IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JACOB M. OZBIRN,
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. 39556

USCA Dkt. No. 20-0286/AF

REPLY BRIEF

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Cases

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, the Appellant, Airman First Class (A1C) Jacob M. Ozbirn, hereby replies to the Government's Answer (Govt Ans.), filed December 2, 2020, concerning the granted issue.

ARGUMENT

The Government fails to address why A1C Ozbirn's request for "naked pictures" is legally sufficient in light of the constitutionally principles protecting nudity. Furthermore, while the Government asks this Court to adopt the "totality of the circumstances" standard, the circumstances in A1C Ozbirn's case—particularly compared to the cases cited by the Government—show why A1C Ozbirn's conviction is legally insufficient. Finally, not only is there insufficient evidence of specific intent to commit the offense, A1C Ozbirn's generic request for naked photographs does not qualify as a substantial step for committing the offense of attempted receipt of child pornography.

1. *The Government fails to consider the constitutional concerns in this case.*

The Government fails to adequately show that A1C Ozbirn intended to receive pictures that would meet the definition of child pornography. Indeed, there has been a tremendous amount of litigation

involving child pornography offenses, due to the tension between criminalizing unlawful nudity of children, and constitutionally protecting free speech. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), *United States v. Moon*, 73 M.J. 382, 387 (C.A.A.F. 2014), *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). As Judge Key noted in his dissent, "nudity without more is protected by the First Amendment to the Constitution" and while the Government may prohibit child pornography, laws seeking to prohibit such material are invalid when they operate to prohibit a substantial amount of protected speech. (JA at 36, citing *New York v. Ferber,* 458 U.S. 747, 765, n.18 (1982) and *Ashcroft,* 535 U.S. at 256-58 (2002).) However, the Government's brief does not address any of the constitutional concerns of the relevant criminal conviction; it does not cite a single free speech case that supports its position; a mere mention of the First Amendment is glaringly missing from its entire brief.

2. *This Court has never applied a "totality of the circumstances" approach when examining specific intent to receive child pornography*.

The Government invites this Court to infer specific intent for the offense based on the "totality of the circumstances." (Govt Ans. at 13.) It

is unclear why the Government places such emphasis on the "totality of the circumstances" standard, rather asking this Court to analyze whether the Government met its burden with circumstantial evidence, as is typical practice. *United States v. King,* 78 M.J. 218, 221 (C.A.A.F. 2019) (the conviction for viewing child pornography was legally sufficient as there was strong circumstantial evidence that the appellant had viewed child pornography). In other words, the Government has failed to articulate the difference between "totality of the circumstances" and circumstantial evidence. The Government cites to *Roderick*, where this Court adopted the approach taken by other federal courts by combining a review of the *Dost* factors with "an overall consideration of the totality of the circumstances" when determining whether an image constitutes a lascivious exhibition of the genitals or pubic area of any person. *Roderick*, 62 M.J. at 430 (citing *United States v. Dost,* 636 F. Supp. at 832). However, *Roderick* actually highlights A1C Ozbirn's position that not every nude image of a minor child meets the specific definition of child pornography. The "totality of the circumstances" test used in *Roderick* emphasized the need to closely analyze each image, to ensure criminalizing a "naked picture" does not infringe on constitutionally

protected speech. *Id.* at 425. Furthermore, the "totality of the circumstances" analysis in *Roderick* is different than the one the Government proposes. The Government asks this Court to look at the totality of the circumstances of A1C Ozbirn's *other conduct*, separate from his request for "naked pictures," rather than actually analyzing the images he was requesting.[1]

3. *The totality of the circumstances or the circumstantial evidence in this case does not support finding the conviction legally sufficient.*

Nevertheless, even if this Court were to look at the totality of the circumstances or examine the circumstantial evidence in the case, A1C Ozbirn's conviction for attempted receipt of child pornography is not legally sufficient. The Government claims that there is not and should not be "bright-line distinctions between 'generic' and 'specific' requests for child pornography." (Govt Ans. at 16.) However, if A1C Ozbirn had specifically requested a photograph of the decoys' genitals or a video of masturbation, there would be substantially less doubt about whether the

[1] However, as the Air Force Court conceded, the *Dost* factors are of "limited utility" in this case because there are no actual images. (JA at 14, citing *Roderick*, 62 M.J. at 429.

conviction was legally sufficient. Instead, A1C Ozbirn made a generic request for "naked pictures."

The Government cites to *Johnston,* a case where the Air Force Court found a conviction for attempted receipt of child pornography to be factually and legally sufficient. *United States v. Johnston*, ACM 39075, 2017 CCA LEXIS 715, at *9 (A.F. Ct. Crim. App. 16 November 2017) (unpub. op.), pet. denied, 77 M.J. 312 (C.A.A.F. 2018). Notably, in *Johnston*, the Air Force Court did not utilize the "totality of the circumstances" analysis. Instead, the Air Force Court stated, "*[r]elying on Appellant's own words* in his messages to [the decoy], a reasonable factfinder could conclude that Appellant had the specific intent to receive child pornography, i.e., the 'lascivious exhibition of the genitals or pubic area' of the person he believed to be a 14-year-old girl and took a 'substantial step' towards obtaining such by requesting a photograph of her vagina." *Id.* at *9 (emphasis added). The appellant in *Johnston* specifically asked for a picture of the decoy's vagina by stating, "I want to see ur pu**y," a specific request which the decoy acknowledged when she responded, "im at school how m [*sic*] I gonna take a pu**y pic 4 u?" *Id.* at 8. So, despite the Government's claim that the Air Force Court focused

on "'messages,' plural," which "embodied the 'totality of the circumstances' approach," it is clear that the Air Force Court only focused on the messages that captured the appellant's *specific* requests for a picture of the decoy's genitals. This undercuts the Government's claim that a specific request is not relevant for determining whether there was a request for child pornography. Furthermore, it underscores the differences between this case and a case like *Johnston*. A1C Ozbirn *never* made a specific request for a picture of the genitals (or even the breasts), instead making a generic request for "naked pictures."

The Government also addresses *Payne*, where the Air Force Court found a conviction for attempting to persuade, induce, entice, or coerce a minor to create child pornography to be legally sufficient. *United States v. Payne,* 2013 CCA LEXIS 18 (A.F. Ct. Crim. App. 17 Jan. 2013) (unpub. op.), aff'd, 73 M.J. 19 (C.A.A.F. 2013). The Government highlights that the Air Force Court looked to the "context" of the conversations. Specifically, the Air Force Court stated, "when placed in context…the evidence supports the findings of the members that the appellant requested a 'lascivious exhibition of the genitals or pubic area'" of the decoy pretending to be a minor. *Id.* at *11-12. Among the relevant

context highlighted by the Air Force Court was that the appellant asked the decoy for a "nude" picture and accompanied his request with pictures of his erect penis and a video of himself masturbating. *Id.* at *5. The Air Force Court noted that these pictures and videos showed "examples of the type of images [the appellant] had in mind" when he requested a "nude" photograph. *Id.* at *12. A1C Ozbirn, on the other hand, never sent a picture or video of his penis when he requested a "naked picture." In his dissent, Judge Key noted the differences between the *Payne* case and A1C Ozbirn's conduct:

> Sending a graphic video of a person masturbating along with pictures of an erect penis arguably provide greater context for the type of images SSgt Payne was seeking in return. Here, we have less, as [A1C Ozbirn] sent no such pictures or videos. [The Air Force Court's] decision in *Payne* seems to have pushed the bounds of the concept of inferring specific intent to its outer limits, beyond which lies only speculation. (JA at 38.)

Despite such emphasis on a totality of the circumstances, the Government ignores the most important facts and circumstances in the aforementioned cases and the one at hand.

Finally, the Government cites to *United States v. Gilbert,* where the Army Court of Criminal Appeals (hereinafter, the Army Court) found the appellant's guilty plea was insufficient for the charge of possession of

child pornography. *United States v. Gilbert*, No. ARMY 20190766, 2020 CCA LEXIS 255 (A. Ct. Crim. App. July 31, 2020). The appellant in *Gilbert* explained during his guilty plea that he repeatedly asked a minor to send "nude" "selfies" and also sent a digital video and photos of his penis in an attempt to persuade her to reciprocate. *Gilbert*, unpub op. at *2. The Government states that the Army Court was "provided a detailed explanation of that particular appellant's mindset" in his guilty plea. (Govt Ans. at 18-19.) The Government maintains that in A1C Ozbirn's case, unlike *Gilbert*, "there is no such explanation, but the Court is left with legally sufficient evidence of Appellant's mindset." (Govt Ans. at 19.) The Government's explanation for their distinction is perplexing. Specifically, in *Gilbert,* the Army Court found that even though the appellant explicitly stated he hoped that the minor would eventually send him a picture of her engaging in explicit conduct, there was insufficient evidence to sustain a conviction. *Id.* at *9. Despite this, the Government asserts that this case is legally sufficient even though there is *no* evidence of A1C Ozbirn's mindset during a guilty plea or any other place in the record. The Government's conclusion is even more puzzling in light of fact that the appellant in *Gilbert* actually sent pictures and

videos of his penis in an attempt to persuade the minor to reciprocate—circumstances which are *not* present in A1C Ozbirn's case.

The Government also states that A1C Ozbirn's sexual conversations with the decoys pretending to be minors were "focused on genitalia." (Govt Ans. at 21.) However, this does not remedy the fact that A1C Ozbirn never actually requested pictures of the decoys' genitalia or pubic area displayed in a lascivious manner. The Government asks this Court to assume specific intent from other convicted conduct, when there is no evidence of the kinds of "naked pictures" A1C Ozbirn was requesting. The evidence in the record only contains a couple of facts that actually show the type of pictures, naked or otherwise, that A1C Ozbirn was requesting. First, when A1C Ozbirn asked "Jodie" "Can you send me a naked picture?" and "Jodie responded "No I can't do that," A1C Ozbirn responded, "How about a regular picture with you holding a peace sign up?" (JA at 89.) When "Jodie," a few seconds later, stated, "I'm not sending naked pictures of me," A1C Ozbirn responded, "I mean *any* pictures." (*Id.*) A computer forensic analyst testified that he found internet searches from A1C Ozbirn's phone where A1C Ozbirn seemed to be trying to determine whether the people he was

messaging were who they claimed to be. (JA at 4.) The Government attempts to get into the mind of A1C Ozbirn and speculate that he had the subjective intent to receive pictures of the decoys' genitals. However, the actual record only provides a few nuggets of specific information showing the type of pictures he wanted: "naked pictures;" a picture of "Jodie" holding up a peace sign; and "any pictures." (JA at 89.) As Judge Key stated in his dissenting opinion:

> Had [A1C Ozbirn] been conversing with an actual child or perhaps a like-minded adult, it is entirely possible he would have received pictures qualifying as child pornography. He very well may have hoped to receive images that would so qualify, *but there is simply no evidence this was the case. Without evidence* [A1C Ozbirn] specifically intended to obtain not just a picture of a nude child, but one that included both the lascivious exhibition of the genitals or pubic area and which was obscene, [A1C Ozbirn] cannot be convicted of attempted receipt of child pornography. (Emphasis added.) (JA at 38-39.)

Furthermore, it is unlikely A1C Ozbirn actually expected to receive a lascivious display of the genitalia. Indeed, "Febes" expressed that she was sexually immature as she referred to her vagina as the "wee area" (JA at 55) and asked, "is that how baby is made?" during one of the sexual conversations. (JA at 61.)

4. *A1C Ozbirn's request for naked pictures was not a substantial step*.

The Government misstates A1C Ozbirn's position by claiming "Appellant does not dispute the legal sufficiency of the majority of the underlying elements of his conviction."[2] (Govt Ans. at 12.) However, besides the insufficient evidence of specific intent, there is also insufficient evidence that A1C Ozbirn made a "substantial step" in committing the offense. In *Gilbert,* the appellant admitted to the military judge during his guilty plea that he repeatedly requested a "nude" "selfie" of the minor. *Gilbert*, unpub. op. at *2. The appellant stated that his request to see the minor "naked" was a substantial step toward what he hoped would result in the minor sending him an image of her touching her breast or vagina. *Id.* at *3. The Army Court found the military judge abused his discretion by accepting the guilty plea, as the minor hinted she *might* send him a photo of her breasts, which would not meet the definition of child pornography. Furthermore, the Army Court noted this Court's decision in *United States v. Winckelmann*, where this Court drew "the elusive line separating mere preparation from a substantial step."

[2] Both the Air Force Court and the dissenting opinion focused on the specific intent aspect of the conviction. (JA at 14, 38.)

70 M.J. 403, 407 (C.A.A.F. 2011) (other citations and internal quotation marks omitted). In that case, this Court referenced federal courts of appeal that have defined a substantial step as "more than mere preparation, but less than the last act necessary before the actual commission of the crime." *Id. (*citing *United States v. Chambers,* 642 F. 3d 588, 592 (7th Cir. 2011)). The Army Court found that the appellant's "hope and desire" that the minor would send him a photo that would constitute child pornography was nothing more than mere preparation. *Gilbert*, unpub. op. at *11.

Federal circuit courts have also highlighted that a substantial step must "strongly corroborate a defendant's intent to commit the predicate offense." *United States v. DeMarce,* 564 F. 3d, 989, 998 (8th Cir. 2009) (internal quotation marks omitted); *See also, United States v. Bauer*, 626 F.3d 1004 (8th Cir. 2010) (the court finding the defendant's actions, such as mailing money and instructions to a girl he believed to be a minor and requesting that she record herself performing sexual explicit acts constituted a substantial step). Other courts have defined substantial step as an "appreciable fragment of a crime and an action of such substantiality that, unless frustrated, the crime would have occurred."

United States v. Dobbs, 629 F.3d 1199, 1208 (10th Cir. 2011) (other citations and internal quotation marks omitted).

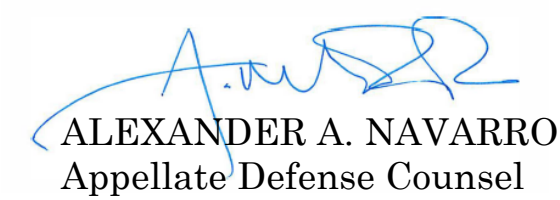
In this case, the fact that A1C Ozbirn was not messaging actual minors is not the only thing that "frustrated" the crime from occurring. *Dobbs,* 629 F.3d at 1208. Rather, even if A1C Ozbirn's request for "naked pictures" had somehow been fulfilled, there is no indication that the crime would have been committed—i.e., that he would have received a picture showing the genitalia or some other sexually explicit conduct. A1C Ozbirn never provided any direction to the decoys about the type of naked picture he wanted to see. In *Gilbert,* the appellant sent the minor a picture and video of his penis. *Gilbert*, unpub. op. at *2. When the minor told the appellant she might send him a picture of her breasts, the appellant expressed dissatisfaction and eventually replied "….I mean it's only fair you like seeing me naked so I should be able to see some of you." *Id.* A1C Ozbirn never exhibited this kind of conduct. In fact, when "Jodie" said she was *not* going to send a naked picture, A1C Ozbirn backed off his request and asked for a picture of her holding up a peace sign or *any* picture. (JA at 89.) If A1C Ozbirn were actually speaking to a real minor, there is insufficient evidence that A1C Ozbirn's request for

"naked pictures" would be fulfilled with photographs that exhibited a lascivious display of the genitals or sexually explicit conduct. Accordingly, when A1C Ozbirn requested a "naked picture," this was not a substantial step toward receiving child pornography.

Conclusion

This Honorable Court should set aside the finding of guilt as to Specification 5 of the Charge and dismiss it with prejudice.

Respectfully Submitted,



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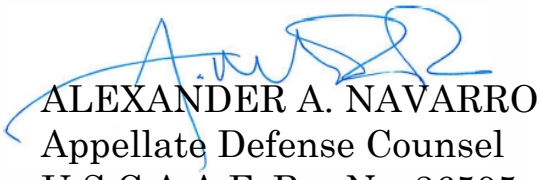
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on December 14, 2020.



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