30 May 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee/Cross-Appellant,*	)	REPLY BRIEF FOR THE ISSUE CERTIFIED AND FINAL BRIEF FOR THE ISSUE GRANTED ON BEHALF
v.	)	OF THE UNITED STATES
	)	USCA Dkt. No. 14-5006/AF
Senior Airman (E-4) JUSTIN M. PIOLUNEK, USAF *Appellant/Cross-Appellee.*	)	USCA Dt. No. 14-0283/AF Crim. App. No. 38099

REPLY BRIEF FOR THE ISSUE CERTIFIED AND FINAL BRIEF FOR THE ISSUE GRANTED ON BEHALF OF THE UNITED STATES

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

ISSUES PRESENTED

I.

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.

II.

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.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review the issues in this case under Articles 67(a)(2) and 67(a)(3), UCMJ.

STATEMENT OF THE CASE

In addition to accepting Appellant/Cross-Appellee's (hereinafter "Appellant") statement of the case, the United States incorporates by reference its Statement of the Case from its Brief in Support of the Issue Certified, dated 18 April 2014.

STATEMENT OF FACTS

The United States incorporates by reference its Statement of Facts from its Brief in Support of the Issue Certified, dated 18 April 2014. Any additional facts are set forth in the argument section below.

SUMMARY OF THE ARGUMENT

AFCCA erred when it found three of the 22 images offered in support of the Government's case did not constitute visual depictions of a minor engaged in sexually explicit conduct. Given the definitions recited by the military judge, as well as the definitions contained within the CPPA, Images 8308, 8313, and 0870 within the original Prosecution Exhibit 1 (not the Sealed Joint Appendix) are, as a matter of law, visual depictions of K.L.R. engaged in sexually explicit conduct. As such, these images do not constitute constitutionally protected speech.

If, however, AFCCA was correct in finding error, the error does not warrant dismissal of Specifications 1 and 2 of the

Charge. Appellant failed to object to the admission of these specific images on constitutional grounds; as such, this Court should view any alleged error under the plain error standard. If, however, this Court is inclined to nonetheless test the error for harmlessness rather than plain error, the quantitative strength of the evidence, the qualitative nature of the evidence, and the circumstances surrounding the offense should all prove that any error was harmless beyond a reasonable doubt.

ARGUMENT

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT IMAGES 8308, 8313, AND 0870 DID NOT CONSTITUTE VISUAL DEPICTIONS OF K.L.R. ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

Standard of Review

This Court reviews issues of legal sufficiency *de novo*. United States v. Winckelmann, 70 M.J. 403, 406 (C.A.A.F. 2011).

Law and Analysis

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting United States v. Turner, 25 M.J. 324 (C.M.A. 1987)). In resolving legal sufficiency questions, "this Court is bound to

draw every reasonable inference from the evidence in favor of the prosecution." United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993) (quoting United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991)); *see also* United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001). This Court's assessment of legal sufficiency is "constrained by the bounds of the record from the court below when reviewing an appellant's guilt or innocence[.]" Roderick, 62 M.J. at 431 (citing United States v. Holt, 58 M.J. 227, 232 (C.A.A.F. 2003)).

The military judge below properly found that Images 8308, 8313, and 0870 within the original Prosecution Exhibit 1 were visual depictions of K.L.R. engaged in sexually explicit conduct as a matter of law. Yet, Appellant states conclusively in his brief that "neither K.L.R.'s genitals nor her pubic area were visible on [sic] the photographs." (App. Br. at 13.) Appellant is mistaken: Images 8308, 8313, and 0870 within Prosecution Exhibit 1 all contain K.L.R.'s nude pubic area.[1] Although none of the images contain an exhibition of the genitals, K.L.R.'s pubic region is indeed exposed in all three. *See* 18 U.S.C. §

[1] The United States references Prosecution Exhibit 1 repeatedly in both of its briefs and not the Sealed Joint Appendix because the quality of the images contained within the Sealed Joint Appendix is substantially diminished compared to the original images. With regard to Image 0870 specifically, it is nearly impossible to make out the pubic region in the poor copy contained within the Sealed Joint Appendix. Because of this, the United States respectfully requests that this Court review the actual images admitted at trial (contained within Prosecution Exhibit 1 in the Record of Trial) in order to determine whether, as a matter of law, they constitute sexually explicit conduct.

2256 (2008). Thus, merely because these images contain a lascivious exhibition of K.L.R.'s nude pubic area, but not her genitals, does not somehow transform the three images into constitutionally protected speech.[2]

Not only do Images 8308, 8313, and 0870 all depict K.L.R.'s pubic area, they contain a lascivious exhibition as well. This Court in United States v. Roderick, 62 M.J. 425 (C.A.A.F. 2006), adopted the six "Dost factors," in addition to combining a review of those factors "with an overall consideration of the totality of the circumstances." Id. at 430 (citing United States v. Dost, 636 F.Supp. 828, 832 (S.D. Cal. 1986)). Using this test, it is clear that all three images contain a lascivious exhibition of K.L.R.'s pubic area as a matter of law.

[2] The binary nature of the holding in Barberi (*i.e.*, that an image is either constitutionally protected speech or is child pornography), gives an appellant convicted of a child pornography offense multiple chances at obtaining relief on appeal. *See* United States v. Barberi, 71 M.J. 127, 135 (C.A.A.F. 2012)(Baker, C.J., dissenting)("There appears to be no middle ground."). The more images the prosecution admits at trial, the more chances an appellate court will have to disagree with the military judge's legal finding concerning any one image. This "one-way ratchet" is particularly helpful to an appellant during a CCA's Article 66(c), UCMJ review: A CCA could ostensibly find that an image, as a matter of law, constituted child pornography under the CPPA, but, as a matter of fact, that it did not. *See, e.g.*, United States v. Walters, 58 M.J. 391, 395 (C.A.A.F. 2003)("civilian appellate courts do not possess the authority to conduct this type of factual sufficiency review."). If any single image is factually insufficient to constitute child pornography, it appears the image may be constitutionally protected too. Barberi thus appears to stand for the proposition that it would be error for a trial court to admit a single image that the CCA (or CAAF) *post hoc* decides, either legally or factually, is constitutionally protected. *But see* United States v. Rodriguez, 66 M.J. 201 (C.A.A.F. 2008)(when the factfinder returns a guilty verdict on an indictment charging several acts, the verdict stands on review even if the evidence is sufficient with respect to any one of the acts charged). This *post hoc* review to determine the constitutionality of each and every image is troublesome given the subjective nature of Dost and what qualifies as a lascivious exhibition.

At the outset, this Court should view all of the images within Prosecution Exhibit 1 together, and not merely as separate, discrete images. To do otherwise would lead to an absurd result. In a case involving video evidence, for example, it would require that the Government exclude any portions of the video where the under-aged participants are clothed or are merely nude prior to engaging in sexually explicit conduct, because those portions of the video (taken out of context) are "constitutionally protected."[3] To be sure, all of these images focus on K.L.R. alone, as she is the only individual present in each one of the photos. And viewed together, these images are, without a doubt, intended to be sexually suggestive, as many of the images, including the three at issue, depict K.L.R. in an "unnatural" pose (considering K.L.R.'s age), generally associated with sexual activity.

Additionally, K.L.R. is fully nude in the three contested images, and all three images suggest both "sexual coyness" and a "willingness to engage in sexual activity," especially in light of the other images that graphically reveal K.L.R.'s genital area. *See* Roderick, 62 M.J. at 429. Moreover, considering the totality of the circumstances (the images all viewed together, Appellant's online "chats" with K.L.R., and Appellant's

[3] What is a video, after all, but a series of images shown together in rapid succession?

confession) it is crystal clear that each of these images is intended and designed to elicit a sexual response in the viewer. Put frankly, these images are not analogous to an Abercrombie and Fitch advertisement or a topless teenager in a French arthouse film--these images are child pornography. K.L.R. is a victim. And the fact that Appellant can argue with a straight face that these images are "constitutionally protected" should be for this Court the canary in the mine shaft, signaling that something is very much amiss.

II.

EVEN IF THE MILITARY JUDGE PLAINLY ERRED BY ADMITTING IMAGES 8308, 8313, AND 0870, THE ERROR DID NOT MATERIALLY PREJUDICE A SUBSTANTIAL RIGHT.

Standard of Review

Failure to make a timely objection to evidence constitutes waiver in the absence of plain error. Mil. R. Evid. 103; United States v. Datz, 61 M.J. 37, 41-42 (C.A.A.F. 2005). The burden is entirely on Appellant to demonstrate plain error. *See* United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005). To establish plain error, Appellant must show all of the following: (1) There was error; (2) such error was "plain," "clear," or "obvious;" and (3) the error materially prejudiced a substantial right. United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998) (citing United States v. Olano, 507 U.S. 725, 732-35 (1993)).

In order to prove "material prejudice to a substantial right" in a plain error scenario, Appellant must prove that the error was "so significant as to influence the outcome of the trial."[4] Powell, 49 M.J. at 465.

Law and Analysis

Appellant never objected to these specific images at trial.[5] In fact, he seemingly acknowledged that the images admitted by the judge contained depictions of K.L.R.'s pubic area and genitals. (J.A. at 106.) But, assuming, *arguendo*, error existed in this case that was either plain or obvious,[6] Appellant suffered no material prejudice to a substantial right. Outside of Barberi, this Court has not addressed how exactly to determine, in a plain error scenario, whether prejudice exists if a military judge admits "constitutionally protected" images.

[4] This Court appears to have expressly rejected the "fourth prong" of the plain error test due to the "high threshold" contained within Article 59(a), UCMJ of a "material prejudice" to a "substantial right." United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2012)(noting the difference between Article 59(a) and Fed. R. Crim. P. 52(b)). The fourth prong would allow discretion to remedy a plain error "only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Humphries, 71 M.J. at 220-21 (Stucky, J., dissenting)(quoting Puckett v. United States, 556 U.S. 129, 135 (2009)). How Article 59(a) bestows a "high threshold" for reversal is unclear in its actual application by military appellate courts: Material prejudice to a substantial right, in reality, can be applied similarly to the prejudice standard for an objected-to constitutional error. *See, e.g.*, United States v. Knapp, 73 M.J. 33 (C.A.A.F. 2014)(Stucky, J., writing for the Court)(finding material prejudice to a substantial right notwithstanding DNA evidence, a videotaped confession, testimony by the accused, and an eyewitness). Moreover, the "burden of proof/persuasion" in a plain error review versus a harmless error review is, quite frankly, a legal fiction given the appellate (not factfinding) setting.

[5] DC: "[W]e are going to ourselves identify what images [the Government] is planning to ask for members to consider. The ones that [the Government] is not asking to be considered would be 404 . . . ." (R. at 295.)

[6] Appellant was tried from 31 October to 3 November 2011, months before this Court's 15 May 2012 decision in Barberi.

Barberi certainly hints that, even if not objected to, admitting "constitutionally protected" images may lead to automatic reversal: "An error in admitting plainly relevant evidence which possibly influence the jury adversely to a litigant cannot . . . be conceived as harmless." Barberi, 71 M.J. at 132 (quoting Chapman v. Calfornia, 386 U.S. 18, 21-22 (1967)). "We cannot know which images formed the basis for the finding of guilt to the possession of child pornography specification." Id. If admitting these three images (out of 22) is *per se* prejudicial (which the United States does not concede), then the United States acknowledges it loses.[7]

[7] In Barberi, the appellant made a R.C.M. 917 motion after the government's case-in-chief, preserving the error. 71 M.J. at 129. This Court thus subjected the error "to harmless error review." Id. at 132 (quoting Hedgpeth v. Pulido, 555 U.S. 57, 60-61 (2008)). Whether a constitutional error like the alleged error here can be reviewed for plain error is unclear given this Court's recent decision in United States v. Clifton, 71 M.J. 489 (C.A.A.F. 2013): "Under a plain error analysis, this Court will grant relief in a case of nonconstitutional error only if . . . ." Id. at 491 (emphasis added). This language, however, may only be referring to the issue of which party bears the burden to show prejudice (as mentioned *supra*, a distinction that amounts to a legal fiction): "Keeping in mind that Appellant bore the burden to show prejudice in the absence of an objection at trial and in the context of a nonconstitutional error . . . ." Id. at 492; *see also* United States v. Powell, 49 M.J. 460, 465 (C.A.A.F. 1998)("the burden shift[s] to the Government to show that the error was not prejudicial"). For more than a decade, this Court cited Powell for the proposition that, in a plain error context, the burden shifts to the government to disprove prejudice beyond a reasonable doubt. *See, e.g.*, United States v. Carpenter, 51 M.J. 393 (C.A.A.F. 1999)("If a plain error is constitutional error, the government must convince the Court of Appeals for the Armed Forces beyond a reasonable doubt that the error was not prejudicial."); United States v. Carter, 61 M.J. 30 (C.A.A.F. 2005)("the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable doubt."); United States v. Brewer, 61 M.J. 425 (C.A.A.F. 2005)("the burden shifts to the Government to show that the error was harmless beyond a reasonable doubt."); United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011)(citing Carter). But, this course apparently changed in United States v. Girouard, 70 M.J. 5 (C.A.A.F. 2011), where this Court applied the traditional plain error test (Appellant carrying the burden) in a constitutional error context.

But, if plain error applies here, as it must, the overwhelming amount of other evidence, outside of the three contested images, should convince this Court that Appellant suffered no material prejudice to a substantial right.[8] Even under a harmless error review, the evidence here (19 out of the 22 images) clearly constituted child pornography under the CPPA, and would have secured a conviction absent the admission of "constitutionally protected" images.

As opposed to viewing prejudice though a "traditional" plain error prism, AFCCA conducted a harmless error review of the images in question. Although the Supreme Court did not test for harmlessness in reversing the conviction in Stromberg v. California, 283 U.S. 359 (1931), that case was decided prior to Chapman v. California, 386 U.S. 18, 21-22 (1967), which held that some constitutional errors can be harmless. *See* Barberi, 71 M.J. at 132. In the fairly recent decision of Hedgpeth v. Pulido, 555 U.S. 57 (2008), the Supreme Court reiterated that "constitutional errors can be harmless," and listed a series of post-Chapman decisions that demonstrated that principle. *See, e.g.*, Neder v. United States, 527 U.S. 1 (1999) (omission of an element); California v. Roy, 519 U.S. 2 (1996) (erroneous aider

[8] This is particularly true given the military judge's treatment of the images offered: "[B]ut I concur with trial counsel that my intention is not to just give a bunch of pictures, some that the government doesn't consider offens[ive], or some that the government does not believe is sexually explicit conduct . . . and just sort of hope the members figure it out." (R. at 281.)

and abettor instruction); Pope v. Illinois, 481 U.S. 497 (1987) (misstatement of an element); Rose v. Clark, 478 U.S. 570 (1986) (erroneous burden-shifting as to an element of an offense).

Additionally, this Court has recently held that the omission of several elements in a findings instruction--a constitutional error--could be tested for harmlessness. United States v. Payne, 73 M.J. 19 (C.A.A.F. 2014). In Payne, this Court found a constitutional trial error, but concluded that "the omission of instructions on the third and fourth elements of attempt did not materially prejudice Payne's substantial rights."[9] Payne, 72 M.J. at 25-26.

Despite being incorrect in finding error, AFCCA properly applied the harmlessness prejudice test from Chapman and Barberi. In order to determine whether an alleged error is harmless beyond a reasonable doubt, this Court must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Barberi, 71 M.J. at 132 (quoting Chapman, 386 U.S. at 23). "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

[9] Although this Court cited the plain error standard due to the lack of a defense objection to the instructions at trial, the Court went on to say it was "therefore satisfied beyond a reasonable doubt that the omitted elements were both 'uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.'" Payne, 73 M.J. at 25-26 (emphasis added). *See* note 6, *supra*.

record." Barberi, 71 M.J. at 132 (citing United States v. Gardinier, 67 M.J. 304, 306 (C.A.A.F. 2009)). Further, as AFCCA correctly noted, in Harrington v. California, 395 U.S. 250, 254 (1969), "the Supreme Court stated the Chapman test for harmless error could be satisfied where there is overwhelming evidence of guilt." Piolunek, 72 M.J. at 838. Additionally, whether an error is harmless in a particular case depends upon a "host of factors," including the importance of the contested evidence in the prosecution's case, whether the evidence was cumulative, the presence or absence of additional evidence corroborating or contradicting the evidence in question, and the overall strength of the prosecution's case. *See* Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

In looking at whether the three (8308, 8313, and 0870) alleged constitutionally protected images (again, out of 22 images total) had a prejudicial impact, AFCCA considered three factors: (1) the quantitative strength of the evidence, (2) the qualitative nature of the evidence; and (3) the circumstances surrounding the offense as they related to the elements of the offense charged. Id.

Regarding the quantitative strength of the evidence, this case is completely distinguishable from Barberi. In Barberi, four out of the six images (or, as AFCCA noted, 67%) were found to be constitutionally protected, so it was essentially

impossible to determine whether the general verdict[10] rested on constitutionally protected images. Here, however, only three out of 22 images admitted are possibly protected, and those three belonged to the same series of images with the exact same victim, K.L.R. Although AFCCA properly noted "the test for harmlessness can[not] be reduced to a simple mathematical equation," the "stark contrast in the number of images in this case that were not constitutionally protected, as compared to those in Barberi, is [certainly] relevant to the question of harmlessness."[11] Piolunek, 72 M.J. at 838.

With respect to the qualitative nature of the evidence, AFCCA correctly held that the remaining 19 images "clearly constituted a lascivious exhibition of the genitals or pubic area." Id. Further, each of the images in the series was created in response to Appellant's requests, with the express intent to elicit a sexual response in the viewer. (J.A. at 123-61.) Moreover, given the context in which these images were requested and provided (the images were solicited during extremely vulgar conversations between K.L.R. and Appellant), each image suggests a willingness to engage in sexual behavior.

[10] Members may not make special findings. *See* R.C.M. 918(b).
[11] The Government wholeheartedly agrees that this Court could not have "intended to suggest that a conviction must be set aside in every case where even one image offered into evidence" was later determined to be constitutionally protected. Piolunek, 72 M.J. at 837. If that were the case, it would result in the "absurd outcome of vacating a conviction for possessing 10,000 images of minors . . . because one image did not include a lascivious display of the genitals or pubic area." Id.

(Id.) Further, unlike in Barberi, Appellant here admitted he possessed these images in a written confession. (J.A. at 162-70.) Therefore, even with the alleged constitutionally protected images admitted into evidence, this Court can be convinced beyond a reasonable doubt that the members would have still found Appellant guilty and reached the same sentence.

Last, regarding the circumstances surrounding the creation, receipt, and possession of the images, this Court can also be convinced that there was absolutely no "reasonable probability that the evidence complained of might have contributed" to Appellant's conviction. Barberi, 71 M.J. at 132. Appellant did not accidentally come upon these images or search for these images on the internet; he actively formed a relationship with K.L.R., engaged in sexually explicit conversations with her, and then invited images depicting a lascivious display of her genitals and pubic region with full knowledge of her age. (J.A. at 81, 123-61, 171.) Thus, disregarding the three images in question, the evidence of Appellant's guilt was overwhelming, and that fact would have been absolutely clear to the members.

Because Images 8308, 8313, and 0870 fulfill the legal definition of "sexually explicit conduct," the evidence was legally sufficient and the general verdict should stand. If, however, it was error to admit these images, the evidence of guilt was overwhelming and, thus, any error is harmless.

CONCLUSION

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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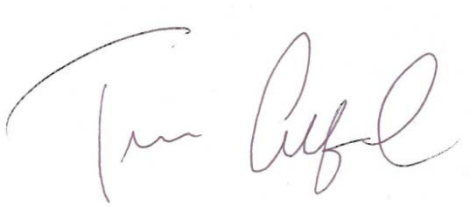
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian defense counsel, and to the Appellate Defense Division on 30 May 2014.



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