IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant v. Christopher S. COOLEY Fireman Apprentice (E-2) United States Coast Guard, Appellee	)))))))))	REPLY BRIEF ON BEHALF OF THE UNITED STATES 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

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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.[1]

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 the Case

[1] In his answer and brief, FA Cooley has not addressed those charges that were dismissed with prejudice by the Coast Guard Court of Criminal Appeals yet were previously withdrawn by the convening authority before findings at trial.

On February 23, 2015, the Judge Advocate General of the Coast Guard filed a certificate for review of the Coast Guard Court of Criminal Appeals (CGCCA) decision in this case to this Honorable Court. On March 25, 2015, Appellant filed its Brief. On April 24, 2015, Appellee filed his Answer. Appellant replies herein.

III.

Argument

A. Establishing the full extent of FA Cooley's crimes against children, rather than perfecting a charging theory, was the main reason for delay in this case.

FA Cooley's arguments concerning the reasons for delay in this case do not acknowledge that over 200 images of children in various stages of undress were found on electronic media seized from his possession. Neither does FA Cooley acknowledge that no electronic forensic report was able to establish the identity of any of these children. Instead, FA Cooley calls his initial confession to Coast Guard Investigative Service (CGIS), "the linchpin" of this case. (Appellee Answer at 13). In doing so, he implies that the government had no further duty to investigate his crimes, because they had a rambling, incomplete confession.

As of the July 2012 confession, the United States had no knowledge of the full extent of the child pornography possessed or possibly created by FA Cooley. (J.A. 315-17). The confession only indicated that he traded in pornographic images with others

on the internet. (J.A. at 316). He also admitted to receiving four images from four underage girls and "several" pictures from one underage boy, as well as asking for, but not receiving nude photos, from two other boys.(J.A. at 315-316).

As of January 2013 – with the formal completion of the first electronic forensic report – the United States would only know that about 200 images presumptively qualified as child pornography[2]; or as FA Cooley has stated, that the government "had proof that some of the images seized [] were child pornography." (Appellee Answer at 13).

The January report did, however, indicate that a significant amount of these images were "associated to phone numbers in the address book of [FA Cooley's] Apple iPhone." (J.A. at 336). It also stated that thirty five image files were data-carved from various directories located on FA Cooley's phone and these image files depicted what appeared to be persons under the age of eighteen, some of which were nude or in various stages of undress." (CGIS Memorandum of Activity dated January 23, 2013, J.A. at 332). The CGIS Electronic Crimes Section submitted 205 images from FA Cooley's phone to the National Center for Missing and Exploited Children for possible match with known child victims; none of the images were matches. (J.A. 336-338).

[2] (J.A. at 330-33).

Neither the January nor the follow-on March forensic report established the identity of any the children depicted in any images found across FA Cooley's electronic devices or whether these images were created by, or at the request of, FA Cooley. (J.A. at 330-33; 334-38). It was clear, however, that the scale of what the forensic analysis found was far beyond what FA Cooley admitted to.

This last feature critically distinguishes FA Cooley's case from other child pornography cases. FA Cooley has continually framed the United States' delay as perfecting existing charging theories – an "intentional delay" to move from charging the possession of apparent child pornography to actual child pornography. (Appellee Answer at 12). While the additional charge for actual possession was added, the record clearly indicates FA Cooley's particular manner of predatory behavior demanded an investigation into how many children FA Cooley might have directly interacted with. This investigation was not an effort to update "older" charges based on completed formal evidence, but an investigation into the full reach of criminal misconduct. This effort that was necessary given how FA Cooley had admitted to communicating with children by asking them to send him pictures of their naked bodies or masturbating. (J.A. at 290, 315-17).

This additional criminal misconduct could have detrimental consequences to the victims and the United States had the right, if not the duty, to pursue a more thorough investigation. *United States v. Cossio,* 64 M.J. 254, 257 (C.A.A.F. 2007). Instead, FA Cooley argues that if the government could bring forward a single formal charge, it should be required to proceed immediately to trial, regardless of how many victims may be unaccounted for by the accused's actions in the same overall course of criminal misconduct. In this case, the United States was not pursuing a lengthy separate investigation into unrelated misconduct. For example, the government was not investigating whether FA Cooley had committed housing fraud given some initial evidence of child pornography. The government was investigating the extent and nature of FA Cooley's sexual communications with children and his possession of child pornography.

The main evidence that this extended effort existed comes from sworn testimony of the lead case agent, CGIS Special Agent (S/A) James Renkes. S/A Renkes testified that FA Cooley's tactics demanded further investigation. (J.A. at 512-13; 515-16). S/A Renkes testified that this case required him to try and identify as many child victims as possible. (J.A. at 516). The dates on which either the January or March forensic reports were completed do not mark the completion of this effort. Ultimately,

charges were preferred and referred despite the fact that identification of all of FA Cooley's victims was not complete.

B. FA Cooley has not established prejudice. His pretrial confinement was not oppressive and the delays associated with this case did not impair his ability to defend himself at trial.

FA Cooley's own misconduct, and his own failure to abide by the very liberal conditions on his liberty, led to his second round of pre-trial confinement, which was ordered after he contacted one of his victims via text message. (J.A. at 323). FA Cooley was housed at the Navy's Brig in Miramar, which houses both pre and post-trial prisoners. (J.A. at 345). Pre and post-trial prisoners are housed in separate wings that are joined by a small common area, which consisted of an inmate phone booth, a cleaning closet, a staff head and two guard offices or desks. *Id.* Pre and post-trial inmates are not housed together, but instead are allowed some limited and supervised interaction in the common area that lies between the two wings of the facility.

FA Cooley's assertion that he "was held in close contact with post-trial prisoners" is incorrect. (Appellee Answer at 22). Moreover, there is no absolute prohibition against the comingling of pre and post-trial prisoners. *See e.g. United States v. Morris*, 48 C.M.R. 409, 411 (C.M.A. 1973) (finding no Article 13 violation for limited interaction between pre and post-trial prisoners); *United States v. Palmitter*, 20 M.J. 90,

94 (C.M.A. 1985); *United States v. Stroud,* 27 M.J. 765, 771 (A.F. Ct. Mil. Rev. 1988) ("no indication in the record that the appellant's placement into the general prisoner population was intended in any way as punishment").

During this second period of pre-trial confinement, FA Cooley's buttocks were touched by another prisoner. This incident of abusive sexual contact was *immediately* investigated by the Brig[3], followed by a United States Marine Corps Criminal Investigation Division (USMC CID) investigation – all of which led to the preferral of charges against the assailant. (JA at 339, 391). The Inmate Disciplinary Report against the assailant is dated February 2, 2012 – the date of the alleged incident. (J.A. at 351). The Brig's Office of Investigations completed a first investigative report on February 6, 2012. The two investigations and the preferral of charges against the assailant, were not carried out at the request FA Cooley's trial defense counsel, as he has contested, but were the independent acts of the Brig in a successful effort to fully investigate the incident and hold the perpetrator accountable.

Therefore, FA Cooley's assertion that the "brig failed to conduct a criminal investigation" is incorrect and unequivocally contradicted by the record. Further, FA Cooley makes no mention of the USMC CID investigation in his Answer, nor the fact that

[3] (JA at 341-43).

that the lapse in Coast Guard policy (such as the timely availability of a Coast Guard Victim Advocate) were addressed by the trial court under Article 13, UCMJ, and that he was given confinement credit equal to the length of time it took the Coast Guard to provide him a victim advocate. (J.A. at 261).

However egregious and prolonged FA Cooley would like to recast the incident between himself and inmate Moya, the fact remains it was a single isolated incident, which was immediately investigated and remedied by the United States. The perpetrator of the act was charged under the UCMJ. There was no sustained course of oppressive conduct that the United States was complicit in or simply ignored.

The remainder of FA Cooley's arguments concerning the particularly harmful nature of his pretrial confinement consist of vague and unsupported accusations concerning the habitability of the brig. None of this amounts to oppressive incarceration.

Finally, FA Cooley's argues that the delays in this case failed to allow him to retain the best expert consultant for his particular defense. Qualified expert consultants were twice appointed for his defense. Had FA Cooley's second expert consultant truly been inadequate, he had every opportunity to move for the appointment of a new consultant. FA Cooley was required to make a showing of the particular expert consultant that he needed during trial. *See United States v. Garries,* 22

M.J. 288, 290 (C.M.A. 1986). While FA Cooley may now claim that he did not have the best expert possible, any prejudice related to that decision has nothing to do with delay. His argument that the expert was unqualified is speculative at best.

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. 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 2,396 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: 4 May 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 4 May 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.