

IN THE UNITED STATES COURT OF APPEALS FOR  
THE ARMED FORCES

UNITED STATES,

Appellee

v.

Carlton Wilder, Jr.  
Lance Corporal (E-3)  
United States Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 201400118

USCA Dkt. No. 15-0087/MC

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

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## Issue Presented

WHETHER THE PROMULGATION OF R.C.M. 707 ABROGATED THE "SUBSTANTIAL INFORMATION" RULE ORIGINATED IN *UNITED STATES v. JOHNSON*, 23 C.M.A. 91 (C.M.A. 1974).

### Statement of Statutory Jurisdiction

Lance Corporal (LCpl) Carlton Wilder, Jr., United States Marine Corps (USMC), received an approved court-martial sentence that included a punitive discharge. Accordingly, his case fell within the lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).<sup>1</sup> LCpl Wilder timely filed a petition for grant of review, properly bringing his case within this Court's Article 67(a)(3), UCMJ, jurisdiction.<sup>2</sup>

### Statement of the Case

On November 12, 2013, a military judge sitting as a general court-martial found LCpl Wilder guilty, pursuant to his pleas, of one specification of attempted sexual assault of a child in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2012), one specification of possession of child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012), and two specifications of distribution of child pornography in violation of Article 134, UCMJ.<sup>3</sup> LCpl Wilder pled not guilty to one charge of indecent exposure in violation of Article 120, 10

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<sup>1</sup> 10 U.S.C. § 866(b)(1) (2012).

<sup>2</sup> 10 U.S.C. § 867(a)(3) (2012).

<sup>3</sup> J.A. at 41-43.

U.S.C. § 920, three specifications of attempt to commit a sexual act under Article 80, UCMJ, 10 U.S.C. § 880 (2012), and, three specifications of possession of child pornography under Article 134, UCMJ, and one specification of receipt of child pornography Article 134, UCMJ, 10 U.S.C. § 934. These charges were later dismissed pursuant to the pretrial agreement.<sup>4</sup> The military judge sentenced LCpl Wilder to a dishonorable discharge, confinement for a period of thirteen years and four months, forfeiture of all pay and allowances, and reduction to pay grade E-1.<sup>5</sup> Pursuant to a pretrial agreement, the Convening Authority suspended all confinement in excess of eighty-four months, approved the remaining sentence as adjudged, and, except for the dishonorable discharge, ordered it executed.<sup>6</sup> As part of this pretrial agreement, LCpl Wilder agreed to withdraw his speedy trial motion.<sup>7</sup>

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) issued its opinion in this case on August 12, 2014.<sup>8</sup> The lower court affirmed the findings of guilty and the sentence.<sup>9</sup> Appellant filed a timely petition for review with this Court on

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<sup>4</sup> J.A. at 42, 159.

<sup>5</sup> J.A. at 49-50.

<sup>6</sup> J.A. 19-24.

<sup>7</sup> J.A. at 161.

<sup>8</sup> J.A. at 1.

<sup>9</sup> *Id.*

October 9, 2014. On March 19, 2015, this Court granted the petition and specified the issue on review.

### Statement of Facts

On November 8, 2012, LCpl Wilder posted an online advertisement searching for a "dirty taboo couple."<sup>10</sup> An undercover agent (UCA) of the Naval Criminal Investigative Service (NCIS) contacted LCpl Wilder posing as the wife of a Marine with two daughters, aged four and seven years old.<sup>11</sup> In an email, LCpl Wilder offered to pay for the children's underwear and pictures of child pornography and also asked for the opportunity to engage in sexual activity with the children.<sup>12</sup>

On November 13, 2012, LCpl Wilder met another UCA, purportedly the father of the children, and paid \$45.00 in exchange for what he believed were items of children's underclothing and a disc purporting to contain child pornography.<sup>13</sup> Together they drove to a house where LCpl Wilder believed he was going to engage in sexual activity with the children.<sup>14</sup> Instead, he was arrested and taken into custody by NCIS.<sup>15</sup>

At that time LCpl Wilder voluntarily informed interrogators

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<sup>10</sup> J.A. at 54.

<sup>11</sup> *Id.* at 53.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> J.A. at 47.

he possessed child pornography and had distributed an image of his penis to a minor, offenses of which they were unaware.<sup>16</sup> He provided consent to search his barracks room, his computer, and his phones.<sup>17</sup> He also gave investigators passwords to his email and social media accounts.<sup>18</sup>

On November 14, 2012, NCIS agents released LCpl Wilder to his command. The command then ordered him into pretrial confinement for the offenses that had taken place the day before, namely the attempted sexual assault of two children and possessing child pornography.<sup>19</sup> He remained in continuous pretrial confinement until November 12, 2013, a total of 364 days.<sup>20</sup>

Charges I (attempts to commit indecent acts on a child and receive child pornography in violation of Article 80 of the UCMJ) and II (wrongful receipt, possession and distribution of child pornography in violation of Article 134 of the UCMJ) were preferred on December 4, 2012, and LCpl Wilder was arraigned on April 23, 2013. The trial date was set for August 27, 2013.<sup>21</sup>

On April 16, 2013, the Government preferred two additional charges that were eventually referred to a separate court-

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<sup>16</sup> J.A. at 48.

<sup>17</sup> *Id.*

<sup>18</sup> J.A. at 49.

<sup>19</sup> J.A. at 69.

<sup>20</sup> J.A. at 30.

<sup>21</sup> J.A. at 32.



martial. The first alleged that LCpl Wilder indecently exposed his penis in violation of Article 120, UCMJ. This charge was ultimately dismissed.<sup>22</sup> The second additional charge alleged possession of child pornography in violation of Article 134, UCMJ. These charges were later joined with the court-martial on review as Additional Charges I and II.

On July 17, 2013, the Government preferred another charge alleging that LCpl Wilder wrongfully distributed a picture of his penis in violation of Article 134, UCMJ. That charge was also later joined with the court-martial before this Court as Additional Charge III.

On August 5, 2013, LCpl Wilder was arraigned at a separate general court-martial on these additional charges; he objected to joinder of all charges at a single court-martial.<sup>23</sup> At that arraignment, the parties agreed to a separate trial schedule, including a deadline of October 4, 2013, for motions, and a trial date of November 19, 2013.<sup>24</sup>

LCpl Wilder filed a motion to dismiss on September 18, 2013.<sup>25</sup> In the motion, he urged the trial court to dismiss the additional charges based on violations of his right to a speedy trial under Rule for Courts-Martial (R.C.M.) 707, Article 10,

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<sup>22</sup> Appellant pled not guilty to this charge and it was dismissed without prejudice. J.A. at 42.

<sup>23</sup> J.A. at 32.

<sup>24</sup> *Id.*

<sup>25</sup> J.A. at 70-77.

UCMJ, and the Sixth Amendment.<sup>26</sup> The Government responded on October 3, 2013.<sup>27</sup> Citing progress on pretrial negotiations, the defense requested two one-week continuances to the Article 39(a), UCMJ, motion hearing.<sup>28</sup> However, on October 18, 2013, prior to litigating the motion, LCpl Wilder entered into a pretrial agreement with the Convening Authority, which contained the following provision:

I agree to withdraw the currently pending "Defense Motion to Dismiss." I understand that if this agreement becomes null and void, I will be able to re-file any such withdrawn motion.<sup>29</sup>

On November 12, 2013, LCpl Wilder agreed to joinder of all charges, withdrew his motion to dismiss, and entered pleas of guilty consistent with the terms of the pretrial agreement.<sup>30</sup>

On appellate review, NMCCA found the pretrial agreement provision requiring LCpl Wilder to withdraw his speedy trial motion was illegal.<sup>31</sup> The court remedied this by reviewing the issue of whether the government violated his right to speedy trial.<sup>32</sup> It found no speedy trial violation.<sup>33</sup>

Separating the earlier charges (arraigned first) from the later charges (arraigned second), NMCCA concluded there was no

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<sup>26</sup> J.A. at 73.

<sup>27</sup> J.A. at 111.

<sup>28</sup> J.A. at 99.

<sup>29</sup> J.A. at 73.

<sup>30</sup> J.A. at 37-39.

<sup>31</sup> J.A. at 5.

<sup>32</sup> *Id.*

<sup>33</sup> J.A. at 3.

speedy trial violation under R.C.M. 707, Article 10, or the Sixth Amendment.<sup>34</sup> In doing so, it held "that R.C.M. 707(a)(1) establishes the commencement of the speedy trial clock for the additional charges as the dates of preferral," not the date LCpl Wilder was confined for the original charges.<sup>35</sup> The court further stated: "Since the accused was arraigned on Additional Charges I and II 111 days after preferral, and on Additional charge III 19 days after preferral, we conclude that the appellant's rights under R.C.M. 707 were not violated."<sup>36</sup>

#### **Summary of Argument**

This Court should apply *United States v. Johnson*, which held that the speedy trial clock for additional charges begins when the Government has in its possession "substantial information on which to base" those charges. The lower court declined to follow *Johnson*. Instead, it held that the R.C.M. 707 speedy trial clock for additional charges starts at preferral. The lower court's interpretation of R.C.M. 707 leads to an absurd result, allowing the government to promptly charge an accused only with charges sufficient for confinement, then piling on more charges later with a new clock regardless of when the government had the information on which the new charges were based. This interpretation eviscerates R.C.M. 707's speedy

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.* at 5.

trial rights. Further, the lower court's interpretation conflicts with the rule of lenity and the decisions of other military courts. This Court should reverse the lower court and apply *United States v. Johnson*.

The government had "substantial information on which to base" the additional charges when it put LCpl Wilder in confinement. Therefore, under *Johnson*, the R.C.M. 707 speedy trial clock commenced on November 14, 2012, the date pretrial confinement began. LCpl Wilder was arraigned on the first set of charges more than nine months after confinement and the second set more than a year later. To remedy this speedy trial violation, this Court should dismiss all charges with prejudice.

#### **Standard of Review**

The denial of the right to speedy trial is reviewed under a *de novo* standard.<sup>37</sup> Interpretation of rules is also reviewed *de novo*.<sup>38</sup> This Court is bound by the facts as found by the military judge unless those facts are clearly erroneous.<sup>39</sup>

#### **ARGUMENT**

**R.C.M. 707 DID NOT ABROGATE UNITED STATES v. JOHNSON'S SUBSTANTIAL INFORMATION" RULE. FURTHER, INTERPRETING THEM TO BE CONSISTENT WITH EACH OTHER PREVENTS ABSURD RESULTS,**

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<sup>37</sup> *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1993).

<sup>38</sup> *Cf. United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014).

<sup>39</sup> *United States v. Wilson*, 72 M.J. 347, 350 (C.A.A.F. 2013).

**COMPORTS WITH THE RULE OF LENITY AND IS  
CONSISTENT WITH INTERPRETATIONS OF OTHER  
MILITARY APPELLATE COURTS.**

When an accused is placed in pretrial confinement and additional charges are later preferred, the Government's accountability for the additional charges "should commence when the Government had in its possession substantial information on which to base" those charges.<sup>40</sup> This is known as the "substantial information" rule. This Court should find R.C.M. 707 does not abrogate this holding.

**A. NMCCA's literal interpretation of R.C.M. 707 creates an absurdity.**

R.C.M. 707 provides that the accused must be taken to trial within 120 days of the imposition of restraint. R.C.M. 707(b) (2) explains that "[w]hen charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge." R.C.M. 707(a) states, in relevant part, that the speedy trial clock commences upon the preferral of charges or the imposition of restraint. Under both of these tests speedy trial has been violated.

LCpl Wilder was held in confinement 364 days prior to the date of trial. Further, the Initial Review Hearing Officers report indicates that LCpl Wilder was alleged to have committed:

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<sup>40</sup> *United States v. Johnson*, 23 C.M.A. 397, 399 (C.M.A. 1975) (internal citation omitted).

- a. Violation of the UCMJ, Article 80: Attempts
- b. Violation of the UCMJ, Article 120B: Rape and Sexual assault of a child
- c. Violation of 18 U.S.C § 2252A: Child Pornography.<sup>41</sup>

This language appears to include the additional charges which would clearly make November 14, 2012 the date of imposition of pretrial restraint.

NMCCA, however, did not interpret the pretrial confinement as being based on the additional charges. Finding it applied only to the original charges, NMCCA then took the language of R.C.M. 707 literally: "Since the appellant was not ordered into pretrial confinement on the additional charges, a plain reading of this rule indicates the speedy trial clock on each set of these charges commenced on the dates of preferral."<sup>42</sup> The NMCCA then concluded that R.C.M. 707 voided the "substantial information" rule of *United States v. Johnson*.<sup>43</sup>

Despite the close to four-decade application of *Johnson's* "substantial information" test, NMCCA chose to disregard it:

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<sup>41</sup> J.A. at 99. 18 U.S.C. § 2252A applies to anyone who

"knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;"

<sup>42</sup> J.A. at 5.

<sup>43</sup> *Id.*

*Johnson* created a judicial rule as part of the Court of Military Appeals jurisprudence that established the presumption of an Article 10 violation when pretrial confinement exceeded three months. *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971). Since then, the President has promulgated R.C.M. 707, which contains extensive procedural rules relating to the right to a speedy trial and *Burton* was thus overruled in favor of R.C.M. 707. *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993) .<sup>44</sup>

To bolster this interpretation, NMCCA cited the Air Force Court of Criminal Appeals (AFCCA) in *United States v. Proctor* as reaching a similar conclusion.<sup>45</sup> But this comparison is inapt. In *Proctor*, continuing investigation was necessary to prefer the additional charges. Here no further investigation was required. LCpl Wilder provided information for the additional charges the day he was questioned by NCIS.

**B. This Court should not interpret a rule in a way that creates an absurd result.**

"A plain language reading should not result in an absurdity."<sup>46</sup> The plain language reading of R.C.M. 707 endorsed by the NMCCA in this case was rejected by the AFCCA in *United States v. Bray*, 52 M.J. 659 (A.F. Ct. Crim. App. 2000). The AFCCA wrote:

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<sup>44</sup> *Id.*

<sup>45</sup> *United States v. Proctor*, 58 M.J. 792, 797 (A.F. Ct. Crim. App. 2003).

<sup>46</sup> *United States v. Martinelli*, 62 M.J. 52, 81 n.24 (C.A.A.F. 2005) (Crawford, J., dissenting) ("When the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." (internal quotations omitted)).

[s]uch a reading of R.C.M. 707 is too narrow and would emasculate the speedy-trial provisions of R.C.M. 707. The prosecution would have no incentive to promptly charge an accused with any offenses other than the minimum necessary for him to be confined.<sup>47</sup>

In *Bray*, the court dismissed with prejudice a second set of charges, holding "when an accused is placed in pretrial confinement as a result of a particular incident, the speedy-trial clock begins to run for all offenses that the prosecution knows, or reasonably should know, were part of that incident."<sup>48</sup>

Here LCpl Wilder was already in pretrial confinement when additional charges were preferred. Under *Johnson* and *Bray*, the Government's accountability for the additional charges "should commence when the Government had in its possession substantial information on which to base the preference of [those additional] charges."<sup>49</sup>

### **C. NMCCA's decision contradicts the decisions of other service Courts of Criminal Appeals**

NMCCA's decision not only conflicts with AFCCA's *Bray* decision, but also the holdings from other sister courts. In the recent case of *United States v. Cooley*, the Coast Guard recognized the substantial information rule as alive and well.<sup>50</sup>

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<sup>47</sup> *Bray*, 52 M.J. at 662.

<sup>48</sup> *Bray*, 52 M.J. 659, 661 (A.F. Ct. Crim. App. 2000).

<sup>49</sup> *United States v. Johnson*, 1 M.J. 101, 103 (C.M.A. 1975) (internal cite omitted).

<sup>50</sup> *United States v. Cooley*, No. 1389, (C.G. Ct. Crim. App. Dec. 24, 2014) (unpublished op.), *pet. for review filed*, \_\_ M.J. \_\_ (Feb. 23, 2015), J.A. 164-180.



In *Cooley*, the court dismissed two charges without prejudice where charges were added after the accused was in pretrial confinement. The "clock started when the Government had in its possession substantial information on which to base the preference (preferral) of the added charges."<sup>51</sup>

Although not as recent, the Army has also issued an opinion in line with *Cooley* and *Bray*. The Army Court of Criminal Appeals applied the substantial information standard in *United States v. Boden*.<sup>52</sup> In *Boden*, the accused faced multiple charges preferred at different times. The Government argued the general rule that where pretrial restraint was based only on the original charges, the proceedings as to each charge must be considered separately for speedy trial purposes. The court rejected this argument, relying on *Johnson* to hold where there are multiple charges with pretrial restraint, speedy disposition of the later charges begins on the date the government has in its possession substantial information on which to base preferral of those charges.<sup>53</sup> NMCCA's summary rejection of *Johnson* is simply not supported by the other services.

The military judge and the NMCCA erred in failing to view Appellant's pretrial confinement as a continuum of events ranging from his placement in pretrial confinement for Charge I

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<sup>51</sup> *Id.* at 174.

<sup>52</sup> *United States v. Boden*, 21 M.J. 916, 917-18 (A.C.M.R. 1986).

<sup>53</sup> *Id.* at 918.

and Charge II until the eventual disposition of all charges including the additional charges. The NMCCA and the military judge instead erroneously viewed the pretrial confinement in pieces, as discrete time periods requiring individual analysis. However, this view fundamentally misapplies the law surrounding Constitutional and extra-constitutional provisions for speedy trial and is in direct contravention to the fundamental protections that these provisions provide.

**D. The Rule of Lenity should apply to start the speedy trial clock as of the date of confinement.**

The rule of lenity should apply and the provision most favorable to the accused should control - in this case speedy trial must be construed to start with the imposition of restraint. The Rule of Lenity provides that ambiguities in penal statutes are resolved in favor of the appellant.<sup>54</sup> As discussed, in this case a literal reading creates an absurdity. And other than speculation, there is no indication that Congress meant to override *Johnson*. Therefore, November 14, 2012 should trigger the speedy trial clock.

**E. The Government violated LCpl Wilder's right to speedy trial.**

Appellant was held in pretrial confinement for 364 days and had moved for dismissal based on a speedy trial violation.

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<sup>54</sup> *United States v. Ferguson*, 40 M.J. 823, 1994 CMR LEXIS 189 (N-M.C.M.R. 1994).

While there are not many facts developed on the record since the motion was not litigated, the record does reveal enough to conclude that the Government violated LCpl Wilder's right to speedy trial. The IRO's report clearly shows that confinement was based on all charges. Even if this were not the case, dismissal of Additional Charges II and III would still be appropriate given the substantial information regarding these charges which were available from the first day of LCpl Wilder's confinement.

The government has not acted with reasonable diligence to bring LCpl Wilder to trial. On the day pre-trial confinement began, on November 13, 2012, LCpl Wilder informed NCIS agents that he had sent an inappropriate photo to a minor, even providing the agents her city and state of residence. He also informed them that he currently possessed digital media containing child pornography. He permitted NCIS to seize his electronic media and to use his passwords.<sup>55</sup>

Despite having this information, the Government chose not to arraign LCpl Wilder on these charges until 265 days after imposition of pre-trial confinement.<sup>56</sup> Further, although the Article 32 investigating officer made his report based on all these charges on May 7, 2013, it took the Government ninety more

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<sup>55</sup> J.A. at 84-86.

<sup>56</sup> J.A. at 37-39.

days to arraign Appellant.<sup>57</sup> Worried about an adverse ruling on the motion to dismiss, the government obtained a pretrial agreement with a prohibited term-waiver of speedy trial rights. These facts compel the conclusion that LCpl Wilder's R.C.M. 707 speedy trial right was violated and that his conviction should be set aside.<sup>58</sup>

**F. Dismissal with prejudice is the proper remedy.**

In this case, the charges must be dismissed with prejudice. Under R.C.M. 707(d),

a failure to comply with this rule will result in dismissal of the affected charges. . . . Dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. . . . In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

While the charges are serious, the prejudice to the accused is significant. Any other result would effectively give the

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<sup>57</sup> J.A. at 27; J.A. at 72.

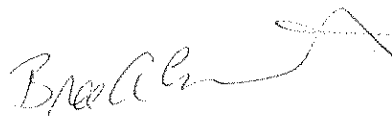
<sup>58</sup> In an exhibit entitled, "Sentencing Memo (Continuation of Lance Corporal Wilder's unsworn statement through counsel)," the civilian defense counsel argued: "The conviction will stick. There were motions pending and waived by this plea that could have resulted in charges being dismissed, perhaps with prejudice. Even if the motions were denied, there would be appellate issues that would have kept this case active for years, perhaps resulting in a retrial. Pleading guilty removed the real possibility charges would be dismissed and removed realistic appellate issues." J.A. at 59 (emphasis added).

Government a free pass and make a mockery of the speedy trial requirement.

**Conclusion**

R.C.M. 707 did not abrogate the substantial information rule originated in *United States v. Johnson*. This interpretation would create an absurd result, eviscerating LCpl Wilder's speedy trial rights under R.C.M. 707, and is contrary to the decisions of other military courts.

Accordingly, this Court should dismiss LCpl Wilder's convictions of Additional Charges II and III with prejudice.



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**Certificate of Filing and Service**

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on May 6, 2015.



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**Certificate of Compliance with Rule 24(d)**

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 3763 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface using Microsoft Word 2010 with 12 point Courier New font.



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