**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES, Appellee | ) | REPLY TO ANSWER BRIEF ON BEHALF OF APPELLEE |
| v. | ) | |
| | ) | Crim.App. Dkt. No. 201300426 |
| Ruben VARGAS<br>Staff Sergeant (E-6)<br>U.S. Marine Corps Reserve,<br>Appellant | ) | USCA Dkt. No. 14-6009/MC |

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

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### Court of Appeals for the Armed Forces



### United States Courts of Appeals



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COMES NOW Appellant and provides the following reply to the Government's answer to Appellant's Supplement to Petition for Grant of Review:

**Reply Argument**

**I.**

**ARTICLE 62, UCMJ, DOES NOT PERMIT THE GOVERNMENT TO APPEAL THE MILITARY JUDGE'S DENIAL OF A CONTINUANCE REQUEST IN THIS CASE NOR THE MILITARY JUDGE'S ORDER RESTING THE GOVERNMENT'S CASE.**

A. The Denial of the Government's Continuance Request and Order Resting the Government's Case were Non-Appealable Orders.

The Government acknowledges that *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008) did not overrule *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985). (Brief on Behalf of Appellee at 14.) In other words, *Browers* is still binding precedent upon this Court. However, the Government has tried to minimize the fact that *Browers* is directly on point with this case by stating that *Browers* "contains dicta arguably adverse to the United States position here." (Brief on Behalf of Appellee at 11.) More importantly though, the *issue* and *holding* of *Browers* are certainly adverse to the Government's position in this case.

"The issue is whether denial of a continuance requested so that the Government may produce a material witness constitutes the *exclusion* of evidence." *Browers*, 20 M.J. at 360 (emphasis

in original). "Whether the order was appealable requires construction of Article 62. Under our construction of this article, we must conclude . . . that the Government was not entitled to appeal from [the trial judge's] denial of a continuance." *Id.* at 359.

The Government makes two dubious assertions in support of its argument that it should be permitted to appeal the military judge's orders in this case. First, the Government asserts that "had the military judge granted the recess, the witnesses would have testified . . . ." (Brief on Behalf of Appellee at 16.) This is not accurate. Even if the Government's continuance request had been granted, Special Agent (SA) Fogel still would not have testified.

Contrary to the Government's assertion that SA Fogel and Sergeant Baschnagel "both were involved in interviewing Appellant on the night of September 1, 2012[]" (Brief of Behalf of Appellee at 3), SA Fogel was not even in the room during Appellant's interrogation and had no admissible testimony to present. (Government's Written Notice of Appeal IAW R.C.M. 908 of October 23, 2013 at 2 ("Agent Baschnagel is one of two agents who interviewed the accused immediately after the incident. The other, Special Agent Carlos Castro, NCIS, is presently deployed.").) In other words, the military judge's rulings did not exclude any evidence or testimony from SA Fogel.

The Government also incredibly asserts that "[t]here is no suggestion that the case 'languished' . . . ." (Brief on Behalf of Appellee at 16.) In making this argument, the Government attempts to focus on the delay between its latest continuance request during trial and the following day when it anticipated its witnesses would be present. This argument must fail.

The orders by the military judge were to prevent any further delay, even if only for one day, in a case that had severely languished from its inception. The record is replete with evidence that this case was over eight months old (three longer than *Browers*) and that six continuances had already been granted (four more than *Browers*), five of which were attributable to the Government's actions in the case.

The Government further asserts that it is not arguing for a liberal construction of Article 62, UCMJ, but that it is arguing that "neither should it be construed strictly . . . ." (Brief on Behalf of Appellee at 12.) This Court did explain that "*Browers* does not support the proposition that the term 'excludes' under Article 62 should be construed more narrowly than the term 'excluding' under [18 U.S.C.] section 3731." *Wuterich*, 67 M.J. at 74.

However, concluding in this case that the military judge's denial of a continuance sought by the Government so that it may produce its witnesses is not an appealable ruling does not

require a more strict or narrow reading of the term "excludes" than under section 3731. This is evidenced by the fact that "the government ha[s] not identified any cases arising under 18 U.S.C. § 3731 in which denial of a continuance had been treated as an appealable order." *Id.* (citing *Browers*, 20 M.J. at 360).

Further, upon hearing the Government's motion for reconsideration of her ruling denying the Government's continuance request, the military judge stated, "Your motion for reconsideration is denied. This decision is not based on the court's schedule. *It's based on the rights of the accused and his schedule*." (Record at 190 (emphasis added).)

These were the factors cited by the United States Court of Appeals for the First Circuit in *United States v. Watson*, 386 F.3d 304 (1st Cir. 2004) to determine that the judge's denial of a continuance in that case was not an order excluding evidence.

> [T]he record does not support an inference that the district court was engaged in the making of an evidentiary ruling. . . . Quite the contrary: the record reflects the wise and judicious exercise of the court's responsibility to manage its docket *and preserve the defendant's entitlement to their timely day in court*.

*Watson*, 386 F.3d at 311 (emphasis added).

Similarly, when faced with a trial counsel who had no more evidence to present yet who adamantly refused to rest the Government's case, the military judge's order that the Government's case was rested was an appropriate carrying out of

her responsibility to exercise reasonable control over the proceedings.

In sum, neither the military judge's ruling denying the Government's continuance request nor her order that the Government's case was rested were appealable rulings under Article 62, UCMJ.

B. The Government is Capable of, and In Fact Did, Waive its Right to Appeal the Military Judge's Denial of the Government's Continuance Request.

The Government argues that "[r]esearch reveals no cases—— and Appellee (sic) cites none——supporting the proposition that the United States must 'preserve' issues for appeal, or that it may waive interlocutory appeal where the jurisdictional thresholds are otherwise met." (Brief on Behalf of Appellee at 17.) Apparently, the Government's position is that the United States is either incapable of, or not permitted to, waive an issue for appeal, even in the face of an express statement of its intent to do so.

Such a position contradicts the plain language of Article 62, UCMJ. "An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling." 10 U.S.C. § 862(a)(2) (2012). In other words, if the Government does not appeal an order or ruling within seventy-two hours, it has waived its right to

appeal that issue. It is also not clear why the Government does not recognize the case law of *United States v. Sweeney*, 70 M.J. 296, 303 (C.A.A.F. 2011) defining waiver as an intentional abandonment of a known right, which is precisely what occurred in this case.

The military judge relied upon the Government's express and intentional abandonment of its right to pursue an appeal of the continuance denial. After receiving the waiver, the military judge lifted the stay she had granted for the Government to pursue an appeal of that issue. Instead, the Government was allowed to come back on the record to unsuccessfully re-litigate the issue of the military judge's order resting the Government's case. The Government then noticed its appeal on the latter issue.

Downplaying the "legal import" of its waiver on the denial of the continuance, the Government asserts that "the Trial Counsel provided written notice of appeal of the Military Judge's orders denying the United States continuance and resting the Government's case within seventy-two hours of the initial order denying the continuance." (Brief on Behalf of Appellee at 17.)

Even assuming *arguendo* that the Government's waiver of its right to appeal the denial of its continuance request was revocable during the seventy-two hour period from the time of

the ruling, such an argument is moot because the Government did not actually appeal that ruling. Rule 908 of the Rules for Courts-Martial, Manual for Courts-Martial (R.C.M.), United States (2012 ed.) requires that the notice of appeal "shall identify the ruling or order to be appealed and the charges and specifications affected." R.C.M. 908(b)(3). The Government's Notice of Appeal reads as follows.

> On 22 October 2013 at approximately 1400, this Court handed down an order that directed the Government to rest its case-in-chief . . . . Specifically, the Court ordered: reasonable cause did not exist to continue the case to allow for the Government's essential witnesses to testify on the morning of 23 October. . . . On the morning of 23 October, the Government asked the Court to reconsider its order to rest the Government case and intended to present evidence on the motion. The Court granted the Government's motion to reconsider its ruling, however, after reconsideration, the court reaffirmed its previous ruling resting the Government case.

(Government's Notice of Appeal at 1.)

While the Government's Notice of Appeal contains much unnecessary verbiage, the fact that it identified the military judge's order resting the case as the order it was appealing is not surprising given that the Government had waived its right to appeal the ruling denying the continuance.

WHEREFORE, Appellant respectfully requests that this Court grant review of this issue, reverse the decision of the Navy-Marine Corps Court of Criminal Appeals, and reinstate the ruling of the military judge.

## II.

**THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS APPLIED THE WRONG STANDARD OF REVIEW BY IMPROPERLY SUBSTITUTING ITS OWN INTERPRETATION OF THE FACTS.**

The Government argues that "the Military Judge's comment that Trial Counsel 'was not prepared for trial as they should be' was not a finding of fact . . . ." (Brief on Behalf of Appellee at 19.) However, if it is unclear whether that is a finding of fact, it is certainly at least the military judge's interpretation of the facts. And the lower court's substitution of its own interpretation of the facts is an application of the wrong standard of review.

The Government argues that "nothing in Article 62 or this Court's case law prevents the lower court from articulating its rationale for exercising jurisdiction under that statute." (Brief on Behalf of Appellee at 20.) This argument overlooks the salient issue presented, however, which is that what Article 62, UCMJ, and this Court's case law prevent is the lower court from substituting its own judgment or interpretation of the facts for that of the military judge.

In reviewing appeals under Article 62, UCMJ, the lower court is not permitted to "find its own facts or substitute its own interpretation of the facts." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

WHEREFORE, Appellant respectfully requests that this Court grant review of this issue, reverse the decision of the Navy-Marine Corps Court of Criminal Appeals, and reinstate the ruling of the military judge.

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**Certificate of Filing and Service**

I certify that the Reply to Answer Brief on Behalf of Appellee in the case of *United States v. Vargas* was electronically filed with the Court and transmitted by electronic means to the Appellate Government Division and to Code 40 on June 16, 2014.

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