IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee* v. Airman First Class (E-3) **JEREMIAH L. KING** United States Air Force *Appellant*	**REPLY TO GOVERNMENT ANSWER** Crim.App. Dkt. No. ACM 39055 USCA Dkt No. 18-0288/AF October 9, 2018

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

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, A1C King, the Appellant, hereby replies to the government's brief concerning the granted issue, filed October 1, 2018.

THE EVIDENCE SUPPORTING A1C KING'S CONVICTIONS FOR VIEWING AND ATTEMPTING TO VIEW CHILD PORNOGRAPHY IS LEGALLY INSUFFICIENT BECAUSE ALL OF THE ALLEGED CHILD PORNOGRAPHY WAS FOUND IN UNALLOCATED SPACE OR A GOOGLE CACHE.

In its Answer the government attempts to stretch the standard of review to the point that any possible inference be made in the government's favor, even if remote, unreasonable, and contradicted by the evidence. But this Court is only required to "draw every <u>reasonable</u>

inference <u>from the evidence</u> in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (emphasis added).

Under the test in *Leary v. United States*, 395 U.S. 6 (1969), this Court is to look to see if there is a sufficient logical link between the evidence and the elemental fact. If, under the circumstances of the case, it can be said with substantial assurance that the inferred fact is more likely than not to flow from the proved fact, then the inference is permissible. *Id.* An inference is unconstitutional if the suggested conclusion is not one that reason and common sense justify in light of the proven facts. *Francis v. Franklin*, 471 U.S. 307, 353-4 (1985).

Because the inferences the government asks this Court to make do not flow from proven facts, and are not supported by reason and common sense, they are unreasonable. Furthermore, since the government's inferences are contradicted by the evidence, they necessarily are not based on the evidence. Each of the government's improper inferences are addressed below.

<u>1. The government's claim that A1C King used Photobucket to search for, download, and view child pornography is contradicted by the evidence and cannot be reasonably inferred.</u>

At trial, the government argued that "[t]he forensics corroborates the confession." JA at 816. But in its Answer the government largely abandons all reference to its computer forensics expert's testimony and instead advances a new argument. Now, the government urges this Court to salvage the conviction for viewing child pornography by inferring that A1C King downloaded the three images of child pornography using Photobucket on his work computer and then transferred them to his home computer. Answer at 31-36. To be sure, if such facts were true it would go a long way towards shoring up the government's lack of evidence that A1C King knowingly viewed child pornography. Unfortunately for the government, such an inference is neither supported by the facts nor reasonably inferred therefrom.

First, the evidence presented at trial directly contradicts the government's new argument. In its Answer, the government states as fact that it "presented evidence Appellant used Photobucket to view the charged images" and that "there was proof Appellant knowingly viewed the charged images because he selected them, saved them to his Photobucket account, and viewed them on his home computer." Answer at 19-20. However, the government's own forensics expert testified at trial that he was "not certain of what specific webpage that these images would have come from" and was not able to point to any evidence that indicated A1C King ever saw the child pornography. JA at 364, 379. In fact, the government's expert acknowledged that "it could have been that he didn't see it because the cache may have created it." JA at 364.

Additionally, the government claims A1C King "knowingly viewed the charged images because he devoted particularized attention to each image as he selected it, uploaded it, and viewed it on Photobucket." Answer at 41-2. But the government provides no citation for this assertion. In fact, there is no support in the record for this claim.

While the government is free to call upon this Court to draw all <u>reasonable</u> inferences <u>from the evidence</u> in its favor, the government cannot create new facts from whole cloth. *See Barner*, 56 M.J. at 134. Although it is true that A1C King admitted to using Photobucket to search for things like anime, he never admitted to using Photobucket to view child pornography. JA at 459 at 13:58:20, 14:07:30. In fact, A1C King explicitly told law enforcement that he infrequently used Photobucket at home and that he never had child pornography on his Photobucket account. *Id*. at 14:12:00, 14:26:00. The government's own forensic evidence at trial supports A1C King's denial.

If, as the government claims in its Answer, A1C King downloaded the child pornography at work, and then intentionally saved it so he could access it at home, then the government's computer expert would have found evidence of the child pornography on A1C King's government computer. The government's expert performed such an analysis but did not find the charged child pornography on A1C King's government computer. JA at 470-91. As it relates to A1C King's home computer, and contrary the government's assertion in its Answer, the government's expert did not find any artifacts or other evidence that A1C King ever knowingly downloaded the child pornography.
JA at 340, 366, 372-73, 472. Finally, if Photobucket was used to download and save the child pornography, then Photobucket would have records of it and would have flagged it as was done with the eight suspected child erotica pictures.[1] *See* JA at 76, 453-58.

Far from being derived from the facts, the government's novel claim that A1C King used Photobucket to search for and view the child

[1] None of the eight images flagged by Photobucket were charged as, or determined to be, child pornography.

pornography is refuted by the evidence. Thus, this Court should not stretch the standard of review to encompass this unreasonable and unsupported inference. As the facts and expert testimony at trial bore out, "[i]nternet analysis was conducted on [all 34 devices seized] and no determination was made on whether [A1C King] visited known child pornography websites" and "[t]here's no indication of" A1C King attempting to remove or otherwise access any of the three files. JA at 339-40, 471. In fact, as the government's expert testified, "it could have been that he didn't see" the child pornography at all. JA at 364. For these reasons, this Court should find the evidence legally insufficient.

2. The government's claim that the search terms are circumstantial evidence of guilt is contradicted by the evidence and it is unreasonable to infer that A1C King ever searched for the three charged images of child pornography.

The government's Answer concedes that "there was no connection between the charged search terms . . . and the charged images" and that the "charged search terms [were entered] after two of the charged images entered Google Cache."[2] Answer at 29. Nevertheless the

[2] The third charged image was found in unallocated space. JA at 259. As a result, there is no forensic evidence concerning when or how it was created. JA at 483.

government proceeds to argue that this Court can infer that A1C King sought out the three specific charged images because he generally searched for anime and other pornography. *See* Answer at 27-30. Such an inference is not supported by the evidence and is unreasonable.

First, contrary to what the government claims, A1C King did not search for child pornography. A1C King told law enforcement that he likes anime pornography and that is what he most often searched for. JA at 459 at 14:07:30. Additionally, A1C King admitted that he would search for "hardcore pornography" that depicted women 18 years old and older. *Id*. at 15:38:00. However, he vehemently denied ever searching for underage pornography. *Id*. at 15:38:00, 15:39:00, 16:14:00. In fact, A1C King told law enforcement that the first time he saw photos of children posing in bathing suits and the like was when he was searching for anime pornography. *Id*. at 14:28:00, 16:14:00.

A1C King was curious about the pictures he saw of young girls and he began to search for more pictures using the search terms that were associated with the picture, "Dany Camy."[3] *Id*. at 14:28:00,

[3] A1C King did not know what "Dany Camy" meant. JA at 459 at 14:28:00. Nor did he suspect that it may in any way be associated with child pornography. *Id*.

15:33:45. But the search terms A1C King used, and the pictures that were returned, were not child pornography.[4] *Id.* at 14:28:00, 14:39:00. It may be repulsive and morally reprehensible to some that A1C King searched for, and looked at, images of young girls posing in bathing suits and the like, but it is not a crime and is not a reasonable basis to infer that he sought child pornography. The forensic evidence supports A1C King's statements to law enforcement and conflicts with the government's proposed and uncorroborated inference.

First, the inference is unreasonable because, as the government acknowledged, the search terms came after the images of child pornography were created on the computer. Answer at 29; JA at 458, 479, 485. Assuming, *arguendo*, that A1C King did enter the search terms specifically looking for child pornography, he did not begin to do so until after the charged images were created/accessed. The only reasonable conclusion then is that, at the time the charged images were accessed, the accessing was done inadvertently.

Second, if A1C King truly was searching for child pornography,

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[4] None of the three images of child pornography that A1C King was convicted of viewing came from these Photobucket searches.

there would be evidence on his computer. But the government's expert did not find any other child pornography, or evidence that A1C King visited a single known child pornography website, or evidence that A1C King had digitally wiped clean any of his 34 devices. JA at 471. Far from reasonable and based on the evidence, the government's prayer that this Court infer that A1C King "systematic[ally] and purpose[fully] search[ed] for child pornography" is unreasonable and detached from the evidence. Answer at 30.

3. The government's reliance on Mil. R. Evid. 404(b) evidence and conduct that A1C King was acquitted of are unpersuasive and do not provide a sufficient basis to infer knowing viewing.

Lacking any direct or forensic evidence that A1C King knowingly sought and viewed the charged child pornography, the government attempts to fill the gap by referencing other conduct. Specifically, the government claims that because A1C King searched for anime, and engaged in sexualized role-playing chats online, the government has met its burden and "established Appellant intended to view child pornography."[5] Answer at 25. This Court should decline the

[5] The government originally charged A1C King with possession of child pornography and viewing child pornography for having anime pornography on his computer, but those charges were later dismissed. JA at 13. The government also charged A1C King with possession of child pornography for the pictures of child erotica, but

government's invitation to make such an inference because it is unreasonable and not based on the evidence.

A1C King's participation in role-playing chats and viewing anime pornography is not illegal. Nor is there any reason to believe that someone is more likely to seek or view child pornography just because he or she engages in such chats or views anime pornography. Yet, the government asks this Court to draw such an inference without any evidentiary support in the record or citation to legal authority.

4. The government's claim that A1C King confessed to viewing the charged child pornography is contradicted by the evidence and cannot be reasonably inferred.

In one paragraph of its Answer, the government claims that "Appellant admitted to viewing hardcore child pornography on his home computer." Answer at 35. But in another paragraph of its answer, the government acknowledges "Appellant did not explicitly admit he . . . viewed the three charged images." Answer at 31.

Regardless of which of the two positions the government ultimately takes, both fail. The government's claim that A1C King

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the military judge acquitted A1C King of that offense. JA at 13, 452. Finally, the government charged A1C King with indecent language for the sexual role-playing chats he had online, but the military judge acquitted him of that offense. JA at 14, 452.

admitted to viewing child pornography is undercut by the very recording the government cites. In that recorded dialogue between A1C King and law enforcement (JA at 459 at 15:59:33), A1C King does not come anywhere close to admitting he knowingly viewed child pornography. On the contrary, what A1C King told law enforcement was that there was only one time he recalled seeing potential child pornography and that was when a pop-up window opened on his computer while he was looking for anime. JA at 459 at 15:59:33. He immediately closed the window. *Id.* Far from admitting to knowingly viewing child pornography, A1C King's body language, tone, and language clearly convey that he was surprised it popped up on his screen and he did not seek it out. *See id.*

If the government takes the position that A1C King did not directly confess but his guilt can be presupposed because of a "demonstrated guilty conscious," that argument too must fail. Answer at 37. Although the government offers a conclusory statement that "Appellant created a cover story" when he disclosed the pop-up, the government cites to no evidence in the record to support its conclusion. Answer at 38. Despite retaining the assistance of a computer expert, having extensive digital evidence from 34 devices, and having a lengthy recorded subject interview, the government does not point to a single shred of evidence to support its conclusion. Thus, such a conclusion, or inference, is unreasonable and not based on the evidence.

Conversely, A1C King's statement that the only child pornography he may have seen occurred when a pop-up unexpectedly appeared on his screen is supported by the evidence. In fact, the government's expert testified to the feasibility of such an occurrence. *See* JA at 399-400. The forensic evidence also backed up A1C King's account. According to the government's expert, "no determination was made on whether [A1C King] visited known child pornography websites." JA at 471. No photographs or videos of known child pornography were found. *Id.* And "[n]o webmail or email artifacts were found that indicate any attempts to produce, distribute child pornography, or arrange a sexual encounter with a minor." *Id.*

Thus, the government's request that this Court find A1C King admitted to knowingly viewing child pornography is without any basis in the evidence. Additionally, it is unreasonable for this Court to accept the government's invitation to infer that A1C King admitted to such conduct, or had consciousness of guilt, because the evidence directly contradicts such an inference.

5. The government's reliance on several U.S. Courts of Appeals decisions is misplaced because the facts of those cases are readily distinguishable.

The government asserts that A1C King's position is that the prosecution must "prove an accused's knowledge, access, and control of copies of the charged images found in cache or unallocated space." Answer at 46. But the government fundamentally misunderstands A1C King's position. A1C King does not claim that the prosecution must prove knowledge, access, or control of the underlying files, but rather, "the mere existence of child pornographic files on a computer would be insufficient to establish knowing viewing." Brief at 26.

While the government is correct that A1C King "cited caselaw focused on possession" (Answer at 46), that is because "there is a dearth of federal caselaw" concerning the offense of viewing child pornography (Brief at 22). But the rationale from possession cases that mere presence on child pornography on a computer is insufficient to establish knowledge is equally applicable to viewing offenses. *See* Brief at 16-25. Even the cases cited by the government affirm this position.

The government claims "[t]his case is similar to *McArthur* where the government also relied upon circumstantial evidence and the appellant also argued the computer may have cached images the appellant never saw." Answer at 44. But the government is mistaken because in *McArthur* there was direct evidence the accused viewed child pornography. The accused in that case was arrested with child pornography in his wallet, admitted to viewing child pornography, and attempted to delete the child pornography the day after his arrest. *United States v. McArthur*, 573 F.3d 608, 610-12 (8th Cir. 2009).

The government also points to *Pruitt* for the proposition that searching for child pornography and possessing child pornography files in unallocated space is sufficient circumstantial evidence to sustain a conviction. Answer at 40. But in *Pruitt*, unlike in A1C King's case, the accused admitted to viewing child pornography, there was evidence the accused visited known child pornography websites, and there was proof the accused accessed child pornography. *See United States v. Pruitt*, 638 F.3d 763, 764-7 (11th Cir. 2011).

Finally, the government cites to *Kaine*. But in *Kaine*, the conviction was upheld after the government offered evidence that the accused had saved child pornography in a folder on his desktop, visited known child pornography websites, and admitted to downloading child pornography. *United States v. Kaine*, 589 F.3d 945, 948-50 (8th Cir. 2009). None of which are present in A1C King's case.

Simply put, none of the cases the government cites support its proposition that there is enough circumstantial evidence to infer that A1C King knowingly viewed child pornography. On the contrary, the cases the government cites provide vivid examples of the type of strong evidence—beyond mere presence of the contraband file in a cache or unallocated space—required to support a conviction. No such evidence exists in this case. Because the government did not put on evidence that A1C King knowingly viewed the three specific images charged, his convictions are legally insufficient.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on October 9, 2018 and that a copy was served via electronic mail on the Air Force Appellate Government Division on October 9, 2018.

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