IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20080636
Staff Sergeant (E-6) Christopher A. Barberi United States Army, Appellant	)	USCA Dkt. No. 11-0462/AR

William E. Cassara
PO Box 2688
Evans, GA 30809
(706)860-5769
bill@williamcassara.com
USCAAF No. 26503

Lead Counsel for Appellant

John L. Schriver
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703)693-0715
USCAAF No. 35629

INDEX OF FINAL BRIEF ON BEHALF OF APPELLANT

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

United States Supreme Court

Court of Appeals for the Armed Forces

Courts of Criminal Appeals

Other Courts

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	FINAL BRIEF ON BEHALF OF APPELLANT
Christopher A. BARBERI Staff Sergeant (E-6), United States Army, Appellant	)	ACCA Dkt. No. 20080636 USCAAF Dkt. No. 11-0462/AR

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

ISSUE PRESENTED

I. WHETHER THE GENERAL VERDICT OF GUILT RESTED ON CONDUCT THAT WAS CONSTITUTIONALLY PROTECTED, IN THAT AT LEAST ONE OF THE SIX IMAGES PRESENTED TO THE MEMBERS WAS NOT CHILD PORNOGRAPHY.

STATEMENT OF STATUTORY JURISDICTION

The statutory basis for the jurisdiction of the Army Court of Criminal Appeals was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for the jurisdiction of this Court to consider Appellant's petition for grant of review, filed on 22 April 2011, is 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant was tried at Heidelberg and Mannheim, Germany on 26 March; 17 April; 14 May; 23, 25, 27 and 30 June; and 2-3 and 11 July 2008 before a general court-martial convened by Commander, Headquarters, V Corps. Appellant was charged with two specifications of sodomy under Article 125, UCMJ (Charge I); one specification of creating more than three images of child

pornography, one specification of possessing more than three images of child pornography, and one specification of indecent acts, all under Article 134, UCMJ (Charge II). Specification 1 of Charge I alleged misconduct that occurred outside the statute of limitations and was dismissed prior to trial. Specifications 1 and 3 of Charge II were also dismissed prior to trial.[1] Specification 2 of Charge II was amended to allege possession of child pornography (as opposed to possession of more than three images of child pornography).[2].

Appellant pleaded not guilty to all charges and specifications.[3] Appellant was found guilty of both the sodomy specifications and the specification alleging possession of child pornography.[4] He was sentenced to reduction to E-1, confinement for two years, and a bad conduct discharge.[5] Before that Court, Appellant assigned five errors.[6] The Army Court of

---

[1] JA at 19.
[2] JA at 20.
[3] JA at 14.
[4] JA at 42.
[5] JA at 43.
[6] I. APPELLANT'S CONVICTION FOR POSSESSING CHILD PORNOGRAPHY MUST BE SET ASIDE BECAUSE THE GENERAL VERDICT OF GUILT RESTED ON CONDUCT THAT WAS CONSTITUTIONALLY PROTECTED, IN THAT AT LEAST ONE OF THE SIX IMAGES PRESENTED TO THE MEMBERS WAS NOT CHILD PORNOGRAPHY; II. THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE THAT SD MADE CERTAIN STATEMENTS TO INVESTIGATORS THAT WERE CONSISTENT WITH HER TRIAL TESTIMONY. THE STATEMENTS WERE NOT "PRIOR CONSISTENT STATEMENTS" UNDER R.C.M. 801(d)(1) BECAUSE THEY WERE NOT MADE PRIOR TO THE TIME THE MOTIVE TO FABRICATE AROSE, WHICH WAS BEFORE SHE INITIALLY REPORTED APPELLANT TO THE AUTHORITIES, AND NOT WHEN SHE WAS TESTIFYING BEFORE THE MEMBERS; III. THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT A CONVICTION OF POSSESSION OF CHILD PORNOGRAPHY BECAUSE NONE OF THE IMAGES DEPICTED A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA, AND THERE IS EVIDENCE THAT APPELLANT DID NOT TAKE THE PICTURES; IV. THE MILITARY JUDGE DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN HE PREVENTED THE DEFENSE FROM CROSS-EXAMINING SD'S MOTHER ABOUT A SOCIAL SERVICES INVESTIGATION OF ALLEGATIONS THAT THE VICTIM'S MOTHER HAD SHOWERED AND SLEPT IN THE SAME BED WITH HER SON, WHICH TENDED TO SHOW THAT THE VICTIM'S MOTHER WAS BIASED AGAINST APPELLANT BECAUSE HE HAD SUCCESSFULLY OBTAINED CUSTODY OF THE SON AGAINST THE MOTHER'S WISHES; and V. V. THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT THE CHARGE OF SODOMY.

Criminal Appeals affirmed the findings and sentence on 22 February 2011.[7]

STATEMENT OF THE FACTS

Argument

Appellant was originally charged with both creating and possessing "more than three" images of child pornography under clauses (1) and (2) of Article 134, UCMJ. The government moved to dismiss specification 1 of Charge II (the creation charge), and moved to amend specification 2 of Charge II (the possession charge) by deleting the words "more than three," thus alleging only that Appellant "did . . . knowingly possess child pornography. . . ."[8]

Prior to trial, the defense objected to the admission of the images in Prosecution Exhibits 21 through 26 because, in the defense's view, there was a lack of authentication. After a hearing in which SD authenticated the exhibits, the military judge admitted Prosecution Exhibits 21 through 26, but noted there might be an unresolved issue with respect to the relevance of Prosecution Exhibits 25 and 26 that the defense may have "been touching on . . . earlier with an earlier objection."[9] The military judge asked trial counsel to state the relevance of

---

[7] United States v. Barberi, 2011 CCA LEXIS 24 (Army Ct. Crim. App., 22 Feb. 2011).
[8] JA at 19, JA at 44.
[9] JA 15.

Prosecution Exhibits 25 and 26, and specifically whether they "prove any of the offenses," or whether they were "actually directly related to any of the offenses."[10] Trial counsel responded, "No, Your Honor, it just shows a course of conduct . . . a breaking down of barriers and in taking these types of photographs, and going into the bathroom, taking nude photographs of his stepdaughter when she's developing. . . ."[11] Trial counsel confirmed that, for specification 1 of Charge II (the creation charge), the images relevant to the charge were those found in Prosecution Exhibits 21 through 24, although for specification 3 of Charge II (an indecent act charge that was later dismissed), all six photographs were relevant.[12] Trial counsel reiterated that, with respect to the creation charge, the photographs that formed the foundation were Prosecution Exhibits 21 through 24, and nothing else.[13]

In discussing whether the creation charge was either multiplicious or an unreasonable multiplication with the indecent acts charge, the military judge noted, "Prosecution Exhibits 25 and 26 could never constitute the offense in Specification 1 of Charge II because it's not a lascivious exhibition of the genitals."[14] There was no further discussion

---

[10] JA at 15.
[11] Id.
[12] Id.
[13] JA at 17.
[14] JA at 17-18.

in the record regarding whether Prosecution Exhibits 25 or 26 were admissible, or admitted, as evidence in support of specification 2 of Charge II (the possession charge), although the definition of child pornography is the same whether the charge is for possession or creation.

These issues were originally litigated before Judge Grammel. The new military judge, Judge Marchessault, noted,

> I've reviewed the transcripts relating to all previously 39(a's) [sic] in this case over the weekend, it was 269 pages long; I've also reviewed Colonel Grammel's order specifically relating to the stories that Mr. Court just referenced. I concur with Colonel Grammel's analysis and his rulings and adopt them as my own.[15]

In its case in chief, the government asked various witnesses to discuss Prosecution Exhibits 25 and 26. Specifically, trial counsel asked SD questions about them.[16] All the images in Prosecution Exhibits 21 through 26 were published to the members during the government's case in chief.[17] Defense counsel discussed Prosecution Exhibit 26 with SD.[18] Both trial counsel and defense counsel discussed Prosecution Exhibit 25 and 26 with Special Agent Miklos, particularly his recollection of a discussion he had with SD about them.[19]

---

[15] JA at 21.
[16] JA at 22-23.
[17] JA at 24.
[18] JA at 25-26.
[19] JA at 27-32.

At the close of the government's case, civilian defense counsel moved for a finding of not guilty of specification 2 of Charge II pursuant to R.C.M. 917.[20] He argued that

> mere photographs of naked children is not child pornography; that the photography must be lewd and lascivious in some manner; it must focus on the genitalia; it must be in a position or a condition in order to try and incite lust or depraved morals. Photos 21 through 26, the defense submits, in no way can be construed to do that. While they do show, in 21 through 24, a naked young girl, [SD] has said it is her in the shower, they are not, in the defense's submission, did not meet the definition of child pornography.
>
> Likewise, the exhibits 25 and 26 are not focusing on genitalia, are not lewd and lascivious, and not in seductive poses. They do not meet the definition of child pornography. The government has presented no evidence that they do. They have not presented the statute. They have not presented any expert opinion and, clearly, as the defense stated, lascivious means, "exciting sexual desires marked by lust," and instructions which the Courts have been given--have given in this kind of case in the military include language such as "not every exposure of genitals or pubic area constitutes a lascivious exposition."[21]

Prior to ruling, the military judge stated, "Government, please provide me a moment. I've not reviewed these images."[22] After reviewing the images, the military judge concluded, "Based on the foregoing statement of law, the defense motion for a finding of not guilty is denied."[23] Trial counsel asked SD's brother

---

[20] JA at 33.
[21] JA at 33-34.
[22] JA at 34.
[23] JA at 36.

Ethan about Prosecution Exhibit 25.[24] Assistant trial counsel asked Ms. Quinlan about Prosecution Exhibit 25.[25]

During an Article 39(a) session focusing on instructions, the defense requested that "the panel be instructed or polled or in some way have the panel identify under Charge II, the Specification, which photograph of Prosecution 21 through 26, if any, they find to constitute child pornography."[26] In the defense's view, this would "enable the appellate authorities to determine if, in fact, child pornography was found by the panel."[27] The government objected, noting that R.C.M. 918 does not provide any authority for special findings by members, and indeed, prohibits it.[28] The military judge noted that R.C.M. 918(b) provides, "Special findings may be made in a military judge alone trial," and the discussion "explicitly says, 'Members may not make special findings.'"[29] The military judge then denied the defense request.[30]

In his closing argument before the members, trial counsel argued to the members,

> the accused in this case groomed his stepdaughter, SD, so that she believed it was okay to let him take pictures of her when she was nude or partially nude, so then he kept those pictures that he took of her

---

[24] JA at 37.
[25] JA at 38.
[26] JA at 39.
[27] Id.
[28] JA at 39-40.
[29] JA at 40.
[30] Id.

> naked, he burned them on a disc, and he kept them; for that reason he is guilty of possession of child pornography.[31]

He went on, "You heard Ms. Quinlan tell you today, by his own admission, that he took this picture, Prosecution Exhibit 25."[32] Trial counsel argued that "all of these pictures including this one, Prosecution Exhibit 25, were all created in January of '02. . . ."[33]

The remaining facts necessary for the resolution of the issues can be found in the argument below.

SUMMARY OF THE ARGUMENT

Appellant was charged in a single specification with possession of child pornography. The government introduced six images of Appellant's stepdaughter, and argued to the members that all six were child pornography. The members entered a general verdict of guilty to possession of child pornography. The Army Court of Criminal Appeals concluded that four of the six images were not child pornography as a matter of fact and law, stating, "We find PE 23, 24, 25, and 26 are legally and factually insufficient" because they "do not depict any portion of the minor child's [SD's] genitalia or pubic area," but

---

[31] JA at 41.
[32] Id.
[33] Id.

affirmed Appellant's conviction based on the remaining two images.[34]

Images not containing a lascivious exhibition are constitutionally protected speech.[35] Where a general verdict of guilt rests in part on conduct that is constitutionally protected, the Due Process Clause of the Fifth Amendment to the United States Constitution requires the conviction to be set aside.[36] The Army Court of Criminal Appeals erred in affirming Appellant's conviction because while general verdicts are permissible under the law in some cases, a general verdict resting in part on constitutionally protected activity is not.

ARGUMENT

I. WHETHER THE GENERAL VERDICT OF GUILT RESTED ON CONDUCT THAT WAS CONSTITUTIONALLY PROTECTED, IN THAT AT LEAST ONE OF THE SIX IMAGES PRESENTED TO THE MEMBERS WAS NOT CHILD PORNOGRAPHY.

Standard of Review

The sufficiency of a general verdict is a question of law reviewed de novo.[37]

Argument

The general rule with respect to general verdicts is that when the government presents evidence of several acts of misconduct in support of a single specification, it "makes no difference how many members chose one act or the other, on

---

[34] United States v. Barberi, 2011 CCA LEXIS 24 at *4 (Army Ct. Crim. App. 22 Feb. 2011)..

[35] See, generally, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002).

[36] Stromberg v. California, 283 U.S. 359 (1931).

[37] United States v. Rodriguez, 66 M.J. 201 (C.A.A.F. 2008).

theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members."[38]

A different analysis applies, however, when a general verdict potentially rests on a theory that is unconstitutional. In Stromberg v. California, 283 U.S. 359 (1931), the appellant was charged with violating a California statute prohibiting the display of a red flag in public for any one of three purposes. The trial judge instructed the jury that it could convict if it found the defendant guilty of displaying the flag for any one of the three purposes. The jury returned a general verdict of guilty. The Supreme Court held that since the first purpose of the California statute was unconstitutional, the conviction was invalid because there was no way to determine whether the conviction rested on a constitutional or an unconstitutional ground.[39]

Other Supreme Court cases applying this rule followed. Williams v. North Carolina[40] states, "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights." Thomas v. Collins[41] held a labor organizer's contempt citation invalid because it was predicated upon constitutionally protected speech expressing a

---

[38] United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007).
[39] Stromberg, 283 U.S. at 368.
[40] Williams v. North Carolina, 317 U.S. 287 (1942).
[41] Thomas v. Collins, 323 U.S. 516, 528-29 (1945).

general invitation to a group of nonunion workers, and upon non-protected solicitation of a single individual. Leary v. United States[42] held a general verdict resting on either of alternative theories, one of which required an unconstitutional presumption, must be set aside. Street v. New York[43] states, "When a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." Bachellar v. Maryland[44] held that it was impossible to say from the evidence whether convictions rested on a constitutionally insufficient allegation of "fighting words" or a constitutionally sufficient ground of failure to obey police command. And Griffin v. United States[45] states, "Where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." In Zant v. Stephens[46] the Supreme Court discussed its prior holdings in Thomas and Street and explained,

> The rationale of Thomas and Street applies to cases in which there is no uncertainty about the multiple grounds on which a general verdict rests. If, under the instructions to the jury, one way of committing

[42] Leary v. United States, 395 U.S. 6 (1969).
[43] Street v. New York, 394 U.S. 576, 585-588 (1969).
[44] Bachellar v. Maryland, 397 U.S. 564, 572 (1970).
[45] Griffin v. United States, 503 U.S. 46, 53 (1991).
[46] Zant v. Stephens, 462 U.S. 862, 883 (1983).

> the offense charged is to perform an act protected by the constitution, the rule of these cases requires that a general verdict of guilt be set aside even if the defendant's unprotected conduct, considered separately, would support the verdict.

Images not containing a lascivious exhibition are constitutionally protected speech.[47] Since four of the six images presented to the members in this case were constitutionally protected, then the entire conviction of possessing child pornography falls because there is no way to determine whether the conviction rested on constitutional or unconstitutional grounds. This is so even if this Court believes there is otherwise overwhelming evidence of guilt as to the non-protected conduct, because "[r]eliance on the valid ground, without an actual jury finding, too closely resembles a presumption that the jury relied on that ground, thus undermining even the most narrow applicability of Stromberg."[48]

The rule announced in Stromberg is discussed only in a few military cases. In United States v. Cendejas[49] (a contested case tried before a military judge alone), this Court, citing Stromberg, invalidated a conviction for child pornography where the military judge applied a definition of child pornography that had been found to be unconstitutional. This Court stated that, in its view, the military judge "found guilt because the eight images were either virtual or actual beyond a reasonable doubt."[50]

---

[47] See, generally, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002).
[48] United States v. Holly, 488 F.3d 1298, 1307 n.6 (10th Cir. 2007).
[49] United States v. Cendejas, 62 M.J. 334 (C.A.A.F. 2006).
[50] Cendejas, 62 M.J. at 339.

The Army Court of Criminal Appeals in this case applied this Court's holding in United States v. Rodriguez[51], and concluded that since in its view PE 21 and 22 constituted child pornography, a general verdict was not improper. The Court did not discuss Stromberg and merely applied the general rule regarding general verdicts. Respectfully, while Rodriguez states the general rule with respect to general verdicts, it is inapposite to this case because, inasmuch as the appellant in that case was charged with wrongful use of marijuana on divers occasions, it did not involve constitutionally protected conduct. To the extent that Rodriguez is applicable, it is because this Court noted that "a different analysis would apply in a case where a possible basis for conviction was either illegal or unconstitutional."[52]

Because of the constitutionally protected nature of the conduct at issue, the conviction in this case requires automatic reversal; it is not amenable to harmless error review. The Supreme Court recently concluded that in some cases the Stromberg rule is subject to harmless-error analysis and such errors do not necessarily require automatic reversal.[53] The Court explained that since Stromberg was decided before the Supreme Court in Chapman v. California[54] concluded that an error of constitutional dimension did not necessarily require reversal if the error was harmless beyond a reasonable doubt, an

---

[51] United States v. Rodriguez, 66 M.J. 201, 204 (C.A.A.F. 2008).
[52] Rodriguez, 66 M.J. at 204, n. 4 (citing Stromberg).
[53] Hedgpeth v. Pulido, 555 U.S. 57 (2008)(per curiam).
[54] Chapman v. California, 386 U.S. 18 (1967).

instructional error - even one of constitutional dimension - could be reviewed for harmlessness.[55] The Court of Appeals for the Tenth Circuit Court, in Holly, applied a Chapman harmless-error analysis on an instructional error where "the error . . . was merely an instructional error and did not involve a theory of conviction which could not constitute a lawful foundation for a criminal prosecution."[56]

Appellant acknowledges that most constitutional violations are subject to harmless error review.[57] But as Zant v. Stephens makes clear, there are two rules flowing from Stromberg. The first "requires that a general verdict must be set aside if the jury was instructed that it could rely on any two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground."[58] The second rule "encompasses a situation in which the general verdict on a single-count indictment or information rested on both a constitutional and an unconstitutional ground."[59] Appellant respectfully submits that while the first type of Stromberg errors dealing with is amenable to harmless-error review, the second type is not because the government based its prosecution, in part, on a charge that constitutionally protected activity is unlawful. This was reason enough for the Supreme Court to set aside the conviction in Street, which was decided after Chapman, without

---

[55] Pulido, 555 U.S. at 60.
[56] Holly, 488 F. 3d at 1307.
[57] Neder v. United States, 527 U.S. 1, 8 (1999).
[58] Zant v. Stephens, 462 U.S. at 881.
[59] Id., at 882.

conducting a harmless-error review. This Court, in Cendejas, reviewed a Stromberg error for harmlessness (and concluded that the error was not harmless beyond a reasonable doubt), but this case is distinguishable. In Cendejas the military judge applied a definition of child pornography, part of which was later found to be unconstitutional, and this Court concluded that it "must assume that he applied the full scope of the 18 U.S.C. § 2256(8) definition to his finding of guilt," where the military judge "did not state or suggest that he would disregard those portions of the definition that were later found to be unconstitutional."[60] In this case it wasn't the definition that was constitutionally infirm; rather, it was the constitutionally protected nature of the conduct at issue.

As the Court of Appeals for the Tenth Circuit noted in Holly, a harmless error review of a Stromberg error is "both unnecessary and impossible" where there are "no circumstances under which a conviction based on [an] invalid ground could be upheld."[61] And that is the case here. The government offered six separate examples of conduct for conviction, four of which were constitutionally invalid. And it makes no difference that the remaining two may have been constitutionally valid (a point Appellant does not concede) because there is nothing in the record to conclusively indicate that the members convicted Appellant based only on conduct that is not constitutionally protected.

---

[60] Cendejas, 62 M.J. at 339.
[61] Holly, 488 F.3d at 1305.

Even if this Court were to conduct a harmless error analysis, the government cannot meet its burden to show the error was harmless beyond a reasonable doubt[62] where two thirds of the images – four out of six – introduced as evidence in support of the charge are not child pornography as a matter of law and were therefore constitutionally protected. There is no way to determine with any amount of certainty whether the members based the conviction on any or all of the constitutionally protected images despite the defense's effort to establish a record to assist reviewing authorities in determining the precise conduct upon which Appellant's conviction rests.

Appellant respectfully submits that the conviction of possession of child pornography under Specification 2 of Charge II and the sentence must be set aside.

[62] See United States v. Othuru, 65 M.J. 375 (C.A.A.F. 2007)(burden is on the government to show an error of constitutional dimension is harmless beyond a reasonable doubt).

Conclusion

WHEREFORE, appellant respectfully requests this Court grant the requested relief.

For: William E. Cassara
PO Box 2688
Evans, GA 30809
(706)860-5769
bill@williamcassara.com
USCAAF No. 26503

Lead Counsel for Appellant

John L. Schriver
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703)693-0715
USCAAF No. 35629

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Barberi, Crim. App. Dkt. No. 20080636, Dkt. No. 11-0462/AR, was delivered to the Court and Government Appellate Division on October 14, 2011.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736