19 May 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee/ Cross-Appellant* v. Senior Airman (E-4) **JUSTIN M. PIOLUNEK,** USAF, *Appellant/ Cross-Appellee.*	**BRIEF ON BEHALF OF APPELLANT/CROSS-APPELLEE** USCA Dkt. No. 14-5006/AF USCA Dkt. No. 14-0283/AF Crim. App. Dkt. No. 38099

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Issues Presented

I.

WHETHER APPELLANT'S CONVICTIONS FOR POSSESSION AND RECEIPT OF CHILD PORNOGRAPHY ON DIVERS OCCASIONS MUST BE SET ASIDE BECAUSE SEVERAL IMAGES OFFERED IN SUPPORT OF THE SPECIFICATIONS ARE NOT CHILD PORNOGRAPHY AND ARE CONSTITUTIONALLY PROTECTED, A GENERAL VERDICT WAS ENTERED, AND IT IS IMPOSSIBLE TO DETERMINE WHETHER SAID IMAGES CONTRIBUTED TO THE VERDICT. 1

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT IMAGES 8308, 8313, AND 0870 DID NOT CONSTITUTE VISUAL DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT AS A MATTER OF LAW. 1

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

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Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. § 866. This Honorable Court has jurisdiction over the granted issue

under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) and the certified issue under Article 67(a)(2); 10 U.S.C. § 867(a)(2).

Statement of the Case

On 31 October - 3 November 2011, Appellant/Cross-Appellee[1] was tried by a general court-martial composed of officer and enlisted members convened at Lajes Field, Azores, Portugal. Contrary to his pleas, the members found him guilty of one specification of wrongful receipt of child pornography, one specification of wrongful possession of child pornography, one specification of enticing a minor child to send sexually explicit images, and one specification of communicating indecent language to a minor, and the charge, all in violation of Article 134, UCMJ. Appellant was sentenced to a reduction to the grade of E-1, 18 months confinement, and a dishonorable discharge. J.A. at 35. On 14 February 2012, the convening authority approved the adjudged sentence. Action, Vol. 5, Record of Trial.

On October 22, 2013, AFCCA affirmed the findings of guilty and the sentence. *United States v. Piolunek*, 72 M.J. 830 (A.F. Ct. Crim. App. 2013). In accordance with Rule 19 of this Court's Rule of Practice and Procedure, appellate defense counsel filed a petition for grant of review on December 23, 2013, and this Court granted Appellant's motion for leave to

[1] Appellant/Cross-Appellee will hereinafter be referred to as Appellant for purposes of this brief.

file the supplement to the petition for grant of review by January 13, 2014.

Appellate defense counsel filed the supplement on January 13, 2014. On 1 April, 2014, this Court granted review on the first issue presented. On 18 April, 2014, the Judge Advocate General certified the second issue presented to this Court.

Statement of Facts

Appellant was married to SrA Kristen Foster in February of 2010. J.A. at 57. In October of 2010, SrA Foster suspected Appellant of infidelity and demanded the password to his Google email ("gmail") account. J.A. at 61. SrA Foster accessed Appellant's gmail account around 19 October 2010, at which time she found an email communication with and pictures of a person she believed to be K.L.R., a 15-year-old girl. J.A. at 64.

SrA Foster then forwarded the email and pictures to her own account. J.A. at 65. She reported the email and pictures to Security Forces and the Air Force Office of Special Investigations (OSI) around 20 October 2010. J.A. at 67-68. SrA Foster went back into Appellant's gmail account following her initial report on 24, 25, and 26 October 2010. J.A. at 68. When she went back into Appellant's gmail account, she obtained additional emails between Appellant and the person she believed to be K.L.R., which she forwarded to her own account and later provided to OSI. J.A. at 68.

Based on SrA Foster's report, OSI interviewed Appellant on or about 21 October 2010. R. 388. At that time, Appellant admitted to communicating with and receiving pictures from the person he believed to be K.L.R. when she was 14- and 15-years-old. R. 388-389.

Appellant was charged with receipt and possession of child pornography based on the pictures he received from the person he believed to be K.L.R. *See* Charge Sheet, 9.1-9.6, J.A. at 24. In addition, he was charged with wrongfully enticing K.L.R. to send him said pictures. *Id.* Finally, Appellant was charged with wrongfully communicating indecent language to K.L.R., orally and in writing.[2] *Id.*

The government admitted 22 images in support of the aforementioned specifications at trial. The government also admitted multiple images they did not believe were child pornography under M.R.E. 404(b). Prosecution Exhibit 1 contains all of the photographs provided to the panel in support of the specifications. The following images from this exhibit were offered as alleged child pornography:

Page 4-8111, 8113, 8115
Page 5-8116
Page 6-8308, 8313, 8314
Page 7-8317, 3329, 8334, 8337
Page 8-8382, 8386
Page 10-8700, 8702
Page 11-8727

[2] Appellant was found guilty of this specification, except the words "orally and,[.]" He was found not guilty of the excepted words.

Page 12-9414
Page 15-0862
Page 16-0870, 0875
Page 17-1025, 1036

J.A. Volume 2[3]; *see also* App. Ex. XXXVI, J.A. at 109.

AFCCA found 3 of the 22 charged images did not meet the definition of child pornography under the law as instructed by the Military Judge. *Piolunek,* 72 M.J. at 837. However, AFCCA went on to find the error was harmless. *Id.* at 838.

Summary of Argument

AFCCA failed to follow this Honorable Court's precedent set forth in *United States v Barberi* when it affirmed Appellant's convictions for possession and receipt of child pornography. They found 3 of the 22 charged images failed to meet the definition of child pornography and were constitutionally protected. AFCCA went on to test for prejudice in a manner that was inconsistent with this Honorable Court's guidance in *Barberi* and held the error was harmless.

While AFCCA erred in finding harmless error based on the facts of this case, they were correct in finding that at least 3 of the 22 charged images failed to meet the definition of child pornography as provided by the Military Judge and thus were constitutionally protected. Images 8308, 8313 and 0870 do not even depict the genitals or the pubic area of K.L.R., let alone

[3] This exhibit is sealed.

constitute a lascivious exhibition as required by the instructions given to the panel. The certified issue should be decided in favor of Appellant.

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR POSSESSION AND RECEIPT OF CHILD PORNOGRAPHY ON DIVERS OCCASIONS MUST BE SET ASIDE BECAUSE SEVERAL IMAGES OFFERED IN SUPPORT OF THE SPECIFICATIONS ARE NOT CHILD PORNOGRAPHY AND ARE CONSTITUTIONALLY PROTECTED, A GENERAL VERDICT WAS ENTERED, AND IT IS IMPOSSIBLE TO DETERMINE WHETHER SAID IMAGES CONTRIBUTED TO THE VERDICT.

Standard of Review

This Honorable Court reviews convictions for legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

"The longstanding common law rule is that when the factfinder returns a guilty verdict on an indictment charging several acts, the verdict stands if evidence is sufficient with respect to any one of the acts charged." *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008) (citing *Griffin v. United States*, 502 U.S. 46, 49 (1991)). This Honorable Court has recognized an exception to this rule where one of the grounds of the conviction is found to be unconstitutional. *United States v. Barberi*, 71 M.J. 127, 131 (C.A.A.F. 2012).

This Honorable Court stated in *United States v. Cendejas*, 62 M.J. 334, 339 (C.A.A.F. 2006) (citing *Stromberg v. California*, 283 U.S. 359, 368 (1931)):

> [I]f a factfinder is presented with alternative theories of guilt and one or more of those theories is later found to be unconstitutional, any resulting conviction must be set aside when it is unclear which theory the factfinder relied on in reaching a decision.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002), the Supreme Court recognized the general principle that "the First Amendment bars the government from dictating what we see or read or speak or hear." The Court also recognized that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Id.* at 245-46. "Thus, speech that falls outside of these categories retains First Amendment protection." *Barberi*, 71 M.J. at 130; *see also New York v. Ferber,* 458 U.S. 747, 765 (1982) (holding that "descriptions or other depictions of sexual conduct, not otherwise obscene" retain First Amendment protection).

This Honorable Court's holding in *Barberi* is directly on point. Barberi was investigated for allegations of sexual abuse against his stepdaughter, and as a result of that investigation law enforcement obtained a compact disc containing electronic images of the victim in various stages of undress. *Barberi*, 71

M.J. at 129. The victim testified that Barberi took the photos of her. *Id.* Barberi was charged with knowing possession of child pornography in violation of Article 134, UCMJ, clauses (1) and (2). *Id.* The specification as alleged was comparable to the receipt and possession specifications alleged against Appellant in this case. *Cf. Id*. at n.2 and J.A. at 38. The Government introduced six photographs of the victim in support of the specification, and the members found Barberi guilty of the offense. *Id.* at 129.

The Army Court of Criminal Appeals subsequently found that four of the six images were legally and factually insufficient to support the conviction, but rejected Barberi's argument that the general verdict of guilt must be set aside. *Id*. This Honorable Court granted review, and the issue presented was whether the Army Court of Criminal Appeals properly relied on the general verdict rule to affirm Barberi's conviction for possession of child pornography in light of the constitutional protection afforded to the possession of four of the six images charged. *Id.*

The members in *Barberi* were instructed with reference to the definitions found in the Child Pornography Prevention Act of 1996 (CPPA), 18. U.S.C. §§ 2252A-2260 (2006). *Barberi*, 71 M.J.

at 129-130. The members were also provided with the six "*Dost*[4] factors" relied on by this Honorable Court in *United States v. Roderick*, 62 M.J. 425, 429-30 (C.A.A.F. 2006), for determining what constitutes a "lascivious exhibition." *Id.* at 130. The instructions provided were comparable to those given in the Appellant's case. *Id*. at 129, 130; J.A. at 109.

This Honorable Court found that "under the definitions provided by the military judge, in order for the images to constitute child pornography they must contain an exhibition of the genitals or pubic area and that exhibition must be lascivious." *Barberi*, 71 M.J. at 130. This Court agreed that four of the six images did not constitute child pornography as defined by the military judge. *Id*. Because the four images in question did not contain an exhibition of the victim's genitals or pubic area, the Court did not need to evaluate whether they were "lascivious" or analyze them in light of the "*Dost* factors." *Id.*

Based on the specification and definitions provided by the military judge, this Honorable Court found the four images in question were "constitutionally protected conduct." *Id*. at 132. This Court rejected the Government's argument that the general verdict rule allowed the conviction to be affirmed, but did find they were required to apply a harmless error review as part of

[4] *United States v. Dost*, 636 F.Supp. 828, 832 (S.D.Cal. 1986).

the analysis. *Id*. (citing *Chapman v. California*, 386 U.S. 18, 21-22 (1967)). According to this Honorable Court, "as in *Chapman*, we must determine 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Id*. (citing *Chapman*, 386 U.S. at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

"To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Barberi*, 71 M.J. at 132 (citing *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)). The Court stated, "As noted, we cannot know which images formed the basis for the finding of guilt to the possession of child pornography specification. Accordingly, the constitutionally protected images reasonably may have contributed to the conviction and cannot be deemed unimportant in relation to everything else the members considered." *Id.* at 132-33. This Court reversed the decision of the Army Court of Criminal Appeals as to Barberi's conviction for possession of child pornography. *Id.* at 133.

In the present case, Appellant was charged with receipt and possession of child pornography in violation of Article 134, UCMJ, clauses (1) and (2). The instructions provided by the Military Judge were substantially similar to those given in *Barberi*, Appellant was convicted of both specifications, and no

special findings were entered which would allow this Honorable Court to determine which image(s) formed the basis of the panel's verdict. Thus, Appellant's conviction for these offenses must be set aside because several of the photographs offered in support of the specifications do not meet the definition of child pornography provided to the panel.

AFCCA found 3 of the 22 charged images failed to meet the definition of child pornography and were thus constitutionally protected. *Piolunek,* 72 M.J. at 837.[5] As noted by AFCCA, they did not even need to apply the *Dost* factors to determine whether the images qualified as a lascivious exhibition because neither K.L.R.'s genitals or pubic area were depicted in the images. *Id*. at 838. The holding with regard to these images is correct; however, AFCCA's analysis and conclusion that this error was harmless is incorrect.

AFCCA went on to make reference to the fact that in *Barberi*, 67% of the images failed to meet the definition of child pornography, whereas in this case only 14% of the images were constitutionally protected. *Id*. AFCCA stated they did not believe this Honorable Court intended to set a precedent that could lead to the "absurd outcome of vacating a conviction for possessing 10,000 images of minors engaging in sexually explicit

[5] Appellant argued to AFCCA that more than 3 of the 22 charged images failed to meet the definition of child pornography provided to the panel and does not concede that all of the other 19 images constitute child pornography.

conduct because one image did not include a lascivious display of the genital or pubic area." *Id*.

AFCCA went on to test for prejudice and found harmless error. They reasoned that the evidence of the Appellant's guilt was overwhelming and thus the constitutionally protected images were "unimportant" in light of everything else the members considered on the question of guilt. *Id*. at 839.

AFCCA erred when it found harmless error in this case. At least 3 of the charged images are constitutionally protected, a general verdict was entered, and it is impossible to determine which images formed the basis of Appellant's conviction under Specifications 1 and 2. This case falls squarely within this Honorable Court's holding in *Barberi*.

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT IMAGES 8308, 8313, AND 0870 DID NOT CONSTITUTE VISUAL DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT AS A MATTER OF LAW.

Standard of Review

This Honorable Court reviews convictions for legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

In this case, the members were instructed with reference to the definitions found in the Child Pornography Prevention Act of

1996 (CPPA), 18. U.S.C. §§ 2252A-2260 (2006). AFCCA correctly noted that the Military Judge "stated that the appellant was charged with receipt/possession of 'child pornography', he used the term 'sexually explicit conduct' from the CPPA (rather than the 'sexually explicit nature' language from the specifications) and defined 'sexually explicit conduct' consistent with that phrase from the CPPA." *Piolunek*, 72 M.J. at 835.

Based on the definitions given to the panel in this case, AFCCA found that images 8308, 8313, and 0870 did not meet the legal definition of sexually explicit conduct. *Id.* at 837. AFCCA did not even feel the need to analyze said images using the *Dost* factors because neither K.L.R.'s genitals nor her pubic area were visible on the photographs. *Id.* This holding was correct. These images do not meet the definition of a minor engaged in sexually explicit conduct that was provided to the panel.

In its brief supporting the certified issue, Appellee/Cross-Appellant[6] questions how conduct "in the arena of child pornography could be constitutionally protected but punishable under Article 134 Clause 1 and 2. . ." *See* Government Brief in Support of Certified Issue, p. 12 (emphasis in original). That question was answered by this Honorable Court in *Barberi*, and the relevant portion of the *Barberi*

[6] Appellee/Cross-Appellant will hereinafter be referred to as Appellee for purposes of this brief.

opinion was cited in the paragraph immediately preceding this statement in Appellee's brief. The government has the option of proceeding under clause 1 or 2 of Article 134 without reference to the definitions set forth in the CPPA, in which case an entirely different analysis could apply. *Barberi*, 71 M.J. at 131. In this case, as in *Barberi*, Appellant's panel was instructed using the definitions from the CPPA and the constitutional analysis applies.

Appellee argues that the interactions between Appellant and K.L.R. are relevant to whether or not images 8308, 8313, and 0870 constitute child pornography under the definitions from the CPPA. If this is the case, it would logically follow that an image could be considered child pornography under the CPPA when possessed by one individual but constitutionally protected speech when possessed by another.

This case is not about whether or not Appellant's conduct was improper, nor is it about whether or not images 8308, 8313, and 0870 are disturbing or distasteful in the context of this case. As noted by this Honorable Court in *Barberi*, although images may be disturbing or distasteful, "that alone does not place them into the category of unprotected speech. . ." *Barberi*, 71 M.J. at 131 n.4.

As AFCCA properly held, images 8308, 8313 and 0870 do not qualify as child pornography based on the definitions provided

to the panel. As was the case in *Barberi*, we cannot know which images formed the basis of Appellant's finding of guilt to these specifications. Therefore, the "constitutionally protected images may reasonably have contributed to the conviction and cannot be deemed unimportant in relation to everything else the members considered." *Id*. at 132-33.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Honorable Court dismiss Specifications 1 and 2 of the Charge, and set aside the sentence in this case.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Court and served on the Appellate Government Division on 19 May 2014.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

XX This brief contains 4,196 words.

2. This brief complies with the typeface and type style requirements of rule 37 because:

XX This brief was prepared in a monospaced typeface using Microsoft Word version 2010 with 12 point font using Courier New.

Respectfully Submitted,

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