

9 June 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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

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

REPLY ARGUMENT

A. The Standard of Review Suggested by the Appellee for
the Granted Issue is Incorrect

In its brief on the granted issue, the Appellee/Cross-Appellant¹ argues that "even if the military judge plainly erred by admitting images 8308, 8313 and 0870, the error did not materially prejudice a substantial right."

This argument seems to ignore the standard of review and framework set forth by this Honorable Court in *U.S. v Barberi*, 71 M.J. (C.A.A.F. 2012). The standard of review suggested by the Appellee focuses entirely on plain error analysis, when in fact the question is one of factual and legal sufficiency, which this Honorable Court reviews *de novo*. *Barberi* at 129, (citing *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008)).

Because a portion of the general verdict entered in this

¹ Hereinafter referred to as "Appellee."

case rests upon constitutionally protected conduct, *Barberi* does require a test for prejudice, but is not the test suggested by the Appellee. "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)). When applying this test in *Barberi*, 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.

B. Appellee Fails to Effectively Distinguish Appellant/Cross-Appellee's² Case from *Barberi*

Appellee has made several attempts to distinguish Appellee's case from *Barberi*.

Appellee repeatedly references the factual basis of Appellant's case in an effort to somehow cure the legal insufficiency of the convictions in question. It is worth noting that *Barberi* took pictures of his stepdaughter in "various states of undress" and was accused of sexually abusing

² Hereinafter referred to as Appellant.

her. *Barberi*, 71 M.J. at 129. The images *Barberi* was convicted of possessing were taken and possessed in this context. *Id.* While it is obvious that Appellant should not have engaged in the conduct that formed the basis for his convictions, it is worth noting that he had never even met the minor victim in person. If the factual background is relevant to this analysis, as the Appellee argues, *Barberi's* conduct appears more egregious than the Appellant's.

The Appellee also argues that images 8308, 8313, and 0870 should be viewed together with the other images charged to determine whether or not they are legally sufficient. As previously noted, this argument logically suggests that an image may be contraband when possessed by one individual but not another. This also ignores the factual background in *Barberi*. *Barberi* took pictures of his stepdaughter, and these were the images he was charged with possessing. While 4 out of the 6 failed to meet the legal definition of child pornography given to the panel, 2 images did meet the definition. If the context or series were relevant to the contraband nature of the images, it seems that the 2 contraband images could have somehow made the other 4 images in the series child pornography. It does not appear that this Honorable Court was willing to make such a leap in *Barberi*, and Appellant respectfully submits it should not be made here.

Appellee uses the mathematical argument forwarded by AFCCA in an attempt to distinguish this case from *Barberi*. It is true that in this case, AFCCA found that only 14% of the charged images failed to meet the definition of child pornography provided to the panel, whereas in *Barberi*, this Honorable Court determined that 67% of the charged images failed to meet the definition. *United States v. Piolunek*, 72 M.J. 830, 838 (A.F. Ct. Crim. App. 2013). If this case did involve the "1 in 10,000"³ images hypothetical set forth by AFCCA, Appellee's argument would be more compelling, but that is not the case before this Court.

An alternate view of the *Barberi* decision is that this Honorable Court was instructing our colleagues at the trial level to ensure they admit only the images that actually meet the definition of child pornography. Trial counsel had the option of admitting images 8308, 8313, and 0870 under M.R.E. 404(b) but chose not to do so.

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

³ *Piolunek*, 72 M.J. at 837.

cannot be deemed unimportant in relation to everything else the members considered." *Barberi*, 71 M.J. 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 9 June 2014.



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COMPLIANCE WITH RULE 24(d)

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

XX This brief contains 1,472 words.

2. This reply 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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