IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	REPLY 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:

Appellant hereby replies to the government's Answer, filed in this Court on 14 November 2011.

Initially, Appellant notes that the government argues, "It is not the military judge's responsibility to conduct a legal sufficiency finding on images that could constitute child pornography before admitting or allowing the images to be the basis of a conviction."[1] Respectfully, given that only relevant evidence is admissible and irrelevant evidence is inadmissible, it is the military judge's responsibility to ensure that only relevant evidence is admitted at trial.[2] This is particularly so where, as here, the defense specifically raised an objection to the introduction of these images based on relevance.[3]

The government argues that Appellant "cites no case in which a Court has set aside a general verdict because one of the possible bases of conviction was [not] unconstitutional as in

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[1] Answer at 6.
[2] Mil. R. Evid. 402.
[3] JA at 15.

Stromberg . . . but merely unsupported by the evidence."[4] That is true. Any case in which one of the possible bases for conviction was not unconstitutional would be inapposite to this case. To be clear, despite the government's attempt to recast it as such, this is not an "insufficiency of the evidence" or "failure of proof" case. The issue in this case is that the "grounds" or "theory" or "basis" upon which Appellant's conviction may have rested was constitutionally protected activity, falling squarely within the ambit of Stromberg.

The government cites Griffin v. United States[5] in support of its position, but Griffin is distinguishable from this case. In Griffin, the petitioner and two co-defendant's were charged with a conspiracy having two objects. The government proved both objects as to the co-defendant's but only one as to the petitioner. The Supreme Court affirmed because the conviction was legally supportable on one of the submitted grounds. But Griffin is merely a case involving alternative bases, both of which, if proven, would have been unlawful. This case also involves alternative bases, two of which may have been unlawful (a point Appellant does not concede). But the other four bases were not only not unlawful, but were constitutionally protected activity.

The government cites Tenner v. Gilmore[6] for the proposition that "where the flaw is in the proof, as opposed to in the

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[4] Answer at 9.
[5] Griffin v. United States, 502 U.S. 46 (1991).
[6] Tenner v. Gilmore, 184 F.3d 608 (7th Cir., 1999)

statute itself, the reviewing court should assume that the jury found that the defendant committed the acts that the facts support." While Tenner does discuss legal flaws as opposed to flaws in the proof, in discussing legal flaws it does not limit its holding to "the statute itself," as the government seems to suggest. Indeed, the word "statute" doesn't even appear in the opinion. And although the facts in Tenner are inapposite to this case, the discussion of the law in Tenner actually supports Appellant's position. The Court in Tenner discussed the difference between legal flaws and flaws in the proof as expressed in the cases of Griffin and Yates v. United States[7]. The Court stated,

> A jury may be told, for example, that the law forbids the doing of either A or B, and the verdict shows that the jury found that the defendant did one of these things, but not which. If one of the two is not a crime, Yates concludes, a new trial must be held. For all the court can tell, the jury found that the defendant committed the act that law does not condemn.[8]

This case differs slightly from the hypothetical in Tenner; in this case the members were told that the law forbids A, and were then shown six examples of what the government claimed was evidence of A but in reality only two of the six may have been evidence of A and the other four were evidence of constitutionally protected activity. Since possession of four of the six images was not a crime, and was in fact constitutionally protected, the conviction must fall because

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[7] Yates v. United States, 354 U.S. 298 (1957).
[8] Tenner, 184 F.3d at 611.

"for all the court can tell, the jury found that the defendant committed the act that the law does not condemn."[9]

The government also cites Turner v. United States[10] for the proposition that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." But unlike this case, Turner did not involve constitutionally protected activity.

The government argues that Appellant "seeks . . . an extension and expansion of Stromberg to a context to which no court has ever applied it before."[11] Respectfully, Appellant seeks no such thing. While it is true that Appellant believes that Stromberg applies "to the evidence presented not just the law or instructions," that is because the application of Stromberg is not as narrow as the government would have this court believe. The cases that apply the Stromberg rule do not speak only in terms of "law" or "instructions"; they speak in terms of "grounds" and "theories" and "bases." In this regard, these issues must be decided in context, considering not only the statute and instructions as the government has argued, but also the manner in which the government attempted to prove the specification, including whether the government put on evidence of constitutionally protected activity as a "grounds", "theory" or "basis" upon which the members could convict.

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[9] Tenner, at 611.
[10] Turner v. United States, 396 U.S. 398 (1970).
[11] Answer at 8.

As Appellant noted in his initial Brief to this Court, there was a Stromberg error in this case, and that error is not amenable to harmless error review because there are "no circumstances under which a conviction based on [an] invalid ground could be upheld."[12] Even if this Court reviews the error for harmlessness, the government has not met its burden to show that the error was not harmless beyond a reasonable doubt where two-thirds of the images presented to the members were not child pornography as a matter of law.

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

WHEREFORE Appellant so prays.

Respectfully submitted,

FOR

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[12] United States v. Holly, 488 F.3d 1298, 1305 (10th Cir. 2007).

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 November 16, 2011.

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