IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF ON BEHALF
	)	OF APPELLANT
Appellee,	)	
	)	
v.	)	
	)	
Colonel (O-6)	)	
ROBERT J. RICE,	)	
United States Army,	)	Crim. App. No. 20160695
Appellant.	)	USCA Dkt. No. 19-0178/AR

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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 Appellant's appeal under Article 66 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Court has jurisdiction under Article 67(a)(3), *id*. § 867(a)(3).

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, all in violation of Article 134 of the UCMJ, 10 U.S.C. § 934. The military judge sentenced Appellant to confinement for five years and dismissal. Under a pretrial agreement, the convening authority approved the dismissal and four years' confinement—subject to Appellant's right to appeal the denial of his motion to dismiss based upon the Double Jeopardy Clause.

The Army Court affirmed the findings and sentence on November 28, 2018, and reaffirmed them on reconsideration on December 18. Appellant filed a Petition for Grant of Review on February 14, 2019, and, with the Court's permission, filed a supplement in support on March 11. After the United States waived its right to respond, this Court granted Appellant's petition on May 1, 2019.

STATEMENT OF FACTS[1]

In 2013, Appellant was assigned to the staff of the U.S. Army War College, Carlisle, Pennsylvania, where he resided with his spouse. After his spouse began to suspect that he was using dating websites to commit adultery, she purchased and installed a computer program on his HP Pavilion computer through which she acquired significant incriminating evidence. Appellant's spouse turned that information over to local police, who obtained and executed a search warrant for Appellant's HP Pavilion computer. In a search conducted under a subsequent warrant, the government also recovered a Seagate external hard drive. Both Appellant's computer and the external hard drive contained child pornography.

From there, and "[f]or 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

1. Because the specific ordering of the relevant events in Appellant's overlapping district court and court-martial prosecutions is central to the issue presented, this brief includes a timeline of those events as an appendix. *See post* at 36.

Middle District of Pennsylvania." *Rice* v. *United States*, 78 M.J. 649, 651 (A. Ct. Crim. App. 2018) (J.A. 3).[2]

To that end, on May 14, 2014, a grand jury in the Middle District of Pennsylvania indicted Appellant on two counts:

(I) Possessing child pornography "[b]etween about August 2010 and about January 29, 2013," in violation of 18 U.S.C. § 2252A(a)(5); and

(II) Receiving or distributing child pornography "[b]etween about January 23, 2013 to January 28, 2013," in violation of 18 U.S.C. § 2252A(a)(2) (J.A. 32–33).[3]

While pre-trial proceedings continued in the district court, a general court-martial convening authority on September 17, 2015 referred two charges (totaling five specifications), including the three specifications at issue here. Those specifications charged that Appellant:

(1) 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.

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2. The Army Court's decision also appears in the Joint Appendix at J.A. 1. For ease of reference, this brief cites to the decision in parallel.

3. To distinguish the civilian charges from the military specifications, the two counts of Appellant's civilian indictment will be referred to as "Count One" and "Count Two," respectively.

(2) 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.

(3) 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 (J.A. 51–53).

Appellant was arraigned before the court-martial on October 6, 2015.

Then, on May 2, 2016, a jury was empaneled in Appellant's civilian criminal case in the U.S. District Court for the Middle District of Pennsylvania. The jury returned a guilty verdict on both counts on May 6, 2016, but Appellant was not immediately sentenced. 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 in its case-in-chief. (*See* Pros. Ex. 4 [sealed].)

In light of the civilian conviction on Count One, on June 20, 2016, Appellant's counsel moved the court-martial to dismiss the three relevant specifications—because those specifications represented a successive prosecution for the "same offense" as Count One. On October 11, the military judge denied Appellant's motion. On October 24,

Appellant agreed to plead guilty to the three specifications—while preserving his right to appeal the denial of his motion to dismiss.

Following Appellant's convictions and same-day sentencing in the court-martial on October 24, Appellant's counsel in district court filed a motion on November 10 to dismiss Count One or bar sentencing on it. The motion argued that, because of his military sentence, sentencing Appellant on Count One would violate Appellant's separate right under the Double Jeopardy Clause not to be punished twice for the same crime. Counsel for the United States did not oppose Appellant's motion.

On November 22, 2016, the district court agreed and dismissed Count One. On December 28, the district court sentenced Appellant on Count Two to 142 months' imprisonment, a sentence Appellant is currently serving at the Midwest Joint Regional Correctional Facility in Fort Leavenworth, Kansas.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment "recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they

seek." *Currier* v. *Virginia*, 138 S. Ct. 2144, 2149 (2018). To that end, the Clause separately prohibits a successive prosecution for the same offense after acquittal; a successive prosecution for the same offense after conviction; and the imposition of multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Successive prosecutions, in particular, are "the primary evil to be guarded against." *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994); *United States* v. *Leak*, 61 M.J. 234, 242 (C.A.A.F. 2005) ("As is clear from the text of the clause and common-law origins, the prohibition is directed at the threat of multiple prosecutions."). As a result, for a successive-prosecution claim, "the only available remedy is the traditional double jeopardy bar against the retrial of the same offense." *Currier*, 138 S. Ct. at 2153 (plurality opinion).

This case involves three textbook successive-prosecution violations of the Double Jeopardy Clause—a "debacle," as the Army Court put it, stemming from the government's unexplained decision "to divide various child pornography charges between military prosecutors and prosecutors with the U.S. Attorney's Office for the Middle District of Pennsylvania." *Rice*, 78 M.J. at 651 (J.A. 3). As a result of these

missteps, the two specifications for possession of child pornography to which Appellant pleaded guilty were factually and legally duplicative of Count One in the district court, and the specification for distribution of child pornography to which Appellant pleaded guilty was a greater offense to Count One's lesser-included possession charge. Thus, Appellant's motion to dismiss all three of the specifications at issue here based upon the Double Jeopardy Clause should have been granted.

In the decision below, the Army Court agreed with Appellant that his court-martial on the two possession specifications violated the Double Jeopardy Clause, and did not resolve Appellant's double jeopardy objection to the distribution specification.[4] It was able to avoid that question because it held that dismissal of Appellant's military convictions was unwarranted either way. In the Army Court's view, the district court's refusal to sentence Appellant on Count One, and its decision to instead dismiss that conviction at the sentencing stage, provided an adequate remedy for the double jeopardy violations arising

4. The Army Court observed that whether Appellant's district court conviction on Count One was for a lesser-included offense of the distribution specification was a "close question," and assumed without deciding that it was. *Rice*, 78 M.J. at 654 n.10 (J.A. 8 n.10).

out of Appellant's court-martial. To also dismiss Appellant's court-martial convictions, according to the Army Court, would provide him with an "unjustified windfall[]." *Rice*, 78 M.J. at 656 (J.A. 12) (alteration in original). In Judge Wolfe's words, "as long as the results of one trial go away, the Constitution is not offended." *Id*. at 657 (J.A. 14) (Wolfe, J., concurring).

There are three separate problems with the Army Court's reasoning. First, nothing the district court did with respect to Appellant's civilian trial could have remedied the double jeopardy violations arising from his successive prosecution by court-martial. As over a century of consistent Supreme Court decisions make clear, Appellant's unconstitutional successive prosecution was not just voidable, but void—and dismissal of the successive prosecution is therefore the only proper means of remedying that constitutional injury.

Second, even if the district court somehow had the power to rectify the successive-prosecution violations arising from Appellant's court-martial, that is not what actually happened in this case. Rather, the district court dismissed Count One instead of sentencing Appellant in order to avoid a *second* double jeopardy violation. Because Appellant

had already been sentenced for the "same offense" by the court-martial by the time of sentencing in the district court, sentencing him on Count One would have violated the Double Jeopardy Clause's ban on imposing multiple punishments for the same offense. Dismissing Appellant's military convictions would therefore not be an "unjustified windfall"; it would be the *first* remedy for the successive-prosecution violations.

Third, in trying to avoid giving Appellant an "unjustified windfall," the Army Court instead gave one to the government—not just in this case, but also going forward. The opening line of the Army Court's discussion rightly exhorts that "[w]hat happened in this case should not happen again." *Rice*, 78 M.J. at 652 (J.A. 5). But under the Army Court's analysis, the Double Jeopardy Clause does not prohibit the government from trying a defendant in civilian court first, then before a court-martial on the same offense, deciding which result it prefers, and, if both proceedings return guilty verdicts, picking the forum in which it would prefer the defendant to be sentenced or the result it prefers to defend on appeal. Not only would that approach fail to prevent what happened in this case from recurring, but it would also *incentivize* the exact government behavior it denounced—and "the type

of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U.S. 684, 688–89 (1949).

Ultimately, then, this should be an easy case. Contra the Army Court, the Double Jeopardy Clause is indeed offended by successive prosecutions even when "the results of one trial go away." Supreme Court precedent makes abundantly clear that the only remedy for a successive-prosecution double jeopardy violation is dismissal of the successive prosecution—full stop. Appellant is therefore entitled to dismissal of his military convictions.

ARGUMENT

I. APPELLANT'S MILITARY CONVICTIONS VIOLATED THE DOUBLE JEOPARDY CLAUSE

A. The Double Jeopardy Clause Prohibits a Successive Prosecution for the "Same Offense"

The Double Jeopardy Clause of the Fifth Amendment "recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Currier*, 138 S. Ct. at 2149. As the Supreme Court has explained,

> That guarantee has been said to consist of 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.

Pearce, 395 U.S. at 717 (footnotes omitted).

Successive prosecutions are "the primary evil to be guarded against." *Farley*, 510 U.S. at 230; *see also United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980) ("[T]he Court has said that the prohibition against multiple trials is the 'controlling constitutional principle.'" (quoting *United States* v. *Wilson*, 420 U.S. 332, 346 (1975))). This is so, the Supreme Court has repeatedly reiterated, because "[s]uccessive prosecutions, . . . whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence." *Grady* v. *Corbin*, 495 U.S. 508, 518 (1990) (footnote omitted); *see also Abney* v. *United States*, 431 U.S. 651, 661 (1977) ("[T]he guarantee against double jeopardy . . . . protects interests wholly unrelated to the propriety of any subsequent conviction.").

> 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); *see also Wade*, 336 U.S. at 688–89 (discussing "the type of oppressive practices at which the double-jeopardy prohibition is aimed").

To vindicate these concerns, the Supreme Court has repeatedly held out the Double Jeopardy Clause as the quintessential example of a constitutional "right not to be tried," as distinct from "a right not to be convicted." *Class* v. *United States*, 138 S. Ct. 798, 811–12 (2018). Consistent with that understanding, it is well established that the Double Jeopardy Clause forbids duplicative *prosecutions* for the same offense by the same sovereign, and not just duplicative *convictions*. *See, e.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874).[5]

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5. Although there is some debate as to the exact moment at which jeopardy attaches to a court-martial, *see United States* v. *Easton*, 71 M.J. 168, 172 (C.A.A.F. 2012); 10 U.S.C. § 844, that debate is irrelevant here. Jeopardy attached to Appellant's *district court* indictment when the jury was empaneled on May 2, 2016. *See Crist* v. *Bretz*, 437 U.S. 28, 35 (1978). Thus, the successive-prosecution bar had accrued no later than when evidence was introduced in Appellant's judge-alone court-martial—and, as relevant here, before Appellant sought dismissal of the offending specifications.

B. The Second and Third Specifications to Which Appellant Pleaded Guilty Were Factually and Legally Duplicative of Count One of His District Court Conviction

Whether a successive prosecution is for the "same offense" for purposes of the Double Jeopardy Clause turns on "whether *each* provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) (emphasis added); *see also Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); *United States* v. *Wheeler*, 40 M.J. 242, 245 (C.M.A. 1994). The question under *Blockburger* is whether the separate prosecutions "target the identical criminal conduct through equivalent criminal laws." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016).

Count One of Appellant's district court indictment charged that he possessed child pornography "[b]etween about August 2010 and about January 29, 2013," in violation of 18 U.S.C. § 2252A(a)(5) (J.A. 32). And the second and third court-martial specifications charged Appellant with possession of child pornography "on or about 14 November 2010," and between "on or about 25 November 2010 and on or about 11 January 2012" (J.A. 52). Accordingly, the periods for the possession charges in Appellant's court-martial were subsumed within the periods

for his possession charges in the district court.[6] The second and third specifications were therefore factually duplicative of Count One.

The second and third specifications were also legally duplicative of Count One. In charging Appellant under Article 134, the Army relied upon the same underlying federal criminal offense as the one that formed the basis for Appellant's district court indictment—a violation of 18 U.S.C. § 2252A. And as the Army Court explained, "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." *Rice*, 78 M.J. at 654 (J.A. 8). The Army Court therefore correctly concluded that the second and third specifications to which Appellant pleaded guilty should have been barred by the Double Jeopardy Clause of the Fifth Amendment.

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6. In denying Appellant's motion to dismiss, the military judge wrongly determined that the civilian and military possession charges were factually distinguishable because one set was based upon the images seized from Appellant's laptop and the other was based upon the images seized from Appellant's external hard drive. As the Army Court explained below, whether or not the government *could* have separately tried Appellant based upon the material recovered from the separate devices, it introduced evidence obtained from *both* devices in the district court—rendering the separate prosecutions factually indistinguishable. *Rice*, 78 M.J. at 653–54 & n.6 (J.A. 7 & n.6).

C. For Purposes of the Double Jeopardy Clause, an Offense is the "Same Offense" as Its Lesser-Included Offenses

The Double Jeopardy Clause not only bars successive prosecutions for *duplicative* offenses; it also bars successive prosecution of an offense after jeopardy attached to a lesser-included offense in a prior proceeding. *See Grady*, 495 U.S. at 516 ("If application of [*Blockburger*] reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred.").[7] After all, the test under *Blockburger* is "whether *each* provision requires proof of an additional fact which the other does not." 284 U.S. at 304 (emphasis added); *see also In re Nielsen*, 131 U.S. 176, 188 (1889) ("[W]here . . . 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 offense."); *United States* v. *Hudson*, 59 M.J. 357, 358 (C.A.A.F. 2004) ("The Fifth

7. In *United States* v. *Dixon*, 509 U.S. 688 (1993), the Supreme Court overruled *Grady* insofar as it read the "same offense" language even *more* broadly than *Blockburger*. *See id*. at 703. But lesser-included offenses remain the "same offense" under *Blockburger*. *See, e.g.*, *Currier*, 138 S. Ct. at 2150.

Amendment protection against double jeopardy provides that an accused cannot be convicted of both an offense and a lesser-included offense.").

By definition, each element of a lesser-included offense is an element of the greater offense. *See Brown* v. *Ohio*, 432 U.S. 161, 166–67 (1977). Thus, a lesser-included offense has no elements that its greater offense does not—so that a lesser-included offense is the "same offense" for purposes of the Double Jeopardy Clause's successive-prosecution ban.

D. Count One of Appellant's District Court Conviction was a Lesser-Included Offense of the First Specification to Which He Pleaded Guilty

As noted above, Count One in the district court charged Appellant with possessing child pornography "[b]etween about August 2010 and about January 29, 2013," in violation of 18 U.S.C. § 2252A(a)(5) (J.A. 32). The first of the three specifications to which Appellant pleaded guilty in the court-martial charged that Appellant knowingly and wrongfully distributed six images of child pornography "between on or about 30 November 2010 and on or about 6 December 2010" (J.A. 51).

Numerous federal courts of appeals have addressed the circumstances in which possession of child pornography under 18 U.S.C. § 2252A(a)(5) is a lesser-included offense of receipt or distribution of child pornography under 18 U.S.C. § 2252A(a)(2). Although the courts have ultimately reached different conclusions in different cases, multiple circuits have recognized both that possession is "generally a lesser-included offense," and that "conviction under both statutes is permissible if *separate conduct* is found to underlie the two offenses." *United States* v. *Dudeck*, 657 F.3d 424, 430 (6th Cir. 2011) (emphasis added); *see also, e.g.*, *United States* v. *Burman*, 666 F.3d 1113, 1117 (8th Cir. 2012). As the Seventh Circuit explained in *United States* v. *Faulds*, 612 F.3d 566 (7th Cir. 2010), the analysis centers on whether "the two convictions . . . rest on the same set of operative facts." *Id.* at 570. Thus, possession of child pornography is generally a lesser-included offense of distribution, but the analysis is necessarily case-specific depending upon the facts underlying the separate charges.

Here, there is no question that Appellant's civilian conviction for possession "rest[s] on the same set of operative facts" as the first court-martial specification. The distribution specification in Appellant's court-

martial was based on six images also introduced in the government's case-in-chief in the district court as having been possessed (and distributed) by Appellant during the same date range encompassed within Count One. Whether or not it is legally possible for an individual to distribute child pornography *without* possessing it, that is not what the government argued and proved in the district court in Appellant's case. The first specification to which Appellant pleaded guilty should therefore also have been barred by the Double Jeopardy Clause.

II. THE DOUBLE JEOPARDY VIOLATIONS REQUIRE DISMISSAL OF APPELLANT'S MILITARY CONVICTIONS

A. Appellant's Court-Martial on the Three Offending Specifications Was Void, Not Voidable

It is axiomatic that a successive prosecution in violation of the Double Jeopardy Clause is not just voidable, but void. As the Supreme Court explained in 1874, courts entertaining a successive prosecution in violation of the Double Jeopardy Clause lack *jurisdiction* over the matter: "The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist." *Lange*, 85 U.S. (18 Wall.) at 163; *see also*

Nielsen, 131 U.S. at 183–84 (the court in the second case "has no authority to render judgment against the defendant").[8]

It is precisely because the Double Jeopardy Clause bars a successive prosecution for the same offense, regardless of its outcome, that civilian federal courts permit immediate interlocutory appeals in the event that a district court denies a motion to dismiss a successive indictment based upon a claimed double jeopardy violation. As the Supreme Court explained in *Abney*,

> [T]he guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if 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.

431 U.S. at 662 (footnote omitted).

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8. At the time *Lange* and *Nielsen* were decided, federal courts were limited in entertaining collateral attacks on criminal convictions to determining whether the trial court had jurisdiction. *See In re Grimley*, 137 U.S. 147, 150 (1890) ("The single inquiry, the test, is jurisdiction."); *see also Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 82–83 (1858). Thus, the void/voidable distinction was dispositive of whether a claim could be heard through a collateral attack.

Although there is no parallel to this appealability rule in the military, the same logic follows: a successive prosecution is void from the moment it is initiated, and its validity cannot be restored by any subsequent actions. *See, e.g.*, *Burks* v. *United States*, 437 U.S. 1, 11 n.6 (1978). Otherwise, the Double Jeopardy Clause would not, as the Supreme Court and this Court repeatedly have held, confer "a right not to be tried"; it would amount to little more than "a right not to be convicted." *Class*, 138 S. Ct. at 811–12; *see also Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989) ("A right not to be tried . . . rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause.").

It follows from this analysis that the only appropriate remedy for a successive prosecution in violation of the Double Jeopardy Clause is the dismissal of the successive prosecution, because only that remedy is responsive to the specific constitutional interest a successive prosecution offends—the right not to "be twice put in jeopardy of life or limb" for "the same offense." U.S. CONST. amend. V. Any other remedy fails to account for the fact that Appellant "has still been forced to

endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney*, 431 U.S. at 662.

B. The District Court's Subsequent Actions *Could* Not "Remedy" Appellant's Unconstitutional Court-Martial

In its decision below, the Army Court held that any double jeopardy violation arising from Appellant's court-martial was cured by the district court's refusal to sentence Appellant on Count One—and its decision to dismiss that charge in its entirety. *Rice*, 78 M.J. at 655 (J.A. 10) ("[A]ppellant sought and received a remedy for the double jeopardy violation by gaining dismissal of the possession count at the District Court.").

The central problem with this analysis is that it conflates remedies for *successive-prosecution* double jeopardy claims with remedies for *multiple-punishment* double jeopardy claims. In the latter context, the Supreme Court has long recognized that there are various ways for courts to meaningfully cure a double jeopardy problem—including, most prominently, by vacating the longer sentence on appeal and crediting any time served toward the non-offending sentence. *See, e.g.*, *Jones* v. *Thomas*, 491 U.S. 376, 381–82 (1989); *see also Rice*, 78 M.J. at 655 (J.A. 10) ("Other remedies may also be appropriate, such as

affirming the conviction of a lesser-included offense that is not jeopardy-barred." (citing *Morris* v. *Mathews*, 475 U.S. 237, 246–47 (1986))).

These cases follow from the understanding that, in the multiple-punishment context, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983). As a result, in multiple-punishment double jeopardy cases, courts have a fair amount of flexibility on appeal in crafting a remedy that adequately vindicates the constitutional interest. *See, e.g.*, *Morris*, 475 U.S. at 246–47. And it therefore is understandable why, in that setting, specifically, the Supreme Court interprets the Double Jeopardy Clause to not "provide unjustified windfalls." *Thomas*, 491 U.S. at 387.

Successive-prosecution double jeopardy claims are necessarily different—and the analysis surrounding them is far more formal. *See, e.g.*, *Dixon*, 509 U.S. at 744 (Souter, J., concurring in the judgment in part and dissenting in part) ("The Clause functions in different ways in the two contexts, and the analysis applied to claims of successive prosecution differs from that employed to analyze claims of multiple punishment."). For a successive-prosecution claim, "the only available

remedy is the traditional double jeopardy bar against the retrial of the same offense." *Currier*, 138 S. Ct. at 2153 (plurality opinion). No reconfiguration of the charges on appeal, or recalculation of the sentence, can restore the defendant to the status quo after a successive-prosecution violation, because he has already been subjected to the precise harm that the Double Jeopardy Clause exists to prevent. *See Abney*, 431 U.S. at 662 ("[H]e has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.").

That's why neither the Army Court nor the government could identify a single case in which a federal court has held that any remedy *other than* dismissal of the successive prosecution adequately vindicated a defendant's right under the Double Jeopardy Clause to be free from being "twice put in jeopardy" for the same offense. Nothing that happened in the district court with respect to the civilian charges could erase Appellant's unconstitutional successive prosecution by the military.

C. The District Court's Subsequent Actions *Did* Not "Remedy" Appellant's Unconstitutional Court-Martial

In any event, even if the district court's subsequent actions *could* have had some bearing on the validity of Appellant's military trial, its

actions in this case *didn't* have that effect. As noted above, after Appellant pleaded guilty to the three specifications at issue in his court-martial and was sentenced consistent with his pre-trial agreement, the district court was separately barred by the Double Jeopardy Clause from imposing a duplicative punishment for the same offense.

In holding that the district court's dismissal of Count One provided a "remedy" for Appellant's unconstitutional successive prosecution by the military, the Army Court gave short shrift to the fact that the district court had a distinct obligation to not impose an unconstitutionally duplicative sentence. *See, e.g.*, *Rice*, 78 M.J. at 655 (J.A. 10) ("[Appellant] is not simultaneously entitled to a second remedy for a *single* wrong." (emphasis added)). The district court's dismissal of Count One, however, was not a remedy for the extant successive-prosecution double jeopardy violation; it couldn't have been, because the district court had no authority to dismiss Appellant's successive prosecution by the military.

Instead, the district court's dismissal of Count One was merely a means for avoiding a *second* wrong—a distinct double jeopardy violation that would have arisen from the imposition of multiple punishments for

the same offense. Indeed, the government did not dispute in either the district court or the Army Court that sentencing Appellant on Count One would have constituted a second double jeopardy violation.

Nor could it have done so. As the Army Court tellingly conceded, had the district court only refused to *sentence* Appellant on Count One, dismissal of the offending military convictions would not have provided Appellant with an "unjustified windfall"; rather, it would have been dictated by precedent in order to avoid a second constitutional violation. *Rice*, 78 M.J. at 656 & n.12 (J.A. 10 & n.12) (citing *United States* v. *Sabella*, 272 F.2d 206, 207–08 (2d Cir. 1959) (Friendly, J.)).

For the Army Court, the key was that "Appellant . . . went beyond asking merely that no sentence be imposed, and sought dismissal of the possession count entirely." *Id.* at 656 (J.A. 10) (footnote omitted). When the district court granted that request (to which the government did not object), in the Army Court's view, that effectively converted Appellant's court-martial from an unconstitutional *successive* prosecution into a constitutional *first* prosecution—*nunc pro tunc*. *See id.* (J.A. 11–12) ("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.").

The problem with this reasoning is that it's borrowed from inapposite cases—in which the government seeks to retry a defendant after the first trial ends in a dismissal that is unrelated to his guilt or innocence. *See, e.g.*, *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 decision that the Army Court cited in putative support of this reasoning came in just such a case. *See Rice*, 78 M.J. at 656 (J.A. 12) (citing *United States* v. *McClain*, 65 M.J. 894, 900–01 (A. Ct. Crim. App. 2008)).

But in such cases, and unlike here, the jeopardy from the first trial has been removed *before* the successive prosecution takes place, so that there is no moment when the defendant was "*twice* put in jeopardy." That is to say, there is no successive-prosecution violation to "remedy" in that context, because the first jeopardy is wiped out before the second jeopardy attaches. To similar effect, when a defendant

consents to successive prosecutions (or trial on multiplicitous charges), he is waiving his constitutional objection *before* any violation occurs. *See Currier*, 138 S. Ct. at 2150 (citing *Jeffers* v. *United States*, 432 U.S. 137, 150–52 (1977) (plurality opinion)); *see also United States* v. *Gladue*, 67 M.J. 311 (C.A.A.F. 2009).

None of these cases support the materially distinct proposition for which the Army Court read them—that even *after* the government has conducted an unconstitutional successive prosecution, a dismissal of the charge to which jeopardy *first* attached provides a complete remedy for the double jeopardy violation—as if the unconstitutional successive prosecution could somehow be retroactively transmogrified into a constitutional retrial. And as the above analysis suggests, such analysis is irreconcilable with the nature of a successive-prosecution violation, which can only be remedied by dismissing the offending *prosecution*, and not an offending duplicative *conviction*. The constitutional injury is the successive trial itself, not its result. *See Abney*, 431 U.S. at 662.

III. RATHER THAN AVOIDING AN "UNJUSTIFIED WINDFALL," THE ARMY COURT'S DECISION CREATES ONE—FOR THE GOVERNMENT

As the Army Court rightly put it, "[w]hat happened in this case should not happen again. Divvying-up charges in a constitutionally

dubious manner imperils the fair and efficient administration of justice." *Rice*, 78 M.J. at 652 (J.A. 5). But despite asserting that "[n]othing in this opinion should be perceived as an endorsement of the charging scheme in this case," *id.*, in treating the district court's dismissal of Count One as a complete remedy for the successive-prosecution violation it identified, the Army Court provided just such an endorsement. Indeed, the Army Court's analysis not only does nothing to prevent what happened here from recurring, it incentivizes the exact government behavior it denounced—and the "the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade*, 336 U.S. at 688–89.

A. Dismissal of Appellant's Court-Martial Would Not Be an "Unjustified Windfall"

The Army Court's principal justification for declining to dismiss Appellant's court-martial convictions was that, in light of the district court's dismissal of Count One, dismissal of the court-martial convictions would provide Appellant with an "unjustified windfall[]." *Rice*, 78 M.J. at 656 (J.A. 12) (alteration in original). This argument fails for two reasons.

First, as noted above, a successive prosecution in violation of the Double Jeopardy Clause is not just voidable, but void. There is thus no room for a reviewing court to take into account whether dismissal of a conviction obtained in such a prosecution would provide the defendant with *any* windfall, let alone an "unjustified" one. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks*, 437 U.S. at 11 n.6.

Second, even if the possibility that the defendant might receive an "unjustified windfall" *could* factor into analysis of the proper remedy for a successive-prosecution double jeopardy violation, the Army Court erred in holding that this would have been such a case. By the Army Court's own admission, had the district court refused to sentence Appellant on Count One but *not* dismissed that count, "this case would be functionally indistinguishable [from] *Sabella*," such that Appellant would have been entitled to dismissal of his military convictions. *Rice*, 78 M.J. at 656 n.12 (J.A. 11 n.12). In other words, the "unjustified windfall" the Army Court identified would have been the dismissal of

the military convictions alongside the *dismissal* of Count One, but not—somehow—the dismissal of the military convictions alongside merely a refusal to *sentence* the Appellant on Count One.

But dismissal of Appellant's military convictions alongside dismissal of Count One would not provide Appellant with a single material benefit that he would not have received from dismissal of the military convictions alongside not being sentenced on Count One—a remedy the Army Court did *not* view as an "unjustified windfall." Among other things, because of his operative conviction and sentence in the district court on Count Two, Appellant is still a convicted felon under federal law, and one who must comply with the Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20901 *et seq*.

Indeed, no meaningful legal consequences result from the district court's decision to dismiss Count One instead of declining to sentence Appellant on it. If dismissal of Appellant's military convictions would have been appropriate if the district court merely declined to sentence Appellant on Count One, it therefore cannot follow that dismissal of Appellant's military convictions would yield an "unjustified windfall" solely because the district court took the meaningless additional step of

dismissing Count One. Thus, even if avoiding an "unjustified windfall" *could* be relevant to the remedy for a successive-prosecution violation, there was no such windfall to avoid here.[9]

B. The Decision Below Would Create Perverse Incentives for the Government and Radically Reconfigure the Meaning of the Double Jeopardy Clause

As Judge Wolfe cogently summarized the Army Court's logic, "as long as the results of one trial go away, the Constitution is not offended." *Rice*, 78 M.J. at 657 (J.A. 14) (Wolfe, J., concurring). On that view, the Double Jeopardy Clause does not prohibit the government from trying a defendant in civilian court first, then before a court-martial on the same offense, deciding which result it prefers, and, if both proceedings return guilty verdicts, picking the forum in which it would prefer the defendant to be sentenced or the result it prefers to defend on appeal.

In the process, the Army Court's approach would convert the Double Jeopardy Clause's ban on successive prosecutions for the same

9. Nor is there any argument that Appellant is in any way responsible for the errors that occurred in his case. At every opportunity before both the court-martial and the district court, Appellant timely advanced the precise double jeopardy objections set forth in this brief.

offense from "a right not to be tried" into "a right not to be subjected to enforcement of a second sentence," reconceiving the harm that the Constitution is meant to prevent not as the pain of a second *trial* for the same offense, but as the pain of multiple extant *convictions* for the same offense. In essence, the Double Jeopardy Clause would provide the government with the right to choose the result it prefers—and void the rest. But the Double Jeopardy Clause already separately bans the imposition of multiple punishments for the same offense. The Army Court's reading would all-but vitiate the Double Jeopardy Clause's independent ban on successive prosecutions, which, unlike multiple punishments for the same offense, is the "primary evil" that the Double Jeopardy Clause "guard[s] against." *Farley*, 510 U.S. at 230.

Such strategic manipulation by government prosecutors is the exact type of "oppressive practice" that the Double Jeopardy Clause exists to prevent. *See Wade*, 336 U.S. at 688–89; *see also Green*, 355 U.S. at 187 ("The underlying idea . . . 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."). In wrongly trying to avoid providing Appellant with an "unjustified windfall," then, the

Army Court instead provided one to the government—not only in Appellant's case, but also going forward.

Ultimately, there is no warrant in this Court's jurisprudence or that of the Supreme Court for the fundamental reconceptualization of the Double Jeopardy Clause reflected in the Army Court's analysis. There is no compelling need to even contemplate such a radical doctrinal shift on the facts of Appellant's case. And the Army Court's self-defeating arguments in favor of such an unprecedented and unnecessary change to existing doctrine are, charitably, based upon inapposite, irrelevant, or analytically unpersuasive justifications.

* * *

CONCLUSION

For the foregoing reasons, the specified issue should be answered in the affirmative, and Appellant's military convictions should be dismissed.

Respectfully submitted,

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APPENDIX

TIMELINE OF KEY EVENTS IN APPELLANT'S CASE

DATE	DISTRICT COURT	COURT-MARTIAL
MAY 14, 2014	Grand jury indicts Appellant on two counts	
SEPTEMBER 17, 2015		Convening authority refers two charges (five specifications) to a general court-martial
OCTOBER 6, 2015		Appellant arraigned before general court-martial
MAY 2, 2016	Jury empaneled and sworn; criminal trial begins	
MAY 6, 2016	Jury convicts Appellant on both counts	
JUNE 20, 2016		Appellant moves to dismiss court-martial based upon the Double Jeopardy Clause
OCTOBER 11, 2016		Military judge denies Appellant's motion to dismiss
OCTOBER 24, 2016		Appellant pleads guilty to three specifications; sentenced per pre-trial agreement
NOVEMBER 10, 2016	Appellant moves to dismiss—or bar sentencing on—Count One	
NOVEMBER 22, 2016	District court dismisses Count One	
DECEMBER 28, 2016	District court sentences Appellant on Count Two	

CERTIFICATE OF FILING AND SERVICE

I certify that on May 29, 2019, a copy of the foregoing brief in the case of *United States* v. *Rice*, Army Ct. Crim. App. Dkt. No. 20160695, USCA Dkt. No. 19-0178/AR, was electronically filed with the Court (efiling@armfor.uscourts.gov) and contemporaneously served on the Defense and Government Appellate Divisions.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,733 words. This brief complies with the typeface and type-style requirements of Rule 37.

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