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.	APPELLANT'S REPLY BRIEF 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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Appellant, Fireman Apprentice (FA) Christopher S. Cooley, United States Coast Guard (USCG), through counsel, hereby replies to the United States' Answer of August 3, 2015.

1. Charge II, Specification 3 is not properly before this Court.

The Government asserts Charge II, Specification 3 is not properly before this Court as it was withdrawn and dismissed by the convening authority on October 4, 2013. (Appellee's Brief at 9-10.) Article 66, UCMJ states that a Court of Criminal Appeals "may act only with respect to the findings . . . as approved by the convening authority." 10 U.S.C. § 866(c)(2012). Therefore, it was not appropriate for the Coast Guard Court of Criminal Appeals to dismiss the specification either with or without prejudice. FA Cooley concedes this specification is not properly before this Court.

However, discussion and analysis of Charge II, Specification 3 is relevant to determine whether the Government's actions with regard to Charge IV, Specification 2 were reasonable. Special Agent (SA) Renkes of the Coast Guard Investigative Service (CGIS) asserted official travel and other operational commitments caused him to delay opening the letter charged in Charge II, Specification 3 for four months. (J.A. at 533.) Around the very same time, he was also supposedly investigating FA Cooley's possession of child pornography. (J.A.

at 191-92.) In reality, however, he was often out of the office on other commitments and other investigations. The Government failed to prioritize FA Cooley's case in any way and made no effort to pursue a specification of possession of child pornography until after the military judge dismissed the first charge sheet.

2. FA Cooley was held in confinement in relation to possession of child pornography from December 20, 2012.

The Government incorrectly asserts that FA Cooley asks this court to hold the Government accountable for Article 10 purposes from July 20, 2012 until trial. (Appellee's Brief at 15.) As the dissent from the lower court correctly noted, FA Cooley was confined the in relation to possession of child pornography starting on December 20, 2012. (J.A. at 15.) When FA Cooley was released from his first period of confinement in July 2012, the Government's accountability under Article 10, UCMJ, ended. United States v. Shuber, 70 M.J. 181, 187 (C.A.A.F. 2011). However, the Government's accountability for Article 10, UCMJ, in relation to child pornography allegations began anew when FA Cooley was confined for a second time on December 20, 2012.

"When an accused is placed in pretrial confinement as a result of a particular incident, the speedy-trial clock begins to run for all offenses that the prosecution knows, or reasonably should know, were part of that incident." United

States v. Bray, 52 M.J. 659, 661 (A.F. Ct. Crim. App. 2000). Otherwise, the "prosecution would have no incentive to promptly charge an accused with any offenses other than the minimum necessary for him to be confined." Id. at 662.

Despite Government assertions he was only confined the second time in relation to an orders violation (Appellee's Brief at 16), FA Cooley's actions to obtain and possess child pornography were at the heart of why he was confined according to the confinement order. (J.A. at 323-29.) FA Cooley had already confessed to possessing child pornography (J.A. at 298-301; 315-17) and the Government already believed it had seized child pornography from his electronic devices. (J.A. at 318; 521-22.) The Government knew (and certainly should have known) about FA Cooley's possession of child pornography.

Ultimately, FA Cooley disputes the Government's assertion that possession of child pornography was a "new" offense at all. It was merely a new legal theory of guilt based on information and evidence already available to the Government. Just because the Government initially chose not to prefer a possession of child pornography specification does not put the offense out of Article 10, UCMJ's protections. Where he was confined in relation to the same incident, the Government was accountable for Article 10, UCMJ, from December 20, 2012.

Therefore, with regards to the child pornography specification only, it is irrelevant whether or not the substantial information test has been abrogated. The Government's Article 10, UCMJ accountability began on December 20, 2012 when FA Cooley was confined in relation to possession of child pornography.

3. The substantial information test remains the appropriate method of determining when Government accountability begins for additional specifications under Article 10, UCMJ.

If this Court determines FA Cooley was not confined on December 20, 2012 in relation to possession of child pornography, the latest possible date to begin Government accountability for that offense is March 1, 2013 when the Coast Guard received conclusive proof of FA Cooley possessing child pornography from the CGIS electronic crimes section (ECS). (J.A. at 337-41.) At that point, the Government most certainly had substantial information on which to base a specification.

The Government asserts the substantial information test established in United States v. Johnson, 23 C.M.A. 91, 92-93 (C.M.A. 1974) has been abrogated by Rule for Courts-Martial(R.C.M.) 707 and this Court's decision in United States v. Kossman, 38 M.J. 258, 260-61 (C.M.A. 1993). Under the Government's theory, the Government would never be subject to the Article 10, UCMJ, requirement of reasonable diligence for

crimes discovered after the imposition of confinement until the Government decided to prefer new charges.

The Government cites to the non-binding analysis of R.C.M. 707 as persuasive authority for the application of R.C.M. 707's time-accounting provisions to Article 10, UCMJ. First, the editorial analysis does not carry the weight of the President's authority. Second, even if it did, it is unconvincing where this Court has previously held that R.C.M. 707 and Article 10, UCMJ are distinct sources of a speedy trial right and Article 10 is "clearly different" from, and "is not restricted" by, R.C.M. 707. United States v. Mizgala, 61 M.J. 122, 125 (C.A.A.F. 2005). This is because "the President cannot overrule or diminish [this court's] interpretation of a statute." Kossman, 38 M.J. at 260-61. The President did not abrogate the substantial information test with regard to Article 10, UCMJ, because he cannot. Neither did this Court abrogate that test in Kossman, either explicitly or by necessity. This Court merely held it would no longer apply a 90-day presumption of unreasonableness. Kossman 38 M.J. at 259.

Second, the Government cites to United States v. Wilder, No. 201400118, 2014 WL 3939963 (N-M. Ct. Crim. App. 2003), an unpublished case interpreting the starting point of R.C.M. 707 accountability for additional charges. As the error asserted in this case is a violation of Article 10, not a violation of

R.C.M. 707, this case is inapposite. In Wilder, the Navy-Marine Corps Court of Criminal Appeals held the substantial information test was not applicable to new charges under R.C.M. 707. The Court did not discuss the applicability of the substantial information rule to new charges under Article 10, UCMJ, as the court held Article 10, UCMJ, was not implicated in that case. Id. at *4.

The Government also cites to United States v. Proctor, 58 M.J. 792 (A.F. Ct. Crim. App. 2003), which was wrong when it was decided. In Proctor, the Air Force Court of Criminal Appeals (AFCCA) held the substantial information test was abrogated by Kossman. The accused in Proctor was confined for several allegations of substance abuse and assault. Between his confinement and trial, new allegations of assault surfaced. The AFCCA dismissed the initial charges for R.C.M. 707 violations. Moving to the more recently discovered charges, the court applied R.C.M. 707(a) and R.C.M. 707(b)(2) without regard to the substantial information rule and held that, after the initial imposition of confinement, only preferral of new charges triggers speedy trial accounting under R.C.M. 707.

The AFCCA went on to apply the same R.C.M. 707-triggering analysis to the Article 10, UCMJ, calculation. This interpretation takes new offenses that were previously covered by Article 10 protections after the Government had substantial

information on which to base a specification, and removes those protections until the Government elects to prefer new charges. AFCCA's decision in Proctor was error. The President cannot limit the applicability of an act of Congress in this way. Kossman, 38 M.J. at 260-61.

4. The substantial information test informs whether or not an accused's continued confinement is "in relation to" a new charge.

Even if this Court should decide R.C.M. 707(a) and R.C.M. 707(b)(2) apply in determining when the Government's accountability begins for Article 10, UCMJ, purposes when new specifications are added after an accused is already confined on other offenses, it should read Johnson in conjunction with R.C.M. 707 and find the substantial information rule still controls whether or not an accused is being held "in relation to" new offenses.

Under R.C.M. 707(a), speedy trial calculations begin upon the earliest of preferral of charges, imposition of restraint, or entry onto active duty for a reservist. NMCCA in Wilder and AFCCA in Proctor held that after an accused is confined on one set of charges, newly discovered misconduct is never subject to speedy trial until the preferral of charges. This interpretation is ripe for Government abuse and fails to account for the reality that new offenses are certainly considered alongside the

original offenses as further grounds for continued confinement after they are discovered.

The substantial information rule does not lead to the absurd result advanced by the Government. (Appellee's Brief at 18.) This has been the rule since Johnson was correctly decided in 1974 with no catastrophic consequences. At that time the Government was under even more pressure, with United States v. Burton, 44 C.M.R. 166 (C.M.A. 1972) requiring the Government go to trial within 90 days. With Burton overturned, the triggering of Article 10, UCMJ, protections now only requires the Government to proceed with reasonable diligence. It does not require the Government to go to trial without investigating at all. As the next section discusses, it is precisely that lack of reasonable diligence which is the problem here. Thus, it is not the substantial information test that causes the Government to "lose all the charges," but the Government's total lack of diligence.

FA Cooley does not need a hypothetical scenario to prove his argument, as the reality here is the very scenario the substantial information test aims to prevent. Without the substantial information rule, the government is free to delay the processing of new offenses at its whim, as the Government did in this case. The Government then justified further delay of the (already delayed) original charges in order to tack on the

new offense. The potential for Government gamesmanship is obvious, particularly in a case such as this where the "new" specification is really only a new legal theory of liability for the same acts based on information the Government already had. Instead of going to trial in the spring of 2013 after the Government had completed a thorough forensic analysis of his electronic media, FA Cooley languished in confinement for six unnecessary months.

5. The Government investigation did not proceed with reasonable diligence.

The Government correctly cites to United States v. Cossio, 64 M.J. 254, 357 (C.A.A.F. 2007), for the premise that the Government is entitled to investigate an accused's misconduct before proceeding to trial. However, if additional investigation is required before bringing the accused to trial, the Government must proceed with reasonable diligence. Id. In this case, the Government failed to do so.

First, the Government had no intention of prosecuting FA Cooley under a theory of possession of child pornography and made no move to do so, despite having conclusive evidence to support a child pornography specification for several months. As the Government admitted at trial, their investigative efforts were winding down as the first arraignment approached. (J.A. at 247.) Any suggestion that the complexity of the investigation

was the reason a specification of possession of child pornography was not drafted until June of 2013 is a post hoc rationalization contradicted by the record.

Second, while SA Renkes catalogued possible lines of inquiry like further analysis of digital evidence and witness interviews and suggested that the investigation was "ongoing," he provided no accounting for what effort and time, if any, was actually expended by the Government to advance the progress of the investigation. (J.A. at 512-27.)

The burden of proof was on the Government to show its reasonable diligence. Mizgala, 61 M.J. at 125. The Government did not provide any logs, summaries of interviews, reports of investigation or other evidence that would show what steps were being taken to finish the investigation. With SA Renkes present to testify, they could have asked him about who was interviewed, what evidence was reviewed, what percentage of time was spent on other cases or other operations, and what was the urgency of the other operations compared to FA Cooley's Article 10, UCMJ, protections. They failed to do so. However, SA Renkes did testify about how over that timeframe he was very busy with official travel and other operations. (J.A. at 533.) The Government simply did not carry its burden in demonstrating reasonable diligence in the investigation of FA Cooley.

The logical inference is that there was no significant investigatory effort happening in FA Cooley's case after the March 1, 2013 ECS report, or the Government would have presented it in detail to defeat the Article 10 motion.

Conclusion

For the foregoing reasons and those previously stated, the decision of the Court of Criminal Appeals should be reversed and Charge IV, Specification 2, should be set aside and dismissed with prejudice.

Respectfully submitted,

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Certificate of Filing and Service

I certify that the foregoing Reply Brief was electronically filed with the Court and served on Appellate Government Counsel on 13 August 2015.

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Certificate of Compliance

This Reply Brief complies with the page limitations of Rule 24(c) because it contains less than 7000 words. Using Microsoft Word 2010 with 12-point-Courier-New font, it contains 2,652 words.

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