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. Staff Sergeant (E-6) **CHRISTOPHER A. BARBERI** U.S. Army, Appellant	) FINAL BRIEF ON BEHALF OF) APPELLEE))) Crim. App. Dkt. No. 20080636)) USCA Dkt. No. 11-0462/AR))))

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

Granted Issue

WHETHER THE GENERAL VERDICT OF GUILTY 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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(3), UCMJ, which allows review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."[2]

Statement of the Case

Appellant was tried by a general court-martial, officer and enlisted members, on March 26, 2008, April 17, 2008, May 14 2008, June 23, 27, 30, 2008, July 2-3, 2008 and July 11, 2008. Contrary to his pleas, he was found guilty of one specification of sodomy of a child who had attained the age of 12 but had not attained the age of 16 and one specification of possession of

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[1] *United States v. Barberi*, 2011 WL 748378 (Army Ct. Crim. App. February 22, 2011); 10 U.S.C. § 866(b).
[2] 10 U.S.C. §867(a)(3).

child pornography, in violation of Articles 125 and 134 Uniform Code of Military Justice (UCMJ).

The panel sentenced appellant to reduction to E-1, confinement for two years and a bad-conduct discharge.[3]

The Army Court affirmed the findings and sentence on February 22, 2011.[4] Appellant filed a petition for review with this Court on April 22, 2011. Pursuant to Rule 21(c)(2)(i), the Government filed an opposition to the petition without formal briefing. This Court granted review on September 16, 2011. Appellant filed his brief under Rule 25 on October 14, 2011.

Statement of Facts

Prior to the trial, the government moved for admission of Prosecution Exhibits (PEs) 21-26.[5] The military judge discussed which images went to support which specifications and charges.[6] The military judge made a comment to both counsel concerning unreasonable multiplication of charges given which specifications and charges were supported by PEs 21-26.[7]

The government moved to dismiss specifications 1 and 3 of Charge II.[8] The government also amended specification 2 of

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[3] JA 43.
[4] JA 4.
[5] JA 24.
[6] JA 16.
[7] JA 17.
[8] JA 19.

Charge II by excepting the words "more than three images" and substituting the words "one or more images".[9]

It was after this point in the court-martial that Judge Grammel was replaced by Judge Marchessault.[10] At the conclusion of the government's case in chief, trial defense counsel moved for a finding of not guilty concerning the child pornography specification pursuant to R.C.M. 917.[11] Trial defense counsel argued the images could never be considered child pornography.[12] Trial counsel did not argue during the R.C.M. 917 motion. The military judge reviewed PEs 21-26.[13] The military judge defined the standard of review, and the definitions the military judge used when deciding the motion.[14] The military judge then stated "[b]ased on the foregoing statement of law, the defense motion for a finding of not guilty is denied."[15]

When discussing possible instructions for the panel, trial defense counsel 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

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[9] JA 19-20.
[10] JA 21.
[11] JA 33.
[12] JA 33-34.
[13] JA 34.
[14] JA 35-36.
[15] JA 36.

26, if any, they find to constitute child pornography."[16] The defense believes that will enable the appellate authorities to determine if, in fact, child pornography was found by the panel."[17] The trial counsel responded to this argument by citing R.C.M. 918 which states that "members may not make special findings."[18] The military judge ruled he was bound by the Manual for Courts-Martial and the defense request was denied.[19]

The panel found the appellant guilty of all the specifications and charges.[20] There were no findings and substitutions for any specifications nor did panel return a not guilty findings for any specifications.

Summary of Argument

The general verdict in this case does not violate the exceptions to the general verdict rule in *Stromberg* or *Walters*.[21] This Court can review evidence of legal sufficiency of a conviction without having to extend the *Stromberg* rule from the constitutionality of the law to include the legally sufficiency of all the evidence raised to support an offense. Even if this Court extends *Stromberg* to the evidence presented at trial,

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[16] JA 39.
[17] JA 39.
[18] JA 39.
[19] JA 40.
[20] JA 42.
[21] *See Stromberg v. California*, 283 U.S. 359 (1931) *and United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003).

there is no harm to appellant as the Army Court properly found that he did possess child pornography.

Argument

WHETHER THE GENERAL VERDICT OF GUILTY 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*.[22]

Law and Argument

It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds.[23]

It is the duty and responsibility of the judge to decide the law applicable to a case and to instruct the panel on what the law consists of. It is the panel's duty and responsibility to ascertain the truth of the case from a factual standpoint based on the evidence presented to it. It is the panel's duty

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[22] *United States v. Rodriguez*, 66 M.J. 201 (C.A.A.F. 2008); *United States v. Brown*, 65 M.J. 356, 358-59 (C.A.A.F. 2007).
[23] *Griffin v. United States*, 502 U.S. 46, 49 (1991). In this case the grounds for finding appellant guilty of possession of child pornography were found in PEs 21-26.

and responsibility to apply the law to the facts, and by this application of law to fact and of fact to law, arrive at a verdict.[24] 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. Likewise, "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law."[25]

With minor exceptions, a "court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit."[26] In returning such a general verdict, a court-martial panel resolves the issue presented to it: did the accused commit the offense charged, or a valid lesser included offense, beyond a reasonable doubt? A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means,

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[24] *See generally,* Department of the Army Pamphlet 27-9, "The Military Judges Benchbook" (1 January 2010) Chapter 2, § V, paragraph 2-5 (page 36).
[25] *Griffin*, 502 U.S. at 59.
[26] *Brown*, 65 M.J. at 359; *quoting United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F.1997).

as long as the evidence supports at least one of the means beyond a reasonable doubt.[27]

Two of the exceptions to the general verdict rule are where there are constitutional issues with the law[28] and when a panel finds an accused not guilty of certain conduct by striking the language "on divers occasions" from a specification.[29]

In reviewing constitutional issues of the general verdict rule, it has long been settled that when a case is submitted to the jury on alternative theories, and the panel may have relied on an unconstitutional theory, the conviction must be set aside.[30] The holding of *Stromberg* does not necessarily stand for anything more than the principle that, 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.[31]

Stromberg does not apply to general verdicts that may have been based upon insufficient evidence regarding one of several

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[27] Brown, 65 M.J. at 359; quoting *Griffin*, 502 U.S. at 49-51; *Schad v. Arizona,* 501 U.S. 624, 631 (1991) (plurality opinion) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone.").
[28] *See Stromberg v. California*, 283 U.S. 359 (1931).
[29] *See United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003).
[30] *Leary v. United States*, 395 U.S. 6, (1969) *and Stromberg v. California*, 283 U.S. 359 (1931).
[31] *Griffin*, 502 U.S. at 53.

bases for the verdict.[32] As the basis for conviction includes PEs 21 and 22 which are child pornography, the insufficiency of PEs 23 through 26 does not invoke *Stromberg*. Rather, as long as one or more images of PEs 21-26, are child pornography, the conviction may stand.

When there are multiple factual predicates to a charge, one of which is unsupported by the evidence at trial, a court may generally conclude that the jury convicted on the factually supported charge.[33] In cases where the flaw is in the proof, as opposed to in the statute itself, the reviewing court should assume that the jury found that the defendant committed the act that the facts support.[34]

Appellant argues that the *Stromberg* should also apply to the evidence presented not just the law or instructions.[35] What appellant seeks is an extension and expansion of *Stromberg* to a context to which no court has ever applied it before. However, it is not the first time an appellant has tried to extend *Stromberg*.

In *Griffin*, the Supreme Court examined whether a general verdict of guilty could survive under circumstances where it

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[32] *Griffin,* 502 U.S. at 59-60.
[33] *Id.*
[34] *Tenner v. Gilmore,* 184 F.3d 608, 611 (7th Cir. 1999); (explaining that courts assume that juries can distinguish good proof from bad but do not separate good law from bad).
[35] Appellant's Brief at 12-13.

left in doubt whether the jury had convicted petitioner of conspiring to defraud the IRS, for which there was sufficient proof, or of conspiring to defraud the DEA, for which there was not sufficient evidence.[36] Petitioner in *Griffin* argued that such a verdict violated the Due Process Clause of the Constitution, and argued that the Supreme Court cases of *Stromberg* and *Yates* stood for petitioner's argument.[37] The Supreme Court rejected these arguments.

Appellant, like the petitioner in *Griffin*, cites no case in which a Court has set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in *Stromberg*, nor illegal as in *Yates*[38], but merely unsupported by sufficient evidence.[39] The Supreme Court noted that "if such invalidation on evidentiary grounds were appropriate, it is hard to see how it could be limited to alternative bases of conviction that constitute separate legal grounds;" this underlying principle would apply equally, as the Supreme Court stated, for example, to an indictment charging murder by

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[36] *Griffin*, 502 U.S. at 48.
[37] *Griffin*, 502 U.S. at 51.
[38] *Yates v. United States*, 354 U.S. 294 (1957). *Yates* involved a single-count federal indictment charging a conspiracy (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach.
[39] *Griffin*, 502 U.S. at 56.

shooting or drowning, where the evidence of drowning proves inadequate.[40] Additionally, appellant's argument contradicts the United States Supreme Court in *Turner*.[41]

Turner involved a claim that the evidence was insufficient to support a general guilty verdict under a one-count indictment charging the defendant with knowingly purchasing, possessing, dispensing, and distributing heroin not in or from the original stamped package, in violation of 26 U.S.C. § 4704(a) (1964 ed.).[42] The Supreme Court held that the conviction would have to be sustained if there was sufficient evidence of distribution *alone*.[43] The Supreme Court of the United States set forth as the prevailing rule: "[W]hen 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."[44]

In the case *sub judice*, if any image of the six was not child pornography, the panel could still find appellant possessed one or more images of child pornography. The proper review of this case is not through the lens of *Stromberg*, but

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[40] *See Griffin*, 502 U.S. at 56 and *Schad*, 501 U.S. at 630-631.
[41] *See Griffin*, 502 U.S. at 56; *Turner v. United States*, 396 U.S. 398 (1970).
[42] *Turner*, 396 U.S. 398; *see also Griffin*, 502 U.S. at 56.
[43] *Turner*, 396 U.S. at 420; *see also Griffin*, 502 U.S. at 56.
[44] *Turner*, 396 U.S. at 420; *see also Griffin*, 502 U.S. at 56-57.

rather through legal sufficiency of the evidence under this Court's powers under Article 67, UCMJ.

Assuming *arguendo*, this Court applies *Stromberg* to the evidence presented and not just the law and instructions based on the law, this Court should test the error for prejudice.[45]

This Court should use its legal sufficiency powers under Article 67, UCMJ, to find whether there is any constitutional issue with the general verdict, to see if such an error is harmless beyond a reasonable doubt. The Army Court found appellant did possess two images of child pornography.[46] Any reliance by the panel that PEs 23-26, which were not child

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[45] *Chapman v. California*, 386 U.S. 18, 21-22 (1967); "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

[46] *Barberi*, 2011 WL 748378 at 1; "We find the remaining two prosecution exhibits—21 and 22-constitute child pornography."

pornography, is nullified through the appellant having PEs 21 and 22 which are child pornography.

As there is no violation of the constitutional issues of general verdicts as in *Stromberg*, the government turns to the "divers occasions" exception to the general verdicts rule, where an appellate court "cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty."[47] When the language "divers occasions" is struck from a specification by the panel, the members had found the appellant "not guilty" of some unspecified occasions.[48]

However, when members find an accused guilty of an "on divers occasions" specification, they need only determine that the accused committed two acts that satisfied the elements of the crime as charged—without specifying the acts, or how many acts, upon which the conviction was based.[49]

Appellant was not found not guilty of possessing child pornography. The opposite occurred; he was convicted of possessing "one or more images" of child pornography that PEs 21-22 supported, and the Army Court affirmed the legal and factually sufficiency of PEs 21 and 22 as child pornography.

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[47] *Walters*, 58 M.J. at 395.
[48] Id.
[49] *Rodriguez*, 66 M.J. at 203.

Conclusion

The panel properly convicted appellant of possessing one or more images of child pornography. The panel, through its general verdict, properly applied the instructions from the military judge to the six images admitted into evidence. After applying the instructions, the panel found one or more of these images constituted child pornography. *Stromberg* does not control this case, but rather Article 67 applies to determine if the findings of the panel are correct in law.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on November 14, 2011 and contemporaneously served electronically on civilian defense counsel, Mr. William Cassera and bill@williamcassara.com and military appellate defense counsel, Captain John Schriver at john.schriver1@us.army.mil.

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