IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Christopher S. COOLEY Fireman Apprentice (E-2) United States Coast Guard, Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 15-0384/CG Crim.App. No. 1389

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issue Presented

WHETHER THE GOVERNMENT VIOLATED APPELLANT'S RIGHTS UNDER ARTICLE 10, UCMJ, WHEN THE GOVERNMENT POSSESSED KEY EVIDENCE AGAINST APPELLANT ON JULY 20, 2012 AND FEBERUARY 5, 2013, YET MADE NO MOVE TO PROSECUTE APPELLANT FOR THESE OFFENSES UNTIL JUNE OF 2013, DESPITE HIS PRETRIAL CONFINEMENT FROM DECEMBER 20, 2012.

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge, the U.S. Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over Fireman Apprentice (FA) Cooley's case under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1) (2012). This court has jurisdiction based on Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge, sitting as a general court-martial, convicted FA Cooley, consistent with his conditional pleas, of one specification of attempting to commit a lewd act upon a child, two specifications of attempting to commit indecent conduct, one specification of failure to obey a lawful order, and one specification of possession of child pornography, in violation of Articles 80, 92, and 134, UCMJ. 10 U.S.C. §§ 880,

892, 934 (2012). (J.A.[1] at 411-14.) The military judge sentenced FA Cooley to confinement for seven years, reduction to pay-grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (Id.) The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed. (J.A. at 414.) Pursuant to the pretrial agreement, confinement in excess of fifty months was suspended. (Id.)

On December 24, 2014, the CGCCA set aside the findings and sentence as approved by the convening authority. United States v. Cooley, No. 1389 (C.G. Ct. Crim. App. Dec. 24, 2014). The CGCCA dismissed all charges with prejudice for a violation of Article 10, UCMJ, except Charge II, Specification 3 and Charge IV Specification 2, which the court dismissed without prejudice for violation of Rule for Courts-Martial (R.C.M.) 707.

On February 23, 2015, FA Cooley petitioned for review in this case pursuant to 10 U.S.C. § 867(b), asserting that Charge II, Specification 3 and Charge IV, Specification 2 should have been dismissed with prejudice due to a violation of Article 10, UCMJ. This Court granted review on 03 June 2015. Also on February 23, 2015, the Judge Advocate General of the Coast Guard filed a certificate for review of other portions of the decision

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[1] The parties have agreed to cite to the Joint Appendix filed on March 25, 2015 in United States v. Cooley, 15-0387/CG. All records necessary for resolution of this issue are included in that Joint Appendix.

of the CGCCA pursuant to 10 U.S.C. § 867(a)(2) in United States v. Cooley, 15-0387/CG.

Statement of Facts

Special Agents of the Coast Guard Investigative Service (CGIS) interviewed FA Cooley on July 20, 2012, for suspicion of solicitation of sexually explicit photographs from minors. (J.A. at 315-17.) During this interview, FA Cooley made a detailed confession, and admitted to soliciting minors for sexual photographs and possessing child pornography on his electronic devices. (J.A. at 298-301; 315-17.)

FA Cooley's commanding officer placed him in pretrial confinement on July 21, 2012, based on his confessions, but the initial review officer released FA Cooley. He was placed in pretrial restriction on July 27, 2012, by his commanding officer. (J.A. at 302-06.) On August 22, 2012, his commanding officer released FA Cooley into "conditions on liberty." (J.A. at 309-10.) On December 20, 2012, FA Cooley's commanding officer again ordered him into pretrial confinement for violating a no-contact order and "attempting to obtain pornographic materials of children." (J.A. at 323-29.) FA Cooley languished in pretrial confinement for 289 days until his trial on October 4, 2013. (J.A. at 207-209.)

Special Agent (SA) Renkes of CGIS seized FA Cooley's electronic devices on July 20, 2012, based on his confession.

(J.A. at 518-19.) However, the Government failed to send the devices to the Electronic Crimes Section (ECS) for analysis until September 7, 2012. (J.A. at 518-19.) SA Renkes testified at trial that the evidence sat untouched over this time period because he was "searching for the most expeditious means to actually get the iPhone analyzed" and because he was out of the office frequently. (J.A. at 519-20.) In an affidavit, SA Renkes swore that his efforts during these months were limited to making four phone calls to determine which agency would evaluate the evidence. (J.A. at 368-69.)

On September 27, 2012, ECS sent SA Renkes a disk of images seized off of FA Cooley's electronic media. (J.A. at 336.) SA Renkes received this disk on October 1, 2012, and noted in a report that it contained "contraband" in the form of images of child nudity. (J.A. at 318; 521-22.) By October 1, 2012, the Government had located images of suspected child pornography on FA Cooley's electronic media. (J.A. at 318.)

On November 14, 2012, the images from FA Cooley's media were sent to the National Center for Missing and Exploited Children (NCMEC) for comparison with a database of known child victims. (J.A. at 336.) The negative results of this search were included in a January ECS report. (Id.)

On January 4, 2013, ECS completed its analysis of FA Cooley's media and identified two images of possible child

pornography. (J.A. at 524-25.) The ECS report was released on January 23, 2013. (J.A. at 333-36.) SA Renkes requested additional analysis of the two images, which was completed on March 1, 2013. (J.A. at 337-41.) By March 1, 2013, this analysis definitively confirmed images of child pornography on FA Cooley's computer.

The Government initially preferred charges against FA Cooley on February 19, 2013. (J.A. at 54-57.) The Government elected to charge FA Cooley with an attempted lewd act with a child in violation of Article 80, UCMJ, violating orders to refrain from communicating with children in violation of Article 92, indecent conduct in violation of Article 120, UCMJ and "wrongfully and knowingly possess[ing] one or more sexually suggestive visual depictions of what appears to be a minor" in violation of Article 134. (Id.) Despite possessing forensic proof as of January 4, 2013, that FA Cooley had possessed child pornography (and FA Cooley's confession to possessing child pornography), the Government elected not to charge FA Cooley with possession of child pornography. (J.A. at 54-57; 524-25.)

The Article 32 investigation was held on March 6, 2013. (J.A. at 361.) The Government did not ask the investigating officer to investigate a charge of possession of child pornography, despite the fact that the March 1, 2013, ECS report clearly indicated evidence of possession of child pornography.

SA Renkes, the lead investigator who had this information at that time, was a Government witness at the hearing. (J.A. at 361-67.) The investigating officer, in his report, referred to the pictures substantiating the Article 134 specification as child pornography. (J.A. at 366.)

On February 5, 2013, SA Renkes learned a letter sent by FA Cooley to MP, a minor at a youth academy, was returned undelivered to Base Seattle. (J.A. at 382.) Inexplicably, investigators waited until June 6, 2013, to open the letter. (J.A. at 370-72.) SA Renkes attributed this four-month delay to his "travel and a heavy burden of operational commitments and workload." (J.A. at 533.)

The Government referred the original charges to a general court-martial on March 18, 2013. (J.A. at 55.) The trial counsel and SA Renkes ceased further investigations when charges were referred to court-martial and instead began preparing for trial. (J.A. at 247.) The Government attempted to arraign FA Cooley on April 3, 2013 but did not serve him with the charges until the morning of the hearing, even though they knew he was being held in pretrial confinement. (J.A. at 100.) FA Cooley declined to waive his rights under Article 35, UCMJ, to a five-day waiting period to discuss the charges with his counsel, yet the military judge proceeded anyway over FA Cooley's objections. (J.A. at 100.)

A new military judge took over the case and subsequently dismissed all of the charges for violation of R.C.M. 707 on May 23, 2013, due to the legally ineffective arraignment. (J.A. at 99-106.) The Government re-preferred all the charges the same day but quickly dismissed them again. (J.A. at 245.) Finally, on June 14, 2013, after three weeks of inactivity, the Government preferred the original charges yet again with the addition of two new specifications, Charge II, Specification 3 and Charge IV, Specification 2. (J.A. at 48-53.) These specifications charged FA Cooley with sending a letter to MP in violation of an order, and possession of child pornography. (Id.)

Despite FA Cooley's frequent demands for speedy trial, the Government refused to take immediate steps to bring FA Cooley to trial even then. (J.A. at 124-26.) Instead, the Government ordered a new Article 32 hearing to investigate the newly preferred charges. (J.A. at 380-85.)

The Government also delayed providing a defense expert until September 20, 2013. (J.A. at 402.) Then the defense expert was not available to meet with the defense until September 30, 2013, forcing the defense to ask for delay of the September 30, 2013 trial date until October 4, 2013. (J.A. at 399; 403.)

Summary of Argument

Despite having substantial information on which to base Charge II, Specification 3 and Charge IV, Specification 2 for

months while FA Cooley sat in pretrial confinement, the Government made no move to bring FA Cooley to trial for those offenses. When the military judge dismissed the first charge sheet in May of 2013, the Government launched a new Article 32 investigation in order to increase FA Cooley's punitive exposure. This excessive delay for tactical maneuvering over frequent defense objections was highly prejudicial to FA Cooley, who suffered a sexual assault in the brig awaiting trial.

Argument

THE GOVERNMENT VIOLATED APPELLANT'S RIGHTS UNDER ARTICLE 10, UCMJ, WHEN THE GOVERNMENT POSSESSED KEY EVIDENCE AGAINST APPELLANT ON JULY 20, 2012 AND FEBERUARY 5, 2013, YET MADE NO MOVE TO PROSECUTE APPELLANT FOR THESE OFFENSES UNTIL JUNE OF 2013, DESPITE HIS PRETRIAL CONFINEMENT FROM DECEMBER 20, 2012.

Standard of Review

Whether an accused has received a speedy trial is reviewed de novo, but an appellate court should "give substantial deference to the military judge's findings of fact that will only be reversed if clearly erroneous." United States v. Mizgala, 61 M.J. 122, 127 (C.A.A.F. 2005) (citing United States v. Dowty, 51 M.J. 464, 465 (C.A.A.F. 1999)).

Discussion

The Government had evidence to support a charge of possession of child pornography and violating a lawful order but

made a tactical decision not to charge them on the first charge sheet. Later, after the military judge dismissed the first charge sheet without prejudice due to the Government's negligence, the Government sought a windfall by adding these charges six months after FA Cooley entered pretrial confinement. This Court should not permit the Government to abuse its power in this way. Charge II, Specification 3 and Charge IV Specification 2 should be dismissed with prejudice.

A. The substantial information test enumerated in United States v. Johnson is the correct standard for determining when the Government's accountability begins for Art. 10, UCMJ purposes when the accused is already in pretrial confinement.

In United States v. Johnson, 23 C.M.A. 91, (C.M.A. 1974), the Court of Military Appeals (CMA) grappled with calculating delay for Article 10, UCMJ, purposes when the Government preferred additional charges against an accused already in pretrial confinement on other charges. The CMA determined that the Government's accountability for the additional charges commenced "when the Government had in its possession substantial information on which to base the preference of charges," not the date of preferral of the additional charges. Id. at 93.

At the time Johnson was decided, the CMA applied a presumption of an Article 10, UCMJ, violation in any case of pretrial confinement in excess of 90 days. United States v. Burton, 44 C.M.R. 166, 172 (C.M.A. 1972). In its Answer to the

Supplement to Appellant's Petition for a Grant of Review (Ans. to Supp.) the Government asserts the substantial information rule was overturned by the CMA's decision in United States v. Kossman, 38 M.J. 258 (C.M.A. 1993). (Ans. to Supp. at 15.)

In Kossman, the CMA overturned the Burton presumption. 38 M.J. at 261. The 90 day presumption had originally been created as an enforcement mechanism for Article 10, UCMJ. Id. at 259. After the President promulgated a detailed speedy trial scheme in R.C.M. 707, the Burton presumption was no longer necessary. Id. at 261. Instead, the Court returned to the standard that had been in place before Burton -- reasonable diligence. Id. at 262.

The Government urges that in overturning the Burton 90 day presumption, the CMA also tacitly overturned the Johnson substantial information rule as it applies to Article 10.[2] (Ans. to Supp. at 15.) This Court has never declared that to be so and it should not now.

Article 10 is distinct from and "is not restricted" by R.C.M. 707. Mizgala, 61 M.J. at 125. Indeed, "the President

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[2] Whether or not the Johnson rule still applies to R.C.M. 707 is not within the scope of the granted issue in this case. The Government has not certified a question related to the dismissal of Charge II Specification 3 and Charge IV Specification 2 under R.C.M 707. FA Cooley has raised only that the CGCCA should have dismissed those offenses under Art. 10, UCMJ. Therefore, unless this Court finds those offenses should be dismissed under Article 10, the dismissal under R.C.M. 707 should be regarded as law of the case. See United States v. Doss, 57 M.J. 182, 185 (C.A.A.F.2002).

cannot overrule or diminish [this court's] interpretation of a statute." Kossman, 38 M.J. at 260-261. In promulgating R.C.M. 707(b)(2), the President established a method for determining the start date of the R.C.M. 707 120-day clock when the Government refers additional charges. This rule has no effect on the Johnson rule for determining the start date for Article 10 accountability when the Government refers new charges while the accused is already in pretrial confinement on other charges.

Further, Johnson and Kossman address distinct issues in Article 10 analysis and are not incompatible. In Burton and Kossman, this Court addressed whether or not the Government acted with diligence. Johnson, on the other hand, dictates when the Government's burden of diligence begins. The Johnson substantial information rule remains the appropriate test.

B. The Government had substantial information on which to base the preferral of Charge IV, Specification 2 on July 20, 2012.

FA Cooley made a detailed confession to Coast Guard Investigative Service (CGIS) agents during an interview on July 20, 2012. (J.A. at 315-17.) CGIS had begun investigating Cooley after a report from a parent on July 19, 2012 that he was soliciting nude photos from their child. (J.A. at 311.) FA Cooley admitted to requesting and receiving sexually explicit photos from multiple minors and searching for and downloading explicit photos of minors online. (J.A. at 315-17.) At that

point, the Government had substantial information with which to charge FA Cooley with possession of child pornography.

Even if this Court does not believe a confession combined with the corroborating report from a witness is substantial information, by October 1, 2012, the Government had also discovered images of suspected child pornography on FA Cooley's electronic media. (J.A. at 318.) By the time he went into confinement on December 20, 2012, the Government certainly had all they needed to prefer charges for possession of child pornography. By comparison, in Johnson, the Government only possessed a statement from a co-conspirator witness at the point the CMA held the Government had substantial information to support a charge. Johnson, 23 C.MA at 93.

C. The Government had substantial information on which base the preferral of Charge 2, Specification 3 on February 5, 2013.

In January 2013 the Coast Guard received a returned letter at the barracks at Base Seattle for FA Cooley. (J.A. at 524.) It was a letter addressed from FA Cooley to the minor MP at the "Grizzly Youth Academy" and postmarked on December 11, 2012. (J.A. at 376.) In December of 2012 FA Cooley was subject to a lawful order from his superior commissioned offer to refrain from all communications with minors. (J.A. at 375.) MP was one of the minors FA Cooley had already admitted soliciting for nude pictures. (J.A. at 376.) Undeniably, on February 5, 2013, the

Government had substantial information to support a charge of violating the order to cease communicating with minors.

D. Under the Barker v. Wingo Factors, the Government clearly violated FA Cooley's right to a speedy trial under Article 10, UCMJ.

To survive an Article 10, UCMJ, claim of a violation of the right to a speedy trial, the Government must show "reasonable diligence in bringing the charges to trial." United States v. Wilson, 72 M.J. 347, 351 (C.A.A.F. 2013) (quoting Mizgala, 61 M.J. at 127). While "[s]hort periods of inactivity are not fatal to an otherwise active prosecution," this Court must be able to conclude the Government carried out an "orderly expedition" of the case. Mizgala, 61 M.J. at 129 (quoting United States v. Mason, 21 C.M.A. 389, 393 (C.M.A. 1972)). Further, an Article 10 violation does not require a finding that the Government acted with spite, bad faith, or gross negligence. Mizgala, 61 M.J. at 129. (citing United States v. Kossman, 38 M.J. 258, 261 (C.A.A.F. 1993)).

This Court reviews Article 10, UCMJ, violations under the Supreme Court's Barker Sixth Amendment factors. United States v. Birge, 52 M.J. 209, 211 (C.A.A.F. 1999). The Barker factors are: (1) the length of delay, (2) the reasons for the delay, (3) whether the accused made a demand for speedy trial, and (4) prejudice to the accused. Barker, 407 U.S. at 530. However, Article 10 is a "more stringent" standard than the Sixth

Amendment. United States v. Cooper, 58 M.J. 54, 60 (C.A.A.F. 2003) (quoting Kossman, 38 M.J. at 259). Applying these factors to FA Cooley's case, it is clear that his Article 10, UCMJ, speedy trial rights were violated.

1. The length of delay in this case was excessive and facially unreasonable.

The first Barker factor acts as a triggering mechanism. United States v. Cossio, 64 M.J. 254, 257. Only when the length of delay is facially unreasonable does the court analyze the remaining factors. Id. FA Cooley spent 289 days in pretrial confinement for possession of child pornography and other offenses from December 20, 2012 until trial. Also, from February 5, 2013, when the Government had identified the criminal significance of the letter, FA Cooley served 241 days in pretrial confinement for violating a lawful order. This is more than sufficient to trigger a full Barker inquiry. Cossio, 64 M.J. at 257 (117 days enough delay to trigger full Barker analysis); Wilson, 72 M.J. at 351 (174 days enough delay to trigger full Barker analysis).

2. The reason for the delay was Government tactical decision-making

Despite having substantial information on which to base new charges, the Government made a tactical decision not to charge FA Cooley with possessing child pornography or sending the letter to MP until after the dismissal in May 2013. In the

months leading up to the dismissal, the Government made no move to bring FA Cooley to trial for an additional charge of child pornography or even investigate the letter.

When the Government preferred the first charges on February 19, 2013, it already had proof FA Cooley possessed child pornography from his detailed confession, the October 1, 2012 disk sent to SA Renkes containing the suspected child pornography, and the January Electronic Crimes Section (ECS) report. However, the Government made the decision to charge the possession of "sexually suggestive visual depictions of what appears to be a minor" instead of the more serious crime of possessing child pornography. (J.A. at 54-56.) Under this charging scheme, the Government was not even required to validate that the images contained actual children.

Before the Article 32 investigation on March 6, 2013, the Government already had completed the final ECS forensic analysis on March 1, 2013. In the March 1 Report, ECS declared it had located at least two images of child pornography. The Government did not seek to have possession of child pornography investigated by the investigating officer (J.A. 361-67), despite clear legal authority to do so. See, R.C.M. 405(e). The investigating officer, in his report, even described the images as child pornography, yet the Government made no attempt to charge FA Cooley under that theory. (J.A. at 367.)

In her ruling on FA Cooley's motion to dismiss for an Article 10 violation, the military judge found that new evidence and further analysis of the digital media sparked the need for a new Article 32 investigation in June of 2013 and a new charge of possession of child pornography. (J.A. at 276.) This finding is unsupported by the record. Rather, the evidence shows that after the dismissal, the Government took the opportunity to perfect their charging theory and increase FA Cooley's punitive exposure.

The Government admitted at trial that investigative efforts ceased on March 18, 2013, when the original charges were preferred. (J.A. at 247.) These efforts were "refocused" on continuing the investigation after the charges were dismissed without prejudice in May 2013. (Id.) Thus it appears the Government sought a windfall in response to the dismissal. Even assuming the Government's motives were benign, delaying preferral of a new child pornography specification until June of 2013 was unreasonable when the Government received overwhelming evidence of his guilt in July 2012 and January 2013. United States v. Honican, 27 M.J. 590, 594 (A.C.M.R. 1988).

The Government's further assertion, and the military judge's finding of fact, that the need to interview potential victims caused significant delay is similarly unsupported by the record. The Government advanced this argument at trial with only

the conclusory statements of SA Renkes as evidence. The Government offered no record of who was interviewed, when they were interviewed, what steps were required to secure the interviews, or what further interviews they intended to conduct. One record of an interview with the assistance of a forensic interviewer was part of the record of trial, and that interview took place in early December 2012, well before the ECS analysis was completed and before FA Cooley was even in pretrial confinement. (J.A. at 319-22.) At the Article 32 hearing in July of 2013, SA Renkes testified that he had only conducted 3 interviews since the Article 32 in March 2013. (J.A. at 533.) These were all done in Juneau, undercutting his testimony that geographic diversity was a cause of delay. (J.A. at 533.)

The Government has similarly failed to justify its unreasonable delay in bringing FA Cooley to trial for sending a letter to MP in violation of an order. At the second Article 32 hearing in July 2013, SA Renkes alluded to delays in identifying MP. (J.A. at 390.) Yet he also admitted FA Cooley identified MP as a victim during the initial confession, and the Grizzly Youth Academy replied to SA Renkes with MP’s age within a few days of his initial contact with them. (J.A. at 533.) He also admitted the search authorization was granted within a day of his request. (Id.) There was simply no reason for the Government to wait until June of 2013 to investigate this letter.

Alarmingly, SA Renkes testified at trial and at the second Article 32 hearing that between February 2013 and the summer of 2013, his forward progress on the case was hampered by "his travel and a heavy burden of operational commitments." (J.A. at 533.) This does not explain why it took him four months to open a letter. It also undermines his assertions that he needed months after the ECS report to contact victims and review images over that same timeframe. He provided no documentation showing what investigative steps he took during the roughly six-month period during which FA Cooley languished in pretrial confinement. Nor did he provide any evidence that his workload was exceptionally high during this period.

The CGCCA held that the additional charges were the cause of delay "but were not delayed themselves." (J.A. at 14.) This is incorrect. The most significant delay occurred between the discovery of substantial information to support the charges and the Government's preferral of new charges in June, 2013. The record shows the Government tactically chose not to charge FA Cooley with possession of child pornography or mailing a letter to MP in the first charge sheet. When the military judge dismissed the first charge sheet, the Government used the dismissal as an opportunity to increase FA Cooley's punitive exposure by adding new charges before sending the case back to court-martial.

The second Barker factor weighs most heavily in favor of FA Cooley because the Government deliberately delayed trying FA Cooley for the offenses charged in Charge II, Specification 3 and Charge IV, Specification 2 for six months for tactical reasons.

3. FA Cooley made frequent demands for speedy trial.

FA Cooley frequently and forcefully objected to the Government's pretrial delays. See Barker, 407 U.S. at 529. FA Cooley made his first demand for speedy trial in November of 2012, before he was even confined. (J.A. at 207.) On December 5, 2012, he made a second demand for speedy trial. (J.A. at 207.) He made subsequent requests on January 25, 2013, and June 6, 2013, and filed motions to dismiss for of the Government's denial of his right to a speedy trial. (J.A. at 207; 124; 175.)

4. FA Cooley is prejudiced by excessive and unreasonable delay.

FA Cooley was prejudiced by the unreasonable delay in this case. He languished in oppressive pretrial confinement where he was sexually assaulted by another inmate. His report of the assault was ignored, as were his medical needs, by a command that neglected its duty to visit him on a weekly basis. Further, his defense was impaired by this delay as it prevented him from receiving adequate assistance from a court-mandated defense expert or consulting with his defense counsel.

In the Barker analysis, prejudice is evaluated "in light of the interests of the defendants which the speedy trial right was designed to protect." Barker, 407 U.S. at 532. Those interests are:

> (i) to prevent oppressive pretrial incarceration;
> (ii) to minimize anxiety and concern of the accused;
> (iii) and to limit the possibility that the defense will be impaired.
>
> Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. at 532.

The Barker court also specifically noted the hardship imposed on an accused by lengthy pretrial confinement:

> It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Id. at 532-33.

Here, the all three interests are implicated: FA Cooley was subject to oppressive pretrial incarceration which caused him anxiety and concern and his defense was impaired.

a. FA Cooley experienced oppressive pretrial confinement which caused him anxiety and concern.

FA Cooley experienced oppressive pretrial confinement that gives rise to prejudice in this case beyond what is normally experienced by members in pretrial confinement.

First, FA Cooley was sexually assaulted by a post-trial prisoner on February 2, 2013. (J.A. at 353.) Although he was a pretrial detainee, FA Cooley was held in close contact with post-trial prisoners. (J.A. at 341.) After FA Cooley reported minor misconduct by a convicted prisoner to the guards, that prisoner assaulted him by fondling his buttocks under a towel and whispering suggestively at him. (J.A. at 354.) The assailant was already a known disciplinary risk. (J.A. at 342-43.)

Although FA Cooley reported the incident immediately to the guards, the brig failed to conduct a criminal investigation beyond an internal disciplinary report, report the violation to the Naval Criminal Investigative Services (NCIS) or CGIS, or notify the Coast Guard Sexual Assault Response Coordinators until FA Cooley's defense counsel got involved. (J.A. at 181-82.) FA Cooley was left confined in close proximity to his attacker and was fearful of what the assailant might do to him. (J.A. at 354.) FA Cooley heard his attacker shouting and beating on the walls with his fists. (J.A. at 354.) He was not appointed a Coast Guard victim advocate until August 2013. (J.A. at 184.)

As found by the military judge, the Government failed "to comply with service regulations for . . . reporting of sexual assaults." (J.A. at 281.)

Suffering a sexual assault is clear prejudice. Further, while the assailant was not a Government agent, Government actions made FA Cooley's situation worse. The assault occurred because he was housed in an environment where he was comingled with convicted prisoners. Additionally, despite his timely report, FA Cooley's allegation was not properly investigated and FA Cooley received no victim resources until his legal counsel complained to brig authorities. In the interim, FA Cooley remained imprisoned together with his attacker due to Government inaction, a harrowing experience that caused him real fear.

The Government compares the physical assault that FA Cooley suffered to the verbal harassment experienced by the accused in United States v. Wilson, 72 M.J 347 (C.A.A.F. 2013). This is a very different and far more serious situation. In Wilson, the accused was subjected to racial taunts by other inmates, none of whom ever touched him. FA Cooley, on the other hand was physically assaulted in a disturbing and intimate way. He was then, despite his complaint, kept in the same dorm area as his attacker, causing fear and emotional distress. Unlike in Wilson, FA Cooley was concerned enough at the time to immediately report

his assault and to seek further intervention when his report was not taken seriously by the authorities.

FA Cooley also suffered neglect in confinement. Despite a mandate in Coast Guard regulations to visit FA Cooley weekly, his command's visits were few and sporadic. When FA Cooley was first confined, his assigned command representative was not informed he was in the brig for over a month. (J.A. at 534.) Even after that, the visits were scarce. After receiving no visits from April 2013 to May 2013, FA Cooley filed a redress of wrong on May 24, 2013, to seek adequate command visitation. (J.A. at 128-29.) When no corrective action was taken, FA Cooley filed an Article 138, UCMJ, complaint on June 3, 2013. (J.A. at 130-32.) As FA Cooley complained in his request for redress, in the absence of command visits his medical needs were being neglected. (J.A. at 129.) After FA Cooley's complaints, the Pacific Area Commander ordered a different local Coast Guard unit to take over visits in July. (J.A. at 259.) That unit has never visited FA Cooley. (Id.)

FA Cooley's oppressive confinement caused him anxiety and concern. After he was assaulted, his complaint was ignored and he was left to fend for himself until his defense team intervened. At the same time, because his command was not visiting him regularly, his medical and counseling needs were not being met. FA Cooley's concerns for his health and safety

were severe enough that he frequently complained and moved for Article 13, UCMJ, credit at trial. Cf. United States v. Thompson, 68 M.J. 308, 313-14 (C.A.A.F. 2010) ("Appellant did not raise any kind of formal or informal complaint about her confinement conditions or otherwise request a change in conditions during the period at issue"); Wilson, 72 M.J. at 354 ("Failure to raise an Article 13 claim, though not dispositive of an Article 10 claim, may be considered as a relevant factor bearing upon the question of prejudice for oppressive confinement").

b. Excessive delay prejudiced FA Cooley's ability to prepare for trial.

Due to unreasonable Government delay, FA Cooley was prejudiced in the preparation of his defense. He was forced to rely on an unqualified expert assistant who was not given sufficient time to evaluate FA Cooley due to Government delay and indifference.

On May 16, 2013, the first military judge ordered the Government to detail an expert assistant as a member of the defense to prepare for trial. (J.A. at 265.) On May 23, 2013, the military judge dismissed the charges without prejudice. (Id.) Although the Government preferred charges again the same day, they canceled FA Cooley's access to a defense expert. (J.A. at 399.) When the defense team renewed their request for an

expert, it was denied. (J.A. at 265.) This denial was arbitrary and unreasonable in light of the prior ruling ordering production. (J.A. at 95-98.) The Government forced FA Cooley to litigate again for the assignment of an expert. On September 11, 2013, the military judge again ruled that an expert was necessary. (J.A. 265-67.)

At that point, Government delay and the short timeline before trial precluded the appointment of an expert from the Armed Forces Center for Child Protection, as the military judge had found in May 2013 was appropriate and as the defense had requested. (J.A. at 399.) Instead, the Government waited until September 20, 2013, to appoint a different expert, who was not available to meet with FA Cooley until September 30 2013. (J.A. at 402.) FA Cooley was forced to request delay until October 4, 2013, to meet with the expert.

Unfortunately, this expert was not qualified to perform critical and relevant diagnostic evaluations (a fact the expert informed the Government when they solicited him) and was unable to perform other evaluations in so short a time period. (J.A. at 399; 402-04.) Given the unreasonable delay up to that point, FA Cooley was left with no choice but to go forward with the expert provided or incur additional delay. (J.A. at 399.) This prejudiced FA Cooley as he was unable to offer mitigating testimony to show how his experiences of sexual abuse as a child

impacted his criminal acts. The Government piled on charges and denied expert assistance in the face of a military judge's prior order, and in doing so gained a windfall from an adverse R.C.M. 707 motion at the expense of FA Cooley's Article 10 right to speedy trial.

Further, FA Cooley was confined far from his trial defense counsel. (J.A. at 221.) The Government limited FA Cooley's ability to meet with his detailed defense counsel except on the rare occasions when it provided funding for LT Hanzel to travel to court hearings. (J.A. at 221.) Had FA Cooley not been confined so long so far from his counsel, he would have had more time to prepare his defense.

Conclusion

All four Barker factors heavily favor FA Cooley. Therefore, this Court should find he suffered a prejudicial violation of his Article 10, UCMJ, speedy trial rights due to unreasonable Government delay and dismiss Charge II, Specification 3 and Charge IV, Specification 2 with prejudice.

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Appendix

1. Timeline of relevant events.

Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 02 July 2015.

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Certificate of Compliance

This brief complies with the page limitations of Rule 24(b) because it contains less than 14,000 words. Using Microsoft Word version 2010 with 12-point-Courier-New font, this brief contains 6,494 words.

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Appendix

Date	Days of Confinement	Action
20 Jul 2012	-	CGIS Interviews FA Cooley and receives a full detailed confession. FA Cooley's electronic media are seized. (J.A. at 315-17, 518-19.)
21 Jul 2012	-	FA Cooley placed in PTC (J.A. at 302-03.)
27 Jul 2012	6	FA Cooley released by IRO, placed in PTR (J.A. at 304-07.)
7 Sep 2012	-	SA Renkes sends electronic media to ECS (J.A. at 518-19.)
1 Oct 2012	-	SA Renkes receives preliminary analysis from ECS and disk of contraband images (J.A. at 318, 521-22.)
14 Nov 2012	-	Images sent to NCMEC (J.A. at 336.)
20 Nov 2012	-	FA Cooley submits Request for Redress of Wrong requesting speedy trial. (J.A. at 66, 92.)
1 Dec 2012	-	Request for Redress denied. (J.A. at 207.)
5 Dec 2012	-	Defense submits Art. 138 complaint demanding speedy trial (J.A. 207; Appellate Ex. XXI, Encl. 7.)
22 Aug 2012	-	FA Released from PTR, placed in restrictions on liberty (J.A. at 309-10.)
20 Dec 2012	-	FA Cooley placed in PTC again (J.A. at 323-29.)
4 Jan 2013	16	ECS Completes analysis of electronic media (J.A. at 524-35.)
16 Jan 2013	28	CA denies Art. 138 complaint. (J.A. at 207; Appellate Ex. XXI, Encl. 9.)
23 Jan 2013	35	ECS report released (J.A. at 330-33.)
25 Jan 2013	37	Defense submits Third Request for Speedy Trial (J.A. 207; Appellate Ex. XXI, Encl. 10.)
2 Feb 2013	45	FA Cooley suffers sexual assault in NAVCONBRIG MIRAMAR (J.A. at 353.)
5 Feb 2013	48	Letter returned to Base Seattle turned over to CGIS (J.A. at 382.)
14 Feb 2013	57	Defense emails brig to complain that no investigation has begun into sexual assault (J.A. at 181.)

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19 Feb 2013	62	Charges preferred (1st Charge Sheet) (J.A. at 54.)
1 Mar 2013	72	ECS supplementary report released (J.A. at 334.)
6 Mar 2013	77	First Art. 32, UCMJ hearing held (J.A. at 361-67.)
18 Mar 2013	89	Charges referred to GCM (1st Charge Sheet) (J.A. at 55.) Govt. ceases investigations (J.A. at 247.)
3 Apr 2013	105	Govt. serves FA Cooley with charges. MJ holds arraignment over defense objection. (J.A. at 100.)
17 Apr 2013	119	Defense requests expert assistance (J.A. at 199-200.)
16 May 2013	148	MJ orders appointment of defense expert witness after Govt. denial (J.A. at 265.)
23 May 2013	155	Charges dismissed for violation of R.C.M. 707 (J.A. at 99-106.) Govt. prefers same charges again. (2nd Charge Sheet). Govt. "refocuses" on investigation. (J.A. at 247.) Govt. cancels defense expert. (J.A. at 399.)
24 May 2013	156	Defense submits Redress of Wrongs related to conditions of confinement (J.A. at 128-29.)
3 Jun 2013	166	Defense files Art. 138 complaint related to conditions of confinement (J.A. at 130-32.)
06 June 2013	169	Defense files fourth demand for speedy trial (J.A. at 124-26.) Defense also put Govt. on notice that expert assistance was still required (J.A. at 125.)
14 June 2013	177	Govt. prefers 3rd charge sheet including new specifications (J.A. at 48-53.) Also, defense counsel emails brig to complain that FA Cooley continues to be confined with his attacker. (J.A. at 208.)
9 Jul 2013	202	Defense renews expert request (J.A. at 203.)
17 Jul 2013	210	Govt. again denies expert request (J.A. at 204.)
22 Jul 2013	215	2nd Art. 32 Hearing held (J.A. at 380-290.)
07 Aug 2013	231	Charges referred to GCM (J.A. at 53.)
10 Sep 2013	265	Arraignment and motion hearing (R. 10 Sep.)

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11 Sep 2013	266	MJ again orders expert assistance (J.A. at 265-67.)
20 Sep 2013	275	Govt. appoints consultant (J.A. at 402.)
04 Oct 2013	289	Trial