IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Carlton WILDER, Jr., Lance Corporal (E-3) U.S. Marine Corps Appellant	))))))))))	BRIEF ON BEHALF OF APPELLEE 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:

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

JAMES M. BELFORTI
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443

MARK JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 34114

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

INDEX

Page

Table of Authorities....................iv

Issue Presented....................1

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....................1

Statement of the Case....................1

Statement of Facts....................2

Summary of Argument....................8

Argument....................9

I. RULE FOR COURT-MARTIAL 707 HAS BEEN RECOGNIZED BY THIS COURT AS A PROPER EXERCISE OF THE PRESIDENT'S RULE-MAKING AUTHORITY PURSUANT TO ARTICLE 36, UCMJ, AND HAS THE FULL FORCE OF LAW. THEREFORE, THIS COURT SHOULD APPLY THE PLAIN TEXT OF R.C.M. 707 TO THIS CASE. BOTH R.C.M. 707 AND THIS COURT'S PRECEDENT HAVE ABROGATED THE RULE ANNOUNCED IN *UNITED STATES V. JOHNSON*. EVEN ASSUMING ERROR *ARGUENDO*, THIS COURT SHOULD ONLY DISMISS THE AFFECTED CHARGES WITHOUT PREJUDICE....................9

A. Rules for Courts-Martial are reviewed *de novo* and, like statutes, are reviewed based on the plain language of the Rule....................9

B. *Johnson* has been tacitly overruled by this Court because this Court overruled *Burton*, which is the root of *Johnson*, based on the precedence of R.C.M. 707....................10

1. *Johnson* derives from *Burton*, and both cases are about Article 10, UCMJ....................10

2. The President properly exercised his rule-making authority pursuant to Article 36, UCMJ, via

R.C.M. 707 in order to establish a procedural rule for speedy trial issues....................12

C. The plain meaning of R.C.M. 707 applies because *Johnson* cannot and does not coexist with R.C.M. 707 and applying its plain meaning does not lead to an absurd result..................................13

1. R.C.M. 707 and *Johnson* do not coexist because the President used different language in R.C.M. 707 and *Johnson* applied to Article 10, which is distinct from R.C.M. 707...13

2. Applying R.C.M. 707 literally does not lead to an absurd result..............................17

a. Most of the Courts of Criminal Appeals recognize, either expressly or implicitly, the non-viability of *Johnson* post-*Kossman*. Furthermore, *Johnson* has not been cited by this Court in decades 18

b. Article 10 prevents the Government from confining an appellant, "piling on" additional charges, and then engaging in intentionally dilatory efforts and the Government did not do that in this case 20

D. The rule of lenity is inapplicable here..............24

E. Even if this court were to find a violation of R.C.M. 707, dismissal of all charges and specifications with prejudice is an inappropriate remedy..26

Conclusion..30

Certificate of Service......................................32

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Albernaz v. United States, 450 U.S. 333 (1981)........25, 26

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002).....9

Muscarello v. United States, 524 U.S. 125 (1998)..........25

United States v. Taylor, 487 U.S. 326 (1988)..............29

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

United States v. Burton, 21 C.M.A. 112 (C.M.A. 1971)..10, 15, 16

United States v. Dean, 67 M.J. 224 (C.A.A.F. 2009).........9

United States v. Dooley, 61 M.J. 258 (C.A.A.F. 2005) 27, 29

United States v. Driver, 23 C.M.A. 243 (C.M.A. 1974)......11

United States v. Edmond, 41 M.J. 419 (C.A.A.F. 1995)......28

United States v. Hunter, 65 M.J. 399 (C.A.A.F. 2008)...9, 13

United States v. Johnson, 23 C.M.A. 91 (C.M.A. 1974) ....*passim*

United States v. Kearns, 73 M.J. 177 (C.A.A.F. 2014) .10, 13

United States v. Kossman, 38 M.J. 25 (C.M.A. 1993)....*passim*

United States v. Marshall, 22 C.M.A. 431 (C.M.A. 1973)....15

United States v. McPherson, 73 M.J. 393 (C.A.A.F. 2014)..9

United States v. Mizgala, 61 M.J. 122 (C.A.A.F. 2005)..15, 17, 21

United States v. Murphy, 18 M.J. 220 (C.M.A. 1984)........19

United States v. Robinson, 283 M.J. 481 (C.M.A. 1989).11, 20

United States v. Talavera, 8 M.J. 14 (C.M.A. 1979)........19

AIR FORCE COURT OF CRIMINAL APPEALS CASES

United States v. Bray, 52 M.J. 659 (A.F. Ct. Crim. App. 2000)....18

United States v. Proctor, 58 M.J. 792 (A.F. Ct. Crim. App. 2003)....18, 19

ARMY COURT OF MILITARY REVIEW CASES

United States v. Boden, 21 M.J. 916 (A.C.M.R. 1986)....20

United States v. Honican, 27 M.J. 590 (A.C.M.R. 1988)....19, 20

COAST GUARD COURT OF CRIMINAL APPEALS

United States v. Cooley, No. 1389 (C.G. Ct. Crim. App. Dec. 24, 2014)....19

NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

United States v. Wilder, No. 201400118, 2014 CCA LEXIS 571 (N-M. Ct. Crim. App. Aug. 12, 2014)....20

Uniform Code of Military Justice, 10 U.S.C. §§ 801-941:

Article 10....*passim*

Article 36(a)....12

Statutes, Rules, Briefs,

Rules for Courts-Martial (R.C.M.) 707....*passim*

Mil. R. Evid. 304(g)....23

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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad conduct discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of one specification of attempted rape of a child, one specification of possession of child pornography, and two specifications of distribution of child pornography, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880 and 934 (2012). The Military Judge sentenced Appellant to be confined for thirteen years and four months, reduction to the pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. Pursuant to the Pretrial Agreement, the Convening Authority suspended all confinement in excess of eighty-four months. He then approved

the remaining sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

On August 12, 2014, the United States Navy-Marine Corps Court of Criminal Appeals affirmed the guilty findings and sentence. On October 9, 2014, Appellant filed a petition for review with this Court. On March 19, 2015, this Court granted the petition and specified the issue on review.

Statement of Facts

A. Appellant attempted to rape two girls, ages four and seven.

On November 8, 2012, Appellant posted an advertisement on the Jacksonville, North Carolina, section of craigslist.com. (J.A. at 52.) The advertisement read,

> Looking a [sic] dirty taboo couple, or people with the same interest. I'm into just about every category and I'm willing to throw rose$ [sic] your way if you come through please put any number in the subject box so I know your [sic] real and not a bot. No number no reply which means no money.

(J.A. at 52.) A Naval Criminal Investigative Service (NCIS) Undercover Agent (UCA) contacted Appellant posing as the wife of a Marine with four-year-old and seven-year-old daughters. (J.A. at 46, 113.) Via e-mail, Appellant offered to purchase the daughters' underwear and images of child pornography at $10.00 per pair and $10.00 per picture. (J.A. at 52.) Appellant offered to pay $90.00 to engage in sex acts with the UCA's two daughters. (J.A. at 46.)

On November 13, 2012, Appellant met with another UCA, purportedly the Marine father of the girls, and provided the UCA with $45.00 in exchange for two pairs of children's underwear and a disc of purported child pornography. (J.A. 52-53.) The UCA drove Appellant to an undercover house where Appellant believed he was going to engage in sexual activity with the four-year-old girl and the seven-year-old girl. (J.A. at 53, 78.) Upon arrival at the house, Appellant was apprehended. (J.A. at 53.)

That same night, Appellant admitted to an NCIS agent to possessing, receiving, and distributing child pornography and planning to have sexual intercourse with the UCA's two children. (J.A. at 48, 53.) He admitted to possessing approximately 120 images of child pornography on one computer, between ten and twenty images on another computer, and a few videos. (J.A. at 48.) Appellant was placed in pretrial confinement on November 14, 2012. (J.A. at 123.)

B. <u>NCIS investigated the initial charges</u>.

With Appellant's consent, NCIS seized his digital media containing child pornography on November 13, 2012. (J.A. at 82.) The digital media was submitted to the Defense Computer Forensics Laboratory (DCFL) on November 16, 2012. (J.A. at 114.) Between November 18 and 30, 2012, NCIS conducted preliminary searches of Appellant's email account and discovered

images of suspected child pornography. (J.A. at 114.) On December 1, 2012, NCIS was advised that Appellant's defense counsel had revoked all previously granted consents. (J.A. at 115.) On December 3, 2012, NCIS notified DCFL to suspend its analysis of the items seized from Appellant. (J.A. at 115.)

On December 4, 2012, charges were preferred against Appellant for attempting to commit sexual acts upon children who had not attained the age of 12, and for receipt, possession, and distribution of the child pornography identified during the review of his email correspondence. (J.A. at 125-128, 134-135.) On January 15, 2013, NCIS received the seized digital media back from DCFL. (J.A. at 136.) On January 18, 2013, NCIS obtained a Command Authorization for Search and Seizure (CASS) to search the items that had previously been obtained through Appellant's consent. (J.A. at 115.) On January 22, 2013, NCIS resubmitted the electronic storage media items to DCFL. (J.A. at 115.)

On March 5, 2013, NCIS agents notified Trial Counsel that they had received an initial DCFL report and Forensic Data Extraction from DCFL's analysis of Appellant's digital media. (J.A. at 66.) The DCFL report indicated that approximately 600 files matched images of known child pornography in the database maintained by the National Center for Missing and Exploited Children (NCMEC). (J.A. at 66.)

C. NCIS investigated the subsequent charges and the Pre-Trial agreement was reached.

On March 18, 2013, NCIS agents interviewed RR, a fifteen-year-old girl who Appellant claimed to have contacted. (J.A. at 117.) RR confirmed during that interview that Appellant had sent a picture of his penis to her. (J.A. at 117.)

On March 20, 2013, the Convening Authority referred the initial charges (attempted sexual acts on children under 12 and possession, receipt, distribution of child pornography between August 7 and August 30, 2012 and October 28, 2012) to a general court-martial. (J.A. at 92.) On April 9, 2013, NCIS submitted a follow-on request to DCFL for further analysis of any communications between Appellant and RR. (J.A. at 137.) On April 16, 2013, Additional Charges I and II (indecent exposure to RR and possession of child pornography on November 13, 2012) were preferred. (J.A. at 129-130.)

On April 23, 2013, Appellant was arraigned on the initial charges at a general-court martial.[1] (J.A. at 25-26.) On June 20, 2013, NCIS completed its review of the Forensic Data Extraction. (J.A. at 117.) This review yielded 11,720 image

[1] Appellant previously requested two continuances of his Article 32 hearing from December 28, 2012 to January 30, 2013 and then until February 11, 2013 before waiving his Article 32 hearing. Both times Appellant conceded that the time granted was excludable from all speedy trial consideration. (J.A. at 66, 101, 145-146, 148, 152; see also Appellant's Article 32 continuance requests and waiver in Record of Trial.)

and video files containing suspected child pornography. (J.A. at 117.) On July 17, 2013, Additional Charge III (wrongful distribution of material harmful to a minor, RR) was preferred. (J.A. at 131-132.) On July 24, 2013, the subsequent charges were referred to a separate general court-martial. (J.A. at 129-132.)

On August 5, 2013, Appellant was arraigned on Additional Charges I, II, and III at a general court-martial, 111 days after preferral. (J.A. at 31-32.) At that arraignment, Appellant objected to the joinder of the subsequent charges with the previously-arraigned general court-martial. The Military Judge denied the Government's joinder motion and a separate general court-martial commenced. (J.A. at 28.) At that session of court, the Military Judge established a deadline of September 11, 2013, to file motions. (J.A. at 29.) Appellant filed his Motion to Dismiss for violations of Rule for Court-Martial 707, Article 10 of the UCMJ, and the Sixth Amendment of the United States Constitution on September 18, 2013. (J.A. at 75.) This motion was never litigated. To that point, Appellant had never requested a speedy trial in either of his two general courts-martial. (J.A. at 74.)

On October 9, 2013, Appellant requested a continuance of an Article 39(a) session in his second court-martial (Additional Charges I, II, and III) from its scheduled date of October 10,

2013, until October 18, 2013. (J.A. at 148.) On October 18, 2013, Appellant requested an additional continuance of the Article 39(a) session for his second court-martial until October 22, 2013. (J.A. at 152.) In the pretrial information report forwarded along that same date, in the "additional comments" section, there are hand-written remarks stating, "PTA agreed to that will result in motion being withdrawn." (J.A. at 156.)

On October 18, 2013, Appellant reached the Pretrial agreement with the Convening Authority. (J.A. at 157.) The Pretrial Agreement contained a specially negotiated provision that read, "I agree to withdraw the currently pending 'Motion to Dismiss.' I understand that if this agreement becomes null and void, I will be able to re-file any such withdrawn motion." (J.A. at 160.) Appellant also agreed to file a consent motion for joinder of the initial and subsequent charges. (J.A. at 159.) In exchange, the Convening Authority agreed to withdraw and dismiss without prejudice the charges and specifications to which Appellant pled not guilty. (J.A. at 159.)

On November 12, 2013, Appellant made a motion for joinder of the initial and subsequent charges, which was granted. (J.A. at 33.) This joinder brought Charges I and II preferred on December 4, 2012, Additional Charges I and II preferred on April 16, 2013, and Additional Charge III preferred on July 17, 2013,

before the court in a single court-martial. (J.A. at 34.) In accordance with the Pretrial Agreement, Appellant withdrew his "Motion to Dismiss" Additional Charges I-III based on an allegation of a speedy trial violation. (J.A. at 36.)

During sentencing, Appellant submitted a "sentencing memo" as Defense Exhibit B. (J.A. at 59-65.) Part of the memo states:

> ***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.)

Summary of Argument

The "substantial information" rule of *Johnson* was abrogated by R.C.M. 707. This Court tacitly recognized this fact when it expressly overruled both *Burton* and *Driver* in *Kossman*. This Court has also recognized that R.C.M. 707 has the force and effect of law because it was a proper exercise of the President's Article 36 powers, and this Court should therefore apply the plain text of R.C.M. 707. Assuming *arguendo* that the *Johnson* rule applies to R.C.M. 707 and that there was an error, this Court should only dismiss the "affected charges" and do so without prejudice.

Argument

RULE FOR COURT-MARTIAL 707 HAS BEEN RECOGNIZED BY THIS COURT AS A PROPER EXERCISE OF THE PRESIDENT'S RULE-MAKING AUTHORITY PURSUANT TO ARTICLE 36, UCMJ, AND HAS THE FULL FORCE OF LAW. THEREFORE, THIS COURT SHOULD APPLY THE PLAIN TEXT OF R.C.M. 707 TO THIS CASE. BOTH R.C.M. 707 AND THIS COURT'S PRECEDENT HAVE ABROGATED THE JUDICIALLY-CREATED SUBSTANTIAL INFORMATION RULE ANNOUNCED IN *UNITED STATES V. JOHNSON*. EVEN ASSUMING ERROR *ARGUENDO*, THIS COURT SHOULD ONLY DISMISS THE AFFECTED CHARGES WITHOUT PREJUDICE.

A. Rules for Courts-Martial are reviewed *de novo* and, like statutes, are reviewed based on the plain language of the Rule.

Questions on the interpretation of provisions of the Rules for Courts-Martial (R.C.M.) are questions of law, reviewed *de novo*. *United States v. Dean*, 67 M.J. 224, 227 (C.A.A.F. 2009); *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). Ordinary rules of statutory construction apply when interpreting the Rules for Courts-Martial. *Hunter*, 65 M.J. at 401.

> In all statutory construction cases, the court begins with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

United States v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)).

Just as in the case of statutory interpretation, when a R.C.M.'s language is plain, the sole function of the courts is to enforce it according to its terms. *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014).

B. *Johnson* has been tacitly overruled by this Court because this Court overruled *Burton*, which is the root of *Johnson,* based on the precedence of R.C.M. 707.

1. *Johnson* derives from *Burton*, and both cases are about Article 10, UCMJ.

In *United States v. Burton*, this Court established a prospective rule which stated that a violation of Article 10, UMCJ, would exist when "pretrial confinement exceeds three months." *United States v. Burton*, 21 C.M.A. 112, 118 (C.M.A. 1971). Such a delay would establish a burden on the Government to show diligence and in the absence of such a showing, the charges would be dismissed. *Id.*

In *United States v. Johnson*, the appellant invoked the *Burton* presumption of excessive delay. *United States v. Johnson*, 23 C.M.A. 91, 92 (C.M.A. 1974). In that case, the appellant was originally confined based on unauthorized absence charges. *Id.* After his confinement, however, investigators discovered evidence of a separate robbery. *Id.* This Court determined that the *Burton* speedy trial clock began to run for separate charges when "the Government had in its possession

substantial information on which to base the preference of charges." *Id.* at 93.

In *United States v. Kossman*, this Court recognized that the President's exercise of his rule-making authority took precedence over the judicially-created rules of *Burton* and *United States v. Driver*[2] by specifically overruling both cases. *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993). The Court recognized that:

> The *Burton* presumption was court-made and declared in a procedural vacuum, without the benefit of presidential input. Just as we created it, we now reconsider it. *Burton* and *Driver* are hereby overruled. The landscape of speedy trial has changed dramatically since those cases, and the President has acted responsibly in an area in which he has clear authority. Our rough-and-ready rule of thumb (the *Burton* Rule) now merely aggravates an already complicated subject.

Id. at 261.

This ruling was in keeping with this Court's earlier ruling in *United States v. Robinson. United States v. Robinson*, 28 M.J. 481, 482 (C.M.A. 1989). In *Robinson*, this Court held that the Army Court of Military Review did not err when it applied R.C.M. 707 over this Court's own decisions that had been issued prior to the effective date of R.C.M. 707. *Id.* In essence, this Court answered in *Robinson* the question it asks now: was it

---

[2] *Driver* clarified that the "three months" of the *Burton* rule equated to "ninety days." *United States v. Driver*, 23 C.M.A. 243, 245-246 (C.M.A. 1974).

error for the lower court to disregard *Johnson*, a pre-R.C.M. 707 ruling, and instead apply R.C.M. 707? The answer then, as it is today, was "no."

Johnson was merely the answer to the question of when the *Burton* clock begins to run in a particular factual scenario: when additional charges are preferred against an appellant already in pretrial confinement. But the *Burton* clock has already been explicitly abrogated with by this Court in *Kossman*. Therefore, to the extent this Court explicitly eliminated the *Burton* tree from its jurisprudential garden, the *Johnson* rule was also done away as a dead branch, devoid of jurisprudential nutrients from the eliminated *Burton* tree. This Court should now expressly do away with the "rough-and-ready rule of thumb" of *Johnson*, as it already tacitly did in *Kossman*.

2. The President properly exercised his rule-making authority pursuant to Article 36, UCMJ, via R.C.M. 707 in order to establish a procedural rule for speedy trial issues.

Congress delegated to the President the authority to prescribe "pretrial, trial, and post-trial procedures" for courts-martial. Article 36(a), UCMJ, 10 USC § 836(a); *Kossman*, 38 M.J. at 260. "In 1984, the President, through R.C.M. 707 promulgated extensive *procedural* rules relating to the right to a speedy trial." *Kossman*, 38 M.J. at 260. (emphasis added). This Court found R.C.M. 707 to "plainly [be] an exercise of that

delegation" and held that it had the force and effect of law. *Id.* In 1991, the President made "substantial" amendments to R.C.M. 707, changing it significantly from the previous version that largely mirrored the judicially-created presumption of Article 10 violations in *United States v. Burton*. *Id.*

Since R.C.M. 707 has the full force and effect of law, this Court must give effect to the Rule's plain meaning. *Hunter*, 65 M.J. at 401; *Kearns*, 73 M.J. at 181. Therefore, the only way Appellant's position can prevail is to suggest either that *Johnson* can still apply to R.C.M. 707 or that this Court should not read R.C.M. 707 literally because it will create an "absurd result." (Appellant's Br. at 9.) Neither argument is tenable.

C. The plain meaning of R.C.M. 707 applies because *Johnson* cannot and does not coexist with R.C.M. 707 and applying its plain meaning does not lead to an absurd result.

1. R.C.M. 707 and *Johnson* do not coexist because the President used different language in R.C.M. 707 and *Johnson* applied to Article 10, which is distinct from R.C.M. 707.

R.C.M. 707 does not and cannot coexist with the judicially-created rule of *Johnson*. This is because the plain meaning of R.C.M. 707 cannot be read to include the "substantial information" test of *Johnson*.

R.C.M. 707 specifically addresses when to start the 120-day speedy trial clock in those situations when charges are preferred at different times. R.C.M. 707(b)(2). "When 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(b)(2).

Subsection (a) reads, "the accused shall be brought to trial within 120 days after the earlier of preferral of charges, imposition of restraint...or entry onto active duty..." R.C.M. 707(a). R.C.M. 707(a) makes no reference to when the Government has "substantial information on which to base the preference of charges." *Johnson*, 23 C.M.A. at 93.

Johnson was decided in 1974, years before the promulgation of R.C.M. 707. *Id.* Had the President intended *Johnson* to have continued viability within the R.C.M. 707 framework, he would have utilized the same words utilized in *Johnson*, i.e. "substantial information." But the President did not do this. Rather, the President specifically addressed the issue of *Johnson*, the preferral of multiple charges at different times, but gave a different standard to determine "accountability" of the various charges per R.C.M. 707. R.C.M. 707(a) lays out three discrete possibilities for the start of the 120-day clock in such a situation; preferral of charges, imposition of restraint, and entry onto active duty. There is simply no way to read in the language of *Johnson* while still adhering to the plain text of R.C.M. 707.

Furthermore, *Johnson* was based on *Burton*, which dealt with Article 10. *Burton*, 21 C.M.A. at 118. But R.C.M. 707 is not the same thing as Article 10, which this Court has specifically recognized. *See United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005)(holding that "the language of Article 10 is 'clearly different' from R.C.M. 707" and "Article 10 is not restricted by R.C.M. 707."). Therefore, even if *Johnson* somehow still existed as an independent entity despite the overturning of *Burton*, it is inapplicable in the R.C.M. 707 context because *Johnson* solely applied to alleged violations of Article 10. Applying *Johnson* to R.C.M. 707 is like attempting to fit a square peg into a round hole.

This incongruity is evident from some of the practical issues encountered when attempting to apply the *Johnson* rule to R.C.M. 707. For example, *Johnson's* root case, *Burton*, created a rebuttable presumption of an Article 10 violation when an accused was not brought to trial within three months of being placed in pretrial confinement. *Burton*, 21 C.M.A. at 118. The Government, however, could still prevail if it made a sufficient showing of diligence in bringing the accused to trial. *Id.; see also United States v. Marshall,* 22 C.M.A. 431, 435 (C.M.A. 1973)(holding that the Government may still show diligence, despite pretrial confinement of more than 3 months).

A violation of R.C.M. 707, however, does not trigger a *Burton* type analysis. R.C.M. 707 does not allow the Government to rebut a presumptive violation of its 120-day clock by showing diligence in the way that *Burton* did. *Burton*, 21 C.M.A. at 118. R.C.M. 707 simply states that an accused "shall" be brought to trial within 120 days of certain triggering events and announces that the remedy for violations will be dismissal, either with or without prejudice. R.C.M. 707(a); R.C.M. 707(d).

This demonstrates why the *Johnson* rule cannot be applied contemporaneously with R.C.M. 707: to do so would deprive the Government of an opportunity to rebut a violation with a showing of diligence, which was specifically authorized by this Court in both *Burton* and *Johnson*. *Burton*, 21 C.M.A. at 118; *Johnson*, 23 C.M.A. at 93. The only way this opportunity for rebuttal could still exist would be an application of *Burton* to R.C.M. 707. However, this possibility has been foreclosed by this Court's overruling of *Burton* in *Kossman*. *Kossman*, 38 M.J. at 261.

An application of *Johnson* to R.C.M. 707 would thwart the President's express intention of when "accountability" is triggered for each charge in situations when multiple charges are preferred against an accused, while simultaneously depriving the Government of the opportunity for rebuttal it once possessed under *Burton*, *Marshall*, and *Johnson*.

This inconsistency illustrates what this Court has already recognized: Article 10 and R.C.M. 707 are distinct concepts. *Mizgala*, 61 M.J. at 125. Therefore, *Johnson*, which further extends the *Burton* rule and addresses presumptive Article 10 violations, does not and cannot coexist with R.C.M. 707, which is a presidentially created Rule altogether distinct from Article 10.

2. Applying R.C.M. 707 literally does not lead to an absurd result.

Perhaps recognizing that *Johnson* cannot coexist with R.C.M. 707, Appellant argues instead that this Court should depart from the plain text of R.C.M. 707 because it would produce "an absurd result." (Appellant's Br. at 7.) This is simply not the case here.

To support his contention, Appellant cites cases from inferior courts and argues that applying R.C.M. 707 as written will allow the Government to only charge an accused with what is necessary for confinement and then "pile on" additional charges later. (Appellant's Br. at 7-8.) His first argument is flawed because, contrary to his claim and despite one outlier, there is no real split in the Courts of Criminal Appeals on this issue. Secondly, Appellant's claim of potential abuses of R.C.M. 707 by the Government can be addressed and vindicated through Article 10. *See Id.* ("Article 10 is not restricted by R.C.M. 707.");

see also Kossman, 38 M.J. at 261 ("In the area of subconstitutional speedy trial, Article 10 reigns preeminent over anything propounded by the President.").

a. Most of the Courts of Criminal Appeals recognize, either expressly or implicitly, the non-viability of *Johnson* post-*Kossman*. Furthermore, *Johnson* has not been cited by this Court in decades.

Appellant first cites to the Air Force Court of Criminal Appeals (AFCCA) decision in *United States v. Bray*, 52 M.J. 659 (A.F. Ct. Crim. App. 2000) to support his position. (Appellant's Br. at 11.) But even setting aside the fact that AFCCA's decision is not binding on this Court, *Bray* does not even reflect the current precedent of AFCCA, as that court released *United States v. Proctor* three years later. 58 M.J. 792, 797 (A.F. Ct. Crim. App. 2003) *pet. for review denied*, 60 M.J. 122 (C.A.A.F. 2004).

As the lower court pointed out in Appellant's case, AFCCA held in *Proctor* that the 120-day clock did not start for additional charges preferred after the imposition of pretrial restraint until preferral of those charges pursuant to R.C.M. 707(a). *Id.* AFCCA went on to conclude that this Court had tacitly overruled *Johnson* in its decision in *Kossman*. *Id.*

Appellant relies on an out of date case, from an inferior court, which does not reflect the current position of AFCCA (Appellant's Br. at 11.) He does this to argue that this Court

should not give effect to the plain meaning of a Rule that has already been recognized by this Court to have the full force and effect of law. *Kossman*, 38 M.J. at 260.

Appellant also bases much of his argument on the fact that NMCCA is supposedly in conflict with the other Courts of Criminal Appeals on this issue. (Appellant's Br. at 13.) He goes so far as to suggest that the *Johnson* rule is "alive and well" by citing to a Coast Guard Court of Criminal Appeals Case (CGCCA). (Appellant's Br. at 12.); (J.A. at 164.); *United States v. Cooley*, No. 1389, (C.G. Ct. Crim. App. Dec. 24, 2014). However, *Cooley* is an outlier among the opinions of the Courts of Criminal Appeals.

Other than *Cooley*, the *Johnson* rule has not been followed or cited to favorably by any military Court, including this Court, since 1988. *See United States v. Honican*, 27 M.J. 590, 592 (A.C.M.R. 1988). Despite having handed down multiple opinions with regard to an accused's various constitutional, statutory, and regulatory speedy trial rights within the military system, this Court has not followed the *Johnson* rule since 1979 and it has not even mentioned *Johnson* since 1984. *See United States v. Talavera*, 8 M.J. 14, 17 (C.M.A. 1979); *United States v. Murphy,* 18 M.J. 220, 221 n. 1 (C.M.A. 1984).

Since *Kossman*, two Service Courts have specifically declined to apply *Johnson*. *Proctor*, 58 M.J. at 797; *United*

States v. Wilder, No. 201400118, 2014 CCA LEXIS 571 (N-M. Ct. Crim. App. Aug. 12, 2014). Furthermore, the Army Court of Criminal Appeals (ACCA) case that Appellant cites, (Appellant's Br. at 13), *United States v. Boden*, has not been cited positively again by that court since 1988. *United States v. Boden*, 21 M.J. 916, 918 (A.C.M.R. 1986); *see Honican*, 27 M.J. at 592.

In *Robinson*, this Court found no error where a Court of Criminal Appeals applied R.C.M. 707 in favor of its own conflicting precedents. *Robinson*, 28 M.J. at 482. Furthermore, this Court has expressly overturned *Burton*; the root from which the branch of *Johnson* sprang. The Courts of Criminal Appeals, with the exception of the CGCCA, have already recognized that *Johnson* is dead letter, either by expressly overruling it, like the NMCCA and AFCCA, or by simply ignoring it like the ACCA. In either case, Appellant's unsupported claim of a split in the Courts of Criminal Appeals is still not a basis to ignore the plain text of R.C.M. 707 and this Court's precedent in *Robinson* and *Kossman*.

b. Article 10 prevents the Government from confining an appellant, "piling on" additional charges, and then engaging in intentionally dilatory efforts and the Government did not do that in this case.

As to Appellant's claim that applying R.C.M. 707 literally will allow the Government to "pile on" additional charges after

making a minimal showing for pretrial confinement, this argument fails because it ignores Article 10, UCMJ. As stated *supra*, this Court has already recognized that R.C.M. 707 and Article 10 are distinct. *Mizgala*, 61 M.J. at 125. Article 10 provides its own separate protections to an accused in pretrial confinement. *See Kossman*, 38 M.J. at 261 ("Merely satisfying lesser presidential standards does not insulate the Government from the sanction of Article 10.").

Article 10 and its separate body of caselaw still protects an accused from the kind of dubious practices Appellant suggests the Government might engage in should this Court apply R.C.M. 707 in accordance with its plain text. It is important to remember that Appellant's trial motion alleged separate violations of R.C.M. 707, Article 10, and the Sixth Amendment. (J.A. at 75.) Likewise, the lower court separately analyzed Appellant's Article 10 claim and found no violation. (J.A. at 6.) Appellant's proposed scenario would not come to pass due to Article 10 and did not come to pass in this case due to the facts and circumstances here. Far from an absurd result, in this case applying R.C.M. 707(a) as written led to a correct result.

Here, Appellant was placed in pretrial confinement for attempting to have sex with two children and for possession, receipt, and distribution of child pornography between August 7

and August 30, 2012 and October 28, 2012 (based on the NCIS exploitation of the Appellant's e-mail). (J.A. at 125-128.)

This is demonstrated by the Commanding Officer of 2d Tank Battalion's decision to keep Appellant in pretrial confinement, which was completed just two days after Appellant's confinement. (J.A. at 123.) In that notice, Appellant is alleged to have violated Articles 80 and 120b of the UCMJ, along with 18 U.S.C. § 2252A. (J.A. at 123.) Contrary to Appellant's claim, these offenses did not apply to Appellant's additional charges. (Appellant's Br. at 10.)

Appellant subsequently faced charges for indecent exposure, distribution of materials harmful to minors, and possession of child pornography on November 13, 2012, pursuant to Articles 120 and 134, UCMJ. (J.A. at 129-131.) There is no reference in the Initial Review Officer's (IRO) Report to Appellant's indecent exposure to RR, either by an explanation of the underlying facts or by a reference to the offenses to which he was eventually charged. (J.A. at 119-124.)

Furthermore, Additional Charge II for possession of child pornography was based on a date of possession, November 13, 2012, that NCIS had not yet established at the initial time of confinement. (J.A. at 95, 114, 117.) As was the case with the charges surrounding RR, the necessary evidence to support these

charges was discovered after Appellant had already been placed in pretrial confinement. (J.A. at 117, 135-136.)

Appellant was not charged with anything relating to RR until after the interview with RR in March of 2013. (J.A. at 117, 129-131.) This interview was a necessary prerequisite to preferral of charges in order to corroborate Appellant's initial confession pursuant to Military Rule of Evidence 304. Mil. R. Evid. 304(g).

The initial child pornography charges relate to the child pornography that was received, possessed, and distributed through Appellant's email accounts, which was the only child pornography that NCIS was able to verify at the time of the first preferral date. (J.A. at 114, 117.) While Appellant did admit to possessing child pornography on his computers, NCIS was not able to corroborate that specific possession at the time of the December 4, 2013 preferral. (J.A. 112-118.) It was only once the DCFL Forensic Data Extraction was reviewed in March of 2013 that possession of NCMEC-verified images of child pornography on those media storage devices was established and corroborated. (J.A. at 66.)

This analysis also revealed that while Appellant had only admitted to possessing approximately 120 images, Appellant in fact possessed closer to 11,000. (J.A. at 117.) Far from an absurd result, R.C.M. 707 leads to a logical and correct result

in this case. Appellant was put into pretrial confinement based on the crimes for which NCIS had reliable evidence.

Furthermore, the attempted rapes of the two children were by far the most serious of the crimes that Appellant had committed. To find, as the lower court did, that Appellant was restrained based on these charges and not the subsequent charges is not absurd, but makes logical sense. In any case, Appellant has not established a plain text reading of R.C.M. 707 would result in absurdity and therefore that part of Appellant's argument should be rejected.

D. The rule of lenity is inapplicable here.

Appellant also argues that this Court should apply the rule of lenity to R.C.M. 707. (Appellant's Br. at 14.) But this rule is inapplicable in this case for several reasons.

> The rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose...This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. We emphasized that the touchstone of the rule of lenity is statutory ambiguity. And we stated: Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent. Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.

Albernaz v. United States, 450 U.S. 333, 342 (1981)(internal citations and quotations omitted).

Lenity is inapplicable here because R.C.M. 707 is not a "criminal statute" but rather a procedural rule. It does not describe either what activity is prohibited by a criminal statute, nor the amount or type of punishment for such activity.

Furthermore, even if R.C.M. 707 were to be interpreted similarly to a statute in this context, the rule of lenity is inapplicable because the Rule is not ambiguous. R.C.M. 707(a) has a plain meaning that is not difficult to discern. Finally, even if some ambiguity existed in R.C.M. 707, Appellant has not demonstrated that "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello v. United States*, 524 U.S. 125, 138 (1998)(quotations omitted). Here there is no need to guess what the President intended. The simple existence of some ambiguity "is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Id.* The rule of lenity does not permit a defendant to "automatically win in these cases" unless there is "grievous ambiguity or uncertainty in the statute." *Id.* at 138-39.

This Court should not apply the rule of lenity to the "beginning of the process" of interpreting R.C.M. 707 as an

"overriding consideration." *Albernaz*, 450 U.S. at 342. Rather, this Court should look to the plain meaning of R.C.M. 707.

E. Even if this Court were to find a violation of R.C.M. 707, dismissal of all charges and specifications with prejudice is an inappropriate remedy.

Appellant argues that all the charges should be dismissed with prejudice in this case. (Appellant's Br. at 16.) To support this claim, he cites R.C.M. 707(d), which states "a failure to comply with this rule will result in dismissal of the *affected charges*..." R.C.M. 707(d)(emphasis added).

In this case, even assuming *arguendo* that the R.C.M. 707 clock began running on all charges the moment Appellant was confined, the "affected charges" are Additional Charges II and III. The original charges for which Appellant was initially restrained and later pled guilty unconditionally, are in no way affected by an alleged failure to comply with R.C.M. 707. To dismiss these charges along with the charges actually implicated by R.C.M. 707, would constitute a windfall to Appellant.

This is particularly true in this case where Appellant used the withdrawal of his speedy trial motion as a bargaining chip, argued that his *express* abandonment of appellate issues justified a lighter sentence, and now seeks to use these same appellate issues to escape responsibility for his serious criminal misconduct. (J.A. at 59.) This Court should not grant such an unprecedented and extreme remedy even assuming it

supports a departure from the plain text of R.C.M. 707 and its prior precedent.

Nor should this Court dismiss Additional Charges II and III with prejudice should it find a violation here. R.C.M. 707(d) lays out factors to be considered when a military judge decides whether to dismiss an affected charge with or without prejudice:

> 1. the seriousness of the offenses, 2. the facts and circumstances of the case that lead to the dismissal, 3. the impact of a re-prosecution on the administration of justice, 4. And any prejudice to the accused resulting from the denial of a speedy trial.

R.C.M. 707(d)(1). Every one of these factors favors dismissal without prejudice.

First, these were very serious offenses even after disregarding Appellant's admitted attempts to have sex with children aged four and seven as well as the initial child pornography charges. Appellant still possessed thousands of other images of child pornography and sent pictures of his penis to a fourteen year old girl. (J.A. 53, 78, 117.) This Court has recognized that possession of child pornography alone is sufficiently serious pursuant to R.C.M. 707(d)(1). *See United States v. Dooley*, 61 M.J. 258, 263 (C.A.A.F. 2005)("The finding that the receipt and possession of child pornography is a serious offense, in its impact on both victims and society, is not clearly erroneous."). The nature of the other charges in this case only intensifies the seriousness of these crimes.

Second, the facts and circumstances leading to the supposed violation of R.C.M. 707 were not due to "intentional dilatory conduct" on behalf of the Government, but rather the complexity of the case and the Appellant's failure to express any concern about his speedy trial rights until ten months after his initial confinement. *See United States v. Edmond*, 41 M.J. 419, 421-22 (C.A.A.F. 1995)(holding that the military judge did not abuse his discretion in dismissing charges without prejudice under R.C.M. 707 because there was no "intentional dilatory conduct" by the Government and there was little prejudice suffered by the appellee); (J.A. at 75, 112-118, 133-144.) This case involved thousands of images of child pornography, a child victim, and complex forensic computer analysis. (J.A. at 66, 117.) Furthermore, Appellant did not even assert a desire for a speedy trial until September 13, 2013. (J.A. at 74, 75.) Furthermore, Appellant twice asked for continuances of his original Article 32 investigation, filed his motion to dismiss a week after the filing deadline, and subsequently asked for separate eight and four day continuances of his then pending separate court-martial. (J.A. at 29, 66, 74, 101, 145-146, 148, 152.) Finally, Appellant eventually withdrew his motion and then pled guilty. These facts and circumstances cut against a dismissal with prejudice.

Third, a re-prosecution would not have a negative impact on the administration of justice. Rather, allowing an Appellant who has confessed to such serious crimes to avoid responsibility for those crimes based *arguendo* on a violation of a procedural rule would be far more deleterious to the administration of justice than a retrial in this case.

The final factor to consider is prejudice. "Prejudice may take many forms, thus 'such determinations must be made on a case-by-case basis in the light of the facts.'" *Dooley*, 61 M.J. at 264 (quoting *United States v. Taylor*, 487 U.S. 326, 341 n. 13 (1988)). Prejudice can include any detrimental effect on Appellant's trial preparation, or any impact on the right to a fair trial. *Id.* Restrictions on liberty can also constitute prejudice. *Id.*

Here, other than an unsupported assertion in his brief, Appellant has suffered no prejudice due to the delay in this case. (Appellant's Br. at 17.) There is nothing in the Record to demonstrate that the delay negatively impacted Appellant's ability to prepare for trial. In fact, Appellant utilized the delay to his benefit, by using it as a bargaining chip to obtain a beneficial pretrial agreement and utilizing it during sentencing arguments. (J.A. at 59, 160.) Likewise, Appellant's confinement alone cannot constitute sufficient prejudice to warrant a dismissal with prejudice. It is likely that even if

the subsequent charges had not been brought, Appellant would have remained in confinement until he pled guilty to his original charges. This is based on the fact that he was initially confined for his most serious offenses, attempted rapes of children.

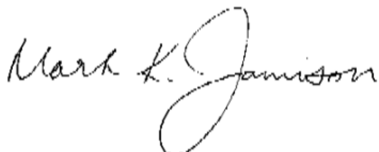
When considering R.C.M. 707(d) and the factors in R.C.M. 707(d)(1), even if this Court were to find a violation, it should only dismiss Additional Charges II and III and it should only do so without prejudice.

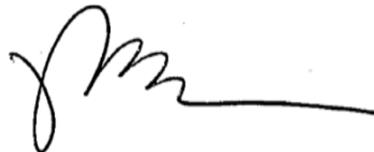
Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

JAMES M. BELFORTI
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443





MARK JAMISON
Colonel, U.S. Marine Corps

BRIAN K. KELLER
Deputy Director

Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 34114

Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 6,641 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 Version 2010 with 12 point, Courier New font.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on June 5, 2015.

JAMES M. BELFORTI
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
james.belforti@navy.mil
Bar no. 36443