No. _____

IN THE

Supreme Court of the United States

JEREMIAH L. KING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

MAJOR DUSTIN J. WEISMAN
Counsel of Record
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
dustin.j.weisman.mil@mail.mil

LIEUTENANT COLONEL ANTHONY D. ORTIZ
MAJOR MARK J. SCHWARTZ
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

Counsel for Petitioner

QUESTION PRESENTED

This Court has long held that "[i]nferences and presumptions are a staple of our adversary system of factfinding" and that it "is often necessary for the trier of fact to determine the existence of an element of the crime -- that is, an 'ultimate' or 'elemental' fact -- from the existence of one or more 'evidentiary' or 'basic' facts." *County Court v. Allen*, 442 U.S. 140, 156 (1979). However, a permissive inference runs afoul of the Due Process clause if "there is no rational way the trier of fact could make the connection permitted by the inference." *Id*. at 157.

The Court of Appeals found Petitioner's conviction for knowingly viewing child pornography legally sufficient, despite a complete absence of direct evidence. Instead, the Court of Appeals inferred both knowledge and wrongful viewing from the fact that Petitioner used search terms that could be associated with child pornography and admitted to viewing lawful images of minors in their underwear.

The Question Presented is:

> Whether the Court of Appeals relied upon permissive inferences that violated the Due Process Clause of the Fifth Amendment in finding Petitioner's conviction legally sufficient.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Air Force Airman First Class Jeremiah L. King respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted in the Appendix at Pet. App. 3a. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is reprinted in the Appendix at Pet. App. 17a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on August 18, 2018, *United States v. King*, 78 M.J. 94 (C.A.A.F. 2018), and issued a final decision on January 4, 2019. This Court therefore has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that no person:

> shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V.

Article 134, UCMJ, 10 U.S.C. § 934, provides that:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a

> nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

The President, pursuant to his authority under 10 U.S.C. § 934, specifically proscribed child pornography. *See* Manual for Court-Martial, United States (2012 ed.), pt. IV, ¶ 68b. The elements of the offense of viewing child pornography are:

> (1) That the accused knowingly and wrongfully viewed child pornography; and
>
> (2) That, under the circumstances, the conduct of the accused 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.

MCM, pt. IV, ¶ 68b.b(1).

STATEMENT OF THE CASE

A. Legal Background

In *County Court v. Allen*, 442 U.S. 140 (1979), this Court distinguished permissive presumptions (also known as permissive inferences) from mandatory presumptions. The Court held that the former comported with the Due Process Clause unless "there is no rational way the trier could make the connection permitted by the inference." *Id.* at 157.

As defined by this Court, a permissive inference is not rational "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969); *see also Allen*, 442 U.S. at 167. In determining whether a permissive inference satisfies this rationality test, the proper evidence to scrutinize is the evidence submitted in the particular case, not the general experience of the community or the validity of the legislative findings that support the inference. *Allen*, 442 U.S. at 162-63.

However, in *Allen*, this Court further indicated that there might be an exception to the rationality test if the permissive inference provided the sole and sufficient basis for guilt. *See id*. at 167. In such a case, the permissive inference may be required to meet the more stringent "beyond a reasonable doubt" standard. *Id*.

This Court has yet to review the propriety of using permissive inferences to satisfy the knowledge or viewing element in a child pornography case when law enforcement only found child pornography in a computer's user-inaccessible space. However, this Court has addressed the constitutionality of permissive inferences in other contexts.

In *United States v. Gainey*, 380 U.S. 63 (1965), the Court sustained the constitutionality of an instruction, based on a statute, which authorized the jury to infer from the defendant's unexplained presence at an illegal still that he was carrying on "the business of a distiller or rectifier without having given bond as required by law." The Court upheld the inference on the basis of the comprehensive nature of

the "carrying on" offense and the common knowledge that illegal stills are secluded, secret operations. *Id.*

However, the following term, the Court determined that presence at an illegal still could not support the inference that the defendant was in possession, custody, or control of the still–a narrower offense. *United States v. Romano*, 382 U.S. 136 (1965). The Court reasoned:

> Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt -- the inference of the one from proof of the other is arbitrary.

Id. at 141 (internal quotations and citations omitted).

In *Leary*, 395 U.S. 6, the Court considered a challenge to a statutory inference that possession of marijuana was sufficient to prove that the defendant knew that the marijuana had been illegally imported into the United States. The Court concluded that in view of the significant possibility that any given marijuana was domestically grown and the improbability that a marijuana user would know whether his marijuana was of domestic or imported origin, the inference did not pass constitutional muster. *Id.*

Conversely, in *Turner v. United States*, 396 U.S. 398 (1970), the Court upheld the validity of permitting the jury to infer that a defendant who possessed heroin knew the drug had been illegally imported. The Court distinguished the case from *Leary* by noting "the overwhelming evidence is that the heroin

consumed in the United States is illegally imported," unlike marijuana. *Id.* at 415-16.

The Court also upheld the traditional common law inference that "guilty knowledge may be drawn from the fact of unexplained possession of stolen goods" in *Barnes v. United States*, 412 U.S. 837 (1973). The Court found that the "longstanding and consistent judicial approval" of the permissive inference provided a "strong indication" that the inference comported with due process. *Id.* at 844.

Similarly, in *Allen*, the Court upheld a permissive inference that imputed possession to three adult men who were found, along with a 16-year-old girl, in a vehicle with firearms. 442 U.S. at 163. The permissive inference was rational because the accused men were not "hitchhikers or casual passengers," the firearms were in plain view, and there was no reasonable explanation as to why a 16-year-old girl would have two large handguns in her small purse. *Id.*

These cases illustrate how this Court applies the rationality test for permissive inferences. However, the Court has yet to apply the rationality test to a case involving digital evidence.

B. Procedural History

Petitioner, an Airman First Class in the Air Force, entered a not guilty plea before a general court-martial to knowingly and wrongfully viewing child pornography in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012). He was found guilty and sentenced to a dishonorable discharge, reduction to the lowest grade, and nine months confinement. Because his sentence included a dishonorable discharge, the Judge

Advocate General referred the case to the Air Force Court of Criminal Appeals (AFCCA), 10 U.S.C. § 866(b)(1) (2012). On appeal to AFCCA, Petitioner argued his conviction for knowingly viewing child pornography was factually and legally insufficient.

A three-judge AFCCA panel rejected Petitioner's appeal and summarily found the conviction for knowingly viewing child pornography factually and legally sufficient. The Court of Appeals granted review, 10 U.S.C. § 867(a)(3) (2012), of AFCCA's decision and heard argument on the legal sufficiency of the conviction.

After full briefing and oral argument on the merits of Petitioner's challenge, the Court of Appeals issued an opinion holding that "a reasonable factfinder could have reached the conclusion that [Petitioner] knowingly viewed the three charged files." Pet. App. 12a. The Court of Appeals based this holding on circumstantial evidence. Pet. App. 11a. Namely, that Petitioner "searched for images . . . using terms that are indicative of child pornography," possessed "thousands of offensive photos," and "admitted he viewed 'thrilling' images of nude children." *Id.*

REASONS FOR GRANTING THE PETITION

At trial, the prosecution offered no direct evidence that Petitioner knowingly and wrongfully viewed the three charged images of child pornography. *See* Pet. App. 11a-13a. In fact, Petitioner was convicted of viewing child pornography that the prosecution's own computer expert testified may never have even appeared on Petitioner's computer screen. Pet. App. 8a, 11a. It was only through the use of circumstantial evidence and permissive inferences that the factfinder

(and subsequently the Court of Appeals) was able to sustain the conviction.

However, several permissive inferences the finder of fact (and Court of Appeals) made in Petitioner's case ran afoul of the Due Process Clause. These inferences were crucial to the prosecution's case because they substituted for the prosecution's complete lack of evidence regarding the required elements that Petitioner in fact knew of and viewed the charged images. These inferences were improper because there was "no rational way the trier could make the connection permitted by the inference[s.]" *Allen*, 442 U.S. at 157.

I. There Is No Rational Way to Infer that Petitioner Viewed the Charged Child Pornography.

Like many child pornography cases throughout the country, there was no direct evidence that Petitioner ever viewed child pornography. Instead, as is increasingly common, the prosecution attempted to carry its burden by making permissive inferences from digital forensic evidence. In Petitioner's case, one inference built upon the other. *Cf. Romano*, 382 U.S. 136.

First, the Court of Appeals found that Petitioner visited a webpage that contained an image of child pornography.[1] Pet. App. 11a. From this, the Court of

[1] The Court of Appeals made this finding despite the prosecution's computer expert's report noting that there was no evidence Petitioner visited known child pornography websites. Pros. Ex. 10 at 16. Furthermore, the Court of Appeals made this finding despite the computer expert's testimony that he was unable to determine how any of the three charged images ended up on Petitioner's computer. R. at 608, 718.

Appeals inferred that the computer displayed the child pornography on its screen. Pet. App. 11a-12a. Second, the Court of Appeals inferred that, since the child pornography was displayed on screen, Petitioner must have seen the image when it was displayed. *Id*. However, based on "the evidence submitted," both of these inferences are irrational. *Allen*, 442 U.S. at 162-63.

As the prosecution's forensic computer expert testified, Petitioner's internet browser had "the ability to cache or save portions of the webpage, images from the webpage, or potentially the whole webpage to [his] system" and "potentially capture images that [were] not on the user screen at that specific time." Pet. App. 8a. Despite this testimony, and despite a complete lack of other evidence that the computer screen ever displayed the charged images, the Court of Appeals found that each of the three images of child pornography were displayed on Petitioner's computer screen. *See* Pet. App. 11a-12a.

Next, the Court of Appeals built off its first inference (that the images were displayed on the computer screen) and found that Petitioner actually saw each of the charged images. *Id*. Once again, the inference the court drew was detached from any "evidence submitted" at trial. *Allen*, 442 U.S. at 162-63. In addition to the lack of evidence supporting the inference, common sense dictates that it is common for a computer user to visit a website and still not view every image that is displayed. Nonetheless, the Court of Appeals tethered these two unsupported inferences together to find that Petitioner viewed child pornography.

The Court of Appeals' inferences violated Petitioner's Due Process rights because there was no rational basis for either inference. Although it is possible that the images were displayed, and Petitioner saw them, mere possibility is not the standard under this Court's precedent. To survive constitutional scrutiny it must be "said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend." *Leary*, 395 U.S. at 36. Here, neither presumed fact (*i.e.*, that the images were displayed and Petitioner saw them) is more likely than not to flow from the fact that Petitioner visited a webpage(s) containing the images. According to the prosecution's own expert witness, Petitioner's web browser was capable of automatically saving images and whole webpages to Petitioner's computer without him ever seeing or having knowledge of the charged files. *See* Pet. App. 8a. The fact that one inference builds off the other makes the ultimate inferred fact even more suspect, and thus irrational. Far from relying upon the evidence to infer a fact, the prosecution's case was merely unsupported inference upon unsupported inference.

In analogous possession of child pornography cases, several Federal Circuits have required the prosecution to admit additional evidence before making certain inferences from digital evidence. For instance, the Fifth, Ninth, and Tenth Circuits have all set aside convictions (or ordered re-sentencing) for possession of child pornography where (1) the subject images were discovered in inaccessible areas of an accused's computer, and (2) there was no evidence the accused accessed the images or knew they existed. *See United States v. Moreland*, 665 F. 3d 137, 150 (5th Cir.

2011) ("the government was required to introduce evidence . . . to support a reasonable inference both that [the accused] knew that the images were in the computers and that [the accused] had the knowledge and ability to access the images and to exercise dominion or control over them."); *United States v. Flyer*, 633 F.3d 911 (9th Cir. 2011) (setting aside a conviction for possessing child pornography where the images were found in the unallocated space of the accused's computer and the prosecution did not present any evidence that the accused knew of the presence of the files on his hard drive); *United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006) (ordering re-sentencing for an accused convicted of possessing images of child pornography found in his hard drive's "cache" because the accused lacked knowledge of the cache files and did not access the cache files); *United States v. Dobbs*, 629 F.3d 1199, 1204 (10th Cir. 2011) (setting aside a conviction where the prosecution "presented no evidence" that the accused "had accessed the files stored in his computer's cache" even though evidence established he had searched for and viewed child pornography using his computer).

This Court should adopt the reasoning of the Fifth, Ninth, and Tenth Circuits to ensure that permissive inferences based on digital evidence are rationally based on "the evidence submitted in the particular case." 442 U.S. at 162-63. Such a holding will ensure the Court of Appeals and other courts do not arbitrarily infer viewing (or possession) based solely on the presence of a contraband file on a computer.

II. The Finder of Fact and Court of Appeals Could Not Rationally Infer that Petitioner Acted with the Requisite Knowledge.

Much like the "viewing" element of the child pornography offense, the Court of Appeals found the prosecution satisfied the knowledge and wrongfulness elements by making several permissive inferences. First, the Court of Appeals found that Petitioner searched for and viewed "offensive," but lawful, photographs of children. Pet. App. 6a. From this, the Court of Appeals inferred that Petitioner had the desire to engage in criminal conduct by seeking out child pornography. Pet. App. 11a. Second, the Court of Appeals inferred that since Petitioner allegedly desired child pornography, Petitioner must have acted with the requisite knowledge when he allegedly viewed the charged images. *Id*. However, as before, neither of these inferences are rational.

Underlying the first inference is the Court of Appeals' description of the uncharged images as "offensive." *See* Pet. App. 6a. The term "offensive" conveys a sense that the images were unlawful contraband, but the images the Court of Appeals referenced were lawful to possess and view. These "offensive" images consisted of thousands of images of anime cartoons, adult pornography, and a few non-pornographic images of children.[2] Trial Transcript (R.) at 490, 538; Pros. Ex. 10 at 2-4.

---

[2] None of the images of children, other than the three charged images, met the requirements to be child pornography under *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom,* 812 F.2d 1239 (9th Cir. 1987). Although at least one image

Because the "offensive" images were lawful, and of a completely different character from child pornography, it was not rational to infer that Petitioner desired child pornography. It cannot be "said with substantial assurance that" someone who views anime, lawful pornography, or lawful images of children, would take the enormous (and criminal) leap and seek child pornography. *Leary*, 395 U.S. at 36. And nothing in the record supports making such a link. *See Allen*, 442 U.S. at 162-63.

The Court of Appeals' reliance on search terms is similarly flawed. *See* Pet. App. 11a-12a. The fact that the search terms could return results for child pornography does not mean the user intended to view child pornography.[3] *See* R. at 751-52; *see also United States v. Paris*, No. 201200301, 2013 CCA LEXIS 575 (N-M. Ct. Crim. App. July 30, 2013) (unpub. op.) ("we are not persuaded by the Government's argument

---

depicted a nude child around the age of 12 years, it was not pornographic in nature. *See* Pros. Ex. 4.

[3] The only search terms potentially related to child pornography or child erotica that Petitioner admitted to entering were "little girl" and "dany camy." Pros. Ex. 4 at 14:28:00, 15:33:45. Petitioner only searched for "dany camy" once or twice and did not know what it meant. *Id*. He searched for it because he saw it was associated with a picture he found. *Id*. Petitioner also searched for "little girl" but it was mainly while he was looking for anime pictures and the only thing that came up as a result of the search was pictures of babies and clothed children. *Id*. at 14:39:00. Petitioner never saw, or attempted to find, pornographic images of real children as a result of these searches. Pros. Ex. 4. The prosecution's computer expert could not link the search terms to any of the images–including the three charged images– on the 34 devices law enforcement seized. Pros. Ex. 10 at 16.

that the appellant's Internet search terms in conjunction with his obvious interest in images of nude children is sufficient to prove that he specifically intended to access websites containing child pornography").

As the prosecution's expert testified, it is possible that a user who likes anime (like Petitioner) could be looking for cartoons but then real images of child pornography could be returned. R. at 751-52. In fact, "thousands of photos" of anime pornography and adult pornography were discovered on the devices seized in this case–all of which is lawful to view and possess. R. at 490.

The law is well established in some Federal Circuits that the mere presence of child pornography on a computer is insufficient to impose criminal liability. *See*, *e.g.*, *Flyer*, 633 F.3d 911; *Dobbs*, 629 F.3d 1199. However, in Petitioner's case, the Court of Appeals' decision diverged from these circuits. Unlike cases where knowledge and wrongfulness could be inferred based upon other independent evidence (*see*, *e.g.*, *United States v. Romm*, 455 F.3d 990 (9th Cir. 2006)), in this case there was no such corroborating evidence.

Unlike *Romm* where the accused attempted to delete the child pornography to hide it from law enforcement, there was no evidence whatsoever that Petitioner attempted to delete the three charged files. *Compare* 455 F. 3d 990 *with* R. at 691-92, 720; Pros. Ex. 10 at 3. In fact, the prosecution's expert testified that Petitioner may not have known the files even existed and he "did not see any indication" that

Petitioner had the knowledge or tools to even access the files. R. at 724.

In addition to being fundamentally irrational, the inferences were unsupported by the record. The prosecution did not offer evidence which established that Petitioner even had a general predisposition to view child pornography. In fact, the evidence indicated the opposite. Despite reviewing 34 devices, the prosecution was unable to show that Petitioner visited a single known child pornography website, possessed any known child pornography, or attempted to produce or distribute any child pornography. Pros. Ex. 10 at 2. The prosecution's expert was not even able to tie the search terms to any images on the 34 devices. Pros. Ex. 10 at 16.

Had Petitioner been looking for child pornography, the prosecution's expert would have found something to back up that theory. Instead, the prosecution's case centered solely on three files about which Petitioner neither knew about nor could access. Far from being rational, it was wholly irrational for the fact-finder and Court of Appeals to simply infer knowing viewing and wrongfulness. What the evidence established, at most, is that Petitioner visited a webpage, which unbeknownst to him, had an image of child pornography on it and that image was automatically cached.

The prosecution's theory was not rational because it would require the fact-finder to believe Petitioner sought out and viewed the child pornography, yet somehow left no trace. In fact, based on the evidence it cannot "be said with substantial assurance that the

presumed fact[s] [are] more likely than not to flow from the proven fact[s] on which [they are] made to depend." *Leary*, 395 U.S. at 36.[4] Thus, the permissive inferences the finder of fact and Court of Appeals relied upon to find knowledge and wrongfulness violates Petitioner's Due Process rights and conflicts with the precedent of several circuits.

Allowing permissive inferences such as the ones relied upon in this case to stand would have a deleterious effect across the nation. Prosecutions, like the one in Petitioner's case, would turn into strict liability cases because the state would only need to show that the child pornography was found on the accused's electronic device. Then, the finder of fact would be free to infer wrongfulness and knowing possession and/or viewing without the need for additional evidence. Such an expansion would subject any person who uses a computer to potential prosecution for contraband found on their device, regardless of whether they knew, or even could have known, that the file was on the device. To avoid this absurd result, this Court should grant review and make clear that the test laid out in *Allen* and *Leary* applies with equal force to permissive inferences involving digital evidence.

---

[4] The inferences may be more properly reviewed under this Court's stricter "beyond a reasonable doubt" test laid out in *Allen* because the inferences form the sole and necessary basis for both the viewing and knowledge elements. *See* 442 U.S. at 167.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAJOR DUSTIN J. WEISMAN
Counsel of Record
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
dustin.j.weisman.mil@mail.mil

LIEUTENANT COLONEL
ANTHONY D. ORTIZ
MAJOR MARK J. SCHWARTZ
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

Counsel for Petitioner