IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
	)	Crim.App. Dkt. No. 201300426
Ruben VARGAS Staff Sergeant (E-6) U.S. Marine Corps Reserve, Appellant	)	USCA Dkt. No._____

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

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed Appellant's case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012). Appellant seeks this Court's review pursuant to Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On February 25, 2013, the Government arraigned Appellant. (Record of Trial (R.) at 7.) On October 22, 2013, the Government withdrew and dismissed Charge II and proceeded to trial on the sole remaining charge alleging a violation of Article 128, UCMJ. 10 U.S.C. § 928 (2012). (R. at 51; Appellate Exhibit (AE) XXXIV; Charge Sheet.) On October 22, 2013, the military judge ruled that the Government had rested

its case. (R. at 192.) On October 23, 2013, the Government made a motion for the military judge to reconsider her ruling that the Government had rested. (R. at 207; AE XLIII.) The military judge granted the motion to reconsider and affirmed her ruling that the Government had rested its case. (R. at 222.) The Government appealed the military judge's ruling pursuant to Article 62, UCMJ.

On February 28, 2014, NMCCA issued its unpublished decision in which it granted the Government's appeal. (Appendix A.) Service of the NMCCA decision upon Appellant was effected on April 2, 2014. Appellant petitioned this Court for a grant of review on June 1, 2014.

Statement of Facts

Trial was initially set to begin on April 23, 2013. (AE I, at 1.) On April 5, 2013, due to the recent hiring of civilian defense counsel, the start date for trial was reset to June 4, 2013. (R. at 11.) At 1530 on May 29, 2013, the Government provided discovery to the defense. (R. at 14.) Because trial was scheduled to begin in approximately five days, the defense requested additional time to review the discovery. (R. at 14.) Trial was reset to begin on July 9, 2013. (R. at 14; AE XV, at 2.)

On July 3, 2013, the court-martial held a session pursuant to Article 39(a), UCMJ, to resolve discovery issues and hear the

defense motion to continue the trial dates. (R. at 14.) After determining that it was likely that the Government had not provided complete discovery to the defense, the military judge continued the trial to the week of July 22, 2013. (R. at 18-19.)

On July 11, 2013, the Government provided additional discovery to the defense. (R. at 34.) On July 12, 2013, the court-martial held another Article 39(a), UCMJ, session to hear defense motions to compel discovery and to continue the trial date due to the discovery that had been newly provided by the Government. (R. at 31; AE X; AE XI.) The motion to compel discovery was granted. (R. at 40.) The military judge then initially reset trial to start on July 30, 2013. (R. at 46.) Due to a scheduling conflict with detailed defense counsel, the military judge then reset trial to begin on August 13, 2013 and stated, "I'm going to grant the continuance until August 13th, and parties better be ready for trial on August 13." (R. at 48.)

On August 6, 2013, the military judge granted the Government's motion to continue the trial until August 27, 2013. (AE XXX, at 2.) On August 21, 2013, to accommodate the availability of two of its witnesses, the Government again moved to continue the trial date to begin on October 22, 2013. (AE

XXXI, at 1.) On August 22, 2013, that motion was granted and trial was set to commence on October 22, 2013. (AE XXXI, at 2.)

On October 16, 2013, the Government moved to continue the trial date to November 18, 2013 to again accommodate the availability of its same two witnesses. (AE XXXII, at 1.) This motion was denied and trial remained set to commence on October 22, 2013. (AE XXXII, at 2.)

On October 22, 2013, the court-martial was assembled. (R. at 56.) The military judge asked, "Trial counsel, is the Government ready to proceed?" (R. at 56.) The trial counsel replied, "Yes, ma'am. At this time the prosecution is ready to proceed with the trial in the case of *United States v. Staff Sergeant Ruben Vargas*." (R. at 56.)

After spending the morning conducting *voir dire* and selecting members, the court-martial recessed at 1132 on October 22, 2013 with the intent to come to order at 1230 and begin the presentation of evidence. (R. at 132.) At 1243, the court-martial was called to order after having conducted a conference pursuant to Rule 802 of the Rules for Courts-Martial (R.C.M.), Manual for Courts-Martial, United States (2012 ed.) regarding the Government's intent to present evidence during its opening statement which had not been pre-admitted. (R. at 132.)

After coming back on the record, the defense objected to pre-admitting the Government's proposed evidence. (R. at 134.)

After being told by the military judge that he could attempt to pre-admit the evidence, the trial counsel responded, "Well, ma'am, we will not have our witness to lay the appropriate foundation for the 911 video until tomorrow morning." (R. at 135.) The following colloquy ensued.

> MJ: That's not my problem. Trial is scheduled for today. I indicated to you yesterday that I expected voir dire to finish by lunch and you would get to your case-in-chief after lunch, which is exactly how we've proceeded.
>
> TC: Yes, ma'am. I understand.
>
> MJ: So you are expected to be prepared for trial.
>
> TC: And we are, ma'am. However, there are witness issues and concerns that resulted as a result of that. Our 911 operator had – was working tonight, and she would not be able to make it until tomorrow. That is a condition that also existed last week that we're aware of. So either way, she was not going to make it until Wednesday. The same could be said for some of our witnesses who would be able to lay the appropriate foundation for the photos.
>
> Special Agent Shawn Fogel is en route from Afghanistan presently right now and will not be here until tomorrow morning. And he is required to admit some of those photos as well.
>
> MJ: Okay. Well, Trial Counsel, I will remind you that you submitted exhibits to the court regarding your pretrial submissions. Specifically, Appellate Exhibit XVI and Appellate Exhibit XXXV where Special Agent Fogel is not listed as a witness. I will not delay the trial to get his appearance at this time.
>
> So you – this trial has been set for quite a while now. We are working on, one, two, three, four, five, six – at least six approved

> continuances in this case. Charges were preferred in March. And government is expected to – I'm sorry, it was arraigned in March.
>
> Government is expected to be prepared for trial upon arraignment, and we're now in October. So you're going to proceed with what you have. And if you can't prove your case, then I'm sorry. So I don't find just cause for a delay at this point for you to get any witnesses.

(R. at 135-36.)

The parties then proceeded with their opening statements and, thereafter, the Government called four witnesses during its case-in-chief. (R. at 140-83.) Upon the conclusion of the testimony of the fourth Government witness, at 1411, the court ordered a fifteen minute health and comfort recess. (R. at 184.) During the recess, the trial counsel informed the military judge that the Government's remaining three witnesses were not presently available to testify. (R. at 184.)

The court-martial was then called to order at 1423 at which time the trial counsel made a motion to continue the trial until the next morning based on the availability of its witnesses. (R. at 184.) The defense had indicated its objection to such a continuance just prior to the motion. (R. at 184.) During the discussion that followed, the military judge asked the trial counsel, "Government, have you served process to any of these witnesses?" (R. at 187.) The trial counsel responded that he had not. (R. at 187.)

The military judge then observed that "there's been plenty of opportunity for the government to prepare for trial. The accused was arraigned in March of this year. We are now in October. The court has granted at least six continuances in this case involving a very simple Specification . . . ." (R. at 187.) The military judge further stated as part of her reasoning that "the government has chosen not to compel the production of their own witnesses and to put those witnesses[']schedules ahead of the court[']s schedule . . . ." (R. at 188.) The motion was denied. (R. at 188.)

Immediately after the denial of the Government motion for a continuance, the following colloquy between the military judge and trial counsel occurred.

> MJ: Do you intend to rest or do you have any other evidence?
>
> TC: We do not intend to rest, ma'am.
>
> MJ: Okay. So you have more evidence?
>
> TC: Yes, ma'am, but it will be provided by these witnesses.
>
> MJ: Okay.
>
> Well, I'm going to bring in the members and call on the government to present evidence or to rest.

(R. at 188.) The military judge then provided the parties with a ten-minute recess to determine how they planned to proceed. (R. at 188-89.)

When the court-martial came to order, the Government moved the military judge to reconsider her ruling denying the Government's motion to continue the trial. (R. at 189.) The military judge denied the motion for reconsideration. (R. at 190, 191.) In denying the motion, the military judge listed several facts demonstrating that the Government was unprepared for trial.

> MJ: The government is ready for trial or they're not ready for trial. The government has demonstrated through the course of today that they were not, in fact, prepared for trial as they should be. With 11 Appellate Exhibits not provided to the court reporter before we came on the record at 0900.
>
> The charge that the government indicated to the court yesterday that was going to be withdrawn was not withdrawn, prior to coming on the record today. And, the fact that the government's opening video, which they clearly spent some time on, was not provided to the defense before today for their review among other things to show a lack of preparation in this case.
>
> The court, accordingly, doesn't give any deference to the fact that you're not prepared, and you took the witnesses['] schedules as more important than the schedule of this court, and the process of the administration of justice.

(R. at 191.) After the military judge denied the motion for reconsideration, the trial counsel stated,

> [g]iven that ruling by the military judge, at this time, the government intends to offer – to exercise its right to an interlocutory appeal under Article 62 of the Uniform Code of Military Justice. The government intends to provide 72-hour written notice to the military judge upon recess from this court.

(R. at 191.)

The military judge then stated that she was not obliged to continue the case while the Government pursued that course of action. (R. at 191.) The case then proceeded and the members were called into the courtroom. (R. at 191-92.) Once everyone was seated, the following exchange took place between the military judge and trial counsel.

> MJ: Government, do you have any additional evidence to present?
>
> TC: Ma'am, we do not have any additional evidence at this time – um, we do not have any additional evidence at this time.
>
> MJ: Okay. Are you resting then?
>
> TC: No, ma'am.
>
> MJ: You may present any additional evidence or you may rest.
>
> TC: Ma'am, again, the government intends to offer additional evidence. However, we do not have that on us at this time. We do not intend to rest our case at this time, ma'am.
>
> MJ: Okay. Your case is rested if you have no additional evidence to present at this time. I have already denied any continuance in this case.
>
> With that, Defense?

(R. at 192.) The defense rested its case without presenting any evidence. (R. at 192.)

The defense then requested an Article 39(a), UCMJ, session to make a motion for a finding of not guilty pursuant to R.C.M.

917. (R. at 192.) The military judge conducted the Article 39(a), UCMJ, session and, after hearing argument from the parties, denied the motion. (R. at 193-94.)

The military judge and parties then began working on finalizing instructions for the members. (R. at 194.) At 1507 the court-martial recessed for the military judge to "clean up" the instructions and for the parties to discuss one disputed instruction. (R. at 200-01.)

During the recess, the trial counsel convinced the military judge during a R.C.M. 802 conference that the trial should have been stayed while the Government pursued an interlocutory appeal pursuant to Article 62, UCMJ. (R. at 201.) After coming back on the record, the trial counsel articulated specifically for the record that "we intend to file an appeal – an interlocutory appeal under Article 62 of the UCMJ. Specifically, to appeal the order of the military judge – or the denial of the government continuance." (R. at 202.) The military judge then decided to stay the proceedings and the court-martial recessed at 1553 on October 22, 2013. (R. at 202, 206.)

At 1759 on October 22, 2013, trial counsel sent an email to the military judge with a copy to the defense which stated, "The government does not intend to file an Article 62 appeal regarding the military judge's denial of the government continuance request." (AE XLIII, at 8.) The Government instead

requested an Article 39(a), UCMJ, session for the following day to litigate a motion for the military judge to reconsider her ruling that the Government's case was rested.

The court-martial was called to order at 1122 on October 23, 2013 to litigate the motion for reconsideration of the order resting the case. (R. at 207.) Before presenting evidence on the motion, the Government stated, "[w]e discovered this morning when Special Agent Fogel showed up from Afghanistan that he was not the person in the room" interviewing Appellant during his statement. (R. at 207.) Instead, trial counsel proffered that the Government discovered that morning that the second person in the room during the interview with Appellant was an individual named Sergeant Bashchnagel. (R. at 207.) The parties then entered into a stipulation of fact as to what the Government witnesses would testify to on the motion. (R. at 216.)

In support of her ruling on the motion, the military judge made numerous essential findings of fact. (R. at 217-22.) As part of those findings, the military judge found that

> The military judge then called the members back into the courtroom and asked if the prosecution had any more evidence to present at this time. Trial counsel responded in the negative, but indicated it still had three witnesses to offer testimony the following morning.
>
> The military judge then asked if the prosecution intended to rest its case. Trial counsel responded in the negative and specifically stated the government does not rest its case.

> The military judge called on the prosecution to present any remaining evidence they had for their case. The prosecution had no evidence available to present. The military judge then rested the prosecution's case.

(R. at 220-21.)

The military judge further found that "[a]t approximately 1800 on 22 October 2013, trial counsel[] informed all parties it would no longer seek and (sic) appeal of the military judge's ruling denying its motion for a continuance." (R. at 222.)

Trial counsel provided the military judge written notice of the Government's intent to appeal her ruling that the Government had rested its case. (Government's Written Notice of Appeal IAW R.C.M. 908, Oct. 23, 2013; Interlocutory Appeal by the United States Docketing Notice, at 1.)

Additional facts regarding the errors assigned for review are included in the argument.

Argument

I.

THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRONEOUSLY INTERPRETED ARTICLE 62, UCMJ, TO ALLOW A GOVERNMENT APPEAL OF THE MILITARY JUDGE'S DENIAL OF A CONTINUANCE REQUEST AS WELL AS THE MILITARY JUDGE'S ORDER RESTING THE GOVERNMENT'S CASE.

A. Standard of Review.

Questions of statutory construction are questions of law to be decided *de novo*. *United States v. Lopez de Victoria*, 66 M.J.

67, 73 (C.A.A.F. 2008). *See also United States v. Reeves*, 62 M.J. 88, 91 (C.A.A.F. 2005) ("Interpretation of a statute and its legislative history are questions of law that [this Court] review[s] *de novo*.").

"[This Court] consider[s] the issue of waiver as a question of law under a *de novo* standard of review." *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005) (*per curiam*).

B. Neither the Military Judge's Denial of the Government's Continuance Request nor the Order that the Government's Case was Rested "Excluded Evidence" pursuant to Article 62, UCMJ, and therefore, the Government Should Not have been Permitted to Appeal Either Ruling.

"Prosecution appeals are disfavored and are permitted only upon specific statutory authorization." *United States v. Bradford*, 68 M.J. 371, 373 (C.A.A.F. 2010). "In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following . . .: An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Art. 62(a)(1)(B), UCMJ.

> Article 62, UCMJ, . . . contains no language on statutory construction, and its legislative history does not demonstrate a rationale for the omission of . . . language [to liberally construe the statute as is found in 18 U.S.C. § 3731]. Therefore, it would be inappropriate to apply the liberal construction mandate of section 3731 when interpreting Article 62, UCMJ.

United States v. Wuterich, 67 M.J. 63, 72 (C.A.A.F. 2008).

"[I]nterlocutory government appeals [are restricted] to those rulings that have a direct rather than incidental effect on the exclusion of evidence." *Id.* at 75. "The pertinent inquiry is not whether the court has issued a ruling on admissibility, but instead whether the ruling at issue 'in substance or in form' has limited 'the pool of potential evidence that would be admissible.'" *Id.* at 73 (quoting *United States v. Watson*, 386 F.3d 304, 313 (1st Cir. 2004)).

Even if the "practical effect" of a ruling is to exclude evidence, such language cannot be used

> to serve as a wedge to force appellate jurisdiction whenever the government can point to an order as being a but-for cause of its inability to gather or present evidence at trial. . . . [A]n interlocutory appeal will lie only when the order itself is the practical equivalent of a suppression or exclusion order; that is, when the order has the direct effect of denying the government the right to use evidence. If such an effect is only incidental, then there can be no appeal.

Watson, 386 F.3d at 311.

1. The Military Judge's Denial of a Continuance Request is Not an Order the Government May Appeal under Article 62, UCMJ.

In *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985), this Court addressed the issue of "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). The Court in

Browers held that it did not and "that the trial judge was correct in deciding that the Government was not entitled to appeal from his denial of a continuance." *Id.* at 359. Further, "if the order denying a continuance is a nonappealable order, then the military judge properly proceeded with the trial . . . ." *Id.*

It is difficult to imagine a case more directly on point with this case than *Browers*. In *Browers*, the trial counsel informed the military judge that two witnesses, the alleged victims in the case, were absent on the date of trial. As a result, the Government requested a continuance to obtain their presence. Defense counsel opposed the motion and noted that the Government had already been granted two previous continuances. In denying the Government's continuance request, the military judge noted that, among other things, the charges dated back five months. Trial counsel then requested a delay of 72 hours in which to consider an appeal pursuant to Article 62, UCMJ, contending that the military judge's ruling deprived the Government of its essential witnesses and therefore was an exclusion of evidence which would permit an interlocutory appeal by the Government. The military judge disagreed with the trial counsel and required the Government to proceed with trial on the merits. Because the Government presented no witnesses, the

military judge entered a finding of not guilty. *Browers*, 20 M.J. at 356-57.

The Government thereafter timely filed notice of appeal of the military judge's ruling denying the continuance. The Court of Military Review ruled such an order was appealable under Article 62, UCMJ, and that the military judge had erred in denying the continuance. *Id.* at 357. This Court reversed the lower court, holding that "the Government was not entitled to appeal from [the] denial of a continuance." *Id.* at 359.

In the present case, the trial counsel informed the military judge that three of its additional witnesses were not present on the date of trial. As a result, the Government requested a continuance to obtain their presence the following day. Defense counsel opposed the motion. The military judge denied the motion and noted that, among other things, the charges dated back over seven months and that there had been six previous continuances in the case. After the military judge denied the Government's motion for reconsideration of her ruling, the trial counsel stated that the Government intended to appeal the military judge's ruling pursuant to Article 62, UCMJ, and would give written notice of the appeal within 72 hours after the court recessed. The military judge did not stay the case and proceeded with trial. Although the Government had no

more witnesses, it refused to rest its case, so the military judge ordered that the Government's case was rested.

Thereafter, the trial counsel convinced the military judge to change her mind and stay the trial so that the Government could appeal her ruling denying the continuance request. After the trial was stayed however, the Government shifted its strategy and waived its right to appeal the denial of the continuance. This waiver had the effect of lifting the stay and allowed the Government to come back on the record to ask for reconsideration of the military judge's order resting the Government's case. After denial of its motion for reconsideration on that issue, the Government timely filed written notice of its intent to appeal the military judge's order that the Government's case was rested. It did not appeal the denial of the continuance. However, the Navy-Marine Corps Court of Criminal Appeals ruled that Article 62, UCMJ, permitted appeal of the denial of the motion for a continuance and that the military judge erred in denying it. This Court should reverse the lower court.

Assuming *arguendo* that the Government preserved its appeal of the denial of its motion for a continuance, the lower court's reliance on *Wuterich* to disregard the controlling precedent of *Browers* is misplaced. *Wuterich* did not overrule *Browers*. In *Wuterich*, this Court faced the question of whether a military

judge's decision to quash a subpoena for the production of evidence had the direct effect of excluding evidence such that it would permit a Government appeal pursuant to Article 62, UCMJ. In answering the question, this Court stated that "the inquiry concerns the impact of the ruling on the pool of potential evidence, not whether there has been a formal ruling on admissibility." *Wuterich*, 67 M.J. at 73.

This approach did not alter the conclusion of *Browers* (and *Watson*) that the denial of a continuance request was a case-management order not tantamount to a ruling directly excluding evidence. *See id.* at 74 (commenting on "the case-management nature of an order denying a continuance" by quoting *Browers*).

"*Browers*, like *Watson*, involved an appeal of a case-management ruling by the trial judge. . . . [T]he order was not appealable because it involved the question of trial scheduling, not the exclusion of evidence." *Wuterich*, 67 M.J. at 73. In further explaining the holding of *Browers*, this Court in *Wuterich* reiterated the Court's conclusion on the critical issue: "denial of a continuance, in a case that had languished, involved a scheduling matter that did not amount to an exclusion of evidence." *Wuterich*, 67 M.J. at 74.

Lastly, despite claiming to follow the example of the United States Courts of Appeals' interpretation of 18 U.S.C. § 3731, *United States v. Vargas*, NMCCA No. 201300426, 2014 CCA

LEXIS 121, at *18 (N-M. Ct. Crim. App. Feb. 28, 2014), the lower court did "not identif[y] any cases arising under 18 U.S.C. § 3731 in which denial of a continuance had been treated as an appealable order." *Wuterich*, 67 M.J. at 74 (citing *Browers*, 20 M.J. at 360).

2. Even if the Government had the Right to Appeal the Military Judge's Order Denying a Continuance in this Case, the Government Intentionally Waived such a Right.

"[W]aiver is the intentional relinquishment or abandonment of a known right." *United States v. Sweeney*, 70 M.J. 296, 303 (C.A.A.F. 2011) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)) (internal quotation marks omitted). An appellate court "cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)) (internal quotation marks omitted).

In this case, in the trial counsel's email at 1759 on October 22, 2013, the Government explicitly abandoned its right to appeal the military judge's denial of its continuance request under Article 62, UCMJ. Further, this fact was found by the military judge and stated on the record. Therefore, pursuant to *Sweeney*, this issue was waived. However, ignoring this fact and Appellant's argument on this issue below, the lower court instead allowed the appeal of this issue to proceed stating,

"[t]he Government requests this court vacate the military judge's decision to deny the Government's request for an overnight recess and then *sua sponte* resting the Government's case over its objection." *Vargas*, 2014 CCA LEXIS 121, at *1.

Nowhere in the lower court's decision does the NMCCA attempt to address whether the Government's waiver of this issue was not valid or explain why the lower court could review this waived issue despite there being no error for it to correct on appeal. The decision of the lower court directly contradicts *Sweeney* and *Campos* and should be reversed.

3. The Military Judge's Order that the Government had Rested its Case was Not an Order which Directly Excluded Evidence.

The lower court did not find that the military judge made a specific ruling excluding the Government's last three witnesses. Rather, it held that the military judge's ruling "denying the brief recess" and then resting the Government's case had the practical effect of directly excluding evidence by limiting the pool of potential evidence that would be admissible. *Vargas*, 2014 CCA LEXIS 121, at *18.

Even assuming *arguendo* that the practical effect of the military judge's ruling that the Government had rested was to prevent the testimony of the Government's three remaining witnesses, the lower court's ruling does not address the fact

that such a "but-for" cause is insufficient to confer jurisdiction.

The military judge's ruling did not go to the legal merits of the witnesses' testimony. At no time did the military judge rule that these three witnesses could not testify at trial or that their testimony would have been inadmissible. In fact, the military judge gave the Government several opportunities to continue to present evidence before finally ruling that the Government's case was rested.

In other words, the reason these three witnesses did not testify at trial was not because the military judge ruled that the Government had rested its case. Rather, they did not testify as a direct result of the Government failing to ensure that the witnesses were present and prepared to testify when the time came to call them. There is nothing in the record to indicate that, had they been present, these witnesses would have been excluded from testifying.

The reasoning and effects of the military judge's ruling in the present case were as the United States Court of Appeals for the First Circuit explained in *Watson*.

> Although the orders appealed from will certainly hamper (and may effectively prevent) the obtaining and subsequent use of [the witness's] testimony, those orders did not, either in substance or in form, limit the pool of potential evidence that would be admissible at the forthcoming trial. Rather, they were premised on, and accomplished, a more prosaic

> goal: the lower court's determination to forestall further delay. That was why the court denied the requested continuance — and the practical effect of that denial was to clear the way for the trial to proceed. That the orders had an incidental effect on the government's evidence-gathering is too remote a consequence to support appellate jurisdiction . . . .

Watson, 386 F.3d at 313.

C. The Lower Court's Decision has Prejudiced Appellant.

Article 62, UCMJ, does not confer upon the United States the ability to appeal the military judge's ruling denying a motion for a continuance nor the order that the Government had rested its case. The Navy-Marine Corps Court of Criminal Appeals lacked jurisdiction to hear this appeal. Appellant has been prejudiced in that the lower court proceeded to hear the merits and erroneously granted the appeal, thereby allowing the Government to now reopen and strengthen its case by presenting additional evidence which it was not prepared to do at trial.

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 ERRED BY APPLYING THE WRONG STANDARD OF REVIEW WHEN IT VACATED THE MILITARY JUDGE'S DECISIONS TO DENY ANOTHER CONTINUANCE AND TO REST THE GOVERNMENT'S CASE.

A. Standard of Review.

"In determining an appeal under Article 62, the Court of Criminal Appeals may take action only with respect to matters of law." R.C.M. 908(c)(2); Art. 62, UCMJ; *see also United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'" *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985) (quoting *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983)).

In reviewing appeals under Article 62, UCMJ, a Service Court of Criminal Appeals cannot "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).

"'To give due deference to the trial bench,' a determination of fact 'should not be disturbed unless it is unsupported by the evidence of record or was clearly erroneous.'" *Burris*, 21 M.J. at 144 (quoting *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981)).

Regarding factual matters in Government appeals pursuant to Article 62, UCMJ, both this Court and Service Courts of Criminal Appeals "are in the same position – bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous. Neither court has authority to find facts in addition to those found by the military judge." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

"In an Article 62, UCMJ, petition, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014).

B. Application of the Wrong Standard of Review.

In attempting to summarize the facts surrounding the military judge's order that the Government's case was rested and her reconsideration of that issue, the lower court stated that "[t]he military judge made findings of fact and reaffirmed her earlier decision denying the Government's request to recess the trial." *Vargas*, 2014 CCA LEXIS 121, at *7. The lower court then went on to acknowledge in a footnote that

> [t]he military judge stated her findings of fact on the record at pages 217-23. We note that unless clearly erroneous, we are bound by the military judge's findings of fact. In the case at bar, the Government does not dispute them; we find no clear error in the military judge's findings of fact; and, we therefore adopt them as our own.

Id. at *8 n.4.

However, the lower court then proceeded to substitute its own interpretation of the facts and failed to acknowledge that the military judge also found several facts to support her reasoning for her decisions elsewhere in the record.

1. The Lower Court Erroneously Substituted its Own Interpretation of the Facts for that of the Military Judge.

Although the lower court professed to adopt the findings of fact made by the military judge as its own, it did not agree with their meaning and proceeded to erroneously substitute its own interpretation of those facts. In making its decision, the lower court stated simply its disagreement with the military judge.

> Contrary to the intimation of the military judge, this wasn't a case of the Government seeking a recess because it was not ready for trial. Quite to the contrary, the record reflects that the trial was well in progress, moving along at a faster pace than anticipated by the trial counsel. The brief recess requested by the trial counsel from 1400 until the following morning to accommodate nonlocal and civilian witnesses would have resulted in little or no impact on the trial schedule as this court-martial was already docketed for three days. In fact, the trial was seemingly progressing ahead of schedule.

Vargas, 2014 CCA LEXIS 121, at *15.

The lower court did not ask itself whether the military judge's finding that the Government was not ready for trial was unsupported by the record or clearly erroneous. Rather, it read the record applying a *de novo* standard of review and concluded that the Government was ready for trial. The impetus for this

erroneous action appears to be the lower court's belief that the denial of the Government's continuance request and order that the Government's case was rested constituted "extreme action taken by the military judge." *Vargas*, 2014 CCA LEXIS 121, at *17.

2. The Military Judge's Supporting Factual Determinations in the Record Were Not Clearly Erroneous.

The lower court made no assertions that any of the military judge's findings of fact were clearly erroneous or unsupported by the record. Instead, in vacating the military judge's rulings, it simply ignored the facts in the record used by the military judge to support her rulings in this case.

For example, the lower court gave no deference to the fact that this case had been continued six previous times, five of which were either attributable to or directly caused by the Government's actions. (Two were defense requests necessitated by untimely discovery provided by the Government and three were Government requests to accommodate the Government witnesses' schedules.) Nor did the lower court give deference to the fact that the Government had already requested that the trial be postponed twice before to accommodate one of the same witnesses, SA Fogel, for which it was now asking for another continuance, with the most recent request having previously been denied. Or that the Government had failed to include SA Fogel on its

witness list. Or that over seven months after arraignment, the Government still did not know that SA Fogel, whom it had represented as necessary to prove a material fact in the proceedings, had not even been in the interview room with Appellant and had no admissible knowledge of the case. Or that the Government had not served process on any of its witnesses to ensure their presence. Or that the Government had not withdrawn the charge it did not intend to proceed on nor had it provided appellate exhibits to the court reporter or its recorded opening statement to the defense prior to the start of trial.

All of these facts support the military judge's finding that the Government was not prepared for trial. Faced then with trial counsel who were stunningly unprepared to proceed with trial and yet who adamantly refused to rest the Government's case, the military judge made findings more than adequately supported by the record and a ruling required to exercise reasonable control over the proceedings: if the Government had no more evidence that it was prepared to present, then the Government's case was rested. *See* R.C.M. 801(a)(3) ("The military judge is the presiding officer in a court-martial. The military judge shall . . . exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual.").

C. The Lower Court's Decision has Prejudiced Appellant.

The lower court's substitution of its own judgment for that of the military judge was an erroneous application of the *de novo* standard of review and in conflict with the constraints placed upon its review by statute and case law. Appellant has been prejudiced by the lower court's error in that the Government now may reopen and strengthen its case by presenting additional evidence which it was not prepared to do at trial.

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 Compliance

This Supplement to Petition for Grant of Review complies with the type-volume limitation of Rule 21(b) because this Supplement to Petition for Grant of Review contains 6369 words, excluding the parts of the Supplement to Petition for Grant of Review exempted by Rule 24(c)(3).

This Supplement to Petition for Grant of Review complies with the typeface and type style requirements of Rule 37 because this Supplement to Petition for Grant of Review has been prepared in a monospaced typeface using Microsoft Office Word 2007 with Courier New style, 12-point font.

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Certificate of Filing and Service

I certify that the Supplement to Petition for Grant of Review 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 1, 2014.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPENDIX TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
	)	Crim.App. Dkt. No. 201300426
Ruben VARGAS Staff Sergeant (E-6) U.S. Marine Corps Reserve, Appellant	)	USCA Dkt. No._____

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

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UNITED STATES OF AMERICA v. RUBEN VARGAS, STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201300426

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2014 CCA LEXIS 121

February 28, 2014, Decided

PRIOR HISTORY: [*1]

Review Pursuant to Article 62(b), Uniform Code of Military Justice, *10 U.S.C. § 862(b)*. Military Judge: LtCol N.K. Hudspeth, USMC. Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Installations East, Marine Corps Base, Camp Lejeune, NC.

COUNSEL: For Appellant: Maj David N. Roberts, USMC.

For Appellee: Maj Richard A. Viczorek, USMCR.

JUDGES: Before F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON, Appellate Military Judges. Judge FISCHER and Judge JAMISON concur.

OPINION BY: F. D. MITCHELL

OPINION

OPINION OF THE COURT

MITCHELL, Senior Judge:

In the case *sub judice*, the Government appears in the role of the appellant pursuant to Article 62, Uniform Code of Military Justice, *10 U.S.C. § 862*, which authorizes Government appeals in certain circumstances. The Government requests this court vacate the military judge's decision to deny the Government's request for an overnight recess and then *sua sponte* resting the Government's case over its objection.

I. Background and History

The appellee's case was referred for trial by special court-martial on 4 February 2013. He was charged with one specification of assault consummated by a battery and one specification of endangering the mental health, physical [*2] health, safety, and welfare of minor children [1] in violation of Articles 128 and 134, UCMJ, *10 U.S.C. §§ 928* and *934*. After arraignment on 25 February 2013, multiple continuances and preliminary court proceedings pursuant to *Article 39(a), UCMJ*, occurred from February to July 2013, and on 12 July 2013 the appellee elected to be tried by members with enlisted representation. Record at 8, 50.

1 Charge II and its sole specification were withdrawn by the trial counsel acting on behalf of the convening authority on 22 October 2013.

The appellee's trial commenced on 22 October 2013 and, anticipating that the trial would last three days, was

docketed accordingly. The day before the appellee's trial commenced, the trial counsel informed the civilian defense counsel that he intended to call four witnesses on the first day of trial and his final three witnesses the next day. The civilian defense counsel did not object to the manner in which the Government proposed to present its case-in-chief.

On the first day of trial, after empanelment of the members, the Government called its first four witnesses: a percipient witness and the three military police officers who responded to the 911 call. Due to [*3] scheduling conflicts with the 911 operator and the physician who treated the victim of the alleged assault, and the fact that the Naval Criminal Investigative Service (NCIS) special agent who took the appellee's statement was deployed and traveling back to the United States from Afghanistan, the trial counsel scheduled those witnesses to be called the next day.

On day one of the appellee's trial, empanelment of the members was completed by noon and the testimony of the Government's first four witnesses concluded at approximately 1400. After a brief recess, the trial counsel asked the military judge to "continue the trial and place (sic) in recess until tomorrow morning[,]" explaining that the last of the Government's witnesses would not be available until then. *Id.* at 184. Civilian defense counsel opposed the motion. *Id.* at 186-87. The military judge denied the motion and asked the trial counsel whether he had any other evidence to present or intended to rest his case. *Id.* at 188. Trial counsel informed the military judge that he did not intend to rest his case at that time. *Id.* After a brief recess, in an *Article 39(a)* session, the trial counsel asked the military judge to reconsider [*4] the Government's request to recess trial until morning. *Id.* at 189-90. The military judge again denied the motion. *Id.* at 190-91. Afterwards, the following exchange occurred between the military judge and the counsel:

> MJ: So your motion is denied. Do you have anything else?
>
> TC: Yes, ma'am. Given that ruling by the military judge, at this time, the government intends to offer - to exercise its right to an interlocutory appeal under *Article 62* of the Uniform Code of Military Justice. The government intends to provide 72-hour written notice to the military judge upon recess from this court.
>
> MJ: You may do so. But, I am not obliged to continue the case while you do that, and I am declining to exercise that continuance so that you may do that. You may do it simultaneously with this case, but we are going to proceed.

Id. at 191.

After the military judge had the members brought back into the courtroom, the following colloquy transpired between the military judge and trial counsel:

> MJ: Government, do you have any additional evidence to present?
>
> TC: Ma'am, we do not have any additional evidence at this time -- um, we do not have any additional evidence at this time.
>
> MJ: Okay. Are you resting then?
>
> TC: [*5] No, ma'am.
>
> MJ: You may present any additional evidence or you may rest.
>
> TC: Ma'am, again the government intends to offer additional evidence. However, we do not have that on us at this time. We do not intend to rest our case at this time, ma'am.
>
> MJ: Okay. Your case is rested if you have no additional evidence to present at this time. I have already denied any continuance in this case. With that, Defense?
>
> CC: Defense rests.

Id. at 192.

After the defense rested its case, the civilian defense counsel requested an *Article 39(a)* session and made a motion under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), averring that the evidence presented by the Government was insufficient to sustain a conviction. *Id.*

at 193. After hearing argument from both sides, the military judge denied the motion. *Id.* at 194. At the conclusion of the *Article 39(a)* session, the military judge brought the members back into the courtroom and excused them from the courtroom until 1600. *Id.* When the court was again called to order, the military judge summarized an intervening R.C.M. 802 conference at which the trial counsel cited the provisions of R.C.M. 908(b)(1). The military judge then [*6] stated that the court should have been delayed until the interlocutory appeal could be decided by the appellate court.[2] *Id.* at 201-02. Prior to the military judge staying the proceeding, the trial counsel had the following conversation with the military judge:

> TC: Yes, ma'am, I would just - the Government would seek a point of clarification as to where we are in the proceedings. I know that the government raised the issue and intends to provide notice.
>
> MJ: I've denied your continuance request.
>
> TC: Yes, ma'am.
>
> MJ: Um -
>
> TC: We were still in our case in chief, I believe ma'am -
>
> MJ: Yes.
>
> TC: And it is the court's position that we were still in the government's case in chief.
>
> MJ: Right. You can put that in your appeal.
>
> TC: Yes, ma'am.
>
> MJ: Uh, my, uh, and the court can tell me to un-ring the bell. But, at the point of this trial, we are at findings instructions.

Id. at 204t.

> 2 R.C.M. 908(b)(1) states: Delay. After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled [*7] to no more than 72 hours under this subsection.

The military judge then had the members brought back into the courtroom, explained to them that the court proceeding was going to be delayed, and excused them until further notice. *Id.* at 205-06. At approximately 1800 that evening, the trial counsel informed the military judge and the civilian defense counsel that the Government would no longer be seeking an interlocutory appeal of the military judge's denial of the motion for a recess. He further requested an *Article 39(a)* session for the next morning.

The following morning, 23 October 2013, the military judge called an *Article 39(a)* session in response to the Government's written motion to reconsider her decision to rest the Government's case. Appellate Exhibit XLIII. During this *Article 39(a)* session, the trial counsel proffered the testimony of the Government's three remaining witnesses and the relevance to its case. The defense stipulated to the proffer of testimony.[3] Record at 214. The military judge made findings of fact and reaffirmed her earlier decision denying the Government's request to recess the trial.[4] The Government gave the required notice and timely filed this appeal.

> 3 The [*8] stipulation of proffered testimony was limited to the motion the Government filed asking the military judge to reconsider her earlier decision to rest the Government's case.
>
> 4 The military judge stated her findings of fact on the record at pages 217-23. We note that unless clearly erroneous, we are bound by the military judge's findings of fact. In the case at bar, the Government does not dispute them; we find no clear error in the military judge's findings of fact; and, we therefore adopt them as our own.

II. The Issues

We are confronted with two issues, which we will address in the following order:

> 1. Are the trial judge's actions appealable under *Article 62, UCMJ*, and R.C.M. 908?

> 2. If so, did the trial judge abuse her discretion in denying the recess and resting the Government's case?

We answer both questions in the affirmative.

III. Jurisdiction

We necessarily begin with the question as to whether this court has jurisdiction to review the Government's appeal under *Article 62, UCMJ*. Limited in scope, *Article 62* provides in part that the United States may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, or which excludes [*9] evidence that is substantial proof of a fact material in the proceeding. This provision ensures that the Government has the same opportunity to appeal adverse trial rulings that the prosecution has in federal civilian criminal proceedings. *United States v. Lopez de Victoria, 66 M.J. 67, 71 (C.A.A.F. 2008)*.

In the case *sub judice*, the military judge did not terminate the proceedings; we therefore focus our analysis as to whether the military judge's ruling excluded evidence that is substantial proof of a fact material in the proceeding.

A. Analysis

In military jurisprudence, the commonly-held understanding of the term "exclusion of evidence" usually involves a situation where the military judge has made a ruling at trial that certain testimony, documentary evidence, or real evidence is inadmissible. The language of *Article 62* itself suggests that Congress intended the term "excludes" to be narrowly construed and applied only to those rulings by the military judge that explicitly exclude or suppress evidence. The legislative history of *Article 62*, however, does not reflect that Congress intended the word "excludes" to be limited to rulings on admissibility. Moreover, Congress intended that [*10] *Article 62* parallel, to the extent practicable, *18 U.S.C. § 3731 (1984)*, which permits appeals by the United States in federal civilian prosecutions.[5] *See United States v. Brooks, 42 M.J. 484, 486 (C.A.A.F. 1995)* ("*Article 62* was intended by Congress to be interpreted and applied in the same manner as the Criminal Appeals Act, *18 USC § 3731*" (citations omitted)).

> 5 *18 U.S.C.S. § 3731*. Appeal by United States. "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment . . . from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding . . . from a decision or order, entered by a district court of the United States granting the release of a person charged with or convicted of an offense . . . . The provisions of this section shall be liberally construed to effectuate its purposes."

While Congress intended *18 U.S.C. § 3731* and *Article 62* to be interpreted and applied in the same manner, the former provision mandates a more liberal application. [*11] It specifically states that "[t]he provisions of this section shall be liberally construed to effectuate its purposes"; *Article 62* contains no such language or mandate. Due to this distinction in language, the Court of Appeals for the Armed Forces (CAAF) has indicated that it would be inappropriate to apply the liberal construction mandate of *18 U.S.C. § 3731* when interpreting *Article 62*, and further charged that cases interpreting the parallel provisions of that code section should be used as guidance and only to the extent consistent with an interpretation of *Article 62* that is not dependent upon the liberal construction admonition. *United States v. Wuterich 67 M.J. 63, 71 (C.A.A.F. 2008)*. Because the legislative history makes clear that Congress intended for *Article 62* appeals to be conducted "'under procedures similar to [those governing] an appeal by the United States in a federal civilian prosecution,'" military courts have looked to federal precedent for guidance on this question. *United States v. Browers, 20 M.J. 356, 359 (C.M.A. 1985)* (citation and footnote omitted).

Article III courts have construed the scope of *18 U.S.C. § 3731* by utilizing an "effects" test. This test focuses [*12] on the effect of a court order, rather than its facial categorization or its title. *United States v. Margiotta, 662 F.2d 131 (2d Cir. 1981)*; *United States v. Humphries, 636 F.2d 1172, 1175 (9th Cir. 1980)*. The effects test is not all-inclusive and is limited to those cases in which the military judge's ruling has a "direct rather than incidental effect on the exclusion of evidence." *Wuterich, 67 M.J. at 75* (citation omitted). The CAAF in *Wuterich* established that "the pertinent inquiry is not whether the court has issued a ruling on admissibility, but instead whether the ruling at issue 'in

substance or in form' has limited the 'pool of potential evidence that would be admissible.'" *Id. at 73* (quoting *United States v. Watson, 386 F.3d 304, 313 (1st Cir. 2004))*. That is precisely the Government's contention in the case at bar.

The appellee, by contrast, avers that the military judge did not rule that the three witnesses could not testify at trial and that she therefore did not deprive the Government of that opportunity. Instead, the appellee argues that the military judge's ruling had an "incidental" rather than direct impact on the Government's case and is therefore not subject to appeal [*13] under *Article 62*. Appellee's Brief of 23 Dec 2013 at 15. Finally, the appellee contends that the witnesses "were not necessary for any elements of the alleged offense," as the four witnesses called by the Government on the first day of trial "provided enough evidence to overcome the defense motion for a finding of not guilty" in accordance with R.C.M. 917. *Id* at 16. We find both of the appellee's arguments unpersuasive.

At first glance, the *Browers* case cited above appears to weaken the Government's position as that case involved a continuance request submitted by Government counsel due to witness unavailability, which was denied by the trial judge. On appeal, the Court of Military Appeals held that the denial by the military judge did not meet the jurisdictional requirements of *Article 62*.[6] That decision, however, did not establish a bright-line rule that a continuance request denied by a trial judge *per se* lacks jurisdiction under *Article 62*. In *Browers*, the Government was seeking a 16-day continuance to find two key witnesses, one who was on convalescent leave and the other who was absent without leave (AWOL). The witnesses' appearance at the court-martial was speculative at best [*14] (assuming the Government could locate the AWOL soldier), and the decision by the military judge not to continue the matter was a "case management" decision determined to be well-within his authority.[7] We also note that in *Browers* the Government requested a continuance prior to presentation of any evidence, a signification distinction from the instant case. *Browers, 20 M.J. at 356-60*.

> 6 In Browers, the United States Court of Military Appeals reversed the United States Army Court of Military Review and found that the Government was not entitled to appeal the denial of a continuance request by the lower court.

> 7 Similarly, in Watson (cited in Browers), the United States Court of Appeals for the First Circuit held that it lacked jurisdiction, under *18 U.S.C. § 3731*, to hear the interlocutory appeal of a case where the Government's witness was deported by the United States Immigration and Naturalization Service and the trial judge, in denying the motion for a continuance, indicated that continuing the case until the witness could be deposed could result in an inordinate delay.

Another critical distinction between *Browers* and the case at bar is that the *Browers* decision to deny the continuance [*15] was an issue of scheduling and did not have the direct result of excluding evidence. *Browers, 20 M.J. at 356-60*. Such was not the case here. By denying the trial counsel's motion for a recess until the next morning and then *sua sponte* resting the Government's case, the military judge effectively denied the Government the opportunity to present critical testimony that is substantial proof of a fact material in the proceeding. Contrary to the intimation of the military judge, this wasn't a case of the Government seeking a recess because it was not ready for trial. Quite to the contrary, the record reflects that the trial was well in progress, moving along at a faster pace than anticipated by the trial counsel. The brief recess requested by the trial counsel from 1400 until the following morning to accommodate nonlocal and civilian witnesses would have resulted in little or no impact on the trial schedule as this court-martial was already docketed for three days. In fact, the trial was seemingly progressing ahead of schedule. The relevance and importance of these witnesses to the prosecution's case was readily apparent from the trial counsel's proffer. Finally, we note that unlike in *Browers*, [*16] in the case at bar the members had been empaneled and evidence had been presented, thus making withdrawal of the charges and re-referral impermissible unless the withdrawal was "'necessitated by urgent and unforeseen military circumstances.'" *See United States v. Easton, 71 M.J. 168, 177 (C.A.A.F. 2012)* (quoting R.C.M. 604(b)).[8]

> 8 R.C.M. 604(a) states that the convening authority or a superior competent authority may for any reason cause any specifications to be withdrawn from a court-martial at any time before findings are announced. R.C.M. 604(b) allows charges which have been withdrawn from a court-martial to be referred to another

> court-martial unless the withdrawal was for an improper reason. See *United States v. Underwood, 50 M.J 271, 276 (C.A.A.F. 1999)* (convening authority dismissed and re-referred after military judge failed to grant the Government's continuance to secure out of state witness.) Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen necessity.

Here, the Government planned reasonably for the presentation of evidence and scheduled [*17] its witnesses's appearances accordingly. That presentation of evidence completed earlier than expected on the first day of trial does not justify the extreme action taken by the military judge. Not only were the last three witnesses available to testify the next day, but they were intentionally scheduled by the Government on that day due to schedule conflicts and travel considerations. The scheduled witnesses' testimony was well-within the three-day timeframe for which the case was docketed. The appellee's trial was proceeding ahead of schedule so there was little concern for undue delay or interference with the trial schedule.

Finally, we summarily dismiss the appellant's argument that the witnesses in question were not necessary to the Government's case because the military judge denied the defense motion for a finding of not guilty in accordance with R.C.M. 917. We note that the quantum of proof required for the Government to withstand an R.C.M. 917 motion was "some evidence," vice the proof beyond a reasonable doubt required for a conviction.

B. Conclusion

We reject the appellee's assertion that this court lacks jurisdiction because the military judge never ruled that the Government's [*18] three remaining witnesses could not testify and therefore there was no exclusion of evidence. We follow the example of the Article III courts' interpretation of *18 U.S.C. § 3731*, as adopted by the CAAF in *Wuterich*, and apply the effects test. Applying the effects test to the case at bar, we hold that the trial judge's ruling in denying the brief recess so that witnesses scheduled to be heard the next day could testify and then *sua sponte* resting the Government's case, had the direct effect of limiting "'[t]he pool of potential evidence that would be admissible'" and excluding evidence that was substantial proof of a material fact." *Wuterich, 67 M.J. at 73* (quoting *Watson, 386 F.3d at 313*.) We therefore answer the first issue of jurisdiction under *Article 62* in the affirmative.

IV. Denial of the Recess

Having resolved the question of whether this court has jurisdiction to hear this appeal, we turn now to the question of whether the military judge abused her discretion in refusing to allow an overnight recess for the Government to produce their final three witnesses and instead resting the case on behalf of the Government over the trial counsel's protest. Although the facts at bar involve [*19] not a continuance, but instead an overnight recess, we turn to the law involving continuances for guidance in this relatively novel situation created by the military judge, to determine whether she abused her discretion.

As a general rule, the decision whether to continue a trial to enable a party to procure an absent witness rests within the sound discretion of the trial court. *See* R.C.M. 906(b)(1) and *Article 40, UCMJ*. Continuances for the production of material witnesses are looked upon with favor, however, and the exercise of sound discretion requires that they be granted upon a showing of reasonable cause. *United States v. Daniels, 11 C.M.A. 52, 28 C.M.R. 276, 279 (C.M.A. 1959)*. A judge's decision will not be disturbed on appeal absent a clear showing that such discretion has been misused. *United States v. Weisbeck, 50 M.J. 461, 464 (C.A.A.F. 1999)*. "An 'abuse of discretion' exists where 'reasons or rulings of the' military judge are 'clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice'; it 'does not imply an improper motive, willful purpose, or intentional wrong.'" *United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)*.

A. Analysis

In order [*20] to guard against bad faith and unwarranted delays, the military judge must consider many factors before ruling on a request for continuance for purposes of securing a witness. The factors this court uses to determine whether a military judge abused his or her discretion by denying a continuance are the same ones adopted by the CAAF in *United States v. Miller, 47 M.J. 352 (C.A.A.F. 1997)*, to include: "'surprise, nature of any evidence involved, timeliness of the request,

substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.'" *Id. at 358* (quoting F. GILLIGAN AND F. LEDERER, COURT-MARTIAL PROCEDURE §18-32.00 at 704 (1991) (footnotes omitted)). Applying the *Miller* factors to the case at bar, we conclude as follows:

Lack of surprise: Civilian defense counsel was well-aware that the Government intended to call the witnesses in question on day two of the three day trial.

Timeliness of the request: The motion for a recess was promptly made by the trial counsel after [*21] examination of his first four witnesses.

Other continuance requests: Multiple continuance requests were made and granted in this case. Again, this was merely a request for a recess for the Government witnesses to testify on the day they were scheduled to do so and well-within the three-day period for which the case was docketed.

Good faith of the moving party: The appellee does not aver, and the military judge did not find, that the Government was acting in bad faith. As stated above, the trial counsel anticipated that the empanelment of the members and the testimony of its first four witnesses would take longer than it did. The trial progressed more rapidly than anticipated.

Length of request and prejudice: The Government requested a recess until the next morning - a matter of a few hours. The appellee has not demonstrated that he would have been prejudiced by the military judge had she granted the recess.

Prior notice: Prior to the trial commencing, the defense was given notice that the three Government witnesses would testify on the second day of trial.

Possible impact on verdict: The Government considered these witnesses critical to its case: the 911 operator was needed to lay the foundation [*22] to admit the 911 tape into evidence; the attending physician was needed to lay the foundation to admit the pictures of the victim of this alleged assault and to testify as to the extent of the victim's injuries; and the NCIS agent was needed to lay the foundation for a statement from the appellant in which he made admissions of guilt.

In this case, we conclude that the expected testimony of these absent witnesses was material, noncumulative, and of critical importance to the Government's case-in-chief. The expected testimony of these witnesses would have a significant impact on whether the Government could prove its case beyond a reasonable doubt.

Each of these factors clearly favors the Government.

In light of the circumstances of this case, we conclude that the military judge's action in denying the Government a brief recess during trial and then *sua sponte*, over objection, resting the Government's case was a clear abuse of discretion.

B. Conclusion

The military judge's ruling is vacated. The record of trial is returned to the Judge Advocate General for remand to the convening authority and delivery to the military judge for further proceedings not inconsistent with this opinion.

Judge [*23] FISCHER and Judge JAMISON concur.