conviction for possession of child pornography and dismissed that count of his indictment, our resolution of this case would be different. Put another way, the intervention of the District Court was necessary to clean up the mess caused when military prosecutors pursued charges duplicative of appellant's prior civilian federal conviction.

The Constitution provides that no person shall "be twice put in jeopardy" "for the same offence." U.S. Const. amend. V. This portion of the Fifth Amendment is commonly referred to as the Double Jeopardy Clause. To determine whether the Double Jeopardy Clause is violated by the prosecution of two statutory offenses in the same case, the Supreme Court has explained, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See also United States v. Roderick*, 62 M.J. 425, 432 (C.A.A.F. 2006).

When successive prosecution—as opposed to a single prosecution on potentially duplicative charges—is at issue, the test for double jeopardy is more expansive than strict *Blockburger* analysis.[3] *See, e.g., Jordan v. Virginia*, 653 F.2d 870, 873-74 (4th Cir. 1980) (citations omitted); *United States v. Sabella*, 272 F.2d 206, 211-12 (2d Cir. 1959). In successive prosecution cases, courts also evaluate "whether 'the evidence required to warrant a conviction upon one of the (prosecutions) would have been sufficient to support a conviction upon the other,' and find[] the second prosecution barred if the same evidence would so serve." *Jordan*, 653 F.2d at 873 (quoting *In re Nielsen*, 131 U.S. 176, 188 (1889)) (further citations omitted).

Appellant contends he is entitled to relief because the offenses of which he was convicted before the District Court subsume the offenses to which he pleaded guilty at court-martial. We find merit in some, but not all of appellant's claims of

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[3] For this reason, the otherwise controlling precedent of our superior court in *Roderick* is not on point. *Roderick* involved multiplicity analysis in a single prosecution. 62 M.J. at 431-32. As articulated in *Jordan* and elsewhere, double jeopardy analysis in successive prosecution cases does not end with the *Blockburger* test. Accordingly, we need not address appellant's other arguments distinguishing *Roderick*.

double jeopardy. We shall first address appellant's receipt or distribution offenses, followed by his possession offenses, and finally, to what remedy he is entitled.

A. Appellant's Distribution Convictions did not Violate Double Jeopardy

The unit of prosecution for receiving or distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)—the statute at issue in the District Court receipt or distribution count—is the "transaction" of receiving or distributing child pornography. *See United States v. Pires*, 642 F.3d 1, 16 (1st Cir. 2011); *United States v. Polouizzi*, 564 F.3d 142, 158 (2d Cir. 2009); *United States v. Buchanan*, 485 F.3d 274, 281-82 (5th Cir. 2007). For example, if ten sexually explicit images of children are received in a single transaction, the receiving party is guilty of only one count of receiving child pornography. Similarly, if one sexually explicit image of a child is distributed ten times in ten separate transactions, the distributing party is guilty of ten counts of distributing child pornography, even though only a single image is involved.

Appellant was convicted in District Court of one count of receiving or distributing child pornography between about 23 and 28 January 2013. Appellant's conviction of that offense requires he engaged in at least one transaction receiving or distributing child pornography between those dates. Appellant's act of receiving or distributing child pornography in January 2013 was more than a year removed from any of the acts underlying any specification to which he pleaded guilty at court-martial. Thus, the acts of receipt or distribution underlying appellant's District Court conviction are factually distinct from the acts underlying appellant's convictions at court-martial, even if the child pornography received or distributed in 2013 was the same as the child pornography possessed and distributed from 2010 to 2012.[4]

In other words, the receipt or distribution offense required proof of an act—the transaction in 2013—not alleged in any specification to which appellant pleaded

[4] It is worth noting that an individual may distribute the same contraband multiple times, and each act of distribution constitutes a distinct offense. Consider, for example, a drug-dealer who sells a buyer cocaine. If the dealer later steals his own product back surreptitiously, his original buyer may return to him to purchase more contraband. The dealer-turned-thief may then sell the same cocaine back to the same buyer without his customer realizing the scheme. In this situation, the dealer has committed two offenses—disregarding the theft—because he engaged in two separate acts of distribution even though the contraband and the buyer are exactly the same. The proliferation of digital contraband makes repeated distribution of the same contraband particularly likely in the modern age.

guilty at court-martial.[5] Likewise, every specification to which appellant pleaded guilty at court-martial required proof of an act—possessing and distributing in 2010 to 2012—not alleged in the receipt or distribution count of which appellant was convicted at the District Court. Further, proof of the 2013 receipt or distribution offense would not have proved any of the offenses to which appellant pleaded guilty at court-martial. *See United States v. Dudeck*, 657 F.3d 424, 430 (6th Cir. 2011) (surveying cases affirming both receipt and possession charges where "separate conduct is found to underlie the two offenses.")

B. Appellant's Possession Convictions Violated Double Jeopardy

While appellant's District Court conviction for receipt or distribution of child pornography does not implicate double jeopardy for any of his court-martial convictions, the same cannot be said for his District Court conviction for possession. The parties now agree the government offered evidence of both appellant's laptop and appellant's external hard drive before the District Court.[6] Plainly, appellant's resulting conviction for possession of child pornography between about August 2010 and on or about 29 January 2013 wholly subsumes appellant's possession of the self-same child pornography between about 25 November 2010 and about 11 January 2012, and on or about 14 November 2010.[7] *See United States v. Forrester*, 76 M.J.

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[5] Even if all distribution includes possession, not all possession includes distribution.

[6] In its brief on the specified issues, the government admirably conceded that evidence of both appellant's laptop, and his external hard drive—which was also referred to as a "Seagate" and "Rocketfish" hard drive—was offered at his trial before the District Court. The government further conceded that under the recent precedent of *Forrester* and *Mobley*, the military judge erred when he found the court-martial possession charges were factually distinguishable from appellant's District Court conviction for possession. While the law is clear in hindsight, we fully acknowledge that the correct unit of prosecution for possession of child pornography was not spelled-out in military jurisprudence until our superior court did so in *Forrester*. At the time he ruled on appellant's motion, the military judge did not have the benefit of those cases that now guide our analysis.

[7] As this is a successive prosecution case, we need not discuss the vexatious question of whether the jurisdictional elements of the civilian and military offenses distinguish the civilian from military crimes for *Blockburger* purposes. It suffices that we find proof of the possession charge alleged in District Court would have sufficed to prove both possession charges to which appellant pleaded guilty at court-martial.

479, 486-87 (C.A.A.F. 2017); *United States v. Mobley*, 77 M.J. 749, 751-52 (Army Ct. Crim. App. 2018).

C. Remedy

Having decided the possession offenses to which appellant pleaded guilty at court-martial were wholly subsumed within the possession offense of which appellant was convicted in District Court, we must decide what remedy is required.

The Double Jeopardy Clause protects against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969). It is the second of these prohibitions that concerns us in this case.

The remedy for a violation of the Double Jeopardy Clause varies based on the nature of the violation. Dismissal of the offending charge is a common remedy. *See, e.g., United States v. Basciano*, 599 F.3d 184, 215 (2d Cir. 2010). Other remedies may also be appropriate, such as affirming the conviction of a lesser-included offense that is not jeopardy-barred. *See Morris v. Mathews*, 475 U.S. 237, 246-47 (1986).

An accused is not, however, entitled to relief on *both* charges, when two charges cannot coexist without offending the Double Jeopardy Clause. *See Jones v. Thomas*, 491 U.S. 376, 387 (1989) ("neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls.").

In this case, appellant elected to raise his double jeopardy challenge not just at his court-martial, but also before the District Court. Appellant received the relief he sought at the District Court when that court dismissed the count of his indictment relating to possession of child pornography from August 2010 through 29 January 2013. Appellant now asserts that because the possession count before the District Court was duplicative of the specifications to which he pleaded guilty at his court-martial, he is entitled to dismissal of the court-martial specifications as well. We disagree.

While appellant's possession offense before the District Court was duplicative of the two possession offenses—but not the distribution offense—to which he pleaded guilty at court-martial, appellant sought and received a remedy for the double jeopardy violation by gaining dismissal of the possession count at the District Court. Appellant was entitled to such relief, but he is not simultaneously entitled to a second remedy for a single wrong.

Appellant's choice to obtain relief at the District Court distinguishes this case from *Sabella*, which—though nonbinding—is highly persuasive.[8] In *Sabella*, two men, Sabella and LaCascia, were convicted of narcotics offenses that, due to a congressional oversight, lacked a lawful punishment. 272 F.2d at 207. Both men challenged their sentences as unlawful. The government agreed that no punishment was authorized and moved the trial court to set aside Sabella and LaCascia's sentences. *Id.* at 207-08. The government's motion was granted, and the trial court not only set aside the sentences, but also dismissed Sabella and LaCascia's convictions despite the fact Sabella and LaCascia had not requested their convictions be set aside. *Id.* at 208.

After the trial court sua sponte set aside Sabella and LaCascia's convictions, the government pursued new charges against both men under a slightly different theory, proof of which would also have proved-up the dismissed charges. *See id.* Setting aside the resulting second convictions, the Court of Appeals for the Second Circuit found it critical that Sabella and LaCascia only originally challenged their sentences, and did not seek dismissal of their first convictions. *See id.* The court found this crucial because "it has been 'quite clear that a defendant, who procures a judgement against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.'" *Id.* (quoting *United States v. Ball*, 163 U.S. 662, 672 (1896)). In *Sabella*, the court found that the rule expressed in *Ball* did not apply because "only the sentence *and not the judgement of conviction* was unlawful and was attacked." *Id.* (emphasis added).

Unlike the facts in *Sabella*, appellant sought and received dismissal of the District Court possession count that caused a double jeopardy violation. Appellant's motion to the District Court was predicated on the court's inability to render a lawful sentence. Appellant, however, went beyond asking merely that no sentence be imposed,[9] and sought dismissal of the possession count entirely. Once appellant secured dismissal of the possession count on grounds unrelated to his factual guilt or innocence, the United States was free to pursue other charges based on the same course of conduct. *See United States v. McClain*, 65 M.J. 894, 900-01 (Army Ct.

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[8] In the years since it was published, *Sabella* has been cited on the topic of double jeopardy by several other federal circuit courts of appeals. *See, e.g., United States v. Rosenberg*, 888 F.2d 1406, 1411-12 (D.C. Cir. 1989). The Supreme Court has also favorably cited *Sabella* on the general topic of successive prosecutions. *See Sanabria v. United States*, 437 U.S. 54, 71-72 n.28 (1978).

[9] Had appellant *only* requested the District Court impose no punishment for his possession conviction, this case would be functionally indistinguishable for *Sabella*.

Crim. App. 2008) (citing *United States v. Scott*, 437 U.S. 82, 98-99 (1978); *Lee v. United States*, 432 U.S. 23, 26 (1977)). *See also Ball*, 163 U.S. at 672.

Thus, while we agree appellant was subjected to jeopardy twice, we conclude he has already received his remedy and is not entitled to what the Supreme Court has described as an "unjustified windfall[]." *Thomas*, 491 U.S. at 387.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge SALUSSOLIA concurs.

WOLFE, Senior Judge, concurring:

I concur with both the reasoning and result of the majority opinion. I write separately to address an issue not directly raised in the briefs.

Appellant's guilty plea at the court-martial was a conditional plea. A conditional plea may be entered only with the agreement of the government. Rule for Courts Martial (R.C.M.) 910(a)(2). Before appellant's court-martial, the trial counsel represented to the military judge that the government—and specifically the convening authority—agreed to the conditional nature of appellant's plea. Under Army regulations, the government may only agree to a conditional plea after consultation with the Chief of the Criminal Law Division of the Office of the Judge Advocate General (OTJAG-CLD). Army Reg. 27-10, Legal Services: Military Justice, para. 5-26(b). Although the record is silent on whether OTJAG-CLD approved of the government's agreement to appellant's conditional plea, we presume administrative regulations were followed absent evidence to the contrary. *See United States v. Masusock*, 1 C.M.R. 32, 35 (C.M.A. 1951).[10]

The rule for conditional pleas provides that such a plea reserves "the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion." R.C.M. 910(a)(2). Put differently, a conditional plea preserves an issue for appeal, which might otherwise be waived by pleading guilty. The preserved issue in this case is appellant's motion to dismiss based on double jeopardy. The rule for conditional pleas also provides, "[i]f the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty." R.C.M. 910(a)(2).

[10] We should not blink twice before granting appellant relief when the government so knowingly accepts the risk of upsetting a plea—but only if this is where the law leads us.

The ruling of the military judge that denied appellant's motion to dismiss the charges against him based on double jeopardy was incorrect—at least in part—at the time it was made. At first blush, this might seem to trigger appellant's ability to withdraw from his plea. Close consideration of R.C.M. 910(a)(2), however, demonstrates otherwise, at least on the facts of this case. Accordingly, I agree with the result reached by the majority for two reasons.

First, appellant's requested relief is *not* to withdraw his plea. Instead, appellant seeks the greater remedy of dismissal of the affected specifications. Indeed, withdrawing the plea could carry significant risk. Appellant's agreement reduced his adjudged confinement from five years to four. Also, as a part of the plea agreement, the government dismissed charges and specifications alleging additional misconduct. It is conceivable the misconduct underlying these additional charges and specifications could be brought again if appellant withdraws from his plea. Further, as we find the District Court's dismissal of the possession count of appellant's civilian indictment remedied the double jeopardy violation, the government would still be able to pursue the possession charges against appellant even if he withdrew from his plea and lost all benefits thereof. *See United States v. Ball*, 163 U.S. 662, 672 (1896) (allowing successive prosecutions when the defendant successfully challenges a conviction on appeal). While Article 66(c), UCMJ, requires a de novo review of the entire record, I do not believe that necessitates forcing an appellant to receive unrequested relief that may carry unwanted risk. Also, R.C.M. 910(a)(2) states the accused "shall be allowed to" withdraw from a plea if he or she prevails on appellate review. The rule does *not* state an appellant "must" withdraw from such a plea.

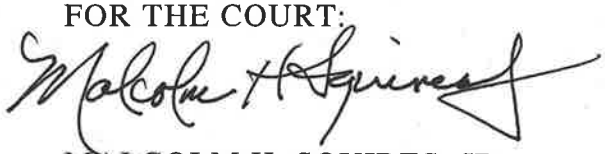
Second, and perhaps more importantly, R.C.M. 910(a)(2) allows an appellant to withdraw from a conditional plea only if he or she "prevails on further review or appeal." Under the plain language of the rule, an appellant must "prevail" on appeal in order to withdraw from a conditional plea. While we find today that the military judge erred when he denied appellant's motion to dismiss the charges against him—at least with respect to the possession specifications—we also conclude appellant received sufficient relief for the double jeopardy violation from the District Court. Accordingly, we affirm the findings and sentence in appellant's case. Clearly, appellant has not "prevailed" on appeal. Thus, R.C.M. 910(a)(2) does not allow appellant to withdraw from his guilty plea in this case.

Today we determine that the remedy for wrongful successive prosecutions can be found in dismissing the guilty determination at either tribunal. That is, as long as the results of one trial go away, the Constitution is not offended.

However, let us assume we have erred and that the proper remedy is to amputate the results from the offending—i.e. the second—trial. Here, that would mean the court-martial convictions for possession of child pornography must go.

But if appellant's arguments are correct, then his request for the dismissal of the indictment in civilian federal court should have been denied as the first trial did not violate double jeopardy. Appellant specifically requested, and received, a dismissal of the civilian charges for possession of child pornography, because of a double jeopardy claim. Having asked for and received relief in one forum, appellant now argues that the same relief is due in the alternative forum. Whether looked at as invited error, waiver, or as a choice of remedies issue, I arrive at the same place.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

Appendix D

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Colonel (O-6) **Robert J. Rice,** United States Army, Appellant	**MOTION TO ATTACH DEFENSE APPELLATE EXHIBIT A** Docket No. ARMY 20160695 Tried at Fort McNair, District of Columbia, on 6 October 2015 and 5 January, 25 August, and 24 October 2016, before a general court-martial appointed by the Commander, Headquarters, Fort Bragg, Lieutenant Colonel Tyesha Smith and Colonel Andrew Glass, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW the undersigned appellate defense counsel, under Rule 23 of this court's Rules of Practice and Procedure, and moves to attach Defense Appellate Exhibit A on behalf of the appellant, Colonel Robert J. Rice.

This exhibit contains the court documents from the United States District Court for the Middle District of Pennsylvania relevant to appellant's granted motion to dismiss a charge against him on grounds of double jeopardy. Specifically, the exhibit includes the motion (2 pages), the brief in support of the motion (7 pages), exhibits A and B to that brief (4 pages and 2 pages), the court's order on scheduling (1 page), the response of the United States (3 pages), and the order of the court dismissing a charge against appellant (1 page).

Panel No. 4

WHEREFORE, appellant respectfully requests this court grant the motion.

Panel No. 4

MOTION TO ATTACH:

GRANTED: _____

DENIED: _____

DATE: JAN 17 2018

CHRISTOPHER DANIEL CARRIER
LTC, JA
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE, U.S. v. RICE (20160695)

Motion to Attach Defense Appellate Exhibit A

I certify that a copy of the foregoing was sent via electronic submission to the Government Appellate Division at us.army.pentagon.hqda-otjag.mb.gad-accaservice@mail.mil on the 8th day of January, 2018.

CHRISTOPHER DANIEL CARRIER
LTC, JA
Appellate Defense Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
		No. 1:14-CR-119
v.	:	(Chief Judge Conner)
	:	
ROBERT J. RICE,		
Defendant.	:	

DEFENDANT'S MOTION TO DISMISS COUNT ONE
OR OTHERWISE TO BAR SENTENCING ON COUNT ONE
FOR VIOLATION OF DOUBLE JEOPARDY
(NON-CONCURRENCE)

Pursuant to Fed.R.Crim.P. 12 and 34, and the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, the defendant, Robert J. Rice, moves to dismiss or otherwise to bar imposition of any sentence on Count One of the indictment. His conviction on that count is for a violation of 18 U.S.C. § 2252A(a)(5), by knowing possession, between August 2010 and January 2013, of a HP Pavilion laptop computer containing one or more illicit images. A General Court Martial of the United States Army, First Judicial Circuit, sitting at Fort Myer, Virginia, *sub nom. United States v. Robert J. Rice*, convicted and sentenced Mr. Rice on October 24, 2016, for the "same offense" as that for which he was convicted in this Court on Count One. Specifically, under Charge II, Specification 3, he was convicted and sentenced by the Court Martial for a violation of UCMJ art. 134, 10 U.S.C. § 934, based on knowing possession of 45 illicit images on the HP Pavilion laptop computer, between

November 25, 2010, and January 11, 2012, an offense entirely included within the conviction in this Court on Count One.

The reasons and justification for this motion are set forth in the brief to be filed separately pursuant to LR 5.1(h) and 7.5.

CERTIFICATE OF NON-CONCURRENCE

Neither AUSA Clancy nor AUSA Schinnour responded to an email from the undersigned, sent on November 8, 2016, seeking concurrence. Counsel for the defendant therefore certifies that as best he can tell, the government does not concur in the relief sought by this motion.

Respectfully submitted,

Dated: November 10, 2016

s/*Peter Goldberger*

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

Attorney for Defendant Rice

CERTIFICATE OF SERVICE

Pursuant to LR 7.2, I certify that I filed the foregoing motion today, November 10, 2016, via this Court's CM/ECF system, thus causing it to be immediately and automatically served upon all counsel of record.

s/*Peter Goldberger*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
		No. 1:14-CR-119
v.	:	(Chief Judge Conner)
	:	
ROBERT J. RICE,		
Defendant.	:	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT ONE OR OTHERWISE TO BAR SENTENCING ON COUNT ONE FOR VIOLATION OF DOUBLE JEOPARDY

The defendant, Robert J. Rice, has moved pursuant to Fed.R.Crim.P. 12 and 34, and the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, to dismiss Count One, or otherwise to bar imposition of any sentence on Count One of the indictment. The basis for his motion is his recent conviction by Court Martial of the U.S. Army of a lesser included offense. The motion should be granted.

The defendant's conviction on Count One is for a violation of 18 U.S.C. § 2252A(a)(5), by knowing possession, between August 2010 and January 2013, of a HP Pavilion laptop computer containing many images of child pornography. A General Court Martial of the United States Army, First Judicial Circuit, sitting at Fort Myer, Virginia, *sub nom. United States v. Robert J. Rice*, convicted and sentenced Mr. Rice on October 24, 2016, for the "same offense" as that for which he was convicted in this Court on Count One. Specifically, under Charge II, Specification 3, of the "charge sheet" in the military case, he was convicted and sentenced by the Court Martial for a violation of UCMJ art.

134, 10 U.S.C. § 934. The basis for conviction on that specification was his knowing possession of 45 illicit images on the same HP Pavilion laptop computer, between November 25, 2010, and January 11, 2012. The military offense is thus entirely included within the criminal conduct for which Mr. Rice was convicted in this Court on Count One.

The Double Jeopardy Clause bars successive punishments by the same sovereign for "the same offence." The power that this Court and the U.S. Army exercise in criminal cases is derived from the same sovereign, that is, the United States of America's federal government. See *Grafton v. United States*, 206 U.S. 333, 351-52 (1907) (U.S. court martial and U.S. colonial court in the Philippines acted for same sovereign for purposes of double jeopardy, barring trial by court martial following acquittal for same murder in civil court); *cf. United States v. Rice*, 109 F.3d 131 (3d Cir. 1997) (general discharge from military for misconduct is not prior punishment for double jeopardy purposes).

Moreover, when double jeopardy is invoked under two different criminal codes of the same federal sovereign, the "same offense" limitation is not enforced according to a strict application of the *Blockburger* elements rule, as it would be when considering a double jeopardy challenge to two counts in the same case. *Cf.* Doc. 92–93 (denying defendant Rice's motion to merge counts); *Gov't of Virgin Is. v. Hodge*, 211 F.3d 74, 77-78 (3d Cir. 2000). To the contrary, the "same offense" question in the present situation (successive prosecutions under different criminal codes of the same sovereign) is whether any count or counts in the two cases charge "the same criminal conduct," that is, "like charges for the same conduct," or "the same conduct under equivalent

criminal laws." *Puerto Rico v. Sanchez Valle*, 579 U.S. —, 136 S.Ct. 1863, 1868, 1870, 1876 (2016)[1]; see also *Hodge*, 311 F.3d at 78 (whether charges under two different criminal codes of same sovereign address "a similar offense growing out of the same occurrence"), quoting *Gov't of Virgin Is. v. Brathwaite*, 782 F.2d 399, 406 (3d Cir. 1986).[2] And as the Third Circuit has recognized, the "same offense" test applicable in the successive prosecutions context, as here, is not necessarily the same as that which applies to multiple counts in a single prosecution. *United States v. Aguilar*, 849 F.2d 92, 99 (3d Cir. 1988).

In comparing the offenses in the context of successive prosecutions under different criminal codes of the same sovereign, differing essential jurisdictional elements – that is, elements which define only what courthouse or court system of the sovereign the case should be heard in – necessarily are not a basis to render two offenses different. *Cf. Luna Torres v. Lynch*, 578 U.S. —, 136 S.Ct. 1619, 1630-33 (2016) (discussing equivalent issue in a variety of contexts); compare *Hodge*, 311 F.3d at 78 (*Blockburger* analysis of two counts prosecuted in single case under different codes does consider jurisdictional element). As implemented and applied in this case, § 2252A(a)(5) of title 18 and § 934 of title 10 constitute the "same offense" in the required sense.

Count One of the indictment in this case charged that Mr. Rice, between about August 2010 and about January 29, 2013, possessed "material" (unspeci-

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[1] *Sanchez Valle* addressed successive prosecution under non-identical ("analogous," 136 S.Ct. at 1869) gun-dealing laws of the United States and of the Commonwealth of Puerto Rico.

[2] *Hodge* and *Brathwaite* concerned single, multi-count prosecutions that encompassed violations of both the Virgin Islands territorial code and the U.S. Code.

fied in the indictment) containing "images of child pornography" (also unspecified and unenumerated there) that had been shipped and transported in interstate commerce. For present double jeopardy purposes, as guided by *Luna Torres*, the requirement that the images have previously moved in interstate commerce may be disregarded. Moreover, it is the possession of the "material" that "contains" the illicit images, and not possession of the images themselves, that is directly criminalized in § 2252A(a)(5). Here, neither the indictment (Doc. 1), the jury instructions (Tr., 5/6/16, at 66-73), nor the special interrogatories attached to the verdict form (Doc. 85), expressly identified the "material" at issue or particularized the "images" that the jury found. But based on the evidence and argument at trial, and as explained in this Court's opinion denying the defense motion to merge counts, the "material" that Mr. Rice possessed over the course of the specified dates, and which he knew to contain one or more illicit images, so as to form the basis for his conviction on Count One, was his personal HP Pavilion laptop computer. And as charged and prosecuted in this case, Count One encompassed all of the thousands of images later retrieved from various folders on the hard drive of that laptop and which the jury was told about by Detective Parthemore, Dr. Mercury, and other witnesses.[3]

[3] Nor could the government, in any event, have avoided the double jeopardy problem by arbitrarily dividing the collective and continuous possession offense into subparts by focusing only on certain images in each case or through an artificial restriction of dates. See *United States v. Aguilar*, 849 F.2d 92, 94, 99 (3d Cir. 1988); *Gov't of Virgin Is. v. Smith*, 445 F.2d 1089, 1093-95 (3d Cir. 1971).

At the same time, under Charge II, Specification 3, of the "charge sheet" in the military case Col. Rice was charged with – and then convicted and sentenced for – the following offense:

> [Defendant Rice] Did, at or near Carlisle Barracks, Pennsylvania, on divers occasions between on or about 25 November 2010 and on or about 11 January 2012 knowingly and wrongfully possess 45 images of child pornography, as defined in 18 U.S.C. Section 2256, on a HP Pavilion Laptop computer, such conduct being of a nature to bring discredit upon the armed forces.

Form DD-2702-1 (Oct. 24, 2016); attached as Exhibit A. The "bring discredit" language is jurisdictional under the Uniform Code of Military Justice and should be disregarded for present purposes. What is important is that the time frame for the military offense is fully included within that encompassed by Count One of the indictment, and so are the 45 images in question.

When one offense is functionally a lesser included version of the other, they are the "same offense" for double jeopardy purposes, regardless of whether it is the greater or the lesser that is prosecuted first, and regardless of whether the two offenses might have been joined in a single charging instrument in the same court. See *Harris v. Oklahoma*, 433 U.S. 682 (1977) (felony murder and associated felony); *Brown v. Ohio*, 432 U.S. 161 (1977) (joy riding and auto theft; offenses committed in different counties of same state).

The "same offense" analysis also does not depend on the two offenses *always* being the "same" when viewed abstractly; it is enough, as the *Harris* example shows, that the two are the "same" as applied in the particular defendant's case. See also *United States v. Dixon*, 509 U.S. 688 (1993) (addressing

two such cases: criminal contempt of protection order based on assault, with separate prosecution for same assault; and criminal contempt of bail order based on drug possession, with subsequent prosecution for possession). Thus, it is immaterial for present purposes that the statutory language of Article 134 (the "General Article") of the UCMJ reads:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934. For this offense, in his military case, Col. Rice was convicted and then sentenced to four years in prison and to be discharged dishonorably after being stripped of his rank and many benefits. *See* Exh. B (transcript of pronouncement of sentence a court martial). Like the statutory offense of "criminal contempt" involved in *Dixon*, a conviction under the General Article of the UCMJ becomes the "same" as another, more specific offense if premised on the same essential criminal conduct.

For all these reasons, Count One of the present case represents the "same offense" as Charge II, Specification 3, in the military case. On October 24, 2016, less than three weeks ago, Mr. Rice was convicted and sentenced for that offense. Under the Constitution, he cannot be punished for it again.

For the foregoing reasons, this Court is prohibited by the Double Jeopardy Clause from imposing any judgment of sentence on Count One of the indictment. That count must therefore be dismissed.

Respectfully submitted,

Dated: November 11, 2016

s/*Peter Goldberger*
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peter.goldberger@verizon.net

Attorney for Defendant Rice

CERTIFICATE OF SERVICE

Pursuant to LR 7.2, I certify that I filed the foregoing brief today, November 11, 2016, via this Court's CM/ECF system, thus causing it to be immediately and automatically served upon all counsel of record.

s/*Peter Goldberger*

EXHIBIT A

DEPARTMENT OF DEFENSE REPORT OF RESULT OF TRIAL

1. DATE OF TRIAL *(YYYYMMDD)*: 20161024

TO: *(Convening Authority)*
Commander, Headquarters, United States Army Military District of Washington, Fort McNair, DC 20319

1. NOTIFICATION UNDER R.C.M. 1101 IS HEREBY GIVEN IN THE CASE OF THE UNITED STATES VERSUS:

a. NAME *(Last, First, Middle Initial)*	b. BRANCH OF SERVICE	c. RANK/GRADE	d. DoD ID/SSN *(Last 4)*
Rice, Robert J.	Army	COL/O-6	5931

e. ORGANIZATION *(Full address)*
Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

2.a. TYPE OF COURT-MARTIAL *(X one)*
[X] GENERAL [ ] SPECIAL [ ] SUMMARY
[X] JUDGE ALONE [ ] JUDGE ALONE

b. CONVENED BY: COURT MARTIAL ORDER NUMBER(S)
CMCO 1, dtd 5JAN16, CMCO 1, dtd 14JAN16 and CMCO 4, dtd 6JUN16

c. ISSUING COMMAND
HQ, Military District of Washington

d. DATE *(YYYYMMDD)*: 20161024

3. SUMMARY OF OFFENSES, PLEAS AND FINDINGS

a. CHARGE/ SPECIFICATION NO(S).	b. UCMJ ARTICLE(S)	c. DIBRS CODE	d. BRIEF DESCRIPTION OF OFFENSE	e. PLEA	f. FINDING
			SEE CONTINUATION SHEET		

4.a. DATE ADJUDGED *(YYYYMMDD)*: 20161024

b. DATE OF ANY FORFEITURES OR REDUCTIONS *(YYYYMMDD)*: 20161107

5. SENTENCE
To be confined for five (5) years; dismissal.

6.a. CONTENTS OF PRE-TRIAL AGREEMENT CONCERNING SENTENCE TO CONFINEMENT *(If any)*
To disapprove any adjudged sentence of confinement in excess of four (4) years.

b. DAYS OF PRE-TRIAL CREDIT	c. DAYS OF OTHER JUDGE ORDERED CREDIT	d. TOTAL PRESENTENCE CREDIT TOWARD POST-TRIAL CONFINEMENT
None.	None.	None.

7. DNA PROCESSING: IAW 10 U.S.C. §1565 [X] IS [ ] IS NOT REQUIRED.

8. SEX OFFENDER REGISTRATION: IAW 42 U.S.C. § 14071 [X] IS [ ] IS NOT REQUIRED.

9. COMPANION ACCUSED/CO-ACCUSED *(Name(s) and Social Security Number(s) (If any))*
None.

10. DISTRIBUTION *(Copy provided to named Agencies/Unit(s))*
Cdr, Headquarters and Headquarters Company, USAG, HQ, USAMDW; SJA, HQ, USAMDW; PSB; Accused; Defense Counsel.

11. SIGNED BY *(X one)* [X] TRIAL COUNSEL [ ] SUMMARY COURT-MARTIAL OFFICER

a. NAME *(Last, First, Middle Initial)*	b. RANK/GRADE	c. BRANCH OF SERVICE
Szilagyi, Zachary A.	CPT/O3	U.S. Army

d. SIGNATURE

e. DATE SIGNED *(YYYYMMDD)*: 20161024

DD FORM 2707-1, MAR 2013 PREVIOUS EDITION IS OBSOLETE. Adobe Professional X

INSTRUCTIONS FOR COMPLETING DD FORM 2707-1, "DEPARTMENT OF DEFENSE REPORT OF RESULT OF TRIAL"

Date of Trial: Enter date (and all other dates) as 4 digit year, 2 digit month and 2 digit day, no separators.

To: Address to the Convening Authority (CA). Include at least two elements of CA unit, geographical location and ZIP code.

1. United States versus:
a. Name. Enter the accused name (Last, First, Middle Initial).
b. Branch of Service (Army, Navy, Air Force, etc.).
c. Rank/Grade (E-6, etc.).
d. DoD ID number or Social Security Number (Last 4 only).
e. Organization. Accused full unit address. Include at least two elements of the accused unit, geographical location and ZIP code.

2. Type of Court Martial. a. Enter an "X" in the appropriate box.
b. - d. Convened by: Convening Order number(s), issuing command, and date(s) of the Court Martial Order Number(s), or, if the trial is by SCM, note on form as appropriate and enter the date of detail of the SCM from the referral on Part V, DD Form 458.

3. Summary of Offenses, Pleas, and Findings.
a. Charge Number(s) and Specification(s), if any.
b. UCMJ Article(s). Article number list from the Uniform Code of Military Justice (example: ART 121).
c. DIBRS Code. Offense severity scale, reference DoDI 1325.7 for code listing (example: ART 121-A1).
d. Brief Description of Offense (example: Larceny).
e. - f. Pleas/Findings. Respective pleas and findings or other disposition.

4.a. Date Adjudged. Date of court-martial.
b. Date of Forfeitures or Reductions. Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a CM takes effect on the earlier of: (1) the date that is 14 days after date on which the sentence is adjudged; or (2) the date on which the sentence is approved by the convening authority.

5. Sentence. Enter the sentence of the court-martial. If trial resulted in an acquittal, enter "N/A".

6. Admin/Judicial Credit/Pre-Trial Agreement.
a. Enter the content of pre-trial agreement concerning sentence, if any. If none, enter "None".
b. Enter the number of days the accused was in pre-trial (pre-sentence confinement). If none, enter "N/A".
c. Enter the number of days of judge ordered administrative credit for illegal pre-trial (pre-sentence) confinement restriction found tantamount to confinement, if any. If none, enter "N/A".
d. Enter the total number of days of pre-trial and judge ordered credit (pre-sentence) confinement credit towards post-trial confinement, if any. If none, enter "N/A".

7. DNA Processing. In accordance with 10 U.S.C. 1565, DNA samples are required on each person subject to UCMJ who is or has been convicted of a "Qualifying Military Offense" (QMO). A QMO is any offense under UCMJ punishable by a sentence to confinement for more than one year, regardless of the sentence imposed. The Service is authorized to collect DNA samples at any time after a general or special court-martial sentence is adjudged for one or more QMO(s). It is the Court-Martial Convening Authority (CMCA) action under Article 60 that determines whether the result of trial concludes with a QMO conviction.
NOTE: DNA sample does not apply to the finding of SCM or proceeding under Article 15, UCMJ.

8. Sex Offender Registration. In accordance with 42 U.S.C. 14071: a person convicted of any of the offenses punishable under the UCMJ (reference DoDI 1325.7 --E27 for listing). NOTE: A "Qualifying Military Offense" is a felony or sexual offense determined by the Secretary of Defense to be a QMO for the purpose of 10 U.S.C.

9. Companion Accused/Co-Accused. Enter the name(s) and Social Security Number(s) (last 4 digits only) of companion or co-accused, if any. If none, enter "N/A".

10. Distribution. Enter a list of copies furnished to named agencies or units (example: Finance, Company, etc.). NOTE: Make sufficient copies after the form is signed by the trial counsel or SCM Officer. Forward the original to the convening authority.

11. Signed By. Enter an "X" in the box to indicate whether Trial Counsel or Summary Court-Martial Officer.
a. - e. Enter the full name, rank/grade and branch of service of the trial counsel or the summary court-martial officer.
NOTE: You should ensure that a copy of the Department of Defense Result of Trial is expeditiously provided to the Finance and Accounting Office (FAO) in any case involving a reduction in rank or forfeiture of pay or fine.

CONTINUATION SHEET, DD Form 2707-1, COL RICE, ROBERT, J., 316-70-5931, U.S. Army, Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer Virginia 22211

Item 3 Continued:

a. CHARGE/ SPECIFICATION NO(S)	b. UCMJ ARTICLE(S)	c. DBIRS CODE	d. BRIEF DESCRIPTION OF OFFENSE(S)	e. PLEA	f. FINDINGS
I	133		To Charge I	NG	D*
I/The	133	133-C	Did, at or near Carlisle Barracks, Pennsylvania, on or about 24 January 2013, wrongfully email an image of male genitalia and a message to a Craigslist user which read "Hello Sir, 50yo, mwm sub, 6ft, 210, 6in pierced cock, clean, D&D free, Mechanicsburg. Wife is away for a few days and i want to be caged, controlled and service a Master.", which conduct was unbecoming an officer and a gentleman.	NG	D*
II	134	134	To Charge II	G	G
II/1	134	134-R4	Did, at or near Carlisle Barracks, Pennsylvania, on or about 26 January 2013, in writing communicate to Yahoo! Messenger user sdoo562, certain indecent language, to wit: "feel her tongue flick the head of ur cock", such conduct being of a nature to bring discredit upon the armed forces.	NG	D*
II/2	134	134-Z	Did, at or near Carlisle Barracks, Pennsylvania, on divers occasions between on or about 30 November 2010 and on or about 6 December 2010 knowingly and wrongfully distribute 6 images of child pornography, as defined in 18 U.S.C. Section 2256, on a HP Pavilion Laptop computer, such conduct being of a nature to bring discredit upon the armed forces.	G	G
II/3	134	134-Z	Did, at or near Carlisle Barracks, Pennsylvania, on divers occasions between on or about 25 November 2010 and on or about 11 January 2012 knowingly and wrongfully possess 45 images of child pornography, as defined in 18 U.S.C. Section 2256, on a HP Pavilion Laptop computer, such conduct being of a nature to bring discredit upon the armed forces.	G	G

CONTINUATION SHEET, DD Form 2707-1, COL RICE, ROBERT, J., 316-70-5931, U.S. Army, Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer Virginia 22211

a. CHARGE/ SPECIFICATION NO(S)	b. UCMJ ARTICLE(S)	c. DBIRS CODE	d. BRIEF DESCRIPTION OF OFFENSE(S)	e. PLEA	f. FINDINGS
II/4	134	134-Z	Did, at or near Carlisle Barracks, Pennsylvania, on or about 14 November 2010 knowingly and wrongfully possess 6 videos of child pornography, as defined in 18 U.S.C. Section 2256, on a Seagate Hard Drive, such conduct being of a nature to bring discredit upon the armed forces.	G	G

*Dismissed on motion by the Government

MOTION TO DISMISS OR BAR - EXHIBIT B

TC: All parties present at the time the court closed are again present.

MJ: **The court grants the government motion to dismiss Charge I and its Specification, and Specification 1 of Charge II.**

Accused and counsel, please rise.

[The accused and his counsel did as directed.]

Colonel Robert J. Rice, this court-martial sentences you:

To be confined for 5 years; and
To be dismissed from the service.

You may be seated.

[The accused and his counsel did as directed.]

I make the following clemency recommendation to the Convening Authority: **To the maximum amount possible, I recommend that the Convening Authority defer and waive forfeitures of pay and allowances for the benefit of Ms. Rice-Goldie.**

Please hand me the quantum.

[The court reporter handed AE XLVI, the quantum of punishment, to the military judge.]

I've been handed Appellate Exhibit XLVI, the quantum.

The quantum provides that the Convening Authority agrees to take the following action: that is, to disapprove any adjudged sentence of confinement in excess of 4 years. Any other lawfully adjudged punishment may be approved.

Colonel Rice, have I correctly stated the sentence agreement that you have with the Convening Authority?

ACC: Yes, Your Honor, you have.

MJ: Counsel, do you agree?

TC: Yes, Your Honor.

CDC: Yes, Your Honor.

MJ: My understanding of the effect of the pretrial agreement on the sentence is that the Convening Authority may approve confinement for 4 years and the dismissal from the service.

Colonel Rice, is that also your understanding?

ACC: Yes, Your Honor, it is.

MJ: Counsel, is that your understanding as well?

CDC: Yes, Your Honor.

TC: Yes, Your Honor.

MJ: Are there any other matters to take up before this court-martial adjourns?

TC: Nothing from the government, Your Honor.

CDC: No, Your Honor.

MJ: The court-martial is adjourned.

[The court-martial adjourned at 1839, 24 October 2016.]

[END OF PAGE]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CIVIL ACTION NO. 1:14-CR-119**
	:	
v.	:	**(Chief Judge Conner)**
	:	
ROBERT J. RICE,	:	
	:	
Defendant	:	

ORDER

AND NOW, this 14th day of November, 2016, upon consideration of the motion (Doc. 106) to dismiss Count One of the indictment (Doc. 1) or to bar sentencing on Count One filed by defendant Robert J. Rice ("Rice"), it is hereby ORDERED that:

1. The government shall file a brief in opposition to Rice's motion (Doc. 106) on or before **November 18, 2016**.

2. Rice may file a brief in reply to the government's opposition brief on or before **November 25, 2016**.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	NO. 1:14-CR-119
v.	:	(CHIEF JUDGE CONNER)
ROBERT J. RICE,	:	(ELECTRONICALLY FILED)
Defendant.	:	

RESPONSE OF UNITED STATES TO
DEFENDANT'S MOTION TO DISMISS COUNT ONE

On May 6, 2016, a jury convicted Rice of both possession (Count One) and receipt and distribution (Count Two) of child pornography. Doc. 85 at 1. On October 24, 2016, Rice pled guilty to offenses in a general court-martial of the United States Army. *See* Doc. 107-1. Two of the Specifications to which Rice pled guilty in the court-martial involved possession of child pornography on dates encompassed by the charges for which he was convicted in this Court. *See* Doc. 107-1 at 3. Following the plea in the court-martial, Rice was sentenced to confinement for four years and dismissal from the Army. *See* Doc. 107-2.

In light of the charges in the court-martial, and Rice's guilty plea and sentencing on those charges, Rice has moved to dismiss Count One

of the Indictment in this case or otherwise bar sentencing on that count on double jeopardy grounds. Docs. 106, 107. Having reviewed the record of proceedings for both the trial in this Court and the guilty plea and sentencing in the court-martial, the United States does not oppose Rice's motion to dismiss Count One in this case.

Respectfully submitted,

BRUCE D. BRANDLER
UNITED STATES ATTORNEY

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PHONE: 717-221-4482
FAX: 717-221-4493

CERTIFICATE OF SERVICE

Pursuant to Standing Order 03-1 and Local Rules 4.2 and 5.7, I hereby certify that the foregoing document was served through electronic case filing.

Respectfully submitted,

BRUCE D. BRANDLER
UNITED STATES ATTORNEY

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 1:14-CR-119**
	:	
v.	:	**(Chief Judge Conner)**
	:	
ROBERT J. RICE,	:	
	:	
Defendant	:	

ORDER

AND NOW, this 22nd day of November, 2016, upon consideration of the motion (Doc. 106) to dismiss Count One of the indictment (Doc. 1) or to bar sentencing on Count One filed by defendant Robert J. Rice ("Rice"), and further upon consideration of the government's response (Doc. 111) indicating the government does not oppose Rice's motion, is hereby ORDERED that Rice's motion (Doc. 106) to dismiss Count One is GRANTED.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Appendix E

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Colonel (O-6) **Robert J. Rice,** United States Army, Appellant	**MOTION TO ATTACH DEFENSE APPELLATE EXHIBIT B** Docket No. ARMY 20160695 Tried at Fort McNair, District of Columbia, on 6 October 2015 and 5 January, 25 August, and 24 October 2016, before a general court-martial appointed by the Commander, Headquarters, Fort Bragg, Lieutenant Colonel Tyesha Smith and Colonel Andrew Glass, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW the undersigned appellate defense counsel, under Rule 23 of this court's Rules of Practice and Procedure, and moves to attach Defense Appellate Exhibit B on behalf of the appellant, Colonel Robert J. Rice.

This exhibit contains the ruling of the United States Court of Appeals for the Third Circuit on appellant's appeal from his conviction in a federal district court. (7 pages).

Panel No. 4

WHEREFORE, appellant respectfully requests this court grant the motion.

Panel No. 4

MOTION TO ATTACH:

GRANTED: ____

DENIED: ____

DATE: JAN 17 2018

CHRISTOPHER DANIEL CARRIER
LTC, JA
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE, U.S. v. RICE (20160695)

Motion to Attach Defense Appellate Exhibit B

I certify that a copy of the foregoing was sent via electronic submission to the Government Appellate Division at us.army.pentagon.hqda-otjag.mb.gad-accaservice@mail.mil on the 8th day of January, 2018.

CHRISTOPHER DANIEL CARRIER
LTC, JA
Appellate Defense Counsel

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1102

UNITED STATES OF AMERICA

v.

ROBERT J. RICE,
Appellant

On Appeal from the United States District Court for the
Middle District of Pennsylvania
(No. 1:14-cr-00119-001)
District Judge: Honorable Christopher C. Conner

Submitted Under Third Circuit L.A.R. 34.1(a)
October 13, 2017

Before: CHAGARES, JORDAN, and FUENTES, *Circuit Judges*

(Opinion filed: November 16, 2017)

OPINION*

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* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

FUENTES, *Circuit Judge.*

Robert Rice appeals his jury conviction for knowing possession of child pornography, and knowing receipt and distribution of child pornography. For the following reasons, we will affirm.

I.

Because we write exclusively for the parties, we set forth only those facts necessary to our disposition. Rice, who was an officer in the United States Army, had a laptop computer. Without his knowledge, his wife, Marilyn Rice-Goldie, installed a spyware program called "Spector Pro" on the laptop. Spector Pro—the presence of which was not readily apparent to computer users—monitored and reported on the activity of Rice's entire computer, including accounts on the laptop that Rice had not authorized Rice-Goldie to access. Among other things, Spector Pro logs keystrokes, takes screen shots, captures web sites visited, and saves the contents of searches, emails and chats.

After installing Spector Pro, Rice-Goldie reviewed Spector Pro's records and discovered child pornography on the laptop. Rice-Goldie eventually turned the laptop over to the police. Based on Rice-Goldie's reports, the police obtained a search warrant and found evidence of child pornography on the laptop.

Rice was charged with one count of knowing possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5), and one count of knowing receipt and distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). Before trial, Rice moved

to suppress the evidence seized under the above warrants, arguing, *inter alia*, that it was acquired in violation of the Wiretap Act.[1] The District Court denied Rice's motion.

In May 2016, Rice was tried by jury. On the first day of trial, Rice-Goldie appeared as a government witness. During defense counsel's cross-examination of Rice-Goldie, the prosecutor erroneously commented, in the jury's presence, that defense counsel's questioning might elicit information related to "a separate investigation into a national security issue."[2] Defense counsel immediately objected and moved for a mistrial. After speaking with counsel at sidebar, the District Court took a recess to consider the transcript and how to proceed. After the recess, the District Court spoke further with counsel about their respective arguments, but ultimately rejected defense counsel's motion for a mistrial. Rather, after recalling the jury, the District Court delivered a short curative instruction informing the jury that the prosecutor's reference to a national security investigation was in error and instructing them to disregard it. With that, Rice's trial continued and the prosecutor's remark was not mentioned again during the rest of the five-day trial.

[1] The Wiretap Act, 18 U.S.C. § 2510, *et seq.*, "formally known as the 1968 Omnibus Crime Control and Safe Streets Act," was technically superseded by the Electronic Communications Privacy Act of 1986. *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 110, 113 n.7 (3d Cir. 2003), *as amended* (Jan. 20, 2004). For the sake of convenience, we refer to the Wiretap Act throughout.

[2] App. 301.

Ultimately, the jury convicted Rice on both counts.[3] Rice was then sentenced to 142 months' imprisonment, to run concurrently with the four-year term of imprisonment imposed by the Army following court-martial. This appeal followed.[4]

II.

Rice appeals his conviction on two grounds. First, Rice contends that the District Court erred in denying his pretrial motion to suppress all evidence that the government seized pursuant to warrants based on Rice-Goldie's alleged violation of the Wiretap Act. Second, Rice argues that the District Court abused its discretion by denying his motion for a mistrial and instead giving a curative instruction after the prosecutor erroneously mentioned once in the jury's presence that Rice's case was related to "a separate investigation into a national security issue."[5] We address these issues in turn.[6]

A. Suppression Motion

Rice first maintains that the District Court should have suppressed evidence obtained through Rice-Goldie's installation of Spector Pro on his laptop as a wrongful

---

[3] On Rice's motion, the court later dismissed Rice's conviction under 18 U.S.C. § 2252A(a)(5) pursuant to the Double Jeopardy Clause of the Fifth Amendment because Rice was convicted by court-martial for the "same offense." App. 903.

[4] The District Court had jurisdiction under 28 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

[5] App. 301.

[6] "We review the denial of a suppression motion for clear error as to the underlying facts, but exercise plenary review as to its legality in light of the [D]istrict [C]ourt's properly found facts." *United States v. Jackson*, 849 F.3d 540, 544 (3d Cir. 2017) (quoting *United States v. Coles*, 437 F.3d 361, 365 (3d Cir. 2006)). The District Court's denial of a motion for a mistrial is reviewed for abuse of discretion. *United States v. Liburd*, 607 F.3d 339, 342 (3d Cir. 2010).

interception of his electronic communications under the Wiretap Act.[7] This argument fails. "The Wiretap Act does not provide a suppression remedy for electronic communications unlawfully acquired under the Act."[8] Instead, 18 U.S.C. § 2515—the Wiretap Act's suppression provision—only mandates the exclusion of unlawfully intercepted wire and oral communications.[9] Indeed, while the legislative history for the USA Patriot Act demonstrates that Congress considered amending § 2515 to extend to electronic communications, no such provision was added.[10]

Recognizing that § 2515's exclusion rule does not apply to electronic communications, Rice asserts that 18 U.S.C. § 2517(3) creates, by negative implication, a suppression remedy for electronic communications under the Wiretap Act. We reject this argument. Section 2517(3) does not suggest that unlawfully intercepted electronic

[7] The Wiretap Act defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12).

[8] *United States v. Steiger*, 318 F.3d 1039, 1052 (11th Cir. 2003); *see also United States v. Meriwether*, 917 F.2d 955, 960 (6th Cir. 1990) ("The [Electronic Communications Privacy Act] does not provide an independent statutory remedy of suppression for interceptions of electronic communications.").

[9] *See* 18 U.S.C. § 2515 ("Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter.") (emphasis added); *United States v. Barajas*, 710 F.3d 1102, 1110 n.5 (10th Cir. 2013) ("In 1986, Congress amended [the Wiretap Act] with the Electronic Communications Privacy Act, and clarified that only wire and oral communications are subject to statutory suppression.").

[10] *See Steiger*, 318 F.3d at 1050.

communications should be suppressed.[11] Rather, § 2517(3) merely describes the limited purposes for which information concerning electronic communications received by authorized means may be disclosed under the Wiretap Act.[12]

B. Mistrial Motion

Lastly, Rice argues that the District Court abused its discretion in denying his motion for a mistrial based on the prosecutor's incorrect statement, before the jury, that Rice's case was related to "a separate investigation into a national security issue."[13] We disagree. The prosecutor's single reference to a national security investigation, which occurred on the first day of trial and was not mentioned again during the rest of the five-day trial, was corrected by the District Court's prompt and succinct curative instruction, and could not have prejudiced Rice in light of the overwhelming evidence presented regarding Rice's possession, receipt, and distribution of child pornography.[14]

---

[11] *See United States v. Jones*, 364 F. Supp. 2d 1303, 1308 (D. Utah 2005) ("[I]t is clear from the general context of § 2517(3) that it does not create by implication a suppression remedy for electronic communications.").

[12] *See* 18 U.S.C. § 2517(3) ("Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication . . . may disclose the contents of that communication . . . while giving testimony under oath or affirmation in any proceeding held under the authority of the United States . . . ."); *see also Jones*, 364 F. Supp. 2d at 1308 ("Read in context, § 2517 describes the limited purposes for which communications received by authorized means may be used or disclosed; its effect has no implication for communications received by unauthorized means.").

[13] App. 301.

[14] *See United States v. Rivas*, 493 F.3d 131, 140 (3d Cir. 2007) ("A mistrial is not required where improper remarks were harmless, considering their scope, their relation to the context of the trial, the ameliorative effect of any curative instructions and the strength of the evidence supporting the conviction.").

III.

For the foregoing reasons, we will affirm Rice's conviction.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Rice*, Crim. App. Dkt. No. 20160695, USCA Dkt. No. 19-0178/AR, was delivered to the Court and Government Appellate Division on March 11, 2019.

CHRISTOPHER D. CARRIER
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