New Developments in Criminal Law: Child Pornography and Appellate Review

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I. *United States v. Piolunek*

On March 26, 2015, the Court of Appeals for the Armed Forces (CAAF) issued its opinion in *United States v. Piolunek*,[1] setting aside its 2012 decision in *United States v. Barberi*,[2] and recasting the manner in which the military appellate courts will approach child pornography cases.

Understanding the true impact of *Piolunek* requires a refresher on the *Barberi* decision. In *Barberi*, the CAAF reversed a child pornography conviction after the Army Court of Criminal Appeals (ACCA) had previously held two of the six images presented at trial were not, in fact, child pornography, but affirmed the conviction.[3] Because the images were found insufficient on appeal, and since it was impossible to know whether the panel considered this now-excluded material in reaching its verdict, the CAAF held that Staff Sergeant (SSG) Christopher Barberi's conviction must be set aside. "Where a general verdict of guilt is based in part on conduct that is constitutionally protected, the Due Process Clause requires that the conviction be set aside."[4]

Like SSG Barberi, Senior Airman Justin Piolunek was convicted of knowing and wrongful possession of more than one image of child pornography.[5] At trial, the members evaluated 22 images of child pornography and returned a general verdict of guilty to the possession charge as drafted.[6] The members did not use the exceptions and substitutions mechanism,[7] nor did they otherwise indicate which images, if any, did not amount to child pornography. On appeal, the Air Force Court of Criminal Appeals (AFCCA) determined only 19 of the 22 images were, in fact, "visual depictions of a minor engaging in sexually explicit conduct," and thus child pornography.[8] Once this factual review was complete, AFCCA made a decision to not apply the *Barberi* precedent and affirmed the conviction using a harmless-beyond-a-reasonable-doubt analysis instead.[9]

The CAAF begins its reasoning in *Piolunek* by asserting the analysis required is not a constitutional review of the images, but instead a review of the military judge's instructions.[10] In *Barberi,* the CAAF reversed a conviction when child pornography images were excluded on appeal using Supreme Court precedent on constitutional error. "[I]f a factfinder is presented with alternative theories of guilt and one or more of those theories is later found to be unconstitutional, any resulting conviction must be set aside when it is unclear which theory the factfinder relied on in reaching a decision."[11] The *Piolunek* court framed the issue differently less than three years later. After the *Piolunek* court found neither the statute nor the legal theory constitutionally infirm, it asserted the *Stromberg* doctrine,[12] which the *Barberi* court used to set aside SSG Barberi's conviction, no longer applied to these scenarios.

Rather than examining whether or not automatic reversal is warranted, the CAAF opined the only question truly necessary in these cases is simply whether the panel was properly instructed. "Absent an unconstitutional definition of criminal conduct, flawed instructions, or evidence that

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[1] *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015).

[2] 71 M.J. 127 (C.A.A.F. 2012).

[3] *Id.* at 128-29.

[4] *Id.* at 128.

[5] *Piolunek*, 74 M.J. at 108.. Senior Airman Piolunek was also convicted of receipt of child pornography, enticing a minor to send him child pornography, and communicating indecent language, and received a sentence of eighteen months confinement, reduction to E-1, and a dishonorable discharge. *Id.*

[6] *Id.*

[7] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921 (2012).

[8] *United States v. Piolunek*, 72 M.J. 830 (A.F. Ct. Crim. App. 2013)

[9] *Id.* at 838-39. Senior Airman Piolunek petitioned the Court of Appeals for the Armed Forces (CAAF) to review the Air Force Court of Criminal Appeals' (AFCCA) decision, and the Air Force Judge Advocate General (TJAG) sought review of AFCCA's ruling that certain images did not constitute child pornography. *Piolunek,* 74 M.J. at 108.. In its opinion, the CAAF swiftly dealt with the issue certified by the Air Force TJAG, noting it lacks authority to review factual determinations generally, unlike the AFCCA, and thus it could not review the lower court's factual determination that the images were not child pornography. 74 M.J. at 110. *See also*, 10 U.S.C. § 867(d), which outlines the plenary authority of each service's Judge Advocate General to personally certify any case acted on by the service courts of criminal appeals to CAAF for review.

[10] *Piolunek*, 74 M.J. at 110-11..

[11] *Barberi*, 71 M.J. at 131 (internal citations omitted).

[12] In *Stromberg v. California*, the Supreme Court set aside a conviction in a general verdict case because it was impossible to know if the defendant had been convicted under a theory or statute that on appeal was held to be unconstitutional. 283 U.S. 359, 368-69 (1931).

members did not follow those instructions . . . there is simply no basis in law to upset the ordinary assumption that members are well suited to assess the evidence in light of the military judge's instructions."[13] Without any evidence to the contrary, the panel, as has long been the standard, is presumed to follow the judge's instructions. Here the military judge properly instructed the panel, the panel returned a verdict of guilty, and the AFCCA found the evidence legally and factually sufficient to sustain the verdict. Thus, SrA Piolunek's conviction was affirmed and servicemembers in similar situations will see the same result.

From an appellate review standpoint, *Piolunek* settles the aftershocks of *Barberi*. While SSG Barberi saw his conviction set aside after the appellate courts held two of the six images in his case were not in fact child pornography, *Piolunek* announces a new doctrine. In cases, such as SrA Piolunek's, where some—but not *all*—of the images are set aside on appeal, the conviction stands. The analysis for the appellate courts centers on whether or not the panel was properly instructed. If the instructions were legally sound, the panel is presumed to have followed those instructions. *Piolunek* refocuses the approach to child pornography images not as constitutional-level error but rather as a factual sufficiency questions. This changed approach leads to a vastly different outcome that compels the CAAF to assert its decision in *Barberi* was error.[14] Practitioners on all sides need to be mindful of instructions practice and must carefully review all instructions before the military judge reads them to the panel or the instructions are passed to the members.

Additionally, any party can request special findings in a military judge alone case and perhaps in certain cases this may be a proper tool.[15] The decision is also a reminder of the role that findings by exceptions and substitutions can play at trial. If specific child pornography images are listed in a specification and the panel or military judge does not except out any images, then all images form the basis for the finding of guilt. As *Piolunek* makes clear, the remaining images, not excepted by the factfinder or set aside by the appellate courts, form the basis for the conviction and its affirmation.

On its face the *Piolunek* decision is limited to appellate review in child pornography cases. As to trial practice, however, the legal analogy is easy to draw. If general verdicts are permissible, even after action by appellate courts to set aside certain images, then they should be permissible by trial courts as well. Therefore, gone are the days of having counsel list out every discrete image of alleged child pornography as part of the findings worksheet. The more conservative view of course is that the ruling in *Piolunek* by its terms is strictly limited to appellate review and the court was silent about any extension to the trial arena.

II. Justice Management in Child Pornography Cases and Beyond

While the CAAF's decision in *Piolunek* is a game changer in the way child pornography cases are decided at the appellate level, an earlier decision from the Army Court of Criminal Appeals (ACCA) illustrates the charging, managing, and proving of such cases is far from perfect. In *United States v. Doshier*, ACCA considered a child pornography general verdict issue where the appellant was convicted of possession of hundreds of images.[16] Sergeant Marcus Doshier was charged with possessing more than four hundred images of child pornography, along with several child sexual assault offenses.[17] Sergeant Doshier argued that since some of the images did not in fact show child pornography, his conviction for this offense should be set aside. While using the AFCCA's *Piolunek* reasoning to uphold the conviction, the *Doshier* opinion is a reminder that trial-level practitioners can and must do a better job of separating prohibited and protected material. "As appellant notes in his brief, some images include depictions of a door, a sign, the back of someone's head, fully-clothed children, children in bikinis, and images too small to determine their content."[18]

The *Doshier* opinion at least implicitly continued ACCA's recent wave of exhortation for all involved to "do better" in the nuts and bolts management of military justice practice, an exhortation that began in *United States v. Mack*.[19] "Those who administer our system of justice must redouble their efforts to ensure that systems are in place to avert the creation of preventable appellate issues and litigation such as those in the instant case."[20] As of June 11,

[13] *Piolunek*, 74 M.J. at 109..

[14] *Id.* It is also worth noting that the CAAF itself contains different members than it did in *Barberi* and that then-Chief Judge Andrew Effron has been replaced on the court by Judge Kevin Ohlson. While then-Chief Judge Effron voted to set aside SSG Barberi's conviction and Judge Ohlson voted to uphold SrA Piolunek's (thus shifting one vote), the decision in *Piolunek* also saw Judge Ryan, who authored the *Piolunek* opinion, change her position and side with Chief Judge Baker and judges Stucky and Ohlson.

[15] *See*, R.C.M. 918(b).

[16] *United States v. Doshier*, No. 20120691, 2015 CCA LEXIS 69, at *2 (A. Ct. Crim. App. February 24, 2015).

[17] *Id.* at *1.

[18] *Id.* at *9.

[19] *United States v. Mack*, No. 20120247, 2013 LEXIS 1016 (A. Ct. Crim. App. December 9,2013).

[20] *Id.* at *8 (Pede, J., concurring).

2015, there have been seventeen cases this calendar year granting some form of relief to an appellant for errors in the post-trial process.[21]

As practitioners across the JAG Corps work to improve, it is important to note that while *Piolunek* lightens the litigation burden, it does not change our overall charter. The system will only continue to work if charge sheets and available evidence together illustrate judge advocates are prepared to take difficult cases to trial as opposed to simply dumping innocuous material into case files and onto charge sheets.

[21] *United States v. Jackson*, No. 20120159, 2015 CCA LEXIS217 *12(A. Ct. Crim. App. May 18, 2015) (nearly two years from sentence to action, on rehearing court limits the accused confinement to one-half of his orginal sentence based on the delay) *United States v. Clarke*, 74 M.J. 627 (A. Ct. Crim. App. 2015) (promulgating order issued 30 days after convening authority's action); *United States v. Carlson*, No. 20130129, 2015 LEXIS 227, at *8 (A. Ct. Crim. App. May 29, 2015) (225 days to transcribe a 163 page record); *United States v. Kittelmann*, No. 20120542, 2015 LEXIS 226, at *2-3 (A. Ct. Crim. App. May 29, 2015) (526 days from sentence to action and 57 more days from action until receipt by ACCA); *United States v. Solt*, No. 20130029, 2015 LEXIS 229, at *10-12 (A. Ct. Crim. App. May 28, 2015) (the court ordered an eight-month reduction in sentence which corresponds to the length of time the case was in post-trial processing beyond the 120-day limit); *United States v. Myers*, No. 20130094, 2015 LEXIS 216, at *2 (A. Ct. Crim. App. May 21, 2015) (203 days to transcribe a 144 page record); *United States v. Willhaus*, No. 20130146, at *2 (A. Ct. Crim. App. May 11, 2015) (261 days to transcribe a guilty plea); *United States v. Middleton*, No. 20121121, 2015 LEXIS 187, at *2 (A. Ct. Crim. App. Apr. 30, 2015) (SJAR signed 218 days after authentication); *United States v. Jordan*, No. 20130366 , 2015 LEXIS 181, at *2 (A. Ct. Crim. App. Apr. 27, 2015) (116 day from action until receipt by ACCA); *United States v. Padilla,* No. 20130874 , 2015 LEXIS 180, at *4 (A. Ct. Crim. App. Apr. 23, 2015) (returned for new action due to issues with forfeitures and dilatory processing); *United States v. Forney*, No. 20121018, 2015 LEXIS 175, *2 (A. Ct. Crim. App. Apr. 16, 2015 (266 days to transcribe a 191-page record); *United States v. Mason*, No. 20140028, 2015 LEXIS 178, at *2, (A. Ct. Crim. App. Apr. 16, 2015) (384 days from sentence to action for a 184-page record); *United States v. Krause*, No. 20140388, 2015 LEXIS 189, at *2 (A. Ct. Crim. App. Apr. 9, 2015) (49 day from action to receipt by ACCA); *United States v. Zemke*, No. 20121069, 2015 LEXIS 121, at *3(A. Ct. Crim. App. Mar. 27, 2015) (350 days from sentence to action for a 159-page record); *United States v. Corona,* No. 20130106, 2015 LEXIS 73, at *2 (A. Ct. Crim. App. Feb. 26, 2015) (two months to send record to military judge for authentication); *United States v. Kindle*, No. 20120954, 2015 LEXIS 43 at *6, (A. Ct. Crim. App. Feb. 10, 2015) (132 days from sentence until defense counsel received the record for errata); *United States v. Fuller*, No. 20120928, 2015 LEXIS 33, at *2(A. Ct. Crim. App. Jan. 28, 2015) (352 days from sentence to action for a 111-page record).