IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Amanda M. Lee
Lieutenant Commander, USCG
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 35615
202-372-3811
Amanda.M.Lee@uscg.mil

Stephen P. McCleary
Appellate Counsel
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 28883
202-372-3734
Stephen.P.McCleary@uscg.mil

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Statement of Statutory Jurisdiction

Appellant's approved sentence included both a bad-conduct discharge and confinement for greater than one year; therefore the Judge Advocate General of the Coast Guard referred Appellant's case to the Coast Guard Court of Criminal Appeals in accordance with Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1) (2012. After the decision of that court, the Judge Advocate General certified Appellant's case to this Court pursuant to Article 67(a)(2), UCMJ. 10 U.S.C. § 867(a)(2)(2012). On the same day, Appellant also petitioned this Court for review under Article 67(a)(3), UCMJ. 10 U.S.C. §§ 867(a)(2) & (3) (2012).

Statement of the Case

Appellant was tried by a general court-martial, military judge alone. Pursuant to his conditional pleas of guilty, entered in accordance with a pretrial agreement, Appellant was convicted of one specification of attempting a lewd act with a child of more than 12 years but less than 16 years, and two specifications of attempting to wrongfully commit indecent conduct, in violation of Article 80, (UCMJ); one specification of failing to obey an order, in violation of Article 92, UCMJ; and one specification of wrongfully and knowingly possessing apparent child

pornography, to the prejudice of good order and discipline in the armed forces and to the discredit of the armed forces, in violation of Article 134, UCMJ. The military judge sentenced Appellant to confinement for seven years, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge. In accordance with the pretrial agreement, the Convening Authority approved the sentence and suspended all confinement in excess of fifty months.

On December 24, 2014, the Coast Guard Court of Criminal Appeals set aside the findings and sentence in Appellant's case. Of relevance to the granted issue, the Coast Guard Court dismissed Charge II, Specification 3 and Charge IV, Specification 2 without prejudice for violation of Rule for Court-Martial (R.C.M.) 707. On the same day that the Judge Advocate General certified Appellant's case to this Court, Appellant petitioned this Court for review asserting those two specifications should have been dismissed with prejudice for violation of Article 10, UCMJ. This Court granted review of Appellant's petition on June 3, 2015.

Statement of Facts

FA Cooley was originally placed in pre-trial confinement based on reports he solicited a minor in

California to send him sexually explicit images on July 12, 2012. (J.A. at 273) He was released from pre-trial confinement on July 27, 2012. (Id.) He was placed in pre-trial confinement again on December 20, 2012 after he violated an order not to contact children by sending at least one text message to a twelve–year-old boy. (J.A. at 274 and 291). FA Cooley was served with a set of preferred charges on 19 February 2013. (J.A. at 274) Those charges were dismissed for violation of R.C.M. 707 on May 23, 2013. (J.A. 99-106). The Government re-preferred those charges on the same day, May 23, 2013. (J.A. at 268) Those charges were withdrawn and dismissed without prejudice on June 14, 2013. (Id.) They were then re-preferred, including Charge II, Specification 3 (orders violation) and Charge IV, Specification 2 (child pornography), June 17, 2013. (Id.) At trial, FA Cooley brought a motion to dismiss Charge II, Specification 3, and Charge IV, Specification 2 for violation of R.C.M. 707. The military judge denied that motion. (J.A. at 268-272)

A. Facts Underlying Charge IV, Specification 2 (Possession of Child Pornography)

On July 4, 2012 FA Cooley sent text messages to a thirteen year old boy in California asking how the boy felt about “gays” or “bi”. (J.A. at 289 and 374) He followed

up that question with messages about porn and asked the boy how often he masturbated. (Id.) In the meantime, the boy alerted his mother who monitored and participated in the communications with FA Cooley. (Id.) FA Cooley continued to send text messages to the boy and asked him for a video of the child taking his clothes off and masturbating. (Id.) FA Cooley also made references in the text messages to sharing videos with another 14 year old boy and alluded that they also masturbated together. (J.A. at 374.) The boy's mother contacted the local police in California, where the boy lived, and the following day Coast Guard Investigative Service (CGIS) was notified. (J.A. at 311 and 375)

On July 20, 2012, CGIS interviewed FA Cooley. He admitted that he had propositioned at least five minor children for sexually explicit photos of themselves. (J.A. at 256). Of note, however, in his two and a half page hand-written statement he spent the first page describing that three of those he had solicited for photos were girls who only sent him photos of themselves in underwear. (J.A. at 298-300) He never admitted to the details of the solicitation first reported to the police and CGIS that were related to the exchange of text messages that began around July 4, 2012 with the victim in California. (Id.)

Also on July 20, 2012, CGIS seized an iPhone, laptop, several hard drives, digital cameras, gaming consoles, and CDs from FA Cooley. (J.A. at 311-312). CGIS attempted to find local resources in Alaska that could analyze the more than 30 storage devices seized from him. (J.A. 368-369; 520-521) When such resources proved unavailable, the devices were transferred to the CGIS Electronic Crimes Section (CGIS ECS) in Virginia. (J.A. at 311) On September 17, 2012, CGIS placed a regional priority on analysis of the electronic media seized from FA Cooley. (J.A. at 257) Investigation identified additional individuals that might be possible witnesses or victims. (J.A. at 99-100) Those able to be identified were located in Juneau and Sitka, Alaska, California, Texas, and Michigan. (J.A. at 100)

Charge IV, Specification 2 is based on images of children derived from the analysis of hundreds of images identified by CGIS ECS. (J.A. at 276) The CGIS investigation, which was ongoing up through the time of trial, involved screening images for indicators consistent with child pornography, corroborating statements of victims to the confession of FA Cooley, and conducting metadata analysis through databases, including that of the National Center for Missing and Exploited Children. (J.A. at 269,

276 and 338) Even at the time of trial approached, CGIS was investigating hundreds of phone numbers from FA Cooley's phone to determine if additional victims existed based on the number of potentially child pornography images found on FA Cooley's electronic devices. (J.A. at 269 and 276) Many of the numbers contained only first names and a phone number and CGIS learned many of those numbers were associated with "pay as you go" phones not subscribed to a traditional mobile phone contract. (Id.) Because of the voluminous material to analyze, the distances involved, the fact that many of the potential victims were minors, and the fact that at least one of the accused's laptops could not be analyzed, at the time of trial, the CGIS investigation was incomplete. (J.A. at 101 and 276)

B. Facts Underlying Charge II, Specification 3 (Violation of an Order by Sending a Letter to a Child)

In January 2013, a letter was returned to the barracks at Base Seattle for FA Cooley, who, at that time, was in pre-trial confinement. (J.A. at 274 and 524) The letter was postmarked December 11, 2012. (J.A. at 376) FA Cooley had been placed in pre-trial confinement in late December for violating an order not to have contact with minors. (J.A. at 274 and 291) That conduct, which was separate and entirely distinct from the letter, involving a different

minor, took place on December 14, 2012. (J.A. at 291) CGIS seized the letter in February 2013. (J.A. at 268) The CGIS analysis of the letter involved attempting to determine the age, identify and whereabouts of the addressee, who turned out to be transient. (Id.) Final investigative steps to develop information to obtain a search authorization were completed in late April or early May 2013. (Id.) A search authorization to open the letter was granted on 6 June 2013. (Id.)

Charge II, Specification 3, the orders violation specification, was withdrawn from the court-martial of FA Cooley and dismissed without prejudice by the Convening Authority pursuant to a pre-trial agreement on October 4, 2013. (J.A. 50-51)

Issue Presented

WHETHER THE GOVERNMENT VIOLATED FA COOLEY'S RIGHTS UNDER ARTICLE 10, UCMJ, WHEN THE GOVERNMENT POSSESSED EVIDENCE AGAINST FA COOLEY ON JULY 20, 2012 AND FEBRUARY 5, 2013 BUT DID NOT PREFER CHARGES AGAINST FA COOLEY FOR THESE OFFENSES UNTIL JUNE OF 2013, DEPSITE HIS PRETRIAL CONFINEMENT FROM DECEMBER 20, 2012?

Standard of Review

Whether an accused received a speedy trial is reviewed *de novo*, but, as cited by Appellant, 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).

Argument

This Court has established that the Government is entitled, if not obligated, to conduct a thorough investigation of offenses before proceeding to trial. United States v. Cossio, 64 M.J. 254, 256-58 (C.A.A.F. 2007). The nature of FA Cooley's crimes required extensive investigation. The Government analyzed more than 30 electronic devices for evidence. FA Cooley solicited minors to provide him naked pictures of themselves doing overtly sexual acts that he proposed to them. There was some evidence from his confession that he may have then distributed the images he received to others. His phone contained hundreds of phone numbers and his electronic media hundreds of possible images of child pornography. Despite months of investigation, the Government was never able to determine if the pictures in FA Cooley's possession were of actual children and who those children were, nor what FA Cooley did with the images and who he might have distributed them to.

In February 2013, when CGIS seized a letter that appeared to be from FA Cooley to a person at the Grizzly Youth Academy, FA Cooley had recently been placed in pre-

trial confinement for violating an order not to have contact with minors. With evidence that FA Cooley was potentially reaching out to more than one minor five months after clearly learning he was being investigated for sexual misconduct with minors, and being ordered to not have contact with minors, the Government understandably took care to develop the evidence of additional efforts by FA Cooley to contact minors.

I. Charge II, Specification 3 (the orders violation specification) is Not Properly before This Court

Charge II, Specification 3 was dismissed without prejudice by the Convening Authority on October 4, 2013, pursuant to the pre-trial agreement. (J.A. at 50-51) No findings were entered by the court-martial as to that specification. Article 66(c), 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). In this case, there was never a finding by the court-martial, let alone was that finding approved by the convening authority. Despite this, the Coast Guard Court of Criminal Appeals dismissed the specification without prejudice, and FA Cooley asks this Court to dismiss the specification with prejudice. Without findings, there was nothing upon which the Court of Criminal Appeals could

act. That court's dismissal of the specification was improper, and it would be improper for this Court to either affirm the lower court's dismissal order or to take any action at all on that specification. Therefore, the United States asks that this Court set aside the dismissal order of the Coast Guard Court of Criminal Appeal with respect to Charge II, Specification 3.

II. The Substantial Information Test

FA Cooley argues that Charge II, Specification 3 (the orders violation specification) and Charge IV, Specification 2, (the child pornography specification) should be dismissed under Article 10 because an excessive period of time passed between when the Government supposedly had "substantial information" on which to charge FA Cooley for the two offenses and when he was brought to trial. This argument is based on United States v. Johnson, 48 C.M.R. 599, 600-601 (C.M.A. 1974), a case decided before R.C.M. 707 was promulgated, and premised at least in part by the presumption of violation of Article 10 for periods of pre-trial confinement exceeding three months originally derived from United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971). Because the Johnson case was decided prior to the promulgation of R.C.M. 707 and is based on case law that has since been usurped, it does not carry the weight or

precedent that Appellant argues it should.

In Johnson, the accused was originally placed in pre-trial confinement for unauthorized absence and other offenses that were dismissed at trial. Johnson, 48 C.M.R. at 600. Five days after being placed in pre-trial confinement, a co-accused named Johnson as a participant in a robbery. The co-accused was granted immunity, but then left his unit without authority. When he returned the co-accused was interviewed and, after the grant of immunity, named Johnson as an accomplice. Id. Since Johnson was not originally confined for the robbery, the Court of Military Appeals tried to determine when to start the consideration of when he was being held for Article 10 purposes. In that context, the defense urged that it began as soon as the investigating agent was aware a co-accused implicated Johnson. The Government urged that accountability began when Johnson was charged with the robbery. In reference to the defense argument, the Court stated "[t]he defense argument would require hasty preparation of charges and their prosecution on a minimal foundation." 48 C.M.R. at 601. The Court found that a later date, when the co-accused gave a statement after a grant of immunity, was the correct time frame in which to begin accountability for Article 10. Id.

As indicated previously, however, this decision was made before R.C.M. 707 was promulgated. The role of R.C.M. 707 in determining when there is a speedy trial violation needs to be analyzed, particularly wherethe Coast Guard Court of Criminal Appeals applied Johnson in its decision to dismiss the child pornography specification and the orders violation specification without prejudice for violation of R.C.M. 707. The Coast Guard Court's application of the "substantial information" test is flawed and demonstrates why that test is no longer viable in either context, as two service courts have found. *See* United States v. Wilder, No. NMCCA 201400118, 2014 WL 3939963 (N-M. Ct Crim. App. Aug. 12, 2014); United States v. Proctor, 58 M.J. 792 (A.F. Ct. Crim. App. 2003).

The Analysis of R.C.M. 707 states "*Introduction*. The rule applies to the accused's speedy trial rights under the 6th Amendment and Article 10, UCMJ". Analysis of Rules for Court-Martial, Rule 707 Speedy Trial, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), at A21-42.

R.C.M. 707 (a) states accountability for bringing an accused to trial begins on the preferral of charges, imposition of restraint, or entry onto active duty. R.C.M. 707(b)(2) then states that when there are multiple charges, each is accounted for separately in accordance with the

provisions of R.C.M. 707(a). R.C.M. 707(b)(3) sets out that dismissal or release from restraint ends the period of accountability for a speedy trial until charges are preferred or re-preferred, or restraint is imposed or re-imposed. The Coast Guard Court's opinion ignores the requirements of the Rule, and imposes a different test: asking when the Government had "substantial information" to begin the speedy trial clock under R.C.M. 707.

This Court has held that different charges and specifications can have different dates on when speedy trial accountability begins, and even charges preferred on the same day can have different periods applicable to them. United States v. Robinson, 28 M.J. 481, 482-83 (C.M.A. 1989)("RCM 707(a)(2) should be construed to sometimes permit separate speedy-trial-clock calculations even though several offenses have been preferred at the same time"). This is consistent with R.C.M. 707, as a person could be placed under restraint or in confinement for one specification, and have that specification preferred on the same day as other specifications that were not the basis for the restraint or confinement. The Coast Guard Court's decision takes that concept a significant step further and would allow different periods of speedy trial clock accountability to apply to the same specification.

Of particular note regarding Robinson, the Court of Military Appeals decision cites favorably to, and indeed quotes extensively from, the Army Court of Military Review decision which was the basis of the appeal. United States v. Robinson, 26 M.J. 954 (A.C.M.R. 1988). Robinson had been originally investigated for involvement with drug distribution and use. While that investigation was ongoing, he was transferred to another Army facility in Germany with limitations on his movement. 26 M.J. at 955. These limitations were found at trial to amount to the imposition of pretrial restraint. Id. The Army Court was specifically asked to dismiss the charges against Robinson under Article 10 based on the "substantial information" test.

The Army Court, although expressly noting the difference between pretrial restraint and confinement, stated "our extension of the Johnson holding would destroy the balance between individual rights and governmental interests so carefully drawn in the Manual provisions under review. Instead, we will apply the language of R.C.M. 707(a). We hold that, where an accused is under restriction in lieu of arrest under R.C.M. 304(a)(2) for an offense, accountability under R.C.M. 707(a) on another offense does not run from the date that the government has substantial

information on which to base preferral of charges for the latter offense." The Coast Guard Court cited to the Army Court decision in Robinson, which had been relied on by the military judge, and found the military judge's reliance on it to be error. (J.A. at 11-12) Yet since the aspect of the Army Court holding at issue was clearly based on a claimed violation of Article 10, not R.C.M. 707, the Coast Guard Court decision, which FA Cooley asked this Court to review, leaves it completely unclear as to when Government accountability for a speedy trial begins, under either R.C.M. 707, where the Coast Guard Court has added a factor not in the Rule, or Article 10, as the substantial information test was developed prior to the detailed guidance in R.C.M. 707 on the impact of restraint on speedy trial accountability.

A. The Child Porn Specification and Substantial Information

FA Cooley urges this Court to apply the "substantial information" test to the child pornography specification and find that Government accountability for bringing FA Cooley to trial began on July 20, 2012, which is the date he confessed to CGIS that he propositioned children for sexually charged pictures. Brief of Appellant, at 11. The problem with this assertion is that Article 10 attaches

when an accused is placed in confinement or arrest. FA Cooley was placed in confinement on July 21, 2012. (J.A. at 99 and 273) Thus, FA Cooley's argument would have the Government's accountability begin before Article 10 attaches under any set of circumstances.

As two military judges found, FA Cooley was placed in confinement for propositioning minor children for sexually explicit images, not possessing any images. (Id.) He was then released on July 27, 2012. (Id.) He was immediately placed on pre-trial restriction. (Id.) And on August 22, 2012 he was removed from pre-trial restriction and had conditions imposed on his liberty. (J.A. 100 and 276-277) He was then returned to pre-trial confinement on December 20, 2012 for violating an order not to have contact with children. (J.A. 100 and 274) The original charges against FA Cooley were preferred on February 19, 2013. (J.A. 100 and 274) The child pornography specification was preferred on June 17, 2013. (J.A. at 275)

FA Cooley was never ordered confined for possession of child pornography. Even assuming he was, as of 22 August 2012, when he was placed in a "conditions on liberty" status, accountability under R.C.M. 707 would have ceased. Under R.C.M. 707(b)(3) accountability for a speedy trial under R.C.M. 707(a) begins on the imposition of

restriction, arrest, or confinement under R.C.M. 304(a)(2)-(4). Conditions on liberty do not trigger R.C.M. 707(a) accountability. The specification could not have been dismissed associated with FA Cooley's release from confinement or restriction as the specification had not yet been preferred. See, R.C.M. 304(a)(1). Such release would have also ceased accountability under Article 10, as the article requires a person be brought to trial or released from pre-trial confinement. See, United States v. Ruffin, 48 M.J. 211, 213 (C.A.A.F. 1998)(Date of accountability for R.C.M. 707 purposes does not relate back to initial imposition of restraint, even where release from confinement takes place one day before preferral of charges).

FA Cooley's argument highlights the difficulty in applying the "substantial information" test after the promulgation of R.C.M. 707. Under R.C.M. 707, the speedy trial clock for the child pornography specification did not begin until the specification was preferred in June 2013. Even assuming it had been a basis for his pre-trial confinement and subsequent restriction, he was released from both between August 22 and December 20, 2012. Thus, the period for speedy trial accountability for the child pornography specification would have ceased under the Rule

until June 2013. Under FA Cooley's argument, the Government would have to assume that upon imposition of pre-trial confinement any information in its possession that might result in investigative leads that could lead to other charges could trigger application of Article 10.

To illustrate the difficulties this argument creates, one should suppose that a member was placed in pre-trial confinement for murder but during further investigation, it is revealed that the member was also possibly involved in other murders and threats to witnesses. Under FA Cooley's arguments, the suspect would either have to be released from confinement despite the potential threat to others or the Government would risk losing all of the charges and specifications by keeping the member confined while further evidence of other very serious offenses was accumulated.

And, practically speaking, it is impossible for the Government and the courts to determine when there is a speedy trial clock violation if an accused is confined and later released from confinement, and charges are preferred after that release, as was the case here. Does the clock start upon preferral of the charges, as R.C.M. 707(a) would suggest? Or does it start when the original confinement began, despite what R.C.M. 707(b)(3) states? Or is it some amorphous period when there is substantial information

about the charge that apparently applies as soon as confinement begins and can never be stopped and whose calculation cannot readily be made, and where the charge cannot be dismissed with release from confinement as the charge is not yet preferred?

Finally, even applying the "substantial information" test, FA Cooley urges this Court to find that "substantial information" that the accused possessed child pornography existed from the date the Government interviewed Cooley and he admitted to soliciting five minors, three of them girls who provided pictures of themselves in their underwear, and seized, but had not yet examined, more than 30 electronic devices. As noted previously, in a two and a half page written statement, FA Cooley spent the first page discussing pictures he obtained of girls, the second page describing how he solicited pictured from two boys, and the third page talking about how could not control himself and thought he needed help. As of July 20, 2012, that statement, information from the mother of the boy in California, and 30 unanalyzed devices were all the evidence the Government had.

This is exactly the type of argument the defense urged the Court of Military Appeals to adopt in Johnson, and where the Court found that such a drastic interpretation of

when the Government possessed “substantial information” would result in ”hasty preparation of charges and prosecution on minimal foundation.” 48 M.J. at 601.

B. The Orders Violation Specification

FA Cooley urges this Court to apply the same “substantial information” test to the specification involving his sending a letter to a minor at the Grizzly Youth Academy. FA Cooley urges that as of the date when CGIS seized the letter, the Government had “substantial information” that FA Cooley had violated the order not to contact minors, and assessment as to whether the Government complied with Article 10 begins from that date. As discussed supra, this charge is not properly before this Court because it was dismissed by the convening authority pursuant to the pretrial agreement. This Court need not consider the merits of Appellant’s argument with respect to this charge and should reverse the order of the lower court dismissing a charge that was not before it.

However, even if this Court were to consider the charge, it need not be dismissed with prejudice. Similarly to the child pornography specification, the Coast Guard Court of Criminal Appeals found that R.C.M. 707 was violated when the Government had what it determined was “substantial information” to charge Charge II,

Specification 3 when the Government learned the age of the addressee in February 2013. (J.A. at 12) The letter, coming on the heels of the text messages to a twelve year old that resulted in reimposition of pre-trial confinement, indicated a broader pattern of contact by FA Cooley. Without talking to the intended recipient of the letter it was difficult to build information about the letter itself, and without knowing the contents of the letter, which was not opened until June 2013, difficult to determine if there was enough information to charge FA Cooley with another violation of the order to not contact children. Given that the letter appeared to be, and in fact turned out to be, close in time to the text message, and five months after FA Cooley knew he was under investigation for soliciting sexually explicit images from minors, care in the development of further evidence was required.

The orders violation specification from the letter to the Grizzly Youth Academy student was preferred on June 17, 2013. (J.A. at 275) Thus, under R.C.M. 707(a), the Government's time period to bring the specification to trial began on that date. The only other action that could have triggered the R.C.M. 707 speedy trial clock would have been the imposition of restraint. But that occurred on December 20, 2013, about a month before the letter was

returned by the Postal Service and investigation could have even begun. (J.A. at 274) Under the Coast Guard Court's reasoning, the Government would be accountable under R.C.M. 707 or Article 10 for offenses of which it became aware after imposition of confinement, and despite the fact that the Rule would otherwise impose accountability for that offense only upon preferral. Again, the Coast Guard Court adds criteria to R.C.M. 707 which the President did not include. And yet, if the "substantial information" test applies to the orders violation specification under Article 10, all parties to the court-martial are faced with potentially at least two dates from which to figure when to start figuring the speedy trial period: 120 days from preferral, or some unknown date after the date in which it is later determined the Government had substantial information. The latter is not a workable test, particularly where it is applied in competition to or at least alongside the standards set forth in R.C.M. 707.

Even if "substantial information" is the test, that information did not exist upon obtaining the envelope returned by the Postal Service, or even upon learning the age of the person it appeared likely the letter was addressed to. Efforts were necessary to gather more information to try to confirm the identity, age, and

whereabouts of the addressee, and potentially some indication of what may have been in the envelope. (J.A. at 268) Once the letter was opened, on or about June 6, 2013, and its contents clear, there was substantial information. (Id.) And the orders violation specification was preferred eleven days later on June 17, 2013. (Id.)

C. Conclusion

For all of the above reasons, the United States urges this Court to explicitly state the "substantial information test" no longer survives, whether for purposes of Article 10, and certainly not as to R.C.M. 707. R.C.M. 707's detailed guidance on starting and stopping points for speedy trial accountability specific as to the impact of pre-trial confinement and restraint provides the necessary balance between speedy trial interests and ensuring adequate investigation. As indicated in the Analysis of R.C.M. 707, it was intended to provide a framework to protect an accused's speedy trial interests under both the 6th Amendment and Article 10.

Even if this Court did apply the substantial information test to this case, the appropriate time frame to determine substantial information for both of these specifications is the date of preferral. As the Military Judge found, due to the complexity of the case and the

volume of materials to review, investigation of the nature and extent of FA Cooley's child pornography involvement continued up through the trial. Any earlier date for the child pornography specification would basically have started the accountability for a speedy trial upon the first discovery of an image that might be child pornography, regardless of how many other images might be found through later investigation and how much data remained to be assessed.

As to the orders violation specification, it was not until the letter was opened on about June 6, 2013 that the suspicions that FA Cooley had communicated with a minor in violation of the no contact order could be confirmed. The orders violation specification was preferred on June 17, 2013.

III. Article 10

Article 10 states:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. 10 U.S.C. § 810 (2012).

The current version of Article 10 is derived from the 1920 Articles of War, Articles 69 and 70. LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES (1951), at 16. As

noted in United States v. Schuber, 70 M.J. 181, 186

(C.A.A.F. 2011), the article

traces its origins to the Articles of War 69 and 70. H. Rep. No. 81–491, at 13 (1949); S. Rep. No. 81-486, at 10 (1949), 1950 U.S.C.C.A.N. 2222. Article of War 70 required the release of a prisoner not provided with timely notice of the charges against him. (footnote omitted)

The relevant portions of Articles 69 and 70 of the 1920

Articles of War read:

Art. 69. Arrest or Confinement. Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement on in arrest as circumstances may require.

Art. 70. Charges; Action Upon . . . When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. 41 Stat 787 et seq.; Pub.L. 66-242 (1920).

Also if interest is the version of Article 70 from the 1916

Articles of War:

Art. 70. Investigation of and Action Upon Charges. No person put in arrest shall be continued in confinement more than eight days or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served or the arrested person be not brought to trial, as herein required, the arrest shall cease. But

persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest. Provided That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. 39 Stat. 661 et seq.; Pub.L. 64-242 (1916).

The Article of War provisions required that a person charged with a serious offense be placed in arrest or confinement. Article 10 placed a caveat that arrest or confinement be "as circumstances may require", but all three versions, from 1950, 1920, and 1916, reflect a presumption that those charged with serious offenses would be immediately confined. As noted in Schumer, Congress wanted to avoid lengthy periods of confinement without charge. 70 M.J. at 186. All of these articles were prior to the advent of R.C.M. 304, R.C.M. 305, and R.C.M. 707. As indicated in 1920, and most particularly in the 1916 Articles of War, the focus of Congress in passing these Articles, and by implication, Article 10, was to prevent pre-trial confinement without charge. If the Government could not bring a person to trial promptly, the accused had to be released. The 1916 Articles of War explicitly state that a person could be released from pre-trial confinement and still tried. The 1920 version eliminated that numerous time deadlines in the 1916 Articles, but the purpose of

removing the specific time periods was to provide more flexibility in application of the time required to bring an accused in pre-trial confinement to trial. As the Judge Advocate General of the Army testified in reference to proposed revisions to the Articles of War:

> "The defects of these articles [articles 70, 71 and 93] are: First, that they are all lacking in penal sanction; second, that the prescribed time limits are often impossible to observe, and if observed, would in certain grave cases lead to escapes; and third that they were enacted when foreign service was not particularly in view and did not take into consideration delays which under present conditions are inseparable from the administration of military justice." S.Rep. 64-130, at 63, Appendix Revision of the Articles of War, Hearing Before the Subcomm. On Military Affairs, 64th Cong. (1916 (statement of Brig. Gen. Enoch H. Crowder, United States Army).

Thus, Article 10, and its predecessors, were always intended as a shield against lengthy pre-trial confinement without charge. The intended remedy was release from pre-trial confinement, and in extreme cases, potential prosecution of those responsible for the delay. See Articles 97 and 98, UCMJ; 10 U.S.C. §§ 897-898 (2012). It has never been intended as a sword for an accused to defeat successful prosecution because the nature of the accused's crimes warranted confinement while the investigation into his actions was completed. See generally, Brief of Appellant, Appendix.

A. Compliance with Article 10

Before proceeding to trial, the Government was permitted to fully investigate FA Cooley's crimes. See United States v. Cossio, 64 M.J. 254, 255-58 (C.A.A.F. 2007). In fully investigating his crimes, the Government moved diligently to take immediate steps to try FA Cooley, as required under Article 10, UCMJ. Courts have recognized that "pretrial delay is often both inevitable and wholly justifiable." Doggett v. United States, 505 U.S. 647, 656 (1992). Justifiable reasons for delay include collecting witnesses and other evidence against the accused. See Id.

1. The Child Pornography Specification

It is not unreasonable for the government to delay proceedings, even where an accused is confined, for forensic examination of electronic equipment. United States v. Cossio, 64 M.J. 254, 257 (C.A.A.F. 2007). In Cossio, the accused was placed in pretrial confinement for 120 days while the government investigated his case. Id. at 255-56. On appeal, this Court held that "it was not unreasonable for the Government to marshal and weigh all evidence, including forensic evidence, before proceeding to trial." Id. (citing R.C.M. 601(e)(2) Discussion ("Ordinarily all known charges should be referred to a single court-martial.")). This Court reasoned that "the

computer equipment seized from Cossio may have provided critical evidence bearing directly on whether the Government could sustain its burden of proof." Id. at 257. After balancing the Barker factors, this Court found that although the processing of charges was inefficient, "the Government has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial." Id. at 258.

Here, after finding a violation under R.C.M. 707, the Coast Guard Court of Criminal Appeals dismissed Charge IV, Specification 2 without prejudice. The United States does not concede that dismissal under R.C.M. 707 was proper. However, the Coast Guard Court did correctly conclude that there was not an Article 10 violation. This case uncovered an abundance of electronic data from a wide range of storage media that required lengthy forensic analysis, which the government had to fully investigate before proceeding to trial. See Cossio, 64 M.J. at 255-56.

That investigation was made more complicated by the discovery that FA Cooley was engaging in the same conduct that initiated the investigation, namely soliciting minors, five months after the investigation began. FA Cooley claims that "[d]espite the overwhelming evidence available, the government made no effort to prosecute FA Cooley for

possession of child pornography until June 2013 . . . ." (App. Supp. to Petition at 9). This, however, is unfounded and unsupported by the record. FA Cooley admitted to soliciting pornographic pictures from minor children. As two different Military Judges found, the Government sought to identify whether the images on FA Cooley's electronic devices were of actual minors, and whether the victims were known to the Appellant. The Government was trying to determine if the Appellant was guilty of not just possession of child pornography, but production and distribution as well. (J.A. 99-100 and 276)

In addition to the forensic efforts with regard to digital images found on FA Cooley's seized electronic media, the Military Judge found CGIS investigated hundreds of phone numbers of potential victims obtained through analysis of FA Cooley's phone. (J.A. at 269) Many of the numbers contained only a first name or nickname and a phone number. Id. CGIS learned that many of the numbers were associated with "pay as you go" phone. Id. And, as noted previously, as of the time of trial, the CGIS investigation into the scope of FA Cooley's exploitation of children continued. (J.A. at 101, 269, and 276)

Furthermore, a confession alone was not enough to support a finding of guilty beyond a reasonable doubt at

trial, nor to identify whether Appellant was guilty of production of child pornography. Appellant's argument, carried to its logical conclusion, is that since FA Cooley admitted to some criminal activity, and he was subsequently placed in pre-trial confinement for later committed criminal activity, the Government was under an obligation to cease its investigation and attempt to proceed to trial based on FA Cooley's admissions regardless of the large amount of electronic equipment seized from the Appellant that would bear directly on whether the Government could sustain its burden of proof. Cossio, 64 M.J. at 257. This would in effect limit the Government to charging FA Cooley with only the things he admitted to. Finding a few images that "appeared" to be minors was not enough to support a charge of possessing, producing, or distributing child pornography. The Government also had no way of knowing whether Appellant would challenge the admissibility of the confession. Thus, the Government had the right to fully investigate before charging Appellant with possessing child pornography.

The Government had to take many steps in order to investigate this complicated crime. But in doing so, the Government proceeded diligently to bring Appellant to trial.

2. The Orders Violation Specification

"[R]easonable diligence in bringing the charges to trial" is all that is required. United States v. Wilson, 72 M.J. 347, 351 (C.A.A.F. 2013 (quoting Mizgala, 61 M.J. at 127). "Short 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).

In December 2012 the Coast Guard became aware that FA Cooley had sent a text message to a 12 year-old-boy in violation of his no-contact order. (J.A. at 291). By early February CGIS was aware that a letter had been sent from Base Seattle that appeared to be from FA Cooley and was addressed to someone at the Grizzly Youth Academy. As noted above, the information about the letter came at the same time FA Cooley was being investigated for the contact with a minor that resulted in his return to pre-trial confinement, the forensic analysis of the vast amount of electronic data seized from FA Cooley was in progress, and the addressee of the letter proved transient and difficult for CGIS to locate. (J.A. 268-269) A search authorization was obtained in early June and the orders violation

specification related to the letter was preferred on June 17, 2013.

FA Cooley's argument essentially asks this Court to view the orders violation specification in isolation, without regard to the other aspects of the investigation into FA Cooley's criminal conduct. Those efforts included attempting to determine how many times he had contacted children after he knew he was under investigation for sexually exploiting them, and after he had been ordered not to have contact with minors. FA Cooley also, as with the child pornography specification, argues that as soon as the Government had some evidence that might be tied to FA Cooley, he had to be charged at once. Once investigative efforts produced information that led to a search authorization to examine the letter, and once review of the letter produced significant indications that FA Cooley solicited additional sexual acts from a child in the letter, the Government preferred the specification within two weeks.

B. Analysis of under the Barker Factors

This Court has reviewed allegations of violation of Article 10, UCMJ, 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 v. Wingo, 407 U.S. 514, 530 (1972. However, in the Barker analysis, prejudice is evaluated under three crtieria:

(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. Barker, 407 U.S. at 532.

Assuming for the purposes of argument that review under the Barker factors has been triggered, the Government argues that FA Cooley's rights under Article 10 as to Charge IV, Specification 2 (the child pornography specification) and Charge II, Specification 3 (the orders violation specification) have not been violated.

1. Length of Delay

FA Cooley was placed on pre-trial confinement on December 20, 2012 after he violated an order that he could not communicate with any minor that was issued on August 22, 2012. (J.A. at 100, 257, and 291) At the point where FA Cooley was placed in pre-trial confinement a second time, the Government was in the midst of investigating the

scope of his sexual exploitation of children, sifting through more than 30 storage devices, performing forensic examination of those devices that could be accessed, attempting to identify victims in the digital images found on the storage media, and attempting to contact individuals whose information was found on FA Cooley's phone. That investigation continued through the time FA Cooley was tried. As of December 20, 2012, although FA Cooley had apparently sent the letter that resulted in Charge II, Specification 3 close in time to when he texted a different twelve year old boy that resulted in his placement in pre-trial confinement, the fact that he had sent a letter to a minor soliciting him to provide the same type of sexually explicit video which began the investigation against him in July 2012 was unknown to the Government.

Investigative efforts were not limited to determining whether FA Cooley possessed child pornography. Given his own admissions, the efforts also focused on whether he had produced child pornography and whether he had distributed it. Those investigative efforts never concluded. With him in pre-trial confinement, and with the considerable obstacles to tracking down his victims and determining what FA Cooley may have done in terms of producing or distributing child pornography, the Government made the

decision to proceed to trial with a possession specification only.

Basically, FA Cooley asks this Court, as he asked the Coast Guard Court, to give him a windfall resulting from the extent and ongoing nature of his efforts to sexually exploit children. Since his crimes required extensive investigation across many states, where CGIS had to attempt to contact minors about FA Cooley's sexual advances, the investigation was protracted. It was made more so by FA Cooley's commission of additional crimes while the initial investigation continued. The delay in bringing Charge IV, Specification 2 and Charge II, Specification 3 to trial was reasonable and those charges were preferred, referred, and brought trial with reasonable diligence.

2. The Reasons for the Delay

FA Cooley argues that the delay in bringing the two specifications at issue to trial was that result of tactical decision-making. First, this Court's predecessor held that delays in bringing an accused to trial for tactical reasons where the Government sought additional evidence is not a violation of Article 10. United States v. Grom, 21 M.J. 53, 56-58 (C.M.A. 1986). In Grom, the Government delayed the accused's trial until after the trial of co-accused's in the hopes of getting admissible

evidence of more serious crimes. Id. While their efforts proved unsuccessful, the delay for that reason was found to be acceptable. Id.

Second, and more importantly, the Military Judge on two separate occasions specifically found that there was no evidence of intentional delay by the Government to seek a tactical advantage. (J.A. at 270 and 276) The Judge also found no evidence FA Cooley was prejudiced by the delays in bringing his case to trial. (J.A. at 276)

3. Demand for Speedy Trial

FA Cooley made demands for speedy trial. That factor weighs in FA Cooley's favor.

In reference to the two specifications at issue under FA Cooley' petition, however, there is more to discuss. An arraignment for FA Cooley was scheduled for April 3, 2013 based on a joint motion from the Government and FA Cooley. (J.A. at 101) The Government did not promptly serve FA Cooley with the referred charges. (J.A. at 100) At the April 3rd arraignment, FA Cooley asserted his rights under Article 35. 10 U.S.C. § 835 (2012). (J.A. at 101) That decision led to further litigation as to the status of the charges pending against FA Cooley, resulting in a decision to dismiss without prejudice the original charges for violation of R.C.M. 707 on May 23, 2013. (J.A. at 99-106)

In the meantime, investigative efforts with regard to FA Cooley continued and on June 17, 2013 Charge IV, Specification 2 and Charge II, Specification 3 were preferred; the two specifications at issue under FA Cooley's petition.

As can be seen from the citations to Article 69 and 70 of the Articles of War, what is now contained in Articles 10, 33, and 35 of the UCMJ were once part of the same statute. See, supra at 23-25; 10 U.S.C. §§ 810, 833, and 835 (2012). Read together, as part of a whole, they make sense. Members of the armed forces charged with serious offenses would be confined awaiting trial. The Government then had to promptly notify the accused's commanding officer of the charges and take steps to bring the accused to trial. Those steps could not be so fast, however, that the accused had no ability to prepare a defense, and thus trial could not proceed until five days after the accused was served with charges.

Here there was admittedly a mistake made in the delay serving FA Cooley with his charges. And he asserted his rights under Article 35, as he had the right to do. But with this petition, he now complains that his tactical decision allowed the machinery of the investigation into his extensive criminal conduct to grind on, and resulted in

the generation of additional evidence which then resulted in additional charges. Had he been arraigned on April 3, 2013, as he had originally asked, that might not be the case. But it is not a violation of Article 10 to continue investigating while the case remained open, and, as of May 23, 2012 and the dismissal of the charges against him for violation of R.C.M. 707, of somewhat uncertain resolution.

4. Prejudice

FA Cooley asserts that he was subject to oppressive pre-trial confinement, that he was subject to great anxiety and concern, and his defense was impaired. Under Barker, impairment of an accused's defense is the most important of the three factors in evaluating whether there has been prejudice. Barker, 407 U.S. at 532{ TA \s "Barker v. Wingo, 407 U.S. 514 (1972)" }; Brief of Appellant, at 20. In his telling, FA Cooley was subject to near apocalyptic maltreatment and neglect while in pre-trial confinement. These same issues, characterized in almost exactly the same way, were litigated at trial when FA Cooley sought, and was denied, dismissal of all of the charges with prejudice for violation of Article 10, and sentence relief for violation of Article 13, for which he was granted credit against his sentence. In reviewing FA Cooley's assertions, the Military Judge found "[t]here is no evidence that the

accused was prejudiced in the preparation of his defense by the delays in bringing this case to trial." (J.A. at 276)

The United States addressed the same allegations in detail in the brief of March 25, 2015. Brief of the United States, at 39-47. Rather than repeat the same argument as to the charges at issue under FA Cooley's petition, the United States respectfully refers to the arguments in the earlier brief.

IV. Conclusion

First, the United States continues to assert that Charge II, Specification 3 (the orders violation specification) is not before this Court.

Second, FA Cooley has squarely placed the "substantial information" test of when Article 10 accountability begins before this Court in his petition and his brief. R.C.M. 707 supplanted any need for the substantial information test. Charge IV, Specification 2, and Charge II, Specification 3 were preferred on June 17, 2013. FA Cooley was tried on October 4, 2013. Even without any excludable periods of delay, FA Cooley was brought to trial 109 days after charges were preferred. This violated neither R.C.M. 707 nor Article 10.

Third, examination of the two specifications at issue in this petition under the factors set out in Barker lead

to the conclusion that FA Cooley was charged and tried in a time frame that violated neither Article 10 nor R.C.M. 707.

Finally, the United States asks this Court, if needed, to examine its precedents with regard to the consequences of a violation of Article 10. Analysis of the legislative history of Article 10, and its predecessors, indicates Congress never intended for Article 10 to serve as a means to prevent prosecution but rather to prevent extended pre-trial confinement. The remedy for violation of Article 10 is release from confinement, or, after the fact, credit against the sentence for having been improperly confined, but not dismissal of charges with prejudice.

LEE.AMANDA.MILDRED.1234093793
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Date: 2015.08.03 11:30:14 -04'00'

Amanda M. Lee
Lieutenant Commander, USCG
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 35615
202-372-3811
Amanda.M.Lee@uscg.mil

MCCLEARY.STEPHEN.P.1013993773
Digitally signed by MCCLEARY.STEPHEN.P.1013993773
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=MCCLEARY.STEPHEN.P.1013993773
Date: 2015.08.03 11:26:07 -04'00'

Stephen P. McCleary
Appellate Counsel
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 28883
202-372-3734
Stephen.P.McCleary@uscg.mil

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains less than 14,000 words. Using Microsoft Word version 2007 with 12 point Courier-New font, this brief contains 8222 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier new 12-point typeface.

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Date: 2015.08.03 11:26:28 -04'00'

Stephen P. McCleary
Appellate Counsel
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 28883
202-372-3734
Stephen.P.McCleary@uscg.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Court on 3 August 2015, and that opposing counsel, CDR Matthew Fay and LT Philip Jones, USCG, were copied on that email at matthew.j.fay@uscg.mil and philip.a.jones@navy.mil, respectively.

Date: 3 August 2015

MCCLEARY.STEPHEN.P.1013993773
Digitally signed by MCCLEARY.STEPHEN.P.1013993773
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=MCCLEARY.STEPHEN.P.1013993773
Date: 2015.08.03 11:26:47 -04'00'

Stephen P. McCleary
Appellate Counsel
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 28883
202-372-3734
Stephen.P.McCleary@uscg.mil