

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

UNITED STATES,)	AMICUS CURIAE BRIEF OF
<i>Appellant,</i>)	THE UNITED STATES AIR FORCE
)	APPELLATE GOVERNMENT
)	DIVISION
)	
v.)	USCA Dkt. No. 17-0408/AR
)	
Sergeant First Class (E-7),)	Crim. App. No. 20160786
ERIK P. JACOBSEN, USA,)	
<i>Appellee.</i>)	

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

CERTIFIED ISSUE PRESENTED

**WHETHER THE TRIAL COUNSEL'S
CERTIFICATION THAT EVIDENCE IS
"SUBSTANTIAL PROOF OF A FACT MATERIAL
IN THE PROCEEDING' IS CONCLUSIVE FOR
PURPOSES OF ESTABLISHING JURISDICTION
UNDER ARTICLE 62(a)(1)(B), UNIFORM CODE
OF MILITARY JUSTICE.**

STATEMENT OF STATUTORY JURISDICTION

Appellant's Statement of Statutory Jurisdiction is accepted.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

Appellant's Statement of Facts is accepted.

ARGUMENT

The Air Force Appellate Government Division provides the following law and argument in support of the Army Government Appellate Division's brief and position on the certified issue. The Air Force Appellate Government Division concurs that the Army Court of Criminal Appeals erred in dismissing the United States' appeal under Article 62, UCMJ for lack of jurisdiction.

In a general or special court-martial, Article 62(a)(1)(B), UCMJ, allows the United States to appeal “[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.”

Whether excluded evidence is “substantial proof of a fact material in the proceeding” is a highly fact-dependent determination that is contingent upon the individual circumstances of each case and the entirety of the evidence that the Government will present in its case-in-chief. Given that a Court of Criminal Appeals does not have independent fact-finding authority when considering an Article 62 appeal,¹ the Court of Criminal Appeals is not the appropriate entity to decide whether excluded evidence meets the criteria for appeal established in Article 62(a)(1)(B).

¹ See Article 62(b), UCMJ (“ . . . In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c))”); United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995) (a Court of Criminal Appeals may not make findings of fact when considering an Article 62 appeal.)

“Materiality” has been described as “the relationship between the proposition on which the evidence is offered and the issues in the case.” United States v. Jefferson, 623 F.3d 227, 233, n.9 (5th Cir. 2010) (citing Anthony J. Bocchino & David A. Sonenshein, A PRACTICAL GUIDE TO FEDERAL EVIDENCE 46 (Nat’l Institute of Trial Advocacy 2006)). Thus, in order to determine materiality to the proceedings, a Court of Criminal Appeals would first have to determine the essential facts and issues in the entire case. A Court of Criminal Appeals is unable to make such a determination when it cannot independently make findings of fact.

It is important to note that in many cases, a military judge’s ruling excluding evidence will occur before the government has presented any evidence on the merits. *See e.g.* United States v. Buford, 74 M.J. 98, 100 (C.A.A.F. 2015); Lincoln, 42 M.J. at 316. In such situations, the military judge will not have made extensive factual findings that encompass the entirety of the government’s case-in-chief or that enumerate all of the “issues in the case.” Without such factual findings and without any fact-finding authority of its own, it is impossible for a Court of Criminal Appeals to determine the essential issues of the case in order to decide whether the excluded evidence is “material” to those issues. *See* United States v. Moskowitz, 702 F.3d 731, 735 (2d Cir. 2012) (citing United States v. Centracchio, 236 F.3d 812, 813 (7th Cir. 2001)) (Government appeals “are usually

from orders suppressing or excluding evidence, and there is no basis on which, in advance of trial, we could determine that the evidence that the government wishes to use was so unimportant to any rational prosecutorial strategy that the appeal was frivolous.”)

Even in the present court-martial, where the Government had begun to present evidence, the Government still had yet to rest its case. (Govt. Br. at 2-3.) As such, the Army Court of Criminal Appeals did not have the necessary and complete factual basis to conclude that the excluded prior consistent statement was not substantial proof of a fact material in the proceeding.

In sum, given the Court of Criminal Appeals’ lack of fact-finding authority in an Article 62 appeal, it cannot adequately determine whether evidence constitutes “substantial proof of a fact material in the proceeding.” As every circuit that has considered the question has concluded (*see Moskowitz*, 702 F.3d at 733-34), the Government is the appropriate entity to determine and certify that excluded evidence is “substantial proof of a fact material in the proceeding” so as to establish jurisdiction for a government appeal.

For the above reasons and the reasons cited in Appellant’s brief, the Army Court of Criminal Appeals erred in dismissing the United States’ appeal for lack of jurisdiction.

CONCLUSION

WHEREFORE Amicus respectfully requests that this Court set aside the decision of the Army Court of Criminal Appeals.



MARY ELLEN PAYNE, Major, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 34088



KATHERINE E. OLER, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4815
Court Bar No. 30753

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to the Army Government Appellate Division and the Army Appellate Defense Division on 25 May 2017.

A handwritten signature in black ink that reads "Mary Ellen Payne". The signature is written in a cursive style with a large initial "M" and "P".

MARY ELLEN PAYNE, Major, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar. No. 34088

COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

This brief contains 801 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 14 characters per inch using Times New Roman.

/s/

MARY ELLEN PAYNE, Major, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 25 May 2017