

1 from military service as part of their claims. *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971);
2 *Bratcher v. McNamara*, 448 F.2d 222 (9th Cir. 1971). Petitioner alleges that the restraint on
3 liberty he is being subjected to is a court martial proceeding that would violate his Fifth
4 Amendment right to be free from double jeopardy. Dkt. 1 at 9. The Supreme Court of the United
5 States has held that being required to appear for trial is sufficient to show custody over an
6 individual for habeas purposes. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294,
7 300-301 (1984).

8 As a general rule, where members of the armed forces file habeas petitions seeking relief
9 from the military's wrongful restraint of liberty, federal civilian courts should not entertain such
10 petitions until all available remedies within the military court system have been exhausted. *Noyd*
11 *v. Bond*, 395 U.S. 683, 693 (1969). Petitioner's habeas petition asks this Court to determine
12 issues that have also been placed before the military trial court, the Army Court of Criminal
13 Appeals, and the United States Court of Appeals for the Armed Forces. Dkt. 2 at 2. Both the
14 military trial court and the Army Court of Criminal Appeals have denied Petitioner's claims. *Id.*
15 On October 5, 2007, the United States Court of Appeals for the Armed Forces issued an order
16 denying Petitioner's claims. Dkt. 7 at 4-6. As of the date of this Order, Petitioner has exhausted
17 his available military court remedies with respect to his double jeopardy claim that forms the
18 basis of his habeas petition. This Court may therefore rightfully entertain the instant habeas
19 petition.

20 II. REQUIREMENT OF STAY

21 Having decided that Petitioner has exhausted his military court remedies with respect to
22 the double jeopardy claim, thereby affording the Court jurisdiction over the habeas petition, the
23 Court must now determine whether a stay of the second military court martial proceeding is
24 justified. The Double Jeopardy Clause "not only protects an individual against being subjected
25 to double punishment but also is a guarantee against being twice put to trial for the same
26 offense." *Abney v. U.S.*, 431 U.S. 651, 652 (1977). The Supreme Court held in *Abney* that for a
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1 criminal defendant to “enjoy the full protection of the Clause, his double jeopardy challenge to
2 the indictment must be reviewable before the subsequent exposure occurs.” *Id.* at 662.

3 The rule articulated in *Abney* applies to the instant matter if Petitioner’s double jeopardy
4 claim is meritorious or not frivolous. *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir.
5 1984). The Court has not been presented any evidence showing that Petitioner’s double
6 jeopardy claim lacks merit. On the contrary, the record indicates that Petitioner’s double
7 jeopardy claim is meritorious. “[A] defendant raising a meritorious *Abney* -type claim-asserting
8 a valid, constitutional ‘right not to be tried’-would be irreparably harmed if the trial court
9 continued to proceed to trial prior to the disposition of the appeal.” *Id.* at 850. The irreparable
10 harm suffered by being put to trial a second time in violation of the Double Jeopardy Clause of
11 the Fifth Amendment stems not just from being subjected to double punishment but also from
12 the harm of undergoing a second trial proceeding. *Abney*, 431 U.S. 660 at 661. Having
13 preliminarily decided that Petitioner’s double jeopardy claim is not frivolous, a stay of the
14 military court martial proceeding is justified.

15 III. CONCLUSION

16 The Court concludes, as a preliminary matter, that it has jurisdiction over the habeas
17 petition and that Petitioner’s double jeopardy claim is not frivolous. The pending court martial
18 proceeding scheduled to begin on October 9, 2007 should be preliminarily stayed. The Court
19 recognizes that these issues are raised on an emergency motion and that the parties have not yet
20 had the opportunity to provide full briefing. The government should be afforded the right to
21 respond and Petitioner should be permitted to reply to that response.

22 The Court further notes that the issues raised by the petition for habeas corpus bear no
23 relation to the charges or defenses in Petitioner’s court martial proceedings. The habeas petition
24 concerns only the alleged violation of Petitioner’s Fifth Amendment right to be free from double
25 jeopardy. This is an issue concerning Petitioner’s individual constitutional right to be free from
26 being subjected to two trial proceedings concerning the same offense and is completely unrelated
27 to the underlying claims addressed by the military trial court.

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3 **IV. ORDER**

4 Therefore, it is hereby

5 **ORDERED** that Petitioner's Emergency Motion for a Stay of Court Martial Proceedings
6 (Dkt. 2) is **GRANTED in part**. Respondents are enjoined from holding the court martial
7 proceeding referred to by Respondent Jacoby. This stay is preliminary and shall remain in place
8 until October 26, 2007, or until further order of the Court.

9 It is further **ORDERED** that Respondents are to file a response to Petitioner's
10 Emergency Motion for a Stay of Court Martial Proceedings on or before October 12, 2007;
11 Petitioner is to file a reply to Respondents' response by October 17, 2007; and the motion is
12 **RENOTED** for consideration on October 19, 2007.

13 DATED this 5th day of October, 2007.

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15 BENJAMIN H. SETTLE
16 United States District Judge
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