IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant

v.

Sergeant First Class (E-7)
ERIK P. JACOBSEN,
United States Army,
Appellee

BRIEF ON BEHALF OF
APPELLANT

ARMY Misc. 20160786

USCA Dkt. No. _____/AR

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

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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 APPELLATE JURISDICTION UNDER ARTICLE 62(a)(1)(B), UNIFORM CODE OF MILITARY JUSTICE.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012) [hereinafter UCMJ]. The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(2), UCMJ, which mandates review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces (C.A.A.F.) for review."

Statement of the Case

Appellee was charged with two specifications of rape and sexual assault under Article 120, UCMJ. (JA 1-2). On November 8, 2016, the military judge ruled that a Government witness could not testify to the victim's prior consistent statements. (JA 24). On November 9, 2016, the Government appealed the military judge's ruling under Article 62, UCMJ. (JA 24-26). On February 6, 2017, the ACCA issued an order dismissing the Government's appeal for lack of jurisdiction under Article 62, UCMJ. *United States v. Jacobsen*, ARMY MISC 20160768

(Army Ct. Crim. App. Feb. 6, 2017) (order). On February 27, 2017, the Government filed a motion for reconsideration en banc. The ACCA granted the Government's request for reconsideration and again dismissed the appeal for lack of jurisdiction. *United States v. Jacobsen*, ARMY MISC 20160768 (Army Ct. Crim. App. Mar. 16, 2017) (order). The Judge Advocate General then certified this case to this Court.

Statement of Facts

The Government charged Appellee with rape and sexual assault in violation of Article 120, UCMJ. (JA 1-2). In its opening statement, the Defense presented the victim's inconsistency as the theme of their case, stating, "Over the course of this trial you're going to hear that [the victim] has told five different stories about what happened on that couch on the evening of Valentine's Day of this year going into the 15th of February." (JA 6-7). The Government opened its case-in-chief by presenting evidence from the named victim. During the cross-examination of the victim, the defense counsel emphasized the inconsistency of the victim's five prior statements and highlighted that she told different accounts of her allegations to several different witnesses. (JA 12-15). For example, when the victim testified that the accused removed her pants, underwear, and shirt, the defense counsel highlighted that she never mentioned the accused removing her shirt in her written

statement at the U.S. Army Criminal Investigative Command [hereinafter CID]. (JA 12-15).

Based on the defense cross-examination of the victim, the Government sought to call a CID special agent to testify to the victim's prior consistent statements under Mil. R. Evid. 801(d)(1)(B)(ii). (JA 16). The defense objected. (JA 16-17).

The military judge ruled that M.R.E. 801(d0(1)(B) does not apply in this case and that the Government could not admit the victim's CID statement as rehabilitation evidence. (JA 26-27). The Government appealed his decision under Article 62, UCMJ. (JA 49) In the notice of appeal, the trial counsel certified that the evidence excluded is substantial proof of a fact material in the proceedings. (JA 49).

On February 6, 2017, the ACCA dismissed the government appeal, stating, "Contrary to appellant's claim, the military judge did not issue '[a]n order or ruling which excludes evidence that is *substantial* proof of a fact *material* in the proceeding.'" *Jacobsen*, ARMY MISC 20160768 at 1. The ACCA ruled that Article 62(a)(1), UCMJ, "confers appellate jurisdiction for orders or rulings that actually meet specified criteria." *Id.* The ACCA concluded that, unlike 18 U.S.C. § 3731, the analogous federal statute, Article 62, UCMJ, permits the appellate court to engage in a substantive determination of the materiality of evidence

subject to a government appeal. The Government filed a motion for reconsideration en banc.

On March 16, 2017, the ACCA again dismissed the government appeal. *Jacobsen*, ARMY MISC 20160768 at 3. The ACCA again held that they lacked jurisdiction to hear the Government's appeal and asserted that, unlike the civilian courts, military appellate courts may assess the merits of government appeals based on the statutory differences between Article 62, UCMJ, and 18 U.S.C. § 3731.

Summary of Argument

This Court should set aside the ACCA's ruling because the lower court misinterpreted and misapplied Article 62, UCMJ. Under both Article 62, UCMJ, and Rule for Courts-Martial [hereinafter R.C.M.] 908, the Government's certification of the appeal conclusively establishes jurisdiction in the appellate courts. This Court should also reverse the ACCA because its ruling conflicts with the precedent of this Honorable Court, federal civilian courts, and precedent from the other courts of criminal appeals, namely the Air Force Court of Criminal Appeals [hereinafter AFCCA] and the Navy-Marine Corps Court of Criminal Appeals [hereinafter NMCCA]. The ACCA's narrow, structural interpretation of Article 62, UCMJ, frustrates the legislative intent behind the statute and divorces the statute from its intended purpose. This Court should overturn the ACCA and

adopt the jurisprudence of AFCCA, NCMCCA, and the federal circuit courts of appeals, all of which treat the Government's certification of the materiality of evidence as conclusive for jurisdictional purposes.

Argument

This case presents the issue of who determines the viability of an interlocutory appeal under Article 62: the Government or the Court of Criminal Appeals.

When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, this Court examines the ruling itself, and then decides whether the Court of Criminal appeals was right or wrong in its evaluation of the ruling. *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008) (citing *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). In this case, where the ACCA did not rule on the military judge's ruling and the Judge Advocate General of the Army certified a jurisdictional issue, this Court should review whether the ACCA was right or wrong in its assessment of its jurisdiction to hear the Government's appeal under Article 62.

Article 62(a)(1), UCMJ, provides that, in a trial by court-martial, the United States may appeal any order or ruling by a military judge that (1) terminates the proceedings with respect to a charge or specification; (2) excludes evidence that is substantial proof of a fact material to the proceeding; or (3) directs the disclosure

of classified information. UCMJ art. 62. In order to make this appeal, the trial counsel must notify the military judge of the intent to appeal within 72 hours of the issuance of the order or ruling. UCMJ art. 62(a)(2). By statute, the notice to the military judge must include two certifications: (1) that the appeal is not taken for the purpose of delay and (2) that, if the appeal concerns excluded evidence, the evidence excluded is "substantial proof of a fact material in the proceeding." *Id.* The text of Article 62 contains no further requirements for certification of an appeal; the Government determines the scope of the appeal by deciding which issues to appeal and the grounds on which to appeal. *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). After the Government determines the scope of the appeal, the notice of appeal confers jurisdiction upon the appellate court. UCMJ art. 62(b).

R.C.M. 908 details the procedure by which military courts file and adjudicate appeals under Article 62, UCMJ, including the requirements for the initial notice to the military judge, forwarding the record to the Courts of Criminal Appeals, and the effect of a Government appeal upon other charges and specifications at the same court-martial. R.C.M. 908. Like Article 62(a), R.C.M. 908(b)(3) mandates that the trial counsel inform the military judge of the Government's intent to appeal and specifies that the notice of appeal shall certify that the appeal is not taken for the purpose of delay and that the evidence excluded

is substantial proof of a fact material in the proceeding. R.C.M. 908(b)(3). R.C.M. 908(b)(2) provides that each service secretary may subject the decision to appeal to authorization by a delegated government representative; however, nothing in this paragraph requires the Government to meet any additional certification requirements prior to filing the notice of appeal with the trial court. R.C.M. 908(b)(2).

I. Civilian courts interpreting 18 U.S.C. § 3731 treat the U.S. Attorney's certification as conclusive for purposes of establishing jurisdiction.

Congress explicitly drafted Article 62 in order "to afford the government a right to appeal which, 'to the extent practicable . . . parallels 18 U.S.C. § 3731.'" *Wuterich*, 67 M.J. at 71 (quoting *United States v. Lopez de Victoria*, 66 M.J. 67, 70-71(C.A.A.F. 2008)). While this Court treats federal precedent on 18 U.S.C. § 3731 as guidance, it also recognizes that Congress intended for interlocutory appeals in the military to follow procedures similar to those governing an appeal by the United States in a federal prosecution. *Id.* (citing *United States v. Browers*, 20 M.J. 356, 359 (C.M.A. 1985)). Further, in *Lopez de Victoria*, this Court noted:

> In *United States v. Wilson,* 420 U.S. 332, 338-9, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975), the Supreme Court read § 3731 as expressing a desire "to authorize appeals whenever constitutionally permissible. . . . [I]t seems inescapable that Congress was determined to avoid creating nonconstitutional bars to the Government's right to appeal." Since government appeals in criminal cases in the Article III courts are creations of statute no less than in

> this Court . . . the same principle applies to Article 62, UCMJ, appeals.

Lopez de Victoria, 66 M.J. at 70 (citation omitted). Despite the differences between military and civilian practice, this Court's interpretation of Article 62, UCMJ, should follow the precedent of the federal circuits unless there is a compelling reason not to do so.

18 U.S.C. § 3731 provides, in pertinent part,

> [a]n appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . .if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

18 U.S.C. § 3731 (2012). The federal civilian courts interpreting 18 U.S.C. § 3731 hold that once the Government timely certifies and submits an interlocutory appeal, the Court of Appeals may exercise jurisdiction over that appeal. *See, e.g.*, *United States v. Johnston*, 228 F.3d 920, 923-924 (8th Cir. 2000) (holding that the Government's notice of appeal stating both that the appeal was not taken for purposes of delay and that the evidence was a proof of a fact material in the proceeding was sufficient to confer jurisdiction upon the appellate court); *United States v. Kepner*, 843 F.2d 755, 761 (3d Cir. 1988). In the view of these courts, the certification requirement of § 3731 serves to show that the prosecuting official made a thorough and conscientious analysis of the case before deciding to press the

appeal. *United States v. Bailey*, 136 F.3d 1160, 1163 (7th Cir. 1998) (citing *United States v. Carrillo-Bernal*, 58 F.3d 1490, 1493 (10th Cir. 1995)). As to the materiality of the evidence subject to the appeal, the courts leave the determination to the U.S. Attorney. *See, e.g., United States v. Jefferson*, 623 F.3d 227, 230-231 (5th Cir. 2010) ("Evidence may be 'substantial proof of a fact material in the proceeding' without being an element of the charged offense. Moreover, and more importantly, the evaluation as to whether the evidence excluded by the district court is 'substantial proof of a fact material in the proceeding' is to be made *by the United States Attorney*, not the district court.") (emphasis in original).[1]

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[1] *See also United States v. Moskowitz*, 702 F.3d 731, 734 (2d Cir. 2012); *In re Grand Jury Investigation*, 599 F.2d 1224, 1226 (3d Cir. 1979) ("The district court having received [this] certification, we are not required by section 3731 to evaluate independently the substantiality or materiality of the contested material."); *Kepner*, 843 F.2d at 761; *United States v. Bergrin*, 682 F.3d 261, 276 (3d Cir. 2012) ("[W]e . . . have appellate jurisdiction . . . so long as" the Government files certification under § 3731"); *United States v. Centracchio*, 236 F.3d 812, 813 (7th Cir. 2001) ("We therefore treat as conclusive of our jurisdiction over [an interlocutory appeal] the submission of the certification required by statute."); *United States v. Johnson*, 228 F.3d 920, 924 (8th Cir. 2000) ("[W]e need not examine whether [the suppressed evidence] would actually be substantial proof of a material fact. The government has so certified, that suffices."); *United States v. W. R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) ("[W]e now hold that a certification by a United States Attorney . . . that the appeal is not taken for purposes of delay and that the evidence is substantial proof of a fact material in the proceeding is sufficient for purposes of establishing our jurisdiction under § 3731") (overruling *United States v. Loud Hawk*, 628 F.2d 1139, 1150 (9th Cir. 1979)); *United States v. Mitchell*, 954 F.2d. 663, 665 (11th Cir. 1992) ("[T]he Government filed its certification that the appeal was not taken for purposes of delay and that the precluded evidence constitutes substantial proof of a fact material in the proceedings. Accordingly, we have jurisdiction pursuant to 18 U.S.C. § 3731."). In the other circuits, there is

The authority of the federal civilian courts interpreting 18 U.S.C. § 3731 shows that this Court should treat the Government's certification of an appeal under Article 62, UCMJ, as conclusive with respect to the evidence's materiality and substantial nature. In this case, the notice of appeal by the trial counsel certifies that the evidence is "substantial proof of a fact material in the proceeding" per Article 62, UMCJ, and R.C.M. 908. (Notice of Appeal). Because the trial counsel, supported by their Staff Judge Advocate, sit in a position roughly analogous to that of the U.S. Attorney, and because Congress intended for military interlocutory appeals to follow the federal courts, this Court should follow federal precedent and hold that the trial counsel's certification is sufficient to confer

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precedent regarding the timeliness or completeness of the certification, but none pertaining to analysis of the merits. *See, e.g.*, *United States v. McNeill*, 484 F.3d 301 (4th Cir. 2007) (addressing timeliness of appeals under § 3731); *United States v. Smith*, 263 F.3d 571 (6th Cir. 2001) (incomplete certification); *United States v. McGinnis*, 247 Fed. Appx. 589 (6th Cir. 2008) (timeliness of certification); *United States v. Shareef*, 110 F.3d 1491 (10th Cir. 1996) (timeliness and completeness of certification); *Carrillo-Bernal*, 58 F.3d at 1492 (timeliness). The First Circuit came closest to assessing materiality in *United States v. Brooks*, 145 F.3d 446, 453 (1st Cir. 1998). However, in that case, the court held that the Government satisfied the statutory requirements of § 3731 when it alleged that excluded evidence was substantial proof of a fact material in the proceeding and that "[t]he link forged in the certificate between the excluded evidence and the crimes charged is not implausible." *Id.* However, the First Circuit has not returned to *Brooks* to rely on this principle. Therefore, the circuits that have actually addressed the issue of materiality have all concluded that the U.S. Attorney's certification is conclusive with respect to the jurisdiction of the appellate court.

jurisdiction on the appellate court under Article 62, UCMJ.[2] To the extent possible, appeals under Article 62, UMCJ, should parallel appeals under 18 U.S.C. § 3731. *Wuterich*, 67 M.J. at 71. In its opinions, the ACCA does not offer any reason why these appeals should operate differently in the military than in federal civilian courts. No military reason justifies a different approach, and the courts of appeals' rule is not "impracticable" in military courts. Therefore, this Court should follow the precedent in the federal civilian courts and hold that the trial counsel's certification is conclusive with respect to the materiality of the Government's appeal.

II. Under Article 62, UCMJ, as under 18 U.S.C. § 3731, the trial counsel's certification is conclusive for purposes of establishing jurisdiction.

The ACCA's unprecedented dismissal of the Government's appeal created a split between the service courts. Both the NMCCA and the AFCCA hold that, as

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[2] As the Government's representative at trial, the trial counsel sits in a similar position to the U.S. Attorney in the federal system for purposes of determining what evidence may be material to the Government's case. In the military system, the convening authority may be a closer analog to the U.S. Attorney for purpose of prosecutorial discretion. Congress considered—and rejected—a provision that would have made the convening authority the certifying official for Article 62, UCMJ, Government appeals. *See The Military Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Personnel of the Comm. of the Armed Services*, 97th Cong. 46 (1983)(prepared statement of William H. Taft, IV, General Counsel of the Department of Defense), at 33 ("We also do not favor that portion of S. 2521 that would require the convening authority to approve any government appeal. The government appeal should be an expedited proceeding that minimizes impact on the trial."

long as the Government *alleges* the substantial nature of the evidence affected by a judge's ruling, the Government satisfies the statutory requirements of Article 62, UCMJ, and the appellate court may exercise jurisdiction over the appeal. *United States v. Pacheco*, 36 M.J. 530, 533 (A.F. Ct. Crim. App. 1992); *United States v. Scholz*, 19 M.J. 837, 841 (N.M.C.M.R. 1984) ("In an interlocutory appeal, it is beyond the scope of this Court to speculate as to what weight or importance a particular piece of evidence might have at trial. It is sufficient that the petitioner believes that the evidence is significant enough to seek reversal of the military judge's exclusionary ruling rather than continue at trial with whatever other evidence that might be available."). In this case, the evidence excluded by the military judge constituted substantial proof that Appellee sexually assaulted the victim.[3] (JA 37-38). Accordingly, having alleged both the substantial nature of the evidence and having met the statutory requirements of Article 62, UCMJ, the Government's appeal conferred jurisdiction on the ACCA.

The *Scholz* and *Pacheco* opinions offer compelling rationale for why the Government should determine the "materiality" of evidence in an interlocutory

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[3] Under the newly amended version of M.R.E. 801(d)(1)(B)(ii), prior consistent statements admitted to rehabilitate a witness come in substantively and not subject to a limiting instruction. Mil. R. Evid. 801(d)(1)(B)(ii) . In this case, the victim's statements would come in both for their capacity to rehabilitate her after cross-examination by the defense and also for their truth. Her consistent statements about the assault support her testimony as to Appellee's guilt and therefore carry significant weight as to a material question in the ongoing court-martial.

appeal. In *Scholz,* after analyzing 18 U.S.C. § 3731, the Navy-Marine Court of Criminal Appeals held that "short of a constitutional bar, the United States has a broad right of appeal under Article 62, U.C.M.J." *Scholz*, 19 M.J. at 840. The *Scholz* court specifically held that the Government need not prove that the evidence constituted the only evidence in the case but rather that the Government need only allege the substantial nature of the evidence in the essence of its appeal. *Id.* The court also addressed the dangers of a broad right to government appeals and concluded that the military's interest in efficient prosecution acts as a check on abuse of the right to appeal. *Id.* Further, the court specifically declined to limit the Government's right to determine its own appeals under the statute, reasoning that the nature of appellate practice should preclude the court from second-guessing the Government's choice of appeal. *Id. Scholz* properly leaves the determination of materiality to the Government, stating that the appellate court should not speculate as to the importance of any piece of evidence to the Government at trial. *Id.*[4]

In *Pacheco*, the Air Force Court of Criminal Appeals explicitly adopted the holding in *Scholz*. *Pacheco*, 36 M.J. at 533. In *Pacheco*, the respondent argued

[4] The ACCA's attempt to scrutinize the trial counsel's certification in this case illustrates the *Scholz* court's warning against appellate courts second-guessing the Government's decision to appeal an order or ruling. In this case, the Government has not rested, the Defense has not presented its case, and the Government has not had an opportunity to present rebuttal, so the ACCA's ruling on the materiality of the evidence is speculative, at best.

that because the Government had other evidence to introduce at trial, the ruling appealed by the Government did not pertain to "substantial" evidence within the meaning of Article 62, UCMJ. *Id.* at 532. Like the NMCCA, the AFCCA began its opinion by reviewing the jurisprudence of 18 U.S.C. § 3731. After assessing the state of the law, the AFCCA held that the certification by the trial counsel confers jurisdiction upon the appellate courts as long as the appellate court finds factual support for the appeal in the record. *Id.* at 533. Citing *Scholz*, the *Pacheco* court held that the as long as the Government alleges that the evidence is substantial, the appellate court may exercise its jurisdiction over the appeal. *Id.* With facts similar to the instant case, the *Pacheco* court also found that the Government's evidence became "substantial" during the course of trial. *Id.* In this case, the evidence the Government sought to introduce became crucial once Appellee subjected the Government's primary witness to cross-examination and impeachment. (JA 10-15). Because the panel could not adequately assess the witness's credibility without the excluded rehabilitation evidence, the evidence is substantial proof of a fact material in the proceeding—namely, whether appellee sexually assaulted the victim. By dismissing the instant appeal on the basis of materiality, the ACCA both improperly infringed on the Government's ability to determine its own appeals and placed itself in conflict with its sister service courts.

Consistent with *Scholz* and *Pacheco*, the scope of jurisdictional review in interlocutory appeals under Article 62, UCMJ, properly relates to whether the appeal meets the listed statutory bases for appeal and the 72-hour timeliness requirement. Once the Government appeals a listed type of action by the trial court in the time prescribed by the UCMJ, the appellate court should review the merits of the military judge's ruling. *United States v. True*, 28 M.J. 1, 4-5 (C.A.A.F. 1989) (Everett, J., dissenting) (arguing that this Court should resist expanding the *type* of rulings subject to Article 62, UMCJ, but should track the federal statute with respect to the procedure for pursuing the appeal).

Scholz and *Pacheco* are consistent with this Court's precedent on Article 62 jurisdiction. This Court already established the only appropriate test for assessing the merits of government appeals under Article 62(a)(1)(B), UCMJ, in *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), and *United States v. Vargas*, 74 M.J. 1 (C.A.A.F. 2014). In *Wuterich* and *Vargas*, this Court defined the standards for evidentiary appeals under Article 62, UCMJ, by holding that the Government could appeal rulings which "in substance or in form [limit] the pool of potential evidence that would be admissible" at trial. *Vargas*, 74 M.J. at 17 (citing *Wuterich*, 67 M.J. at 73). Neither *Wuterich* nor *Vargas* contains any discussion of whether the evidence excluded was proof of a "material" fact, nor whether it was "substantial" evidence of that fact. Accordingly, the "pool of evidence" test

remains the only legal test articulated by this Court to evaluate jurisdiction under Article 62(a)(1)(B).

In this case, the military judge's ruling prevented the Government from admitting a prior consistent statement of its main witness. (JA 45-48). As a ruling excluding admissible evidence, this ruling qualifies for an appeal under both the statutory language of Article 62 and the precedent set by this court in *Vargas* and *Wuterich*. The ACCA therefore erred when it dismissed the appeal based on the materiality of the evidence rather than applying the established "pool of evidence" test.

III. There is no justification based on either Article 62, UCMJ, or the nature of the military justice system for interpreting the statute differently from 18 U.S.C. § 3731.

The ACCA erred when it distinguished the certification of appeals under Article 62 from 18 U.S.C. § 3731 on structural grounds because its structural interpretation undermines this Court's precedent on the relationship between the statutes. All federal courts have limited jurisdiction. *Lopez de Victoria*, 66 M.J. at 69 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999)). Through legislation, Congress extends and refines the jurisdiction granted to federal courts, including military courts of appeals, by the Constitution. *Id.* However, "this principle does not mean that [the court's] jurisdiction is to be determined by teasing out a particular provision of a statute and reading it apart from the whole." *Id.* Rather,

"[s]ince the beginning of jurisprudence under the UCMJ, [this Court has read] the statutes governing our jurisdiction as an integrated whole, with the purpose of carrying out the intent of Congress in enacting them." *Id.* In its order, the ACCA narrowly construed its jurisdictional mandate by arguing that the structural differences between Article 62 and 18 U.S.C. § 3731 justified giving the Government's certification of the appeal less weight than similar certifications in the federal system. *Jacobsen*, ARMY MISC 20160768 at 2-3. In so arguing, the ACCA engaged in precisely the process this Court disdained in *Lopez de Victoria*: the narrow structural argument divorces the certification requirement of Article 62 from both the larger statutory framework and from the legislative intent behind its creation. The ACCA's structural argument with respect to its jurisdiction over appeals under Article 62 therefore has little merit.

Specifically, the ACCA held that absent language in Article 62 containing a mandate "to liberally construe the jurisdictional appeal" and without the phrase that an appeal "shall lie" in the court of appeals when the government meets the statutory criteria, the Government cannot satisfy the jurisdictional requirements of Article 62 without a showing that the evidence excluded by the military judge is actually "substantial proof of a material fact." *Jacobsen*, ARMY MISC 20160768 at 2-3. The ACCA is correct, in part, that the current text of Article 62 does not

contain language mandating that the statute should be liberally construed.[5] The ACCA is also correct that the statute does not include language indicating that the appeal "shall lie" in the Courts of Criminal Appeals once the Government properly certifies the appeal. However, this language does not appear in Article 66, UCMJ, either; in both statutes, the forwarding of the record of trial to the Courts of Criminal Appeals constitutes the conferral of jurisdiction on the appellate court. The ACCA's narrow jurisdictional reading of Article 62 undermines its clear purpose as explained by this Court: to confer jurisdiction upon the appellate court to hear appeals by the United States when properly and timely certified by the trial counsel and when not barred by double jeopardy.

While the ACCA's order notes the differences between § 3731 and Article 62, UCMJ, it does not discuss the many similarities between the two statutes. *Jacobsen*, ARMY MISC 20160768 at 2-3. The two statutes use nearly identical language except where the differences in civilian and military practice require different terms, such as the distinction made between the U.S. Attorney and the trial counsel. For instance, both statutes provide for a government appeal from an

[5] Notably, as a part of the National Defense Authorization Act for Fiscal Year 2017, Congress amended 10 U.S.C. § 862 to add subsection (e), which reads: "The provisions of this section shall be liberally construed to effect its purposes." Congress enacted this amendment on December 23, 2016. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, §5326, 130 Stat. 2000 (2016).

order or ruling that terminates the proceedings with respect to a charge or indictment. *Compare* 18 U.S.C. § 3731 *with* 10 U.S.C. § 862(a)(1)(A). Both statutes also allow the government to appeal where the judge suppresses or excludes evidence. *Compare* 18 U.S.C. § 3731 *with* 10 U.S.C. § 862(a)(1)(B). Both statutes require that the government representative—be they U.S. Attorney or trial counsel—certify that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. *Compare* 18 U.S.C. § 3731 *with* 10 U.S.C. § 862(a)(2). Finally, both statutes indicate that the appeal shall be "diligently prosecuted" by the Government. *Compare* 18 U.S.C. § 3731 *with* 10 U.S.C. § 862(a)(3).

To the extent that the ACCA held that the difference between Article 62, UCMJ, and 18 U.S.C. § 3731 reflects a substantive difference in the two appeals, it makes a distinction without a difference. In *United States v. True*, 28 M.J. 1, 2 (C.A.A.F. 1989), this Court specifically analyzed the differences between Article 62, UCMJ, and § 3731. In *True*, the Government appealed from a ruling of the Court of Military Review that a military judge's decision to abate the proceedings was not the proper basis for a government appeal under Article 62, UCMJ. *Id.* After noting that the "wording" and "presentation" of Article 62 differed from § 3731, this Court held that "the practical effect of the . . . language in both statutes is the same, i.e., avoidance of technical barriers to government appeals." *Id.* The

True court advised that "[p]rudent advice as to the use of this procedure should not be confused with an unjustified narrowing of the scope of this statute or deliberate frustration of the will of Congress." *Id.* at 3 (citing Drafters' Analysis of R.C.M. 908, Manual for Courts-Martial, United States, 1984; *United States v. Browers*, 20 M.J. 356, 360 (C.M.A. 1985) (Cox, J., concurring)). Thus, the ACCA departed from both the plain meaning of Article 62 and this Court's precedent on the relationship between the two appeals statutes.

By narrowly interpreting Article 62, UCMJ, the ACCA frustrated the demonstrated intent of Congress to provide the Government with the right of interlocutory appeal. In creating Article 62, UCMJ, Congress intended the certification process to act as a safeguard against frivolous appeals in the same manner as in the federal system. The legislative history of Article 62 reveals that Congress intended to create a process by which the Government could appeal, and thereby potentially correct, adverse rulings terminating its ability to prosecute instances of criminal conduct. In his testimony before the Senate Armed Services Committee regarding Article 62, the then-Judge Advocate General of the Army, Major General [hereinafter MG] Hugh J. Clausen indicated that the amendment to Article 62 would "parallel 18 U.S.C. section 3731" and "provide an avenue for the Government, as well as the accused, to seek reversal of legal error at the trial level consistent with judicial economy and double jeopardy protections." *The Military*

Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Personnel of the Comm. of the Armed Services, 97th Cong. 46 (1983) (statement of MG Hugh J. Clausen, USA, the Judge Advocate General of the Army). The amendment to the Military Justice Act of 1982 "[paralleled] federal practice" and "[filled] a void created when the United States Court of Military Appeals determined that the convening authority could no longer overturn the legal rulings and orders of a military judge." *Id.* at 52 (statement of Rear Adm. John S. Jenkins, JAGC, United States Navy, Judge Advocate General of the Navy). Congress added the requirement for trial counsel certification explicitly so that the new statute would mirror the similar requirement found in 18 U.S.C. § 3731:

> Senator JEPSEN: Should the amendment to Article 62 concerning government appeal contain a requirement that the trial counsel certify to the military judge that the appeal is not taken for the purpose of delay and that the evidence is essential to the case? *See* North Carolina General Statutes 15A-979(c). Could this be accomplished in the Manual for Courts-Martial rather than in the UCMJ?
>
> Mr. TAFT. In federal civilian prosecutions, 18 U.S.C. § 3731 requires the government attorney to certify to the court "that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." We would not object if the amendment to Article 62 were to contain such a requirement. Alternatively, such a requirement could be set forth in the Manual for Courts-Martial as part of the President's responsibility to provide rules for trial procedure under Article 36.

Id. at 77 (statement of Senator Jepsen, Member, Senate Committee on the Armed Forces, and Mr. William H. Taft, IV, General Counsel of the Department of the Defense [hereinafter DoD]).

While drafting Article 62, Congress explicitly considered the question of who determined whether to appeal an order or ruling under the code. When asked by a senator about the certification process, Mr. William Taft, IV, General Counsel of the DoD, stated:

> The decision to appeal will be made by the trial counsel as representative of the government. The Manual for Courts-Martial and service regulations will provide the procedural requirements for approval by appellate counsel, who represent the government before the Courts of Military Review under Article 70, before an appeal is filed . . . . The determination as to whether the appeal meets the criteria of Article 62, as proposed, will be subject to review by appellate authorities.[6]

Id. at 85 (statement of Mr. William H. Taft, IV, General Counsel of the DoD). Chief Judge Robinson O. Everett, United States Court of Military Appeals, supported appeals by trial counsel as long as Congress considered including the requirement that the trial counsel certify that the appeal was not taken for purposes of delay and that the evidence is essential to the case. *Id.* at 115 (prepared

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[6] As discussed above and consistent with *Wuterich*, *Vargas*, *Scholz*, and *Pacheco*, the appropriate scope of this review is whether the Government met its deadline for filing the appeal and whether it appealed an appropriate *type* of judicial action as contemplated by the statute.

statement of Chief Judge Robinson O. Everett, United States Court of Military Appeals). Similarly, Judge Albert B. Fletcher, Jr., Associate Judge, Court of Military Appeals, testified that Congress should model Article 62 on 18 U.S.C. § 3731 and indicated that, absent some demonstration of military necessity, Congress should include the certification requirements from § 3731 in the final draft of Article 62. *Id.* at 151-152 (statement of Judge Albert B. Fletcher, Jr., Associate Judge, Court of Military Appeals). Accordingly, Congress enacted the existing text of Article 62, which allows the Government to select and certify its own interlocutory appeals and confers jurisdiction over those appeals directly to the appellate courts.

In this case, the Government chose to appeal and followed the certification requirements of Article 62. (Notice of Appeal). The ACCA dismissed the appeal on February 6, 2017, and again on March 16, 2017 for lack of jurisdiction. *United States v. Jacobsen*, ARMY MISC 20160768 (A. Ct. Crim. App. 6 February 2017) (order); *United States v. Jacobsen*, ARMY MISC 20160768 (A. Ct. Crim. App. 16 March 2017) (order). Because Congress explicitly provided certification requirements and the Government met them in the instant case, it was inappropriate of the ACCA to dismiss this appeal for lack of jurisdiction. The ACCA's dismissal frustrates the demonstrated will of Congress in enacting Article 62, UCMJ, and should therefore be reversed.

Conclusion

For the reasons outlined above, this Honorable Court should reverse the decision of the ACCA.

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Certificate of Filing and Service

I certify that the foregoing brief in the case of *United States v. Sergeant First Class Erik P. Jacobsen*, Crim. App.. Dkt. No. ARMY MISC 20160768, USCA Dkt. No. _____ AR, was electronically filed with the Court (efiling@armfor.uscourts.gov) on May 15 2017 and contemporaneously served on the Defense Appellate Division.

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