IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	CORRECTED COPY OF FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 18-0288/AF
Airman First Class (E-3), JEREMIAH L. KING, USAF, *Appellant.*	)	Crim. App. Dkt. No. 39055
	)	Date: 12 October 2018

CORRECTED COPY OF FINAL BRIEF ON BEHALF OF THE UNITED STATES

ZACHARY T. WEST, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 36224

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Counsel Division
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 34088

JOSEPH KUBLER, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 33341

JULIE L. PITVOREC, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 31747

INDEX OF BRIEF

TABLE OF AUTHORITIES

Page(s)

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES

FEDERAL CIRCUIT COURTS OF APPEALS

STATUTES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	CORRECTED COPY OF FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 18-0288/AF
Airman First Class (E-3) JEREMIAH L. KING, USAF *Appellant*.	)	Crim. App. Dkt. No. 39055
	)	Date: 12 October 2018

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

ISSUE PRESENTED

THE MILITARY JUDGE FOUND APPELLANT GUILTY OF VIEWING CHILD PORNOGRAPHY. BUT ALL OF THE ALLEGED CHILD PORNOGRAPHY APPELLANT ALLEGEDLY VIEWED WAS FOUND IN UNALLOCATED SPACE OR A GOOGLE CACHE. IS THE EVIDENCE LEGALLY SUFFICIENT?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct. The Government additionally notes the granted issue concerned Appellant's conviction for viewing child pornography under Charge III, Specification 2, in which the military judge

found Appellant guilty, by exceptions, of viewing child pornography images 01136627.jpg, 01136666.jpg, and 01173367.jpg. (J.A. at 452.)

STATEMENT OF FACTS

In November 2013, Photobucket—an image and video-hosting website—flagged suspected child pornography a user uploaded to the user's account. (J.A. at 76, 453-57.) Photobucket sent the images and the user's IP address to the National Center for Missing and Exploited Children, which traced the user's IP address to a military network and notified the Air Force Office of Special Investigations (AFOSI). (J.A. at 76-77, 453-57.) AFOSI tracked the user's Photobucket e-mail address to Appellant's military e-mail address and interviewed Appellant shortly thereafter. (J.A. at 76-77.)

a. Appellant's AFOSI interview.

AFOSI told Appellant he was suspected of possessing child pornography based on images traced to his government computer. (J.A. at 459 at 13:52:25, 13:58:01.) In response, Appellant explained he searched for images on Photobucket using his government computer. (J.A. at 459 at 13:58:01, 13:59:40.) Appellant said he scrolled through Photobucket image results, selected the images he liked, saved them to his desktop, and uploaded them to his Photobucket account for later viewing on his home computer. (J.A. at 459 at 13:59:25, 14:20:25.)

Appellant looked at over 100 Photobucket images while at work. (J.A. at 459 at 13:59:11.)

Appellant described the images he viewed and downloaded from Photobucket. Although he initially denied each allegation, Appellant eventually admitted to looking at sexually explicit anime of children, images of children, images of nude children, and hardcore child pornography. (J.A. at 459 at 15:58:54, 14:03:00, 14:11:10, 15:59:33.) Appellant also admitted to masturbating to images of nude children. (J.A. at 459 at 16:07:20.) Appellant progressively admitted these acts after AFOSI confronted him on each denial. (J.A. at 459 at 14:00:36, 14:01:46, 14:09:45, 15:59:33, and 15:45:40.)

Regarding images of nude children, Appellant admitted he "looked at underage girls in nude poses" and "was a little bit thrilled." (J.A. at 459 at 14:11:10.) Appellant knew these were children because they were small and did not look like adult women. (J.A. at 459 at 14:03:37.) Appellant saw the girls' buttocks, nipples, and in at least one image, vagina. (J.A. at 459 at 14:14:58.) Appellant saw these images on Google or Photobucket. (J.A. at 459 at 14:11:35.)

After finding images of an underage girl, Appellant "wondered what other girls would look like, so out of curiosity I looked for others, and I should not have." (J.A. at 459 at 14:28:11.) As he found images of children, Appellant decided "I'm going to save that, and I looked at other ones . . . and I was just like

wow, these are really different, these are a whole new aspect of the female body I've never seen before, and I kept them so I could continue to look at them." (J.A. at 459 at 15:51:25.)

Appellant admitted to searching for images of "preteen girls" and "little girls" on Photobucket. (J.A. at 459 at 14:37:45, 14:40:15.) Appellant said he also searched for images of children using the phrase "danycamy." (J.A. at 459 at 14:29:05, 15:35:09.) Appellant searched "danycamy" after finding the term in the caption of an underage girl's picture. (J.A. at 459 at 459 at 15:35:09.) By searching "danycamy," Appellant received images of 12 to 13-year-old nude girls. (J.A. at 459 at 15:36:10.) Appellant found these images sexually thrilling. (J.A. at 459 at 15:44:38.)

Appellant explained he found nude children sexually thrilling because he was going through sexual changes that created new cravings and ideas. (J.A. at 459 at 14:38:10.) Appellant knew viewing images of nude children was wrong, but he thought, "how can I preach to others not to do it, how can I tell people what it is if I don't know what it is myself?" (J.A. at 459 at 14:27:56.) Appellant said he fantasized about nude children and these images fulfilled his sexual urges. (J.A. at 459 at 15:46:12, 16:07:26.)

Appellant also admitted he saw hardcore child pornography. (J.A. at 459 at 15:59:33.) However, Appellant claimed he only saw the hardcore child

pornography when a screen "popped up" on his computer "talking about underage girls." (J.A. at 459 at 16:00:17.) Appellant claimed he was looking at other pornographic images, but once he saw the hardcore child pornography, he exited the screen because he was afraid he would get in trouble. (J.A. at 459 at 16:00:30.) Appellant said the pop-up was on his home computer screen for approximately two minutes. (J.A. at 459 at 16:00:30.)

Appellant initially denied masturbating to images of nude children. (J.A. at 459 at 14:31:33.) Appellant told AFOSI he wanted to masturbate to nude children, but "something would come up" like visitors at his house, his internet turning off, or his computer shutting down. (J.A. at 459 at 15:45:05.) However, Appellant eventually admitted he masturbated to nude children, explaining he looked at images of children, got excited, touched his penis, and ejaculated. (J.A. at 459 at 16:07:25.) Specifically, Appellant said he searched for images while at work, selected images he liked, saved them to his Photobucket account, and then masturbated at home to anime and images of children. (J.A. at 459 at 15:46:43.)

Appellant was ashamed of his Photobucket images and feared they were illegal. (J.A. at 459 at 14:08:46, 14:39:13.) Appellant hid the images from his wife and brother, viewing them when his family was away from the house or asleep. (J.A. at 459 at 14:08:46.) Appellant believed his viewing of the images was "perverted and wrong, and every day I tell myself I shouldn't be doing it, I

should probably go see . . . a therapist or something because maybe there is something wrong with me." (J.A. at 459 at 14:08:46.)

Appellant offered additional details on his computer use. Appellant said he created a file called "my stuff" on his home computer where he saved images from Photobucket. (J.A. at 459 at 15:32:39.) This home computer was password protected. (J.A. at 459 at 15:32:39.) Appellant identified "jeremiah" as one of his user accounts on his home computer. (J.A. at 459 at 16:20:30.)

Appellant also provided AFOSI with details on his Photobucket account and general internet usage. Appellant said Photobucket canceled two of his accounts, one for having sexually explicit images. (J.A. at 459 at 14:21:01.) After Photobucket canceled his most recent account, Appellant used Google and Bing to find images. (J.A. at 459 at 16:17:50.) Appellant also discussed how he was a member of a role-playing website called Gaia Online. (J.A. at 459 at 15:48:08.)

In discussing the timeline of events, Appellant said he began searching for, viewing, and downloading images of children in approximately March or April 2013. (J.A. at 459 at 14:33:26, 14:38:12.) Appellant's sexual cravings began at approximately the same time. (J.A. at 459 at 15:47:46.) Photobucket terminated one of Appellant's accounts for containing sexually explicit images "in the beginning of [2013]." (J.A. at 459 at 14:21:01.) Appellant said he last viewed images of children during the week of 5 December 2013. (J.A. at 459 at 14:24:04.)

b. Seizure of Appellant's electronics and Photobucket account.

After Appellant's interview, AFOSI seized electronics located in Appellant's home and workspace. (J.A. at 81-82.) From Appellant's home, AFOSI seized a desktop computer (Tag 14), an HP laptop (Tag 13), an ASUS laptop (Tag 19), and a phone (Tag 2B). (J.A. at 156-57, 490-91.) The DCFL examiner identified these as Appellant's personal electronics. (J.A. at 197.) Additionally, AFOSI seized two government computers (Tags 1A and 2A) identified by Appellant's supervisor as Appellant's work computers. (J.A. at 171-74, 490-91.) AFOSI sent these electronics to the Defense Computer Forensics Laboratory (DCFL) for forensic examination. (J.A. at 490-91.) DCFL found various sexually explicit and sexually suggestive images, search terms indicative of child pornography, web addresses, and other information. (J.A. at 470-92, 506-54.)

Additionally, Photobucket provided information on Appellant's Photobucket accounts, including Appellant's account history and the suspected child pornography which flagged his account for review. (J.A. at 453-58.) Appellant opened three accounts, all of which Photobucket terminated for violations of their User Agreement. (J.A. at 454.) Photobucket terminated Appellant's most recent account on 3 November 2013, notifying Appellant via his personal Yahoo email address. (J.A. at 457.)

c. Evidence presented at trial.

At trial, the Government presented testimony from AFOSI agents and the DCFL examiner, Photobucket evidence, a video of Appellant's AFOSI interview, the DCFL report, and digital evidence from the seized electronics. (J.A. at 73-407, 453-59, 470-94, 506-54.)

With respect to digital evidence, the Government presented sexually explicit images of real and anime children, sexually suggestive images of children, search terms indicative of child pornography, web addresses, and captioned visual content joking about child pornography and child erotica ("memes"). (J.A. at 486, 506-54.) The DCFL examiner testified where he found this digital evidence, any significant metadata associated with the digital evidence, and the concepts of logical space, unallocated space, and Google Cache. (J.A. at 186-406.)

Logical space, unallocated space, and Google Cache

Logical space is the level of an electronic device a user can access. (J.A. at 209.) Alternatively, unallocated space is the level of an electronic device a user cannot normally access. (J.A. at 210.) The DCFL examiner testified a file's presence in unallocated space means the file previously existed in logical space but was deleted. (J.A. at 210.)

Internet cache is an automated computer function that reduces loading times. (J.A. at 212-13.) When a user visits a webpage, the computer downloads the webpage's images to a local cache folder on the computer. (J.A. at 212-13.) The DCFL examiner testified the images' presence in Google Cache meant the user visited a website containing the images. (J.A. at 251.) Whether manually cleared by the user or automatically cleared by the computer, images cleared from Google Cache most likely go to unallocated space. (J.A. at 342.)

Child pornography search terms

The Government presented evidence Appellant used child pornography search terms across multiple devices, on different dates, using different search methods. (J.A. at 220-27, 485, 506-26.) The Government offered this evidence to prove Charge I, attempted viewing of child pornography.

Specifically, the DCFL examiner testified he found the search terms "skimpy preteen" and "loli porn" on Appellant's home desktop computer, two search terms commonly used to find child pornography. (J.A. at 223-25, 485.) Beyond these two search terms, the Government presented evidence of an additional thirty charged and uncharged search terms found on Appellant's home desktop computer (Tag 14), government computer (Tag 1A), and home laptops (Tags 13 and 19). (J.A. at 506-26.) Table 1 summarizes a selection of relevant charged and uncharged search terms:

Table 1 – Search Terms On Appellant's Government And Home Computers

Search term	Search Method	Found on:	Date/Time (UTC)
preteen dancing sexy	YouTube	Tag 1A	1/18/2013 at 19:34
little girl dancing	YouTube	Tag 1A	1/18/2013 at 19:39
what is dany camy?	Google	Tag 14	7/27/2013 at 7:21
dany camy pictures	Google	Tag 14	7/27/2013 at 7:30
dany cami pictures	Google	Tag 14	7/27/2013 at 7:31
dany camy	Bing	Tag 14	9/9/2013 at 19:57:36
			9/9/2013 at 19:57:39
Dany Camy Teen	Bing	Tag 14	9/9/2013 at 19:58:18
Camy Dreams Set 11	Bing	Tag 14	9/9/2013 at 19:58:27
nude dany camy	Bing	Tag 14	9/9/2013 at 19:58:33
dany camy	Bing	Tag 14	9/9/2013 at 19:58:51
skimpy preteen	Bing	Tag 14	9/9/2013 at 19:59:09
little girls skimpy clothing	Bing	Tag 14	9/9/2013 at 19:59:41
Little Girl Beauty Pageant Swimsuit	Bing	Tag 14	9/9/2013 at 20:00:09
Little Girl Pageant Swimwear	Bing	Tag 14	9/9/2013 at 20:00:13
Little Girl Pageant Swimwear Models	Bing	Tag 14	9/9/2013 at 20:00:18
Girls Pageant WoW Wear	Bing	Tag 14	9/9/2013 at 20:00:30
sexy little girls	Bing	Tag 14	9/9/2013 at 20:02:01
sexy little teen	Bing	Tag 14	9/9/2013 at 20:02:17
real father/daughter sex stories	Google	Tag 14	11/30/2013 at 9:40
father/daughter sex stories	Google	Tag 14	11/30/2013 at 9:44
father/daughter porn sto	Google	Tag 14	11/30/2013 at 9:51
loli	Google	Tag 14	11/30/2013 at 9:51
loli porn	Google	Tag 14	11/30/2013 at 9:51
little girl	Google	Tag 14	12/8/2013 at 10:43
			12/8/2013 at 10:44
			12/8/2013 at 10:47
			12/8/2013 at 10:48
lolion pictures	Google	Tag 13	12/14/2013 at 8:22
little girl	Google	Tag 14	12/14/2013 at 20:40
goth loli	Google	Tag 19	12/16/2013 at 8:37:22

(J.A. at 485, 506-26.)

Child pornography web addresses

The Government also presented evidence of web addresses found on Appellant's government computer, within Appellant's CAC-protected user profile. (J.A. at 227-28, 486.) These web addresses showed Appellant visited Photobucket image results pages. (J.A. at 228-29, 486.) On these pages, Photobucket displayed images from searches of child pornography terms. (J.A. at 228-29, 486.) Table 2 summarizes the web addresses and the relevant search term taken from the web address:

Table 2 – Web Addresses Visited On Appellant's Government Computer

Visited URL	Search term	Date
http://photobucket.com/images/sexy%20preteen	Sexy preteen	1/18/2013
http://photobucket.com/images/cute%20pre%20teen	Cute pre teen	1/18/2013
http://photobucket.com/images/sexy%20loli	Sexy loli	2/6/2013
http://beta.photobucket.com/images/cute%20loli	Cute loli	2/20/2013
http://photobucket.com/images/anime%20lolicon	Anime lolicon	10/30/2013

(J.A. at 228-29, 486.)

Sexually suggestive images of real and anime children

The Government also presented sexually suggestive images of real and anime children found on Appellant's home desktop computer and Photobucket account. (J.A. at 242-49, 453-58.) The Government offered these images to prove Charge II—violation of a general regulation by using a government computer to

wrongfully upload images—and Charge III, Specification 1, possession of child pornography.

With respect to Charge II, the Government presented evidence Appellant used his government computer to upload sexually suggestive images of children to Photobucket. (J.A. at 453-458.) Three of the charged images depicted children posed in sexually suggestive poses, some partially nude. These images were found on Appellant's Photobucket account. (J.A. at 457.)

DCFL found nearly identical images from Appellant's Photobucket account were also in his home desktop computer's unallocated space. (J.A. at 231-42.) The DCFL examiner testified the presence of these images could be consistent with Appellant viewing his Photobucket images on his home desktop computer. (J.A. at 233-35.)

With respect to Charge III, Specification 1, the Government presented evidence Appellant possessed sexually suggestive images of children on his home desktop computer. [1] (J.A. at 242-49.) These images depicted children in sexually suggestive poses, some partially nude. (J.A. at 242-49.) Notably, DCFL

[1] The Government recognizes Appellant was acquitted of Charge III, Specification 1. Nevertheless, this Court can consider the facts underlying this Specification when weighing the legal sufficiency of Appellant's convictions. United States v. Rosario, 76 M.J. 114, 117-18. (C.A.A.F. 2017) (holding a reviewing court is not precluded from considering evidence supporting the charge for which the appellant was acquitted when conducting legal sufficiency review of the charge for which the appellant was convicted).

found evidence that sexually suggestive images of children were saved in a user-created folder named "Gaia Stuff" located within another user-created folder named "my stuff." (J.A. at 242-49, 478.) The sexually suggestive images of children existed in these folders sometime between 29 December 2012 and 11 March 2013. (J.A. at 243-49, 478.)

Sexually explicit images of real minors

With respect to Charge III, Specification 2 (viewing child pornography), the Government presented sexually explicit images of children found in Google Cache and the unallocated space on Appellant's home desktop computer. The images resulting in conviction are summarized below:

Table 3 – Child Pornography On Appellant's Home Desktop Computer

Last 4 digits of file name:	Location:	Associated dates	Image description:
6627.jpg	Tag 14, Google Cache	Entered Google Cache between 10/15/12 and 4/18/13	A nude girl with an undeveloped breast. A male holds a penis to her mouth, encouraging her to perform fellatio.
6666.jpg	Tag 14, Google Cache	Entered Google Cache between 10/15/12 and 4/18/13	A nude girl with her nipples covered by her pigtails. Her fingers cover a portion of her vaginal area, simulating masturbation.
3367.jpg	Tag 14, unallocated space	None	A nude girl wearing a collar around her neck. A hand guides a penis into her mouth.

(J.A. at 479-83.)

Images 6627.jpg and 6666.jpg were found on Appellant's home desktop computer, within Google Cache, within the user account "jeremiah." (J.A. at 250-52, 258, 479-80.) The DCFL examiner testified the user "jeremiah" navigated to a website containing images 6627.jpg and 6666.jpg sometime between 15 October 2012 and 18 April 2013. (J.A. at 251-52.)

The DCFL examiner testified he found duplicates of Image 3367.jpg, meaning there were two other identical images sharing the same hash value as Image 3367.jpg located in the unallocated space of Appellant's home desktop computer. (J.A. at 259-61.) The DCFL examiner testified this meant Image 3367.jpg existed three separate times in the logical space of Appellant's home desktop computer prior to being deleted. (J.A. at 261.)

MRE 404(b) images of children engaging in sexually explicit conduct

The Government also presented MRE 404(b) images depicting children engaging in sexually explicit conduct. (J.A. at 527-36.) Many of these images were found in Google Cache on Appellant's home desktop computer and entered Google Cache during the same 15 October 2012 – 18 April 2013 period as charged images 6627.jpg and 6666.jpg. (J.A. at 528-32.) These MRE 404(b) images depicted children engaging in foreplay or experiencing penile vaginal penetration.

(J.A. at 527-36.) Some of the images contained website logos such as "MomTeenBang.com" and "DaughterDestruction.com." (J.A. at 528, 531.)

Gaia Online conversations

The Government presented evidence of reconstructed web pages showing chat messages found on Appellant's home desktop computer. (J.A. at 279-284, 485, 493-94.) These reconstructed web pages were offered to prove Charge III, Specification 3, communication of indecent language.[2] Gaia Online is a social networking website where users can privately message other users. (J.A. at 279-80.) DCFL discovered private messages between Gaia Online users Jude Grimm and Fairymom. (J.A. at 280-81.) This exchange came from the perspective of Fairymom, meaning Fairymom used Appellant's home desktop computer to log into their account:

> Jude Grimm: . . . Do you have any kind of story you are craving? and how detailed do you want me to be?
>
> Fairymom: I want you to be very detailed! and a current idea is involving loli, toddler, preteen, young teen sex. are you ok with those? I ask because most people arent but the idea is father daughter, but he abuses his daughter since she was born. what do you think?
>
> Jude Grim: Now do you mean that he sexually abuses her the whole time or just beatings and such? . . .

[2] The Government recognizes Appellant was acquitted of Charge III, Specification 3, but this Court can consider the facts underlying this Specification when weighing the legal sufficiency of Appellant's convictions. Rosario, 76 M.J. at 117.

> Fairymom: when she is 16 and 17 going through that bitch phase then yeah lots of rape. but when she turns l still drinking a bottle he lets her suckle his penis instead and drink his milk. and does simple stuff like that until she is older, then he starts to do sexual things to her all the time from being a toddler to a little girl, to a preteen and by that time she is happily doing stuff for him when he asks because she was raised doing it and makes him happy so shes happy. he doesn't [f**k] her until shes bigger like 14 and at age 16 realizes what hes doing and resists. when he rapes her she starts to secretly enjoy it and pisses him off just to rape her. that's basically where i want it to go 😉
>
> Jude Grim: At what age do you want to start the rp?
>
> Fairymom: at age 1 😉 and we will have time skips as we go along. how about u start us off with a pic and he is horny, his wife left him a year ago. he sees her sucking on a bottle and gets a very naughty idea

(J.A. at 493.)

DCFL found another conversation on Appellant's home desktop computer involving Fairymom:

> Fairymom: really! Ok I got something in mind You are a dad recently divorced. You have a 1 year old daughter and haven't had sex since she was born. So you see her sucking on a bottle and get a nasty idea. You start to use her innocence for your sexual release and have sex with her in many different ways at these ages 1. 5. 8. 12. 14. 16-18. (mostly rape). I have pictures too! want more details!?
>
> . . .
>
> Fairymom: No she won't enjoy it until she's like 12 😜 until then its just a way of making her daddy who she

> loves so much happy 😀 he raises her on his dick and sperm. Like she has 3 meals a day and one cream meal he can call it which is her sucking his cum out and swallowing it. Or he can cum on her food like a gift, like she wants him to cum on her food because it tastes so good. kinky stuff like that.

(J.A. at 494.)

On Appellant's seized cell phone, DCFL found an email from Gaia Online sent to Appellant's personal Yahoo email address stating his account was permanently banned. (J.A. at 283-84, 487.) On the same cell phone, DCFL found two emails from Photobucket banning Appellant's account because it contained images which violated its terms of use. (J.A. at 487.)

Child pornography and child erotica memes

Finally, the Government presented evidence of memes joking about child pornography and child erotica found on Appellant's home desktop computer. (J.A. at 537-54.) Some of the images showed children while others showed anime children. The captions included: "RAPING A LOLI: It's not an option, it's a demand"; "LOLICON: The legal way to become a pedophile"; and "I wanna rape an elementary schooler!" (J.A. at 540, 543-44.) One image showed a picture of an underage girl with the caption, "20 to Life: But it's so damn worth it." (J.A. at 542.) DCFL found some of these memes in Google Cache and the folder "my stuff." (J.A. at 544-48, 550-54.)

Summarized timeline of events occurring within the charged timeframe for Charge III, Specification 2 (viewing child pornography)

Date of event	Description of event	Within period charged images entered Google Cache?	Source
Between October 2012 and April 2013	A user of Appellant's home desktop computer visited a website containing charged images 6627.jpg and 6666.jpg.	Yes	(J.A. at 251-52.)
Between October 2012 and April 2013	A user of Appellant's home desktop computer visited a website containing uncharged sexually explicit images of children.	Yes	(J.A. at 528-33.)
Between 29 December 2012 and 11 March 2013	A user of Appellant's home desktop computer saved sexually suggestive images of children to the "my stuff" folder.	Yes	(J.A. at 243-49, 478.)
"Early 2013"	Appellant experienced new sexual cravings leading him to fantasize about and search for images of nude children.	Yes	(J.A. at 459 at 14:38:10.)
January and February 2013	A user of Appellant's government computer visited Photobucket web addresses showing images of "sexy preteen," "cute pre teen," "sexy loli," and "cute loli."	Yes	(J.A. at 227-28, 486.)
"March or April 2013"	Appellant began viewing images of nude children on Photobucket.	Yes	(J.A. at 459 at 13:59:25, 14:20:25, 16:07:25.)
"In the beginning of [2013]."	The first time Photobucket terminated Appellant's account for containing sexually explicit images.	Yes	(J.A. at 459 at 14:21:01.)

Summarized timeline, continued

Date of event	Description of event	Within period charged images entered cache?	Source
July – December 2013	A user of Appellant's home desktop and laptop computers repeatedly searched for child pornography on Google and Bing.	No	(J.A. at 470-94, 506-17.)
3 November 2013	Photobucket terminates Appellant's most recent account.	No	(J.A. at 457.)
Between 17 November 2013 and 18 December 2013	A user of Appellant's home desktop computer visited websites containing child pornography/erotica memes using Google.	No	(J.A. at 537-54.)
22 November 2013	"Fairymom" solicited and offered images of child rape fantasies on Gaia Online.	No	(J.A. at 279-284, 485, 493-94.)
Week of 5 December 2013	Last time Appellant viewed images of underage girls prior to AFOSI interview	No	(J.A. at 459 at 14:24:04.)
18 December 2013	AFOSI interviewed Appellant.	No	(J.A. at 459.)

SUMMARY OF THE ARGUMENT

Appellant's conviction for viewing child pornography is legally sufficient. The Government presented evidence Appellant wanted and searched for child pornography. Further, the Government presented evidence Appellant used Photobucket to view the charged images. Thus, 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. Given the forensic evidence and Appellant's admissions to searching for and viewing child pornography, a reasonable trier of fact could have found Appellant knowingly viewed the child pornography found on his computer.

Additionally, Appellant's conviction for attempted viewing of child pornography is legally sufficient. First, this conviction is not part of the granted issue. Even so, the Government proved Appellant specifically intended to search for child pornography based on the manner and terminology of his searches. The surrounding circumstances showed Appellant's searches were a substantial step towards viewing child pornography. Finally, Appellant did not voluntarily abandon his pursuit of child pornography.

Viewed in the light most favorable to the Government, Appellant's convictions for viewing child pornography and attempted viewing of child pornography are legally sufficient.

ARGUMENT

APPELLANT'S CONVICTIONS FOR VIEWING AND ATTEMPTED VIEWING OF CHILD PORNOGRAPHY ARE LEGALLY SUFFICIENT BECAUSE THE GOVERNMENT PROVED APPELLANT WANTED, SEARCHED FOR, AND KNOWINGLY VIEWED CHILD PORNOGRAPHY.

Standard of Review

This Court reviews questions of legal sufficiency de novo. United States v. Young, 64 M.J. 404, 407 (C.A.A.F. 2007). A conviction is legally sufficient when, "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." Young, 64 M.J. at 407 (quoting United States v. Dobson, 63 M.J. 1, 21 (C.A.A.F. 2006)). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). This Court must "draw every reasonable inference from the evidence in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" United States v. Wilson, 182 F.3d 737, 742 (10th Cir. 1999) (quoting United States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991)). A legally sufficient verdict may be based on circumstantial as well as direct evidence, and even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted).

For example, in Young, this Court considered the legal sufficiency of convictions for attempted distribution and possession of drugs based on circumstantial evidence. 64 M.J. at 405-08. At trial, the evidence established the appellant was in the same room as drugs and drug distribution instruments, but there was no direct evidence the appellant distributed drugs or possessed the drugs found in the room. Id. at 405-07. In performing a legal sufficiency review, this Court noted the evidence allowed a reasonable factfinder to infer the appellant had a direct criminal relationship with the drugs in the room. Id. at 407. Further, by making inferences in favor of the prosecution, appellant's apparent connection to the drug distribution instruments could allow a reasonable factfinder to conclude beyond a reasonable doubt the appellant distributed drugs as well. Id. at 407-08.

Similarly, in McArthur, the 8th Circuit considered whether a conviction for possession of child pornography found in unallocated space was legally sufficient when the evidence was mostly circumstantial. 573 F.3d at 610-15. Investigators found child pornography images and websites in the unallocated space of the appellant's computer after police arrested the appellant with a nude photograph of a child. Id. at 610-13. At trial, an expert testified he could not discern the source of the child pornography found in unallocated space, but there was evidence the appellant visited child pornography websites. Id. at 612. The appellant argued there was no proof he knowingly possessed the child pornography in unallocated

space and the computer may have cached images he never saw. McArthur, 573 F.3d at 614. In weighing legal sufficiency, the 8th Circuit reasoned that although the evidence rationally supported a hypothesis that conflicted with the appellant's guilt, that did not make his conviction legally insufficient. Id. at 614-15.

Law

The elements of viewing child pornography are: (1) the accused knowingly and wrongfully viewed child pornography; and (2) under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Manual for Courts-Martial, United States part IV, para. 68b.b(1) (2012 ed.). Facts showing child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness. Id. at 68b.c(9).

Court of Appeals for the Armed Forces Precedent

This Court has not directly addressed the legal sufficiency of a viewing child pornography conviction when the charged images were in unallocated space or cache. While Appellant cites to Navrestad, that case focused on the test for possession and distribution of child pornography rather than viewing. United States v. Navrestad, 66 M.J. 262, 267 (C.A.A.F. 2008).

Service Courts of Criminal Appeals Precedent

Appellant cites to unpublished Service Court opinions, but these opinions mostly focused on child pornography possession convictions. (App. Br. at 18-21.)

United States Courts of Appeals Precedent

There is a circuit split on the legal sufficiency of convictions for possession or receipt of child pornography when charged images were in cache or unallocated space.[3] The Eighth and Eleventh Circuits have found child pornography possession and receipt convictions legally sufficient when appellants did not have knowledge, access, or control of images in unallocated space and cache. *See* United States v. Kain, 589 F.3d 945 (8th Cir. 2009); United States v. Pruitt, 638 F. 3d 763 (11th Cir. 2011). Under this "Evidence Of" approach, images in cache or unallocated space are evidence of the appellant's earlier viewing and possession of the charged images when they were on the computer screen. Thus, the government need not prove the appellant's knowledge, access, and control of the images in cache or unallocated space.

For example, in Pruitt, the Eleventh Circuit found the appellant's convictions for receipt of child pornography legally sufficient even though he did not have knowledge, access, or control of images in cache and unallocated space.

[3] Legal commentators have described this as a split between the "Evidence Of" and "Present Possession" approach. J. Elizabeth McBath, *Article: Trashing Our System Of Justice? Overturning Jury Verdicts Where Evidence Is Found In The Computer's Cache*, 39 Am. J. Crim. L. 381, 390 (2012).

Pruitt, 638 F.3d at 767. During an investigation, the appellant told investigators he viewed child pornography. Id. at 765. Agents then found child pornography in the cache and unallocated space of the appellant's computer. Id. Agents also found evidence of search terms and web addresses indicative of child pornography. Id.

The 11th Circuit found an intentional viewer of child pornography may be convicted of viewing child pornography even if he did not save the charged images to a hard drive, edit them, or otherwise exert more control over them. Id. at 766. Further, the 11th Circuit established "[e]vidence that a person has sought out -- searched for -- child pornography on the internet and has a computer containing child-pornography images -- whether in the hard drive, cache, or unallocated spaces -- can count as circumstantial evidence that a person has [knowingly viewed] child pornography." Id. The 11th Circuit ultimately held the appellant's conviction for viewing child pornography was legally sufficient. Id. at 766.

Analysis

a. Appellant wanted to view child pornography.

The evidence established Appellant intended to view child pornography. Appellant told AFOSI he experienced cravings, fantasized about nude children, and found images of nude children sexually thrilling. (J.A. at 459 at 14:38:10, 15:44:38, 15:46:12.) These cravings led Appellant to masturbate to images of nude children. (J.A. at 459 at 16:07:25.)

The Gaia Online exchanges corroborated Appellant's admissions about his cravings. (J.A. at 493-94.) First, Appellant was Fairymom. Appellant's password-protected home computer logged into Fairymom's account. Appellant created a Gaia Online folder on the same computer and told AFOSI he used Gaia Online. (J.A. at 459 at 15:48:08.) Gaia Online sent Appellant a termination email which was found on his cell phone. (J.A. at 283-84, 486-87.) Fairymom's language shared the same search terms Appellant entered on his government and home computers. The evidence established Appellant was Fairymom.

The Gaia Online exchanges showed Appellant intended to view child pornography. Appellant discussed raping children, encouraging a baby to suckle his penis like a bottle, and feeding semen to his daughter. (J.A. at 493-94.) Appellant's fantasies centered on using a child's "innocence for your sexual release." (J.A. at 494.) Far from harmless roleplay, these exchanges proved Appellant desired child pornography and took concrete steps to find it. Appellant asked another Gaia Online user to "start us off with a pic" of a man sexually exploiting his 1-year-old daughter. (J.A. at 493.) While discussing raping children, Appellant told another user "I have pictures too! want more details!?" (J.A. at 494.) Appellant was both soliciting and offering images to use in child rape fantasies, demonstrating he wanted those images and had them to offer.

Although the military judge acquitted Appellant of the Specification relating to these Gaia Online exchanges, the underlying evidence was still probative of Appellant's identity, absence of mistake, intent, and knowledge for the viewing and attempted viewing offenses. A person who fantasized about child rape and sought and offered images for those fantasies would also knowingly seek and view child pornography. This exchange also disproved Appellant's argument he was only seeking anime images and accidentally stumbled upon child pornography.

The memes and sexually explicit anime offered further insight into Appellant's mind. The memes showed Appellant sought and found a counter-culture that accepted his cravings for child pornography. Similarly, the sexually explicit anime confirmed Appellant was attracted to sexually explicit images of children, whether real or cartoon.

In total, the evidence established Appellant intended to view child pornography. Appellant acted on that intent by searching for child pornography.

b. Appellant searched for child pornography.

The Government presented evidence Appellant searched for child pornography using multiple devices, search tools, and search terms. This evidence proved Appellant took concrete steps to obtain child pornography.

Appellant searched specialized terms associated with child pornography, like "loli porn" and "skimpy preteen." (J.A. at 223-24, 485.) The DCFL examiner

testified these search terms are commonly used to find child pornography and could return images similar to the charged images. (J.A. at 223-24, 388.) "Loli" was not a common phrase, yet Appellant searched it at least six different times, using various combinations to produce new results. (J.A. at 506-22.)

Appellant also searched non-traditional terms associated with child pornography. Appellant told AFOSI he liked the "dany camy" images, which showed an underage girl in sexual poses. (J.A. at 459 at 14:29:05, 15:35:09.) Appellant searched "dany camy" at least nine times, including "nude dany camy." (J.A. at 506-18.) The progression of Appellant's "dany camy" searches revealed Appellant discovered an obscure phrase, learned it was associated with sexually suggestive images of children, and then repeatedly searched the phrase in a manner that would return child pornography. Appellant cannot credibly argue he was not trying to find child pornography when his searches for "nude dany camy" could only return nude images of a girl he knew was 12 or 13 years old. (App. Br. at 37.)

The timing and method of Appellant's searches were also notable. Appellant searched for child pornography in blocks, stringing together several search terms in a short period. (J.A. at 506-18.) Appellant looked for content about fathers and daughters having sex; seven minutes later, he searched for "loli" and "loli porn." (J.A. at 516.) Appellant searched for "loli" and "loli porn" roughly a week after his Gaia Online fantasies about raping children. (J.A. at 493-

94, 516.) Over the course of a month, Appellant used Photobucket to search "sexy preteen," "cute pre teen," "sexy loli," and "cute loli." (J.A. at 486.) One day, Appellant searched 14 child pornography related terms over five minutes. (J.A. at 508-11.)

Appellant used multiple search methods—including YouTube, Photobucket, Bing, and Google—and multiple devices, including his work computer, home desktop computer, and home laptops. (J.A. at 506-26.) Appellant's search patterns revealed a determined, methodical approach to finding child pornography. These searches began in January 2013, the same period Appellant told AFOSI he started searching for images of children and experiencing new sexual cravings. (J.A. at 459 at 14:33:26.)

Appellant argues there was no connection between the charged search terms in Charge I, Specification 1, and the charged images from Charge III, Specification 2. (App. Br. at 34.) Admittedly, Appellant entered the charged search terms after two of the charged images entered Google Cache. (J.A. at 506-26.) However, the charged search terms were not the only evidence of search terms the Government presented.

The Government presented evidence Appellant visited Photobucket web addresses associated with child pornography in January and February 2013. (J.A. at 228-29, 486.) This forensic evidence proved (1) Appellant visited Photobucket

on his government computer; (2) Appellant searched child pornography terms in Photobucket; (3) Photobucket returned image results for those search terms, meaning Photobucket likely displayed child pornography in front of Appellant; and (4) Appellant searched for child pornography in January and February 2013, within the October 2012-April 2013 period two of the charged images entered Google Cache. Thus, the Government presented evidence of child pornography search terms circumstantially connected to the charged images.

Furthermore, even though the charged searches for child pornography occurred after two of the charged images entered cache, the charged searches are still relevant to whether Appellant knowingly viewed child pornography. A person's later conduct gives context to their earlier conduct. Here, Appellant's child pornography searches in July to December 2013 established a continuing course of conduct with respect to his earlier child pornography searches in January and February 2013. This continuing course of conduct showed Appellant intended to find child pornography during his January and February 2013 Photobucket searches for the same terms.

The Government presented evidence Appellant engaged in a systematic and purposeful search for child pornography that coincided with his sexual fantasies. Based on their specificity and frequency, it is reasonable to conclude Appellant's searches resulted in child pornography he knowingly and wrongfully viewed.

c. Appellant knowingly and wrongfully viewed child pornography.

The Government's theory was Appellant searched for child pornography on Photobucket, uploaded the images to his account, and viewed those images on his home desktop computer. This theory proved Appellant knowingly and wrongfully viewed the charged images because Photobucket displayed each image in front of him. The circumstantial evidence presented at trial supported this theory.

Appellant's AFOSI interview was the starting point. During his interview, Appellant said he searched Photobucket for images of nude children, found the images he liked, and downloaded those images to his work computer. (J.A. at 459 at 13:59:25, 14:20:25.) Appellant then uploaded those images to his Photobucket account. (J.A. at 459 at 13:59:25, 14:20:25.) Appellant accessed his Photobucket account at home, looked at the images, and masturbated to them. (J.A. at 459 at 13:59:25, 14:20:25, 15:46:43.) While Appellant did not explicitly admit he searched for, uploaded, and viewed the three charged images, the presented circumstantial evidence supported that conclusion.

First, Appellant visited Photobucket web addresses containing child pornography image search results. (J.A. at 486.) This proved Appellant went to Photobucket, searched child pornography terms, and likely received child pornography image results. With these image results in front of him, Appellant scrolled through pages of content and selected the child pornography he liked.

Therefore, the evidence supported the conclusion Appellant searched for and found the charged child pornography on Photobucket in early 2013.

Second, the evidence corroborated Appellant's admissions he uploaded images of children to Photobucket. Appellant's most recent Photobucket account contained at least three sexually suggestive images of children. (J.A. at 453-58.) One of these images came from camy-dreams-sets, the same "dany camy" Appellant admitted to searching for on his government computer. Further, Photobucket's multiple terminations of Appellant's accounts demonstrated he repeatedly misused the website for sexually explicit images. Photobucket terminated Appellant's account in early 2013, the same time he searched for child pornography on Photobucket and the same time the charged images entered Google Cache. Thus, the circumstantial evidence supported the conclusion Appellant uploaded the charged child pornography to his Photobucket account in early 2013.

Third, the evidence corroborated Appellant's admissions he viewed his Photobucket images on his home computer. DCFL found images that were both on Appellant's Photobucket account and on his home desktop computer. (J.A. at 231-42.) This was consistent with Appellant viewing images from his Photobucket account on his home computer. Furthermore, DCFL found sexually suggestive images of children saved to Appellant's user-created folder "my stuff" on his home

desktop computer between 29 December 2012 and 11 March 2013. (J.A. at 242-49, 478.) This was the same folder where Appellant told AFOSI he saved images from Photobucket. Therefore, the circumstantial evidence of Appellant's child pornography-seeking habits supported the conclusion that in early 2013, Appellant used his home desktop computer to view the charged child pornography he uploaded to Photobucket.

Fourth, the period two of the charged images entered cache overlapped with multiple events indicative of child pornography. For example, two of the charged images entered Google Cache between 15 October 2012 and 18 April 2013. (J.A. at 251-52.) Forensic evidence from Appellant's work computer showed Appellant searched for child pornography on Photobucket in January and February 2013. (J.A. at 486.) Appellant told AFOSI he began searching for images of nude children in early 2013, experienced his sexual cravings in early 2013, and had his Photobucket account terminated for sexually explicit images in early 2013. (J.A. at 459 at 14:21:01, 14:33:26, 15:47:46.)

Similarly, the MRE 404(b) images entered the Google Cache file during the same period as two of the charged images. These MRE 404(b) images depicted children engaging in foreplay or penile vaginal penetration. (J.A. at 528-36.) Appellant's home desktop computer cached multiple charged and uncharged sexually explicit images of children during the same period. (J.A. at 479-80, 528-

32.) These MRE 404(b) images came from different websites and depicted different scenes; they could not have all been cached from the same website. Considering the amount of sexually explicit images of children in Google Cache, the evidence supported the conclusion Appellant repeatedly viewed a website containing sexually explicit images of children originating from different sources. This description was consistent with Appellant's use of Photobucket, where he would save user-uploaded photos from different websites to one central location—his account. In short, the convergence of six child pornography-related events during this October 2012-April 2013 period further evidenced Appellant's ongoing use of Photobucket to view child pornography.

Fifth, the charged image found in unallocated space—3367.jpg—had duplicates, meaning Image 3367.jpg existed on the logical space of Appellant's home desktop computer three separate times. (J.A. at 259-61.) As the DCFL examiner testified, Image 3367.jpg most likely entered unallocated space after being cleared from cache, again suggesting Appellant's repeated viewing of a website containing sexually explicit images of children. (J.A. at 342.) Regardless of how it arrived in unallocated space, the evidence supported the conclusion Appellant knowingly viewed Image 3367.jpg because it existed in logical space three separate times.

Sixth, Appellant admitted to viewing hardcore child pornography on his home computer. (J.A. at 459 at 15:59:33.) Though Appellant minimized the extent he knowingly viewed the images, the admission nevertheless established Appellant saw hardcore child pornography on his home computer.

Stepping back, this Court should draw the reasonable conclusion Appellant used Photobucket to view the charged images on his home desktop computer. Barner, 56 M.J. at 134. Considering Appellant admitted to using Photobucket to search for, view, and masturbate to images of nude children, it is a reasonable inference that he also used Photobucket to view the charged images of child pornography. The forensic evidence corroborated this conclusion, showing a forensic trail of images from Appellant's work computer to his home desktop computer. Indeed, it would be unlikely that Appellant, who habitually used Photobucket to masturbate to nude children in early 2013 on his home computer, did not use Photobucket to view the charged images cached on the same computer during the same period.

Appellant's typical pattern of using Photobucket proved he knowingly viewed the charged images. Appellant only saved the Photobucket images he liked to his account, requiring him to look at each image. Appellant exercised control over the images when he saved them to his work desktop and uploaded them to his

Photobucket account. Appellant then knowingly viewed the images when he accessed them again and masturbated to them at home.

The Government argued this theory during closing. (J.A. at 419-23.) During their argument, trial defense counsel conceded Appellant knowingly viewed images from Photobucket at home:

> So, we do have a forensic trail that seems to suggest that, at work, he looks at something, beams it up to the cloud universe of Photobucket, and sometime later, may have accessed it in his, you know, personal computer. So, there seems to be some forensic trail of connectivity there.

(J.A. at 441-42.)

Even though copies of the charged images were in unallocated space and Google Cache, the Government proved Appellant knowingly and wrongfully viewed the original images, based on his admitted habit of viewing and saving images he liked at work to Photobucket, and then viewing them again when Photobucket displayed them on his home computer screen. Given Appellant's known practices, a reasonable factfinder could conclude that the charged images were present on Appellant's home desktop computer because Appellant had first viewed and saved them to Photobucket at work and then accessed and viewed them again through Photobucket on his home computer.

d. Appellant demonstrated a guilty conscience.

Appellant repeatedly minimized and lied during his AFOSI interview, showing consciousness of guilt relevant to his convictions.

Appellant denied looking at images of nude children, anime of nude children, and hardcore child pornography. Yet, after AFSOI confronted him, Appellant admitted to each of these acts. Appellant established lines he would not cross only to admit he crossed them.

Appellant also lied to AFOSI, telling them the only terms he searched were "dany camy," "preteen girls," and "little girls." Appellant denied performing any searches for underage pornography. Yet, approximately two weeks before the interview, Appellant searched for "loli porn" and "father/daughter sex stories." (J.A. at 516.) Just days prior to his AFOSI interview, Appellant searched for "goth loli" and looked at memes about raping elementary schoolers and serving prison time for sexually exploiting children. (J.A. at 520, 542-43.) Appellant did not forget to mention these searches, he knowingly concealed them.

This Court should view Appellant's AFOSI interview through the lens of his lies and minimizations. Appellant admitted to viewing images of nude children and hardcore child pornography, but did not explicitly describe viewing the charged images. Appellant admitted to viewing images similar to image 6666.jpg, which depicted an underage girl standing with her hand covering her vagina, but

not images 6627.jpg and 3367.jpg, which depicted children performing fellatio. To this extent, Appellant did not confess to viewing child pornography. However, consistent with his pattern of lies and minimization, Appellant would not have made such a confession.

It is in this context the Court should consider Appellant's admission he saw hardcore underage pornography in a "pop-up" that lasted on his screen for two minutes. (J.A. at 459 at 15:59:33.) Appellant initially denied viewing any hardcore child pornography. But when AFOSI told him they would discover deleted images on his computer, Appellant created a cover story about a mysterious pop-up. Appellant created a similar cover story about masturbating to nude children, claiming his computer always shut off or his internet connection dropped before he could do it. Appellant gave up on his unbelievable masturbation cover story a short time later.

Appellant's hardcore child pornography cover story was just as flimsy, but it established a critical point: Appellant admitted he looked at hardcore child pornography on his home desktop computer. This statement was not a complete confession, but taken in the context of Appellant's earlier lies and minimizations, it was an admission he knowingly viewed hardcore child pornography on his home computer. This admission corroborated the forensic and circumstantial evidence in this case showing Appellant knowingly viewed child pornography.

e. Appellant's viewing child pornography conviction was legally sufficient.

Considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements of viewing child pornography beyond a reasonable doubt. The Government presented evidence Appellant wanted and searched for child pornography, demonstrating consciousness of guilt when he was caught. The Government presented a corroborated theory Appellant found, saved, and knowingly viewed child pornography on Photobucket. This theory proved Appellant's viewing was wrongful because he actively and intentionally acquired the charged images.

Furthermore, Appellant's home desktop computer cached two of the charged images during the charged timeframe. Although the image in unallocated space was undated, Appellant told AFOSI he first looked at images of nude children and experienced new sexual urges in early 2013, the same period he searched for child pornography on Photobucket. Thus, circumstantial evidence proved Appellant viewed the image in unallocated space during the charged timeframe. Finally, Appellant's conduct was of a nature to bring discredit upon the armed forces.

Therefore, Appellant's conviction for viewing child pornography is legally sufficient because a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. While not determinative, a military judge—who is presumed to know the law—found all the essential elements beyond a

reasonable doubt. Similarly, in its exercise of its Article 66 authority, AFCCA found this conviction was legally and factually sufficient.

Case law supports their findings. Like Pruitt, evidence Appellant admitted to viewing child pornography, searching for child pornography, and owning a computer containing child pornography—whether in cache or unallocated space—was sufficient circumstantial evidence Appellant knowingly viewed the charged child pornography. 638 F.3d at 766. The Government did not need to prove Appellant had knowledge, access, or control of copies of the charged images found in unallocated space and cache because Appellant knowingly viewed the original images on Photobucket. *See* Kain, 589 F.3d at 950 (A computer user who views child pornography on a website gains actual control over the images similar to a person who browses child pornography in a magazine).

f. Mere possibilities do not render Appellant's conviction legally insufficient.

This Court need not negate all possibilities except Appellant's guilt to find his conviction legally sufficient. Wilson, 182 F.3d at 742. In his brief, Appellant argues a series of hypotheses in which he did not knowingly view child pornography. (App. Br. at 27-36.) The evidence contradicted Appellant's arguments, but even if these were reasonable hypotheses, they fail to establish it was impossible for a rational factfinder to find the essential elements beyond a reasonable doubt.

For example, Appellant argues it was possible he was not the user when the computer displayed the charged images. (App. Br. at 29.) The Government presented circumstantial and forensic evidence Appellant was the computer user. DCFL found a folder called "my stuff" on Appellant's home desktop computer, the same computer Appellant told AFOSI he (1) created a folder called "my stuff" and (2) looked at images of nude children. (J.A. at 459 at 15:32:39.) On the same computer, DCFL found two of the charged images on the user profile "jeremiah," the same user profile Appellant identified as his. (J.A. at 250-52, 258, 459 at 16:20:30.) On the same computer, DCFL found search terms Appellant admitted to using and evidence from Appellant's Photobucket and Gaia Online accounts. Finally, Appellant's user profile was password protected. (J.A. at 459 at 15:32:39.) Appellant never claimed anyone else used his computers to search for child pornography, nor was any evidence presented to that effect. Considering evidence pointing to Appellant littered his password-protected computer, the evidence established Appellant was the user when his computer displayed the charged images.

Appellant next argues the Government failed to present any evidence his computer displayed the charged images or that he knowingly viewed them. (App. Br. at 27-32.) This argument misunderstands how Appellant used Photobucket to view the charged images. Appellant knowingly viewed the charged images

because he devoted particularized attention to each image as he selected it, uploaded it, and viewed it on Photobucket. It is immaterial Google could cache images outside of Appellant's view because the circumstantial evidence placed each charged image in Appellant's view. The military judge did not assume Appellant's knowledge based merely on the charged files' existence. Rather, the military judge considered the process Appellant used to view images of nude children and, in conjunction with the circumstantial evidence in this case, found Appellant followed the same process with the charged images.

Even assuming *arguendo* Appellant did not use Photobucket to view the charged images, the factfinder could still conclude Appellant knowingly viewed the charged images. The fact Google cached child pornography and child pornography memes proved Appellant visited websites containing those images. Appellant argues his computer possibly cached the charged images without displaying them on the screen. (App. Br. at 27-29.) This argument carried less and less weight as the number of child pornography images in Google Cache increased, especially considering the MRE 404(b) images found in the same folder as the charged images. Viewed in the light most favorable to the Government, it is unlikely Appellant's computer repeatedly cached sexually explicit images of children without Appellant seeing them.

Furthermore, even though it is theoretically possible for Appellant's computer to cache images outside his view, that is inconsistent with Apellant's viewing methods. The evidence proved Appellant methodically searched for images, going page to page on Photobucket looking for what he liked. Driven by his sexual cravings, Appellant used multiple search terms, across multiple search platforms, across multiple computers.

Based on this evidence, the factfinder could reasonably conclude Appellant, compelled by his cravings, methodically scrolled down or clicked through the entirety of each webpage he visited. Thus, even if Google initially cached images outside his view, the evidence demonstrated Appellant would have still viewed the images. Appellant argues it is theoretically possible he did not see the charged images. Yet, theoretical possibilities do not make Appellant's conviction legally insufficient, especially when the evidence allowed a rational factfinder to reject the theoretical possibility. Under this standard of review, Appellant's theoretical possibility must be so strong that not a single rational trier of fact could be left firmly convinced of Appellant's guilt. That is not the case here.

To this end, the legal sufficiency of this conviction does not turn on the inference Appellant used Photobucket to view the charged images. The Government presented evidence (1) Appellant's computer cached multiple child pornography images; (2) MRE 404(b) images entered Google Cache during the

same period as the two charged images; (3) there were duplicates of the child pornography in unallocated space; (4) Appellant saved sexually suggestive images of children to a user-created folder during the charged timeframe; (5) Appellant searched multiple child pornography terms during the charged timeframe; (6) Appellant admitted to looking at and fantasizing about nude children during the charged timeframe; (7) Appellant admitted to viewing hardcore child pornography on his home desktop computer; (8) Appellant solicited and offered images pertaining to child rape during the charged timeframe; (9) Appellant viewed memes about child pornography during the charged timeframe; and (10) Appellant demonstrated a guilty conscience when questioned about viewing child pornography.

Setting aside any conclusions about Appellant's use of Photobucket, the Government aggregated multiple sources of evidence to prove Appellant was connected to child pornography. Viewing this aggregated evidence in the light most favorable to the Government, a reasonable trier of fact could have found Appellant knowingly viewed the charged child pornography in cache when he visited a website that contained those images. This 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. 573 F.3d at 612-14. The 8th Circuit upheld that conviction because it did not need to

exclude every other reasonable hypothesis besides guilt. McArthur, 573 F.3d at 614-15. This Court should follow the 8th Circuit's reasoning.

Likewise, Image 3367.jpg existed three separate times in the logical space of a computer full of forensic activity indicative of knowingly viewing child pornography. In this sense, Appellant's computer was like the room full of drugs from Young. 64 M.J. at 405-07. Appellant was found standing in the middle of the room, surrounded by evidence indicative of child pornography, having previously admitted he looked at and fantasized about images of nude children. But, there was no direct evidence Appellant viewed the charged images, much like there was no direct evidence Young distributed or possessed the drugs in the room. Young, 64 M.J. at 405-07. Yet, like Young, strong circumstantial evidence established Appellant's direct criminal relationship with the charged images. Id. at 407. Viewing the evidence in the light most favorable to the Government, a reasonable trier of fact could have found it was not a real possibility Appellant's computer saved Image 3367.jpg three separate times without him knowingly viewing it.

The question is not whether it was possible Appellant's computer cached images he did not see. The question is whether it was impossible for a rational trier of fact to have found the essential elements beyond a reasonable doubt when the Court views significant aggregated evidence in the light most favorable to the

Government. This Court merely needs to find *any* rational trier of fact could have found the essential elements beyond a reasonable doubt. Virginia, 443 U.S. at 318-19. In a case awash with Appellant's admissions to viewing nude children and repeated searches for child pornography, a rational factfinder could have found all the elements of knowingly viewing child pornography beyond a reasonable doubt. Thus, this Court should find Appellant's viewing conviction was legally sufficient.

g. This Court should hold an accused can be convicted of viewing child pornography without evidence the accused had knowledge, access, and control of copies of the charged images found in cache or unallocated space.

In analogizing to this case, Appellant cites a series of federal court opinions and unpublished Service Court opinions considering possession of child pornography. (App. Br. at 17-25.) Appellant then argues this Court should extend the rationale from those cases to this case. (App. Br. at 26.) However, Appellant's cited caselaw focused on possession. Possession requires more control than viewing. Indeed, a person can view something without possessing it.

When an accused is charged with viewing child pornography, this Court should not require the Government to prove an accused's knowledge, access, and control of copies of the charged images found in cache or unallocated space. The images the Government charged Appellant with viewing are distinct from copies of the charged images that evidenced the earlier viewing. The Government did not charge Appellant with viewing the identical copies in unallocated space and cache,

it charged him with viewing the original images when Appellant's computer displayed them.

When an accused views child pornography but does not save the images to his computer, images in cache and unallocated space may be the only evidence the government has of what an accused viewed on his screen. (McBath, *Trashing Our System of Justice?*, at 390.) Requiring proof of knowledge, access, and control in viewing cases serves as a windfall to an accused, allowing them to avoid criminal liability just because they are unaware of their computer's technical abilities.

This Court should join the Eighth and Eleventh Circuits in holding that evidence an accused has searched for child pornography and has a computer containing child pornography can serve as circumstantial evidence supporting a legally sufficient conviction for viewing child pornography.

By adopting this proposed rule, this Court's holding will be in line with the Federal Courts of Appeals who have considered this issue. Moreover, this proposed rule focuses on the relevant criminality, ensures an accused does not receive a windfall for their technological unsophistication, and yet still requires the government to put on sufficient evidence of knowing viewing.

h. Appellant's attempted viewing of child pornography was legally sufficient when he desired child pornography and repeatedly entered specific child pornography terms.

Law

To commit an offense of "attempt," the accused must take a substantial step towards accomplishing the alleged attempted offense. United States v. Schoof, 37 M.J. 96, 102 (C.M.A. 1993). A substantial step is a "direct movement toward the commission" of the offense that goes beyond "devising or arranging the means or measures necessary for the commission of the offense." Id. at 102-03. The substantial step must indicate the firmness of the accused's resolve to commit the crime, United States v. Jones, 37 M.J. 459, 461 (C.M.A. 1993), and unequivocally show the crime will take place unless interrupted by independent circumstances. United States v. Winckelmann, 70 M.J. 403, 407 (C.A.A.F. 2011) (citation omitted).

However, the substantial step need not be the final act necessary before actual commission of the crime. Id. (*citing* United States v. Chambers, 642 F.3d 588, 592 (7th Cir. 2011)). In fact, an attempt may still be committed where an accused performed "an overt act, and then voluntarily decide[d] not to go through with the intended offense." MCM, pt. IV, para. 4.c(2) (2012 ed.) Whether conduct amounted to a substantial step turns on the facts of each individual case and is judged by reference to the accused's actions as a whole.

See United States v. Brooks, 60 M.J. 495, 498-99 (C.A.A.F. 2005). An accused's acts before, during, and after the attempted offense are relevant to whether those acts exceeded mere preparation. *See* United States v. Church, 32 M.J. 70, 75 (C.M.A. 1991) (Sullivan, C.J., concurring).

For the defense of abandonment, the accused must voluntarily and completely abandon the intended crime solely because of his own sense it was wrong. MCM, pt. IV, para. 4.c.(4) (2012 ed.). The voluntary abandonment defense fails when abandonment resulted, in whole or in part, from other reasons such as fear of detection or apprehension, a decision to await a better opportunity for success, inability to complete the crime, or unanticipated difficulties or unexpected resistance. Id.

Analysis

i. The Court did grant review of this issue.

The granted issue did not include the legal sufficiency of Appellant's conviction for attempted viewing of child pornography. In his supplement to petition for grant of review, Appellant requested review of his viewing and attempted viewing convictions. However, this Court only granted review of Appellant's viewing conviction, excluding the portion of his presented issue regarding the attempted viewing conviction. Considering it was not part of the

granted issue, this Court should not consider Appellant's arguments on the legal sufficiency of Charge I, Specification 1.

However, even if the Court does consider the legal sufficiency of Charge I, Specification 1, the conviction is legally sufficient.

ii. The Government proved Appellant searched the charged terms.

Appellant admitted to searching for "dany camy," "little girl," and "preteen girls," three search terms DCFL found on his home desktop computer. Moreover, DCFL found additional search terms on the same password protected home desktop computer containing Appellant's Gaia Online information, images from Appellant's Photobucket account, and the folder Appellant told AFOSI he created. Appellant's home desktop computer shared common search terms with his government computer—an electronic DCFL conclusively tied to Appellant—and the language he used in Gaia Online. Considering identifying evidence littered his home desktop computer, the evidence established Appellant entered the charged search terms.

iii. Appellant specifically intended to view child pornography when he searched terms associated with child pornography.

Appellant searched terms that produced child pornography, like "loli," "loli porn," "goth loli," and "nude dany camy." (J.A. at 509, 516, 520.) Appellant's use of these terms established his specific intent. The only reason Appellant searched terms associated with child pornography was to view child pornography. After

searching it on Photobucket, Appellant knew as early as February 2013 that searching "loli" produced child pornography. As early as July 2013, Appellant knew the "dany camy" images showed a child. Thus, by the time Appellant was searching "nude dany camy" and "loli porn" months later, he knew he would receive child pornography.

Appellant's broader search patterns revealed his intent behind searches for "skimpy preteen," "sexy little girls," and "little girl." Appellant entered a series of charged and uncharged search terms in quick succession. (J.A. at 506-18.) Appellant searched "nude dany camy," and then minutes later, searched "skimpy preteen" and "sexy little girls." (J.A. at 509.) Appellant searched "father/daughter porn sto" within minutes of searching "loli" and "loli porn" and within a week of fantasizing about raping children on Gaia Online. (J.A. at 493-94, 516-17.) Appellant's earlier searches using known child pornography terms revealed his state of mind when, just minutes later, he searched other terms that could produce child pornography.

As he did at trial, Appellant argues he was looking for anime and stumbled upon child pornography accidentally. (App. Br. at 38.) The evidence contradicts this argument. Appellant told AFOSI he used some variation of the phrase "anime" when he was searching for anime. (J.A. at 459 at 15:34:55.) Indeed, when he wanted the anime version of "loli," Appellant searched for "anime

lolicon." (J.A. at 486.) When he wanted images of real children, he searched for "loli" or "loli porn." (J.A. at 516.) Appellant cannot reasonably explain how he was expecting to find cartoons by searching for "loli porn," "nude dany camy," "skimpy preteen," or "sexy little girls."

iv. Appellant's searches for child pornography were a substantial step considering his history of viewing child pornography.

Appellant directly moved towards viewing child pornography when he searched terms he knew produced child pornography. Appellant searched terms like "sexy loli" and " sexy preteen" as early as January 2013 and "dany camy" as early as July 2013. (J.A. at 486, 507.) Thus, by the time he searched the charged terms in September and November 2013, Appellant knew he would get child pornography. After conducting the charged searches, Appellant continued to look for child pornography memes and, as he told AFOSI, viewed more images of underage girls.

All of these steps indicated the firmness of Appellant's resolve to view child pornography. During the charged searches, Appellant was not entering search terms into a web browser for the first time, but continuing his earlier searches which had already resulted in child pornography. Appellant continued to look at images of children and memes about child pornography after the charged searches. Appellant's acts before, during, and after the attempt proved his acts exceeded mere preparation. *See* Church, 32 M.J. at 75.

Moreover, it was reasonable to conclude Appellant searched for child pornography using his browser's image search function. Many of Appellant's searches were separated by a matter of seconds. (J.A. at 506-18.) This indicated Appellant was in Google or Bing image view, where a person could quickly scan for relevant images rather than reading a list of weblinks. This use of Google and Bing was consistent with Appellant's use of Photobucket, where he browsed for images, not weblinks. Considering he was reviewing images, the firmness of Appellant's resolve is clear: Appellant's searches brought him to the screen where he could view child pornography images without any further clicks.

Appellant would have viewed child pornography but for the independent circumstances that Google and Bing did not display images of child pornography. Winckelmann, 70 M.J. at 407. Much like in King, where this Court found a substantial step even though a stepdaughter refused the appellant's request to display her breasts over Skype, Appellant would have viewed child pornography but for Google and Bing's careful monitoring of the content on their domains. United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012). As such, Appellant's entry of the charged search terms constituted a substantial step.

Even assuming *arguendo* Appellant was not using his browser's image view, he still would have taken a substantial step by reviewing web address results. Entering these specific search terms into a search engine is analogous to driving to

a child's house in a "To Catch A Predator" case. By entering these specific terms, Appellant drove to the street address of the minor he intended to exploit. Even if Appellant did not step inside the home by clicking on the website link, his conduct still amounted to a substantial step. Appellant was standing at the child's doorway, and as this Court noted, travel to a child's home can be a substantial step. Winckelmann, 70 M.J. at 407.

v. Appellant did not voluntarily abandon his attempted viewing when he continued to search for child pornography and only stopped when AFOSI interviewed him.

Appellant's abandonment argument fails because there was no evidence he abandoned his searching solely because he sensed it was wrong. Indeed, Appellant did not sense it was wrong because he kept searching for child pornography. The evidence showed that, seconds after entering a charged search time, Appellant entered another search term indicative of child pornography. (J.A. at 506-18.) This pattern continued through the middle of December 2013, just days before Appellant's AFOSI interview. (J.A. at 518, 520.) Appellant was not abandoning his searches, he was varying the terms to get better results.

Appellant cannot credibly claim he abandoned his attempt to view child pornography when, after the charged searches, Appellant continued to view images of children. Appellant told AFOSI he viewed images of children during the week of 5 December 2013, shortly before Appellant viewed memes about raping

elementary schoolers and going to jail for "20 to Life." (J.A. at 459 at 14:24:04, 542.) Appellant abandoned nothing, and the only thing that stopped him from continuing to search for child pornography was AFOSI's investigation.

vi. Appellant's conviction for attempted viewing of child pornography is legally sufficient.

Considering the evidence in the light most favorable to the Government, a reasonable factfinder could have found all the essential elements of attempted viewing of child pornography beyond a reasonable doubt. The evidence contradicted Appellant's arguments, but in any event, this Court need not negate all possibilities except guilt to find this conviction legally sufficient. Appellant's arguments do not prove it was impossible for a reasonable factfinder to find all the essential elements beyond a reasonable doubt. Thus, this Court should find Appellant's attempted viewing conviction legally sufficient.

CONCLUSION

WHEREFORE the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

ZACHARY T. WEST, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190

Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36224

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 340884

JOSEPH KUBLER, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33341

JULIE L. PITVOREC, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190

Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 31747

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 12 October 2018.

ZACHARY T. WEST, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36224

COMPLIANCE WITH RULE 24(d)

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

☒ This brief contains 12,080 words,

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

☒ This brief has been prepared in a monospaced typeface using Microsoft Word with 14 characters per inch using Times New Roman font.

/s/ ZACHARY T. WEST
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 12 October 2018