IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20120499
Private (E-2) **GARY D. WARNER,** United States Army, Appellant	)	USCA Dkt. No. 13-0435/AR

JACOB D. BASHORE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703)693-0651
USCAAF# 35281

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
USCAAF# 26450

KEVIN BOYLE
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF# 35966

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

Issues Granted

I

WHETHER SPECIFICATION 3 OF CHARGE I IS VOID FOR VAGUENESS BECAUSE THE APPELLANT WAS NOT GIVEN FAIR NOTICE THAT THE CHARGED CONDUCT OF POSSESSING "SEXUALLY SUGGESTIVE" MATERIAL OF MINORS AS "SEXUAL OBJECTS" WAS FORBIDDEN AND SUBJECT TO CRIMINAL ACTION.

II

WHETHER SPECIFICATION 3 OF CHARGE I IS LEGALLY INSUFFICIENT WHEN THE GOVERNMENT FAILED TO PROVE THAT THE POSSESSION OF CONSTITUTIONALLY PROTECTED IMAGES OF MINORS AS "SEXUAL OBJECTS" AND IN "SEXUALLY SUGGESTIVE" POSES HAD A DIRECT AND PALPABLE EFFECT ON THE MILITARY MISSION AND THEREFORE ACTUALLY SERVICE DISCREDITING AS REQUIRED BY *UNITED STATES V. WILCOX*, 66 M.J. 442 (C.A.A.F. 2008).

Statement of the Case

On May 20, 2013, this Honorable Court granted appellant's petition for review. On July 10, 2013, appellant filed his

final brief with this Court. The government responded on August 7, 2013. On August 12, 2013, this Court granted an extension of time for appellant to file a reply brief, up to and including August 26, 2013. Appellant replies herein.

Argument

1. The government's argument is based on the wrong facts.

The government's brief is premised on a serious mischaracterization of the facts. To prove Specification 3 of Charge I, the government admitted Prosecution Exhibit 7. (JA 12). Prosecution Exhibit 7 includes three folders, each specific to a different specification—Specifications 1, 2, and 3 of Charge I.[1] The folder relating to Specification 3 contains twenty-three images, none of which contain any nudity.[2] Those images are captured in footnote 10 of the government's brief.[3]

The government's argument that this Court's recent decision in *United States v. Barberi* "must be overturned" is largely based on three images containing some nudity, which the

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[1] The folders in Prosecution Exhibit 7 refer to Specifications 4, 5, and 6. Prior to arraignment, the original Specifications 1, 2, and 3 of Charge I were dismissed, and the military judge renumbered Specifications 4, 5, and 6 to 1, 2, and 3, respectively. (JA 4; R. at 6-7). Thus, the folder titled "chg1spc6" refers to the allegations in the renumbered Specification 3 of Charge I, the specification relevant to both granted issues.

[2] The Brief on Behalf of Appellant incorrectly states that some images depict partially nude individuals. (Appellant's Br. at 5, 15, 16).

[3] Three of the images are duplicates, leaving only twenty unique images.

government lists in footnote 8 of its brief. However, these images *are not* located in the folder on Prosecution Exhibit 7 related to Specification 3. Rather, these images, which the government argues now on appeal are unlawful depictions of "child erotica," are located in the folder relating to Specifications 1 and 2—the specifications alleging child pornography.[4] At trial, the government never claimed that these three images were relevant to Specification 3 alleging PV2 Warner possessed "images that depict minors as sexual objects or in a sexually suggestive way . . . ." (JA 4; *see also* JA 13-14 (Special Agent Kreiner states that all fifty-four of the images, which include these three images, are suspected child pornography)). Not only is there no evidence that the military judge considered these three images when finding PV2 Warner guilty of Specification 3, the military judge specifically found these three images to be child pornography under Specification 2

[4] The three images listed by the government in its brief and alleged and found by the military judge to be child pornography in Specification 2 (he found PV2 Warner not guilty of these same images in Specification 1) are clearly not child pornography as they merely depict some nudity with no display, lascivious or otherwise, of the genitalia. 18 U.S.C. § 2256(2)(A). It appears that the government identified these three images alleged to be child pornography at trial, and now seek to reclassify them as "child erotica," because they are the only three images located in the child pornography folders that do not depict any genitalia or pubic area.

as indicated by his special findings.[5] (R. at 107). Thus, it is improper for the government to argue, and this Court to consider, these three images when analyzing PV2 Warner's claims against Specification 3. *See United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009)(citing *Dunn v. United States*, 442 U.S. 100, 106-07 (1979); *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980)).

This Court held in *United States v. Barberi* that images depicting nudity of children, and not amounting to sexually explicit conduct, are constitutionally protected under the First Amendment. 71 M.J. 127, 130-31 (C.A.A.F. 2012). The government asks this Court to overturn that holding. (Gov't Br. at 5, 21-24, 38). However, as it relates to Specification 3, the direct holding in *Barberi* is not at issue because the images that PV2 Warner stands convicted of contain no nudity. Rather, the images contain girls in swimsuits and other attire that fully cover the girl's genitalia, pubic area, and breasts—images that are much less revealing than those in *Barberi* that depicted the child's breasts. *See also United States v. Roderick*, 62 M.J.

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[5] Contemporaneously with this reply brief, PV2 Warner filed a request for this Court to grant an additional assignment of error as these images are protected and legally insufficient to constitute child pornography, as convicted in Specification 2. The government tacitly admits this deficiency by its characterization of these images as "child erotica." Thus, as some of the images that the military judge found to be child pornography are clearly not so, this general verdict of guilt must be set aside. *See Barberi*, 71 M.J. at 131-33.

425, 430 (C.A.A.F. 2006)(finding full and partially nude pictures of Roderick's daughter to be non-criminal); *cf. New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982)("nudity, without more is protected expression").

A large portion of the government's argument rests on the notion some state laws prohibit certain aspects of child nudity. That discussion is irrelevant to Specification 3. What the government does not cite is any statute or regulation that prohibits possession, or creation, of images that contain no nudity or lascivious displays of genitalia. Likewise, the government cites no case law finding such images are unlawful under any statutory scheme or unprotected by the First Amendment.

Finding no support for the proposition that images of clothed children are not protected, the government spent little time discussing the images relevant to Specification 3. Upon review of those images, it is evident why—all of the girls are wearing a shirt or bathing suit top that are commonly worn by girls of their age, some of the girls appear to be of an age of majority,[6] some do not depict even so much as a portion of the

[6] !White Girl Jailbait BANG #025 Ass in a Thong kdquality pedo lolita pthc hussyfan preteen ptsc nymphets novinhas 9 ~1.jpg; Pure Jailbait 007 - White Girl Suck Cock! Daughter in a Thong pedo Lolita pthc hussyfan preteen pussy ptsc nymphets novinha ~1.jpg (twenty of the images contain this same title with a

cheeks of the girl's buttocks,[7] and, at worst, some depict a portion of the cheeks of the girl's buttocks. Thus, the government is left with a cursory argument, made without a citation of support, that the clothing depicted is "inappropriate . . . for their age . . . ." (Gov't Br. at 25). That sentiment is far from universally held,[8] nor would it impact the constitutional and legal claims before this Court.

This Court's review of the images will make it apparent why they retain their constitutional protection as they are a far cry from the sexually explicit conduct prohibited by Congress in 18 U.S.C. § 2256, and now the President in Article 134, UCMJ.[9] For example, two images portray a girl who could be anywhere from the age of fifteen to twenty years-old.[10] She is wearing a top that completely covers her breast and shoulder areas and a

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different number; hereinafter, these images will be referenced solely by the assigned number); image 042.

[7] Images 002, 007, 008, 017, 042, 046, and STUPID YOUNG GIRLS IN THONGS #001 JailBait - pedo Lolita pthc hussyfan preteen pussy ptsc nymphets novinhas 9yo 10yo 11yo ~1.jpg.

[8] For a short discussion regarding the rise in popularity of thongs for girls from seven to sixteen years-old, *see* http://en.wikipedia.org/wiki/Social_impact_of_thong_underwear (last visited Aug. 23, 2013). Additionally, a simple google.com search reveals string bikinis are widely available on the internet for babies, toddlers, and preteens.

[9] In December 2011, the President enumerated a child pornography provision in Article 134, UCMJ, via Executive Order 13593. Like Congress before him, the President did not find harm to children that warranted an expansion of the criminalization of sexual material depicting children and the potential further erosion of First Amendment protections.

[10] Images 007 and 042.

bottom that completely covers her pubic area and buttocks. Teenage girls at the beach wear less clothing. The only aspect of these images that make it of any interest is the distasteful words imposed on top of the images.[11] These words expressing distasteful ideas are protected by the First Amendment, and are no less protected by placing them on a protected image as opposed to a clean sheet of paper.

Another example of a charged protected image is image 017. Image 017 is a collage of two photographs—a headshot and an innocuous photograph of the back and side of a teen girl depicting her in a full shirt and a pair of what are commonly known as "boy shorts," akin to what a girl would wear while playing volleyball. This image may have come from a clothing advertisement. The government tried to criminalize its simple possession because someone deemed her appearance inappropriately "sexually suggestive." The First Amendment protects individuals from such government overreaching, even when distasteful words are imposed on top of the image.

The remaining images are also protected speech as they contain no sexually explicit conduct or even mere nudity. As a

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[11] Private Warner was not charged for the words imposed on any of these images. To be criminal at all, the words would have to be deemed obscenity. Private Warner was not charged with possessing any obscene materials nor did the government put on any evidence that these materials were obscene. *See* 18 U.S.C. §§ 1460-1470; *Miller v. California*, 413 U.S. 15, 24 (1973).

result, this Court should hold that the finding of guilty to Specification 3 of Charge I is legally insufficient because all twenty-three images are constitutionally protected and the government failed to charge any facts or put on any evidence that would remove them from this status. *See United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008); *see generally United States v. Castellano*, 72 M.J. 217, 222 (C.A.A.F. 2013)(citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

2. The government's brief demonstrates the vagueness of the terms "sexual objects or in a sexually suggestive way."

This Court does not know what definitions the military judge used or the elements that make up the offense. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983)("the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness . . . ."). The government brief navigates a maze of inferences to tie the phrase "sexual objects or in a sexually suggestive way" to "child erotica," which then it attempts to tie to "lewd" via a footnote in the Supreme Court's decision *Osborne v. Ohio*, then to "lascivious," and finally to the factors enunciated in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (attempting to define the phrase "lascivious exhibition of the genitals or pubic area"). However, this calculus appears to be an invention of the Government Appellate Division as there is no

evidence on the record that the government, defense, or military judge used any of this analysis at trial, demonstrating the lack of notice to PV2 Warner of what conduct is proscribed and how he was convicted. Under the government's broad analysis, a person could be charged with and convicted of possessing images used in advertisements, created on TV from shows like "Toddlers and Tiaras," and taken while at dance performances, beauty pageants, and swimming locations. This is constitutionally unacceptable.

More importantly, there is no case law that directly ties "child erotica" containing no depictions of the genitalia or pubic area to "lewd," "lascivious," and the *Dost* factors. Rather, the term lewd is commonly used when discussing obscenity, and both lewd and lascivious are used in relation to an explicit display of genitalia. What lewd has not been used to define are images of clothed or partially nude children.[12]

The government cites to *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), to emphasize that "nudity is not an essential requirement for an image to be determined to be lewd." (Gov't Br. at 24). That statement is true when the focus of the image is on the child's genitals. The entire analysis of *Knox* is

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[12] The government's argument that Ohio prohibits depictions of lewd nudity that does not contain the genitals is not supported by case law. Rather, Ohio courts have held that possession of nude pictures of children is not a crime and is protected, and a crime occurs only "if the photographs depict a lewd *and* graphic focus on the genitals." *State v. Graves*, 919 N.E.2d 753, 755-56 (Ohio Ct. App. 2009)(emphasis added).

premised on the lascivious exhibition of genitals. 32 F.3d at 743-52. If the focus is on the genitals (factor 1 from *Dost*), the factor pertaining to nudity is less important (factor 4). If the focus of the image is not on the genitals yet still displays genitalia or the pubic area, the factor pertaining to nudity is of much greater importance. If the genitals are not depicted at all, such as in this case, *Knox* and *Dost* are inapplicable, as further discussed *infra* in section 3.

The government also cites to *United States v. Vosburgh*, 602 F.3d 512 (3d Cir. 2010), to support its claim of an adequately alleged specification because *Vosburgh* states that "child erotica" consists of depictions of minors "as sexual objects or in a sexually suggestive way . . . ."[13] (Gov't Br. at 30). The government's citation actually supports PV2 Warner's claim, not the government's, as all parties in *Vosburgh* acknowledged that these materials were legal to possess. *Vosburgh* simply stated that the material not amounting to child pornography could be used at trial to show the knowing possession of child pornography. 602 F.3d at 538. *Vosburgh* in no way put PV2 Warner on notice that his conduct was anything but legal, and it did not attempt to define the bounds of supposed "child erotica."

[13] The definition given in *Vosburgh* was merely the government's position in that case, not a judicial approval of the definition. 602 F.3d 520 n.7.

The government also relies on the Army Court's unpublished opinion in *United States v. Anderson*, ARMY 20080669, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010)(mem. op.), to support its *Vosburgh* analysis. (Gov't Br. at 30-31). *Anderson* was issued approximately seventeen months after PV2 Warner obtained the images alleged in Specification 3, and two months prior to the material being seized. (JA 4). It provided him no notice that possession of the images was unlawful, nor did it define what could be unlawful.

The Army Court in *Anderson* acknowledged the definition mentioned in *Vosburgh*, but more importantly it stated that "child erotica" does not violate federal law, there are "significant First Amendment and Due Process concerns" with charging it, and the Army Court did not opine on whether it was unlawful to possess such images under Article 134, a matter still of first impression for any military appellate court. *Anderson*, 2010 WL 3938363, at *1, 9 n.11. Further, after acknowledging *Vosburgh*, the Army Court still could not define child erotica. Rather, it pondered, "[W]hat would constitute the offense and how would a service member be on notice of what conduct is prohibited?" *Id.* at *9 n.11.

Anderson directly supports PV2 Warner's arguments that he was not on notice that possession of these images was unlawful nor could anyone at his court-martial define the offense with

which he was charged. *See* Assoc. Prof. Mary G. Leary, *Death to Child Erotica: How Mislabeling the Evidence Can Risk Inaccuracy in the Courtroom*, 16 Cardozo J.L. & Gender 1, 16, 20 (2009) (describing the plethora of definitions attributed to "child erotica" and emphasizing that "the distinction between child abuse images/child pornography and so-called 'child erotica' is critically important [because i]t means the difference between protected and unprotected speech").

3. The government's reliance on *Dost* is misplaced.

As the Army Court in *Anderson* could not define "child erotica," and no other statute, regulation, or case defines the material, the government, for the first time on this appeal, attempts to define the matter by using the *Dost* factors. Its entire argument of fair notice appears to rest on the use of *Dost*—"the determination of whether an image is 'child erotica' turns on whether it meets the definition of lewd or lascivious under *Dost*." (Gov't Br. at 31).

The government ignores case law that specifically limits *Dost* to narrowing the statutory definition of "lascivious exhibition of the genitals or pubic area." That was *Dost's* sole purpose. 636 F. Supp. at 832. When this Court adopted *Dost* in *Roderick*, it also specifically limited *Dost* to analysis of images that depict genitals or the pubic area—a "prerequisite to *any* analysis under *Dost*." 62 M.J. at 430 (emphasis added).

That position was reaffirmed last term in *Barberi*. Prior to finding the nude photographs constitutionally protected, this Court stated that "as four of the six images did not contain an exhibition of SD's genitals or pubic area, there is no need for further inquiry into the definition of 'lascivious' or the *Dost* factors." 71 M.J. at 130. This Court did not use the *Dost* factors to analyze whether the four images were "lewd."

Additionally, the Army Court in *Anderson* specifically rejected the *Dost* factors when dealing with "child erotica." 2010 WL 3938363. It stated, "We stress that these factors all relate to whether the image depicts a lascivious exhibition *of the genitals or pubic area,* the depiction that violates the law. The *Dost* factors do not address other lascivious images lacking an exhibition of the genitals or pubic area, such as so-called 'child erotica.'" *Id.* at *8 (emphasis in original). Thus, as this Court presumes that the military judge followed the law, it must presume that he did not consider the *Dost* factors when analyzing the clothed images pertaining to Specification 3. *See United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

Knowing this, the government has provided no support for the use of *Dost* as it relates to the images in Specification 3 or the legally insufficient child pornography contained in Prosecution Exhibit 7 for Specification 2 that it now claims is unlawful and non-protected "child erotica." Thus, it is not

clear what the elements were in this case or what definitions the military judge used to define "sexual objects or in a sexually suggestive way." As such, PV2 Warner was not put on notice that his conduct was prohibited as possession of these images is actually lawful and protected, and his purported crime remains largely undefined.

4. This Court should dismiss Specification 3 of Charge I.

Private Warner asserts that all of the images relating to Specification 3 are constitutionally protected, and this Court should set aside and dismiss Specification 3 as being legally insufficient. Additionally, PV2 Warner asserts that the government failed to prove beyond a reasonable doubt that PV2 Warner's conduct violated clause 2 of Article 134, UCMJ, because it presented no evidence regarding this terminal element. This failure should also merit the specification being set aside and permanently dismissed.

However, if this Court determines that Specification 3 was not void for vagueness and the government met its burden in proving some, but not all, of the images are unlawful and unprotected, this Court should set aside and dismiss Specification 3 as an impermissible general verdict. *Barberi*, 71 M.J. 131-33 (citing, *inter alia*, *Stromberg v. California*, 283 U.S. 359 (1931)). The government's silence on PV2 Warner's argument regarding a general verdict is indicative of a tacit

admission that this Court must then find prejudice because this Court "cannot know which images formed the basis for the finding of guilt . . . ." *Id.* at 132. As such, the constitutional error was not harmless beyond a reasonable doubt and requires dismissal. *Id.* at 133.

Conclusion

Accordingly, PV2 Warner requests that this Honorable Court set aside and dismiss Specification 3 of Charge I and return his case for a sentence rehearing.

JACOB D. BASHORE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0651
USCAAF# 35281

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
USCAAF# 26450

KEVIN BOYLE
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 35966

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Warner, Crim. App. Dkt. No. 20120499, Dkt. No. 13-0435/AR, was delivered to the Court and Government Appellate Division on August 26, 2013.

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