

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,	:	CRIMINAL NO. 15-CR-00047-CKK
	:	
v.	:	
	:	
DEREK DINGER,	:	
	:	
Defendant.	:	
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**GOVERNMENT’S UNOPPOSED MOTION
FOR LEAVE TO DISMISS SUPERSEDING INDICTMENT WITHOUT PREJUDICE**

The United States of America, by and through its attorneys, hereby moves for leave to dismiss the Superseding Indictment against the defendant, Derek Lance Dinger, without prejudice pursuant to Federal Rule of Criminal Procedure 48(a).

BACKGROUND

The Naval Criminal Investigative Service (“NCIS”) in Okinawa, Japan, monitors peer-to-peer internet traffic in order to detect whether users are downloading or sharing illegal material. On August 6, 2014, NCIS identified a particular Internet Protocol (“IP”) address that was using a peer-to-peer network to search for and download child pornography. NCIS discovered the defendant, Derek Lance Dinger, was the subscriber associated with that IP address. NCIS also learned the defendant was a U.S. citizen who lived in Okinawa and worked as a military contractor for III Marine Expeditionary Force aboard Camp Courtney.

Between August 20 and August 26, 2014, NCIS agents conducted surveillance of the defendant’s private, off-base residence. NCIS observed the defendant enter his vehicle outside this residence on August 26. On September 3, 2014, NCIS obtained from the Marine commander at Camp Courtney a Command Authorization for Search and Seizure (“CASS”) to search the

defendant's residence and vehicle.

On September 4, 2014, agents arrived at the defendant's residence in order to execute the CASS. The defendant provided written consent, however, authorizing a search of his residence and his vehicle. The agents seized numerous items of evidentiary value including a desktop tower, laptops, cell phones, various hard drives, tablets, a router, and a modem.

The NCIS agents at the scene requested a voluntary interview with the defendant, and he consented. After questioning, he admitted to downloading child pornography. He described an interest in 14 to 16-year-old females and admitted to having between one and twenty gigabytes of child pornography images and video on his home desktop. The defendant was debarred from Camp Courtney on September 5, 2014, as a result of the investigation. He, his wife, and their daughter relocated to the Philippines on or around September 27, 2014.

On March 31, 2015, a federal grand jury sitting in the District of Columbia returned an indictment charging the defendant with Receipt and Attempted Receipt of Child Pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1), Possession of Child Pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(A) and (b)(1), and 18 U.S.C. § 3261(a)(1), Criminal Offense Committed by Person Employed by the Armed Forces Outside of the United States.

Subsequent forensic analysis of the evidence obtained from the defendant's seized electronic media revealed at least two instances of alleged production of child pornography. On April 21, 2015, the grand jury superseded its original indictment, charging the defendant with Production and Attempted Production of Child Pornography, in violation of 18 U.S.C. §§ 2251(a) and (e), in addition to the charges contained in the original indictment.

As a consequence of the indictment and the issuance of an arrest warrant against the

defendant, his passport was revoked and he was deported to the United States. On May 11, 2015, the defendant was arrested in the Central District of California (“CDCA”). After his arrest, the defendant waived his Miranda rights and consented to another interview with law enforcement, during which he again admitted to receiving and possessing child pornography. Defendant also admitted to producing and attempting to produce child pornography of his stepdaughter.

On that same day, a Magistrate Judge in CDCA conducted the defendant’s initial hearing pursuant to Rule 5 of the Federal Rules of Criminal Procedure. The CDCA Magistrate Judge granted the Government’s motion for detention after finding the defendant was a flight risk and a danger to the community. Pursuant to Rule 5(c)(3), because the defendant was arrested in a district other than the charging district, the CDCA Magistrate Judge issued a Warrant of Removal to the District of Columbia for the defendant to stand charges.

On May 19, 2015, this Court received the Warrant of Removal and accompanying documents from the CDCA. The defendant first appeared before Magistrate Judge G. Michael Harvey on June 4, 2015. At this hearing, the defendant was appointed counsel, entered a plea of not guilty, and was ordered held without bond.

This Court held a status hearing on the record on June 15, 2015. Defendant requested a continuance so defense counsel and the defendant could review discovery and so that the parties could discuss a disposition for this case. At the parties’ request, this Court scheduled the next status hearing for July 14, 2015.

LEGAL ARGUMENT

Rule 48(a) provides that “the government may, with leave of court, dismiss an indictment.” Fed. R. Crim. P. 48(a). While leave of court is required under Rule 48(a), “[a] court is generally required to grant a prosecutor’s Rule 48(a) motion to dismiss unless dismissal is clearly contrary to manifest public interest.” See United States v. Romero, 360 F.3d 1248, 1251 (10th Cir. 2004) (citations and internal quotation marks omitted). The United States has discovered that—based on the facts as currently understood—its assertion of jurisdiction over the defendant in this case is improper, and it therefore requests this dismissal without prejudice pursuant to Federal Rule of Criminal Procedure 48(a).

Defendant is a U.S. citizen and was a military contractor living in Okinawa, Japan. The United States thus initiated this prosecution of the crimes allegedly committed by him in reliance on the jurisdiction provided by the Military Extraterritorial Jurisdiction Act (“MEJA”). See 18 U.S.C. § 3261. To prove an offense under MEJA, the government must show: (1) that the conduct constituting the offense occurred outside the United States; (2) that the offense would have been punishable by more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States; and (3) that the offender was, at the time of the alleged offense, employed by or accompanying the Armed Forces outside the United States. See id. at § 3261(a). Based on these factors, MEJA jurisdiction over the defendant would be proper. MEJA also provides, however, that it may not be used “against a member of the Armed Forces subject to . . . the Uniform Code of Military Justice” or UCMJ. See id. at § 3261(d).

The UCMJ “applies in all places,” 10 U.S.C. § 805, and provides, in pertinent part, that the “following persons are subject to” it: “[r]etired members of a regular component of the armed forces who are entitled to pay.” See 10 U.S.C. § 802(a) & (a)(4). Retired members of a “reserve component” (as distinct from a “regular component”) are *not* subject to the UCMJ unless that retiree is “receiving hospitalization from an armed force.” See id. at § 802(a)(5).

The defendant is a retired member of the Marines. At the time this prosecution commenced, the Government had been informed by military personnel that the defendant had been a member of a reserve component when he retired in 2003. The Government therefore understood that the defendant was not subject to the UCMJ and that MEJA conferred proper jurisdiction. Subsequent factual investigation prompted by post-arrest statements defendant made about his military service revealed the defendant had in fact been an active duty member of the military at the time he retired. The defendant is thus a “[r]etired member[] of a regular component of the armed forces . . . entitled to pay” and is subject exclusively to the jurisdiction of the UCMJ. As a result, the Government’s assertion of MEJA jurisdiction over the defendant is improper. The military has begun the process of instituting proceedings against the defendant in a court-martial of competent jurisdiction.

The Government therefore respectfully requests leave from this Court to dismiss the Superseding Indictment against the defendant. The United States files this dismissal motion in advance of the pretrial conference and trial date. The United States does not seek a continuance of the trial date. Under these circumstances, the Court should grant the United States leave to dismiss the Superseding Indictment. The Government also respectfully requests that any dismissal be without prejudice in the event that discovery of additional facts changes the foregoing analysis.

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ORDER

Upon consideration of the Government’s Unopposed Motion for Leave to Dismiss the Superseding Indictment Without Prejudice, and the record herein, for the reasons set forth in the Government’s motion and for good cause shown, it is this

_____ day of _____, 2015,

ORDERED, that the government’s motion is granted and it is

FURTHER ORDERED, that the superseding indictment in this case be, and hereby is, dismissed without prejudice.

COLLEEN KOLLAR-KOTELLY
United States District Court Judge
for the District of Columbia