IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
Christopher S. COOLEY Fireman Apprentice (E-2) United States Coast Guard, Appellee	)	CGCCA Dkt. No. 1389 USCAAF Dkt. No. 15-0387/CG

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

Daniel Velez
Lieutenant, USCG
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 36027
202-372-3808
Daniel.Velez@uscg.mil

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

INDEX OF BRIEF

Table of Authorities..... 4

Preamble..... 5

Issues Presented..... 5

Statement of Statutory Jurisdiction..... 5

Statement of the Case..... 6

Statement of Facts..... 10

A. FA Cooley's Acts Against Children and His Pretrial Confinement 10

B. The CGIS investigation into FA Cooley's Crimes ... 13

C. FA Cooley's Crimes Committed After He was Interviewed and Under Investigation 17

Relief Sought..... 17

Summary of the Argument..... 18

Argument..... 19

WHETHER THE COAST GUARD COURT OF CRIMINAL APPEALS ERRED BY FINDING THAT PRE-TRIAL CONFINEMENT CAN SERVE AS PER SE PREJUDICE FOR PURPOSES OF DETERMINING A VIOLATION OF ARTICLE 10, UNIFORM CODE OF MILITARY JUSTICE..... 19

Discussion 19

WHETHER THE FACTS AND CIRCUMSTANCES OF APPELLE'S CASE, CONSIDERING THE FACTORS SET OUT IN *BARKER V. WINGO*, 407 U.S. 514, 530 (1972) AND APPLIED TO REVIEW OF ARTICLE 10 BY *UNITED STATES V. BIRGE*, 52 M.J. 209, 212 (C.A.A.F. 1999), AMOUNT TO A VIOLATION OF ARICLE 10, UNIFORM CODE OF MILITARY JUSTICE..... 25

Standard of Review 25

Discussion 25

A. The length of the delay in this case does not alone support a violation of Article 10, UCMJ 26

B. Reasons for the delay were legitimate and showed reasonable diligence in bringing the Appellant's case to trial 29

1. Delay was justified by a difficult forensic analysis and the logistical challenges of identifying and interviewing child-victims 30

2. Brief periods of inactivity in an otherwise active prosecution is not unreasonable 34

3. In trying to complete the investigation into FA Cooley's crimes the United States did not deliberately delay the prosecution nor commit negligence 36

C. The number of speedy trial requests 38

D. The Appellant was not prejudiced by any delay 38

1. FA Cooley did not suffer oppressive pretrial incarceration and no particularized anxiety as a result of confinement. 39

(a) The one-time acts by another inmate do create oppressive confinement conditions or support particular anxiety 39

(b) FA Cooley was provided command visits, normal access to medical care and otherwise was subjected to normal confinement conditions 42

2. FA Cooley's defense has not been impaired or limited. 44

Conclusion 47

CERTIFICATE OF FILING AND SERVICE 51

Table of Authorities

United States Supreme Court:

Doggett v. United States, 505 U.S. 647 (1990). 43
Bell v. Wolfish, 441 U.S. 520 (1979) 23
Barker v. Wingo, 407 U.S. 514 (1972) . . . . . *passim*

United States Court of Appeals for the Armed Forces:

United States v. Dougherty, 73 M.J. 451 (2014) 26
United States v. Danylo, 73 M.J. 183 (2014) . . . . . *passim*
United States v. Wilson, 72 M.J. 347 (2013) . . . . . *passim*
United States v. Thompson, 68 M.J. 308 (2010) 29
United States v. Cossio, 64 M.J. 254 (2007) . . . . . *passim*
United States v. Mizgala, 61 M.J. 122 (2005). . . . . *passim*
United States v. Cooper, 58 M.J. 54 (2005) 20, 22, 30, 35
United States v. Birge, 52 M.J. 209 (1999). 5, 18, 25
United States v. Doty, 51 M.J. 464 (1999) 25, 34
United States v. Robinson, 39 M.J. 88 (C.M.A. 1994) 45
United States v. Kossman, 38 M.J. 258 (C.M.A. 1993). 25, 34
United States v. Johnson, 17 M.J. 255 (C.M.A. 1984) 20
United States v. Tibbs, 15 C.M.A. 350 (1965). 35

Service Courts of Criminal Appeals:

United States v. Dougherty, No. 201300060 (N-M. Ct. Crim. App. Dec. 31, 2013). 26

Rules for Court-Martial:

R.C.M. 601 31

Preamble

COMES NOW THE UNITED STATES and respectfully requests that this Court reverse the decision of the United States Coast Guard Court of Criminal Appeals with respect to Charge I and its sole specification; Charge II, Specification 2; and Charge III, Specifications 1 and 2, which were approved by the convening authority, were properly before the Coast Guard Court of Criminal Appeals under Article 66(c), and were dismissed with prejudice pursuant to Article 10.

I.

Issues Presented

I. WHETHER THE COAST GUARD COURT OF CRIMINAL APPEALS ERRED BY FINDING THAT PRE-TRIAL CONFINEMENT CAN SERVE AS PER SE PREJUDICE FOR PURPOSES OF DETERMINING A VIOLATION OF ARTICLE 10, UNIFORM CODE OF MILITARY JUSTICE.

II. WHETHER THE FACTS AND CIRCUMSTANCES OR APPELLE'S CASE, CONSIDERING THE FACTORS SET OUT IN BARKER V. WINGO, 407 U.S. 514, 530 (1972) AND APPLIED TO REVIEW OF ARTICLE 10 BY UNITED STATES V. BIRGE, 52 M.J. 209, 212 (C.A.A.F. 1999), AMOUNT TO A VIOLATION OF ARICLE 10, UNIFORM CODE OF MILITARY JUSTICE.

II.

Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Court has jurisdiction to

review this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

III.

Statement of the Case

Following an initial Coast Guard Investigative Service (CGIS) investigation into allegations of attempts to perform lewd acts on children and possession of child pornography, FA Cooley was ordered into pre-trial confinement on July 21, 2012. (JA at 302). He was released seven days later following a hearing held pursuant to Rule for Courts-Martial (R.C.M.) 305. (JA at 304). On December 21, 2012, approximately five months after his release from pretrial confinement, FA Cooley was again ordered into pretrial confinement after he violated an order prohibiting him from contacting children. (JA at 323). FA Cooley remained in pretrial confinement for the remainder of the lower court proceedings, which spanned three courts-martial and four military judges.

Charges were preferred against FA Cooley in the first court-martial on February 19, 2013, and a first Article 32, UCMJ, investigation was held fifteen days later on March 6, 2013, seventy-five days after the second imposition of pretrial confinement. (JA at 54, 361). After the Article 32 hearing, and eighty-seven days from the date that the second period of pretrial confinement began, charges were referred to the first

general court-martial on March 18, 2013. (JA at 54). Trial and defense counsel then agreed to conduct arraignment on April 3, 2013. (JA at 58, 101).

At the April 3 arraignment, the referred charges were formally served on the Appellant. (JA at 100). The defense objected to the arraignment under Article 35, UCMJ, as a violation of the five-day waiting period between referral of charges and arraignment. (JA at 101). The military judge nevertheless arraigned the Appellant on April 3, 2013 – 103 days after the second imposition of pretrial confinement. *Id*. Shortly after conducting the arraignment, the military judge retired. (JA at 275).

On May 23, 2013, fifty days after the April 3 arraignment, the newly detailed military judge considered the previous arraignment to be in violation of Article 35, UCMJ, and a legal nullity. (JA at 103). The military judge then dismissed the charges in the first court-martial without prejudice pursuant to R.C.M. 707. (JA at 103-106).

After the first set of charges were dismissed without prejudice, the United States preferred the same charges against FA Cooley on the same day, May 23, 2013. (JA at 275). On June 14, 2013, the convening authority dismissed those charges without prejudice after new misconduct was discovered, thus ending the second court-marital. *Id.*

A second Article 32 hearing was then convened on July 22, 2013, focusing on new evidence concerning FA Cooley's recent contact with a minor (the same misconduct that formed the basis for the second imposition of pretrial confinement) and child pornography found on electronic devices belonging to FA Cooley. (JA at 380).

After the second Article 32 hearing, charges were referred on August 7, 2013 and the Appellant was arraigned in the third court-martial on September 10, 2013. (JA at 49). The Appellant was tried by military judge alone on October 4, 2013, which was 287 days from the start of the second imposition of pretrial confinement. (JA at 413).

In accordance with his pleas of guilty, FA Cooley 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, all 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, in violation of Article 134, UCMJ. (JA at 1-2).

The military judge sentenced FA Cooley to confinement for seven years, reduction to pay grade E-1, total forfeitures, and to be discharged from the Coast Guard with a bad-conduct

discharge. (JA at 2). FA Cooley's conditional pretrial agreement specifically preserved issues under R.C.M. 707, Article 10, and Article 13 for appellate review. (JA at 4). Confinement in excess of fifty months was suspended, per the pretrial agreement.

On appellate review under Article 66(c), the Coast Guard Court of Criminal Appeals (CGCCA) dismissed all charges and specifications against FA Cooley on December 24, 2014.[1] (JA at 2). Those charges and specifications related to the lewd acts, in other words, the criminal conduct for which FA Cooley was originally investigated, were dismissed with prejudice as a violation of Article 10, UCMJ – overturning two military judges' rulings on the same issue. (JA at 14). After consideration of the factors set forth in R.C.M. 707(d)(1), the CGCCA dismissed without prejudice those charges related to possession of child pornography and a violation of a lawful order; the charges that stemmed from the criminal conduct engaged in after his release

[1] Specifications 1 and 3 of Charge II and Specification 1 of Charge IV were dismissed without prejudice by the convening authority at October 4, 2013 trial, pursuant to the PTA. *See* Charge Sheet (JA at 50-51). However, Specification 1 of Charge II and Specification 1 of Charge IV were purportedly dismissed with prejudice by the CGCCA. Should this Court reverse the decision of the CGCCA, it should be noted that there was no approved findings with respect to those specifications and thus the CGCCA had no authority under Article 66(c) to take corrective action on those specifications. See Article 66(c) (the CCA "may act only with respect to the findings . . . as approved by the convening authority"). If the United States were to try FA Cooley again for those specifications that were dismissed without prejudice by the convening authority, he could raise the issue of whether they should have been dismissed with prejudice at that time. However, because those specifications were not before the CGCCA and are not before this Court, no action can be taken on them under Articles 66(c) and 67.

from his first period of pretrial confinement and while he was under investigation.[2] *Id*.

IV.

Statement of Facts

A. FA Cooley's Acts Against Children and His Pretrial Confinement

In July 2011, during his first tour in the Coast Guard onboard the USCGC MAPLE (WLB-207), FA Cooley sought out the company of several children in Sitka, Alaska by socializing with them in various places, including the community pool. (JA at 287-88, 296, 322). FA Cooley met K.G., an eleven-year old boy who lived part of the time in Sitka with his father and part of the time in Juneau with his mother. AE XVI at 4. After making friends with K.G., FA Cooley asked him for a picture of his naked body. (JA at 288).

M.G. was another boy from Sitka that FA Cooley pursued. (JA at 287-288). He was fourteen years old when FA Cooley met him, and sometime during early 2012, FA Cooley asked M.G. for a picture of his penis in exchange for FA Cooley purchasing smokeless tobacco for him. *Id*.

FA Cooley also maintained relationships with children whom he had met near his home in California prior to enlisting. FA Cooley groomed Z.G., a boy he met while dirt biking at a local

[2] Specification 3 of Charge II (which was dismissed by the convening authority at trial in accordance with the pretrial agreement) and Specification 2 of Charge IV.

park. (JA at 289). After enlisting and while stationed in Sitka, FA Cooley sent a text message to Z.G. asking, "How do you feel about gays or bi?" *Id*. Z.G. was thirteen years old when he received this message. *Id*. Over the next two days, FA Cooley sent additional messages intended for Z.G. that were intercepted by his mother. (JA at 290). In these messages, FA Cooley asked for images or videos of Z.G. naked, stripping, or masturbating. *Id*. FA Cooley sent two pictures of himself in his Coast Guard uniform to Z.G. *Id*.

Z.G.'s mother notified the police department in California that a member of the Coast Guard asked her son to create sexually explicit images and videos. *Id*. The police department notified CGIS and on July 20, 2012, CGIS interviewed FA Cooley concerning the complaint by Z.G's mother. (JA at 315).

After acknowledging his rights under Article 31(b), UCMJ, FA Cooley confessed to asking at least five minor children for sexually explicit images or videos, and stated that he had traded pornographic images of minor boys with at least two other persons via email. (JA at 297-301, 315-17). FA Cooley also confessed that he could not control his urges when around children. (JA at 317).

After this interview, FA Cooley was ordered into pre-trial confinement at Joint Base Lewis-McChord, Fort Lewis, Washington. (JA at 302-303). On July 27, 2012, at the seven-day review of

pretrial confinement, FA Cooley was released from confinement with the rationale that restriction to a vessel or quarters would suffice to prevent FA Cooley from contacting children and ensure his presence at trial. (JA at 304-306).

Upon his release from pretrial confinement, FA Cooley was placed into pretrial restriction at Coast Guard Base Seattle. (JA at 307). Believing that lesser forms of restraint would be sufficient, on August 22, 2012, his period of pretrial restriction ended and FA Cooley remained on temporary duty assigned to Base Seattle, with conditions on his liberty. (JA at 309). The conditions on liberty required FA Cooley to "refrain from having any contact whatsoever with any minor." *Id*.

On December 14, 2012, FA Cooley violated his conditions on liberty by sending K.G., the twelve-year-old from Alaska, a text message. (JA at 291). After this was discovered, FA Cooley was apprehended by CGIS agents while he was on leave in California, and on December 21, 2012 he was again ordered into pretrial confinement. (JA at 323). FA Cooley waived his right to a R.C.M. 305 hearing. (JA at 100).

During the second imposition of pretrial confinement, FA Cooley reported that a post-trial prisoner had touched his buttocks. (JA at 339). FA Cooley was in the common area of the brig along with brig staff during the incident, but the act was not witnessed by any of the brig staff. (JA at 341-43). The brig

staff immediately investigated the incident when reported by FA Cooley. *Id*. This alleged incident of wrongful sexual contact was also investigated by the United States Marine Corps Criminal Investigation Division (USMC CID) and the alleged offender was eventually charged under Article 120, UCMJ, for abusive sexual contact. (JA at 339, 391).

During his confinement, the Coast Guard Sector San Diego Command Master Chief, Master Chief Groh, visited FA Cooley approximately fifteen to twenty times. (JA at 468). Master Chief Groh also handled many of FA Cooley's needs while in confinement, including taking him to off-base chiropractic appointments. (JA at 469-70). Coast Guard Senior Chief Petty Officer Cochrane also made at least two command visits to FA Cooley while he was in confinement. *Id*.

B. The CGIS investigation into FA Cooley's Crimes

On July 20, 2012, after the report by Z.G.'s mother of FA Cooley's request for sexually explicit pictures of her minor son, Special Agent (S/A) James Renkes, a CGIS agent assigned to Juneau, seized thirty-one electronic devices from FA Cooley storing in total well over a terabyte of data. (JA at 311). From July 20, 2012 through September 7, 2012, S/A Renkes attempted to find the most expedient means to analyze the enormous volume of seized electronic evidence, which included an inoperable laptop. *See* Affidavit of James M. Renkes, (JA at 368-369). He was unable

to facilitate a local, Alaska-based, analysis of the information. (JA at 520-521). S/A Renkes' efforts included a request for local support from the U.S. Secret Service, which was eventually denied. *Id*. Unable to conduct a local forensic analysis, he sent the entirety of the electronic items seized in Alaska to the CGIS Electronic Crimes Section (ECS) in Virginia for analysis on September 7, 2012. (JA at 311).[3]

On January 4, 2013, ECS completed their first analysis of the over a terabyte of seized data, which led to the discovery of over 300 images – 205 of which depicted what appeared to be persons under the age of eighteen in various stages of undress. PE 4 at 3. Thirty-five of these files were forensically "carved", or retrieved, as previously deleted material on the devices. (JA at 332). This first analysis was documented in a report sent to S/A Renkes on January 23, 2012, which was thirty-three days after the second imposition of pretrial confinement. (JA at 330). The record indicates that the process of retrieving image data (whether present on the devices or in deleted space)

[3] At trial and before the court below, FA Cooley has attempted to make much significance out of the fact that the lead CGIS agent had periods of temporary assignment and that he did not remain continuously in the state of Alaska while pursuing forensic analysis of the thirty-one devices seized from FA Cooley. S/A Renkes was not in Alaska for part of this period and was on temporary assignment during other periods. (JA 511, 519-20). The record is clear, however, that S/A Renkes consistently worked to coordinate forensic analysis of the seized electronic evidence while balancing other duties. *Id.*; *see also* Affidavit of James M. Renkes (JA 368-69). Also, during the period that the agent was seeking a forensic analysis, FA Cooley was not in pretrial confinement, as he had been released in July 2012 after the IRO hearing.

and then determining whether an image qualified as child pornography was a difficult and time consuming task. (JA at 514, 527).

After reviewing the first report, S/A Renkes requested that ECS perform a second analysis in order to confirm the presence of child pornography with respect to two image files. (JA at 334). In a report dated March 1, 2013, (seventy-one days from imposition of the second pretrial confinement) ECS determined that these images contained possible child pornography. *Id*.

After the second ECS report, believing that another image could qualify as child pornography and aware of the inherent difficulties in identifying child pornography, particularly with images of adolescents, S/A Renkes conducted a third review of the imagery and confirmed the presence of an additional image of possible child pornography. (JA at 292). CGIS requested an additional, separate, review by sending the images that appeared to depict child pornography to the National Center for Missing and Exploited Children (NCMEC). (JA at 338). The NCMEC analysis did not produce positive results for known images of child pornography. *Id*.

Determining the scope of FA Cooley’s involvement in child pornography was a central aspect of the investigation. FA Cooley confessed to soliciting images of child pornography and distributing them. But the scope and scale of FA Cooley’s

activities in seeking, possessing, and distributing child pornography were not known. Despite the NCMEC results, S/A Renkes "felt an obligation to resolve to verify whether or not they [] were children at the time of the accused criminal conduct." (JA at 516). Based on the nature of the images and the phone numbers discovered on FA Cooley's phone, it was likely that the children in the pictures were known to FA Cooley and had sent the images of themselves at FA Cooley's insistence. *Id.* The identification was a difficult task, which S/A Renkes described as follows:

> [T]here was information in the phone that was like a first name and a phone number or some type of nickname and a phone number. Many of those phone numbers are, you know, recorded or by me, believed to be like TracFone's or some type of pay-as-you-go phones, so therefore you're lacking subscriber information that you would have with a contract phone service, like, AT&T or cingular or something to that effect. So it requires a copious amount of time to go through. I have to log into several databases. I have to put a phone number into the database, see if anything's returned on it, then some information might be returned; in other words, it might just give you who the cellular company is that contains that phone, but no other information. So then you have to take steps to try and either work with that cell phone company or try and further resolve who may have been in possession of that phone; who the person was that may have had that phone; who the accused may have been in contact with; and that takes an extensive amount of time. And we're talking several hundred numbers and names that have to go through and analyze in that regard.

(JA at 512-13). With respect to correlating image data with phone records, the investigative process of trying to possibly

identify further victims was still ongoing as the case progressed to trial in September 2013. (JA at 515-16).

C. FA Cooley's Crimes Committed After He was Interviewed and Under Investigation

In early December 2012, while FA Cooley was temporarily assigned to Base Seattle, he sent a letter addressed to an individual named M.P. at the Grizzly Youth Academy. (JA at 379). The letter was discovered by Base Seattle on January 15, 2012, when it was returned to Base Seattle as undeliverable. *Id*. In March 2012, S/A Renkes was able to determine that M.P. was a minor at the time the letter was written and in June 2012 he was able to obtain a search authorization to open the letter. (JA at 370, 509-10).

The letter described how FA Cooley was going to meet M.P. and made references that could reasonably be described as sexual code or innuendo. (JA at 378). FA Cooley's letter would result in an additional charge for a violation of Article 92, UCMJ, based on FA Cooley's failure to abide by the no-contact order that had been issued by his commanding officer. (JA at 50).

Additional facts may be found in the argument section.

V.

Relief Sought

The United States seeks an Order reversing the decision of the Coast Guard Court of Criminal Appeals with respect to Charge

I and its sole specification; Charge II, Specification 2; and Charge III, Specifications 1 and 2, which were approved by the convening authority, were properly before the Coast Guard Court of Criminal Appeals under Article 66(c), and were dismissed with prejudice pursuant to Article 10.

VI.

Summary of the Argument

The CGCCA erred by finding that FA Cooley's pretrial confinement was per se prejudicial for the purposes of determining whether there was an Article 10 violation. The CGCCA's conclusions regarding prejudice are contradicted by this Court's precedent and cite to no authority that would indicate that deviation from this precedent is appropriate. In addition, the CGCCA decision is irrational. If Article 10 is triggered by pretrial confinement, and that confinement itself constitutes prejudice, an analysis of confinement under *Barker v. Wingo*, 407 U.S. 514 (1972), where prejudice is one of the factors to be weighed, would be unnecessary in every Article 10 case.

In balancing the *Barker* factors, the CGCA stated that pretrial confinement is prejudice; the length of delay was significant; and the investigative efforts regarding additional criminal conduct were insufficient justification. The reasons for the delay were, however, legitimate and stemmed from extensive electronic forensic analysis made urgent by FA

Cooley's admissions that the he solicited, possessed and distributed child pornography from the children he stalked. When compared to the lack of any material prejudice to FA Cooley, the balance of *Barker* factors weighs in favor of the United States.

VII.

Argument

WHETHER THE COAST GUARD COURT OF CRIMINAL APPEALS ERRED BY FINDING THAT PRE-TRIAL CONFINEMENT CAN SERVE AS PER SE PREJUDICE FOR PURPOSES OF DETERMINING A VIOLATION OF ARTICLE 10, UNIFORM CODE OF MILITARY JUSTICE.

Standard of Review

Whether an accused has received a speedy trial is reviewed *de novo*. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

Discussion

In order to determine whether delay amounts to a violation of Article 10, UCMJ, the service appellate courts are required to consider the four-prong analysis established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972) and adopted by this Court in *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999). The last factor in the *Barker* analysis is prejudice. "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three

such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005) (citing *Barker*, 407 U.S. at 532). Of the three interests encompassed within the prejudice factor under *Barker*, the impairment of the defense's case is most significant. *See United States v. Johnson*, 17 M.J. 255, 259 (C.M.A. 1984) (citing *Barker*, 407 U.S. at 530-32).

This Court has consistently considered the prejudice factor in the light of these three interests, and required the service appellate courts to do the same. *See, e.g., United States v. Wilson*, 72 M.J. 347, 353-54 (C.A.A.F. 2013) (where this Court analyzed the three interests before finding no Article 10 violation); *United States v. Cossio*, 64 M.J. 254, 257-58 (C.A.A.F. 2007); *United States v. Cooper*, 58 M.J. 54, 56-57 (C.A.A.F. 2003) (where this Court reversed the decision of the lower court because it had not applied the *Barker* factors). The service appellate courts should consider prejudice in the light of the speedy trial interests, rather than some generalized notion of prejudice.

Here, the CGCCA failed to consider any of the speedy trial interests in *Barker*, and instead concluded that FA Cooley's pretrial confinement alone was prejudice sufficient to weigh

against the government. The lower court stated: “[E]ach day of confinement before trial is clear prejudice.” (JA at 9). The CCA goes on further to state: “Pretrial confinement is prejudice no matter how solidly based.” *Id.* Lastly, the lower court declined to consider FA Cooley’s other assertions of prejudice and the government’s contradiction of them, concluding instead: “[W]e see no need to address these specific items of alleged prejudice; the prejudice of confinement itself weighs significantly against the Government.” *Id.*

The CGCCA did not consider any of the defendant’s speedy trial interests, including the most significant interest of whether his defense was impaired by the delay, but instead stopped its analysis with the simple fact that FA Cooley was confined before trial. Although the CGCCA cites to *Mizgala* in other parts of the opinion, it failed to recite that portion of *Mizgala* that directs the appellate courts to consider the defendant’s speedy trial interests when determining prejudice. Instead, citing to no authority, the CGCCA deals with the prejudice factor in a scant two paragraphs, concluding with the notion that pretrial confinement equates to prejudice, regardless of any other factors or interests.

The CGCCA clearly erred when it did so. Nothing in Article 10 nor in Sixth Amendment case law allows a court to find prejudice solely based on the fact that the accused was placed

in pretrial confinement. In fact, this Court has explicitly stated that pretrial confinement is not, by itself, sufficient grounds to find prejudice. In *Cooper*, a case which was heard by this Court under Article 62, UCMJ, the trial judge dismissed charges for an Article 10 violation, concluding that he need not consider any other evidence of prejudice if he found that the accused was confined before trial. 58 M.J. at 57 n.3. This Court rejected that conclusion, stating "although the military judge did consider prejudice, both he and the trial counsel apparently believed all that was needed to prove it was the pretrial confinement itself. This view of the law is incorrect." *Id.* at 56-57 (emphasis added). This Court was unwilling to find that pretrial confinement, without more, satisfied the *Barker* factors. Yet, that is exactly what the CGCCA did in this case.

In shaping the jurisprudence of the prejudice analysis, this Court has focused on the term "oppressive pretrial incarceration," finding that it means something more than incarceration itself. For example, in *Mizgala*, this Court found that, while pretrial confinement does involve some anxiety and stress, "there is no evidence in the record that the conditions of that confinement were harsh or oppressive." 61 M.J. at 129. In *Cossio*, this Court affirmed the lower court's decision that there was no prejudice by noting that the military judge found

that “there is no prejudice in this case beyond that inherent in sitting in pretrial confinement.” 64 M.J. at 258.

Recently, in a Sixth Amendment case, this Court wrote that “we have never held that pretrial confinement which exceeds an adjudged sentence is per se prejudicial.” *See United States v. Danylo*, 73 M.J. 183, 188 (C.A.A.F. 2014) (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). There, the appellant was subjected to almost twelve months in pretrial confinement, yet received only a ten-month sentence at trial. Despite the fact that the appellant could not receive any credit for the additional two months that he served awaiting trial, this Court found that he had not shown “sufficient prejudice” to establish a Sixth Amendment violation because he had not shown that he suffered “unique” stress or anxiety, and because he made no claim that his case preparation was hampered by the delay. *Danylo*, 73 M.J. at 188-89. While the Article 10 standard for speedy trial is admittedly more stringent than that of the Sixth Amendment, the *Danylo* case is insightful because it demonstrates that even excessive pretrial confinement should not be considered per se prejudicial. In the case at hand, FA Cooley served ten months in pretrial confinement and his approved unsuspended sentence of confinement was fifty months. (JA 2, 5). He received credit for every day he spent in PTC. (JA 260). But

the CCA still failed to consider any other evidence to determine whether he was prejudiced by the delay.

The decisions in *Mizgala, Danlyo,* and *Cossio* provide context and guidance for the lower courts to use when conducting their Article 10 analysis, and yet the CGCCA chose to ignore the precedent and establish its own path, without any justification for doing so.

The CGCCA's prejudice analysis is not only contrary to case law, but it is also illogical. If this Court, and the Supreme Court before it, concluded that pretrial confinement alone constituted prejudice, there would be no need to consider the defendant's speedy trial interests at all. The analysis of prejudice would start and stop with the question of whether the accused was confined before trial. But yet, in *Barker* and its progeny, the appellate courts have always engaged in a prejudice analysis much more in depth than simply answering the confinement question. The CGCCA failed to do so, and offered no reason why it was departing from this Court's precedent. For this reason, the United States asks this Court to reverse the decision of the lower court dismissing the charges with prejudice.[4]

[4] Those charges and specifications dismissed with prejudice are Charges I and III and all specifications therein, Specifications 1 and 2 of Charge II, and Specification I of Charge IV. The CGCCA did not, however, have jurisdiction to review Specification 1 of Charge II and Specification 1 of Charge IV.

VIII.

WHETHER THE FACTS AND CIRCUMSTANCES OF APPELLE'S CASE, CONSIDERING THE FACTORS SET OUT IN *BARKER V. WINGO*, 407 U.S. 514, 530 (1972) AND APPLIED TO REVIEW OF ARTICLE 10 BY *UNITED STATES V. BIRGE*, 52 M.J. 209, 212 (C.A.A.F. 1999), AMOUNT TO A VIOLATION OF ARICLE 10, UNIFORM CODE OF MILITARY JUSTICE.

Standard of Review

Whether an accused has received a speedy trial is reviewed *de novo*, but the 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. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)).

Discussion

Article 10, UCMJ, requires that when a servicemember is placed in pretrial confinement, "immediate steps shall be taken to inform of the specific wrong of which he is accused and to try him or dismiss the charges." Reasonable diligence is the standard to determine whether the United States has taken immediate steps to bring the accused to trial. *See, e.g., United States v. Kossman,* 38 M.J. 258, 262 (C.M.A. 1993). The military courts have adopted the Supreme Court's four-factored framework from *Barker v. Wingo* for evaluating whether the United States proceeded with reasonable diligence. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999). As discussed *supra*, the *Barker*

factors are: (1) the length of the 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).

A. The length of the delay in this case does not alone support a violation of Article 10, UCMJ.

Two hundred and eighty-eight days elapsed between when FA Cooley was ordered into his second period of pretrial confinement and when he was tried and sentenced. The length of the delay alone does not support a violation of Article 10. In similar cases, delay was determined to be reasonable when proper consideration was given to remaining *Barker* factors. *See, e.g., United States v. Dougherty*, 2013 WL 6858964, at *7-8,(N.M. Ct. Crim. App. Dec. 31, 2013)(371 days of pretrial confinement was not an Article 10 violation in light of all factors considered), *pet. denied, United States v. Dougherty*, 73 M.J. 451 (C.A.A.F. 2014); *Barker*, 407 U.S. 514, 537 (over two years of delay did not warrant dismissal).

The overall delay in this case should also be considered in light of the procedural anomaly of the nullified arraignment on April 3, 2013. Although a subsequent military held that the arraignment was a nullity and dismissed the charges under RCM 707 almost two months later, the government had relied on the seemingly valid arraignment to schedule a trial date and begin

their trial preparation. It was not improper for the government to do so, as the military judge is presumed to know the law and apply it correctly.[5] *See, e.g, United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). The subsequent ruling by the new military judge nullified the arraignment and dismissed the charges. This resulted in delay as the government had to re-prefer and refer the charges, and again get the case onto a crowded trial docket.

But the question for this Court is whether the government proceeded with reasonable diligence. The trial counsel thought their case was moving forward as planned. They relied on the ruling from the military judge that the accused had been arraigned and that the original trial date would be kept. The government did not *intentionally* nullify the arraignment to prolong the case.

In *United States v. Danylo,* this Court held that the period of delay should not be treated as a continuum, but broken down, with a separate analysis for the reasons of each period. 73 M.J. at 190 (C.A.A.F. 2014). While the amount of the delay is a consideration, it is necessary to look at individual pictures to understand the complete picture. Viewed separately, 103 days elapsed between the second imposition of pretrial confinement

[5] The transcript of the Article 39(a) session for the April 3 arraignment is not part of the record of trial. The United States is without the benefit of how the military judge decided that the arraignment should move forward, but it is clear that the military judge did find the arraignment valid.

and the April 3, 2013 arraignment. That is a reasonable amount of time for such activity.

While the requirement for diligence persists post-arraignment for purposes of Article 10, the United States was in a position after the arraignment to bring the accused to trial a short time later. They were moving the case forward with due diligence in the circumstances. Those circumstances were investigating a person who admitted seeking out minor boys, located in different parts of the country, to groom for his own sexual gratification. In an effort to determine the scope of his crimes, the government was reviewing over two hundred images from over thirty devices.

It was the reliance on the first military judge's decision that the first arraignment was valid that caused greater delay. While the reliance on the military judge's ruling was apparently misplaced, as the ruling was later invalidated, that only became apparent at the end of May 2013, at which time the government moved quickly to start the case anew. During this period, the CGIS investigation also continued and further evidence was uncovered that required convening a second Article 32 investigation and bringing additional charges against FA Cooley.

The length of delay in this case is not insignificant. The delay in this case must however be assessed "by the proceedings as a whole." *United States v. Mizgala*, 61 M.J. 122, 129

(C.A.A.F. 2005). In so doing, this Court should treat the procedural framework outlined in *Barker* as an integrated process, rather than a set of discreet factors. *United States v. Thompson,* 68 M.J. 308, 313 (C.A.A.F. 2010). When viewed in the proper context, and in light of the entire investigation rather than any one piece, it is clear that the government proceeded diligently during a complicated and difficult investigation and pretrial period.

B. Reasons for the delay were legitimate and showed reasonable diligence in bringing the Appellant's case to trial.

The CGCCA found no fault with the military judges' findings of fact with respect to the reasons for delay. (JA at 5). The CGCCA held that the amount of pretrial confinement that had elapsed before the United States could bring all known charges to trial was too long to justify the delay in doing so. (JA at 6). The CGCCA "did not consider the pause excusable because it resulted from a good-faith attempt to join all known offenses at one hearing." *Id.*

What the CGCCA has labeled a "pause" was an attempt by the United States to bring all of FA Cooley's crimes to the same trial as the CGIS investigation unfolded. The investigation into FA Cooley's crimes revealed that there were far more victims than the five children originally identified in FA Cooley's confession. The CGIS investigation ultimately revealed over 200

images of children in various stages of undress. Given the *modus operandi* of FA Cooley, it was unknown whether some of images found of his possession were images of children that FA Cooley had asked the children to send him, or if the images were of children unknown to FA Cooley, obtained through another means. (JA at 515). In other words, the *modus operandi* suggested that FA Cooley could have been guilty of producing child pornography, in addition to his other crimes. Therefore, as this case and investigation progressed, it became clear that FA Cooley's confession would not suffice to try him for all the crimes he may have committed against many possible victims.

1. Delay was justified by a difficult forensic analysis and the logistical challenges of identifying and interviewing child-victims.

The CGCCA's analysis is flawed because it ignores the need, and the duty, of the United States to properly investigate and prosecute FA Cooley for all the crimes he committed within the military's jurisdiction. This Court has held that the United States has the right to thoroughly investigate a case before proceeding to trial. *United States v. Cossio,* 64 M.J. 254, 257 (C.A.A.F. 2007).

In *Cossio,* computer equipment seized from the accused was subject to forensic analysis which took nearly four months to complete. 64 M.J. 254, 254 (C.A.A.F. 2007). Similar to FA Cooley's argument, in its Article 10 motion the defense in

Cossio argued that once the accused had confessed, the United States had all the evidence necessary to proceed to trial. *Id.* at 257.

This Court held otherwise and stated that it is "not unreasonable for the Government to marshal and weigh all the 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 further explained that, "[f]orensic examination of computer equipment seized from Cossio may have provided critical evidence bearing directly on whether the Government could sustain its burden of proof." *Id.*

Here, the first Article 32 investigation had just completed in early March when a second round of electronic forensic analysis was complete. (JA at 334, 361). Further review of that information combined with new evidence concerning FA Cooley's contact with children prompted the dismissal of the second court-martial and the convening of a second Article 32 investigation. In so doing, the United States was diligently bringing all known charges together in a single forum, the third court-martial of this case.

This additional information was also consistent with the pattern of criminal behavior already uncovered and which FA Cooley had, at least in small part, admitted to. This is not a

case where the investigation began for child pornography and uncovered evidence of bank robbery. The investigation revealed similar criminal conduct of a far greater scope than originally discovered.

The examination of computer equipment seized from FA Cooley was critical in this regard. This began by pursuing a local Alaska-based analysis in which CGIS sought to liaison with the United States Secret Service to utilize their forensic analysis tools. A local forensic analysis of FA Cooley's electronic devices could not be accomplished. (JA at 368, 519-20).

While a local analysis would have been advantageous, this was not possible. The on-the-ground realities of the investigative and prosecutorial capabilities of the government are relevant to determining whether a delay is justified. *See e.g. Mizgala*, 61 M.J. at 127 (noting that the legal office trying that case was operating out of a temporary facility due to a fire that damaged their permanent office).

Once Coast Guard ECS started the examination, the forensic analysis itself was not simple because of the large amount of data involved and the difficulties in identifying actual child pornography. (JA at 514, 527). The first analysis, part of which required attempting to access an inoperable laptop and forensically carving deleted files from multiple electronic devices, was completed on January 23, 2013. (JA at 330-332).

After reviewing each of the over 200 presumptively qualifying images of child pornography, children in various stages of undress, S/A Renkes requested that ECS perform a second analysis in order to confirm the presence of additional child pornography. *Id*. The second analysis was completed March 1, 2013, in which two images were confirmed to contain possible child pornography. PE 4 at 4. After the second ECS report, S/A Renkes conducted a third review of the imagery and confirmed the presence of an additional image of possible child pornography. (JA at 292-93).

While the electronic analysis was occurring, S/A Renkes also investigated a sizeable amount of telephone metadata, which often contained nicknames associated to disposable mobile phones with subscriber information that is not readily accessible from a standard provider. (JA at 512-13). Some of these contacts were identified as children. (JA at 515). Given FA Cooley's confessions that he had solicited illicit material from children, it was necessary for CGIS to investigate whether tracking down the nicknames in the phone would lead to additional child victims who had been solicited for pornographic pictures.

When CGIS was able to identify some of the victims, these children were located in California, Texas, and in locations in Alaska only accessible by air or maritime transportation. (R. at

103, 289, 316, 515-16). The task of arranging face-to-face interviews with these children, including additional coordination with their guardians, created significant challenges. (JA at 516-17). Coordination with child forensic interview specialists was also necessary for some victims in this case (e.g., the interview with K.G.). (JA at 319-22).

Lastly, two trial court rulings, by two different military judges, identified the difficulties in conducting the forensic analysis and the logistical challenges of identifying and interviewing potential child-victims as justifying the delays in this case. (JA at 99-106, 273-82). Those findings of fact are entitled to deference. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citing *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)); *see also United States v. Kossman,* 38 M.J. at 262 ("Judges who can decide difficult questions such as whether a confession was voluntary can readily determine whether the Government has been foot-dragging on a given case").

Given the complex nature of the case, and with deference to the trial court findings of fact regarding those complexities, the delay in this case was justified.

2. Brief periods of inactivity in an otherwise active prosecution is not unreasonable.

The appropriate standard to determine whether an Article 10 violation has occurred is not constant and ceaseless engagement

with the investigation; "brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003); *see also United States v. Wilson,* 72 M.J. 347, 352 (C.A.A.F. 2013) (recognizing that "there will be occasions when mission requirements may make it impossible to process cases as expeditiously as we might ideally wish"); *United States v. Tibbs*, 15 C.M.A. 350, 353 (1965) ("brief inactivity is not fatal to an otherwise active, diligent prosecution").

A waiting posture, such as "waiting for formal evidence prior to preferring charges," does not imply a failure to abide by Article 10. *See United States v. Mizagala,* 61 M.J. 122, 129 (C.A.A.F. 2005) (finding no Article 10 violation for delays associated with seeking evidence for off-post offenses to create complete litigation packages); *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (finding it not unreasonable for the government to wait for forensic examination of evidence before proceeding to trial). The relevant standard is reasonable diligence and not constant motion. *Cooper*, 58 M.J. at 58.

S/A Renkes pursued other investigative duties in this case, in addition to handling his other duties, and incurred periods while he waited for formal electronic forensic analyses to be complete. This Court has held that waiting for such formal evidence comports with Article 10. *See Cossio*, 64 M.J. at 257.

The letter from FA Cooley that was returned to Base Seattle was provided to CGIS in February, 2015. It was not until March that S/A Renkes was able to connect with someone at the Grizzly Academy and obtain some contact information for the intended recipient. (JA at 510). At that time S/A Renkes was also preparing for the first Article 32 in this case, while maintaining other investigations. (JA at 510).

Periods of inactivity with respect to the investigation into the letter were the result of other investigative efforts in this case and preparation for the first Article 32 hearing. (JA at 510). Given the overall circumstances of the investigative complexities of this case, S/A Renkes was nonetheless diligent. To put all of the investigative work in perspective, as of September 2013, S/A Renkes was still "investigating hundreds of phone numbers of potential victims obtained through the ECS analysis of the phone belonging to the accused." (JA at 276).

The periods of relative inactivity, where the agent was awaiting forensic results and awaiting returns on his efforts to find other victims, did not result in fatal delay.

3. In trying to complete the investigation into FA Cooley's crimes the United States did not deliberately delay the prosecution nor commit negligence.

The intent of the United States in delaying the proceedings, if any, is also relevant to the assessing the reasons for the delay. This Court has explained:

> a deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the [G]overnment. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant. *Finally, a valid reason, such as a missing witness should serve to justify appropriate delay.*

Wilson, 72 M.J. at 347 (quoting *Barker,* 407 U.S. at 531) (emphasis added). In *Wilson*, this Court ultimately held that even though the United States explained much of the delay, "there were several periods of unexplained or unjustified delay. Those delays appear to be result of inattention and neglect and although they weigh against the Government, they do not weigh as heavily against the Government as they would if there was a deliberate effort to delay the case." *Id.* at 355. Nonetheless, this Court denied relief under Article 10.

Here, there is no evidence that the United States acted with any intent to purposefully delay the proceedings against FA Cooley. The military judge specifically stated so in her findings of fact, which are entitled to deference. (JA at 276, 280). Neither intentional nor negligent, the delay in FA Cooley's case – delay associated with seeking additional

evidence - fall into the third category of intent outlined above by the Supreme Court in *Barker.* This type of delay, a missing witness or necessary evidence, is justifiable.

In light of the reasons for the delay in this complex case, and the fact that the government did not engage in intentional or negligent conduct, this factor of the *Barker* analysis weighs in favor of the United States.

C. The number of speedy trial requests weighs in favor of the Appellee.

The Appellant did make four motions for a speedy trial. (JA at 124-26). This factor weighs in favor of FA Cooley.

D. The Appellee was not prejudiced by any delay.

The sheer lack of any prejudice to FA Cooley is indicative of a balance of factors in favor of the United States. Unable to find any prejudice to the accused, the CGCCA, without citation to any authority, held that any confinement is per se prejudice, and that therefore FA Cooley was prejudiced by the delay in bringing him to trial. *See, supra,* part VII.

Prejudice is assessed using the three primary interests speedy trial rights are designed to protect: (ii) prevention of oppressive pretrial incarceration, (ii) minimizing anxiety and concern of the accused; and (iii) limiting the possibility that the defense will be impaired. *Mizgala*, 61 M.J. at 129 (C.A.A.F. 2005) (citing *Barker*, 407 U.S. at 532).

The most important of these interests is limiting the possibility that the defense will be impaired. *Id*. (where this Court wrote that "the most serious is the last, because the inability of a defendant to adequately prepare his case skews the fairness of the entire system").

1. FA Cooley did not suffer oppressive pretrial incarceration or particularized anxiety as a result of confinement.

When considering prejudice, courts are "concerned not with the normal anxiety and concern experienced by an individual in pretrial confinement, but rather with some degree of particularized anxiety and concern greater than [that]." *United States v. Wilson*, 72 M.J. 347, 354 (C.A.A.F. 2013); *Cossio*, 64 M.J. at 257 (where there was no evidence that the Appellant's anxiety and concern associated with confinement has exceeded the norm).

(a) The one-time acts by another inmate do create oppressive confinement conditions or support particular anxiety

FA Cooley has offered little evidence that his pretrial confinement was oppressively harsh or that he suffered any particularized anxiety. To suggest a narrative of continually oppressive brig conditions and particularized anxiety, FA Cooley seized upon a single isolated incident in which a post-trial inmate touched his buttocks in a common area of the brig. This isolated incident does not amount to oppressive incarceration.

Comparing this incident to the confinement conditions in *United States v. Wilson* is instructive. In *Wilson*, the accused, the only African American in a confinement block, was subjected to repeated racist rants and harassment by what appeared to be a white supremacist group. *Id*. at 354. Wilson's attacks were arguably severe and not isolated yet this Court held that Wilson was required to show more, as his conditions did not rise to the level of oppressive pretrial conditions for purposes of prejudice under Article 10. This Court concluded that "any anxiety or concern Wilson suffered was the result of normal incidents of confinement." *Id.* at 355.

Here, the onetime independent action of another prisoner against FA Cooley, however unfortunate, does not amount to systematic oppression. FA Cooley was not subjected to repeated sexual assaults to which the United States turned a blind eye and failed to investigate. Nor did the United States fail to take measures to bring the offender to justice.

In this regard clarity is important. FA Cooley was not technically the victim of a sexual assault as defined under the UCMJ.[6] He reported that his "butt was touched" by another inmate. The action of the other inmate was investigated by Brig staff and USMC CID and the alleged offender was eventually charged under the UCMJ. No other allegations of abusive sexual contact,

[6] A sexual assault, as defined by Article 120, UCMJ, requires penetration, rather than contact.

involving the first offender or any other prisoner, were alleged by FA Cooley. Clearly the brig's response to the incident served to prevent any further harm coming to FA Cooley.

The military judge also provided some measure of relief to FA Cooley as a result of the incident. On September 11, 2013, the military judge ruled on a defense motion for appropriate relief under Article 13, UCMJ, and *Mason* credit for pretrial punishment. (JA at 256). Regarding the butt-touch incident, the military judge stated:

> The butt-touch incident appears to be the result of a criminal act by Inmate Moya. The testimony of the accused shows the Brig Guards did their duty and responded to FA Cooley's complaint. The U.S. is not responsible for the criminal acts of Inmate Moya. However, because the Brig returned Inmate Moya to a commingled area with pretrial detainees and because of the failures in proof by the defense on any details of time or duration, the accused is awarded one (1) full additional day of administrative credit. Additionally because the Government failed to comply with service regulations in reporting the incident, in compliance with COMDTINST 1754.10C, the accused is awarded day for day administrative credit from the date of the incident on 2 February 2013, through 7 March 2013 (33 days), which is the first indication in that he received victim advocate resources.

(JA at 261). FA Cooley did receive some relief for this isolated incident. However, this was not a finding that the incident amounted to oppressive confinement, and it is significant to note that after considering all the testimony of the incident,

including testimony of FA Cooley himself, the military judge thought it serious enough to warrant only one day of relief.[7]

(b) FA Cooley was provided command visits, normal access to medical care and otherwise was subjected to normal confinement conditions.

In his assignment of error to the CGCCA, FA Cooley attached an affidavit from himself describing what he called "punishment" in confinement as a result of oppressive heat conditions and lack of access to running water. (JA at 415). The issues raised in his affidavit were never raised at trial (at which time the incidents were have already alleged to have occurred). This is true despite the fact that there was extensive Article 13 litigation in this case. FA Cooley even testified at the Article 39(a) sessions regarding his time in the brig, yet he never raised the "oppressive heat conditions" until his case was on appeal to the CGCCA. (JA at 436-49). The self-serving nature of the affidavit from the accused is evident. There is nothing, aside from these unsupported statements, to suggest that any of the allegations existed, and therefore should be given little weight, if any, by this Court.

It is a fact, however, that the Coast Guard conducted command visits to FA Cooley to ensure his well-being. The Sector San Diego Command Master Chief visited FA Cooley approximately

[7] Thirty four days of administrative credit were awarded because FA Cooley did not get a victim advocate after he reported the incident.

fifteen to twenty times during his confinement. (JA at 468).[8] Master Chief Groh testified that, "whenever I make a command visit, I always ask if the brig is treating the person fairly as far as if everything is being taken care of, that their needs are being met. That is my main concern." (JA at 465). Master Chief Groh also escorted FA Cooley to several chiropractic appointments. (JA at 470).

There was however, an initial gap in the command visits to FA Cooley, which the military judge addressed in a supplemental Article 13 ruling. On this issue, the military judge stated:

> The Defense has failed to show any evidence of intent to punish the accused in relation to the initial lack of understanding as to policy on frequency of brig visitations. However, because of this failure to understand and comply with COMDTINST M1600.2 the accused is awarded 2 for 1 administrative credit for the 27 weeks (54 days) it failed to meet its visitation obligations.

(JA at 285). FA Cooley also cannot argue that he suffered particular anxiety as a result of his confinement in California far from his home unit. His original unit was located in a remote area of Alaska, thousands of miles from a military confinement facility. There was no hidden agenda to punish FA Cooley or cause him particular anxiety by placing him in confinement in California, which was where he was arrested for violation of the conditions on liberty. In fact, FA Cooley's

[8] Coast Guard Senior Chief Cochrane also made two command visits. (JA at 468-69).

confinement in a Navy facility closest to his arrest in California allowed his mother, who resided in California, to visit FA Cooley nearly every week while he was in pretrial confinement (approximately fifty times). (JA at 532).

Finally, the second period of pretrial confinement was the direct result of FA Cooley's commission of further misconduct while awaiting trial, and was imposed only after his command considered a series of less restrictive means of pretrial oversight (restriction and followed by normal duty with conditions on liberty), which failed only because FA Cooley re-offended.

2. FA Cooley's defense has not been impaired or limited.

Whether FA Cooley's defense has been impaired or limited by delays in this case is the most important factor in determining prejudice as a result of those delays. *United States v. Wilson,* 72 M.J. 347, 353 (C.A.A.F. 2013)("impairment of the defense is the 'most serious' form of prejudice")(quoting *United States v. Johnson,* 17 M.J. 255, 259 (C.M.A. 1984)). Should witnesses die or disappear during a delay or if defense witnesses are unable to accurately recall events that have come the distant past because of the delay in the bringing the case to trial, the resulting prejudice is clear. *Barker,* 407 U.S. at 532. Loss of evidence or adverse impact to case preparation also weighs in favor of an accused. *See Doggett v. United States,* 505 U.S. 647,

583 (1990). An over 10-month delay, where an accused was subject to pretrial confinement, is not prejudicial so long as the accused's ability to present a defense is not impaired. *See Danylo,* 73 M.J. at 188.

Here, there is absolutely no indication, and no evidence, showing that the time needed to prosecute this case prejudiced the defense on the merits or at sentencing. FA Cooley pleaded guilty to the charges. He did not call any witnesses on the merits. He did not present any evidence that his defense was impacted by the delay. FA Cooley was able to call sentencing witnesses, who testified on his behalf.

Neither can FA Cooley argue that the events surrounding his appointment of an expert consultant constituted prejudice associated with delay. The United States cancelled FA Cooley's expert assistance when the military judge dismissed FA Cooley's first courts-marital without prejudice on May 23 2013. The defense counsel eventually filed a second motion for expert assistance to determine the impact of sexual abuse on FA Cooley as a child. (JA at 193). The military judge re-assigned an expert consultant to FA Cooley's defense team. (JA at 282). The appointed consultant, a licensed and qualified professional, performed a psychological examination on FA Cooley. (JA 402-10). The results of this evaluation did not ultimately appear at trial.

In deciding FA Cooley's Article 10 motion, the military judge considered whether FA Cooley was prejudiced by an impairment of his ability to mount defense as a result of delays in this case. (JA at 281-82). The military judge found none, but did consider the argument that FA Cooley's defense may have been impaired as a result of an inability to obtain an expert consultant. (JA at 282). The military judge held that there was no prejudice in this regard because a qualified expert consultant was, in fact, appointed. *Id*.

FA Cooley is focusing on mere speculative prejudice associated with denial of an expert consultant, or rather the appointment of an expert consultant that was not the first choice of the defense. FA Cooley has not, however, addressed how his defense was actually prejudiced by the delay.

A military judge's decision to grant an expert consultant is based on a reasonable probability that expert would be of assistance and that denial of expert assistance would result in fundamentally unfair trial. *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994). It is the underlying facts of the offense and the offender that informs the military judge's discretion on that matter. The military judge could have denied or granted the defense request independent of the delays occasioned by this case.

FA Cooley has therefore, offered no convincing argument to link prejudice associated with delay to prejudice associated with the grant or denial of an expert consultant. The trial court correctly held that there was no impairment to FA Cooley's ability to prepare for trial. In addition, if FA Cooley was dissatisfied with the expert consultant that was provided, he had the opportunity to raise that issue at trial, and did not do so. Instead, he freely and knowingly pled guilty to his crimes, and received the benefit of the pretrial agreement for doing so.

The analysis regarding prejudice therefore weighs heavily in favor of the United States.

Conclusion

Considering all *Barker* factors, the reasons for the delay were legitimate and stemmed from extensive electronic forensic analysis and the difficulties in identifying possible child victims across the United States. The government moved with diligence to bring the case to trial before the CGIS investigation had been fully completed. Even considering the incident of wrongful sexual contact in the brig, FA Cooley did not experience any particular hardship as a result of oppressive pretrial confinement. FA Cooley's additional arguments concerning particular anxiety suffered as a result of this confinement are equally without merit. Finally, and most importantly, the Appellant cannot identify any prejudice to his

ability to prepare for trial that resulted from delays in this case.

WHEREFORE the United States respectfully asks this Court to reverse the decision of the United States Coast Guard Court of Criminal Appeals with respect to Charge I and its sole specification; Charge II, Specification 2; and Charge III, Specifications 1 and 2, which were approved by the convening authority, were properly before the Coast Guard Court of Criminal Appeals under Article 66(c), and were dismissed with prejudice pursuant to Article 10.

Respectfully submitted,

/s/

Daniel Velez
Lieutenant, USCG
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 36027
202-372-3808
Daniel.Velez@uscg.mil

/s/

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

/s/

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

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 10,688 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 CourierPS 12-point typeface.

Date: 25 March 2015

/s/

Daniel Velez
Lieutenant, USCG
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 36027
202-372-3808
Daniel.Velez@uscg.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Court on 25 March 2015, and that opposing counsel, CDR Matthew Fay and LT Philip Jones, USCG, were copied on that email at philip.a.jones@navy.mil and matthew.j.fay@uscg.mil, respectively.

/s/

Daniel Velez
Lieutenant Commander, USCG
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 36027
202-372-3808
Daniel.Velez@uscg.mil.