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	)))))))))	APPELLANT'S REPLY BRIEF Crim. App. Dkt. No. 20160786 USCA Dkt. No. 17-0408/AR

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

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	APPELLANT'S REPLY BRIEF
v.	ARMY Misc. 20160786
Sergeant First Class (E-7) **ERIK P. JACOBSEN**, United States Army, Appellee	USCA Dkt. No. 17-0408/AR

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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(d)(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 and substantial nature 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 it 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.

Law and Analysis

I. The scope of review under Article 62 allows the appellate courts to review the type of ruling appealed by the Government, but not the quality of the evidence excluded by the ruling.

An appellate court may properly reject a Government appeal if the Government appeals a *type* of ruling outside the scope of Article 62. When interpreting Article 62, a court may determine whether the order issued by the military judge was appealable within the meaning of the statute. *United States v. Browers*, 20 M.J. 356, 360 (C.A.A.F. 1985); *see also United States v. True*, 28 M.J. 1, 5 (C.A.A.F. 1989) (Everett, J., dissenting). Article 62(a)(1) permits an appeal from six types of rulings, including rulings which exclude evidence that is substantial proof of a fact material in the proceeding. UCMJ art. 62(a)(1). This Court's precedent therefore denies government appeals from non-appealable rulings, such as the denial of a continuance. *Browers*, 20. M.J. at 360. The appropriate test for that class of rulings—those which exclude evidence—remains the "pool of evidence" test articulated in *United States v. Wuterich*, 67 M.J. 63, 73-75 (C.A.A.F. 2008) and *United States v. Vargas*, 74 M.J. 1, 6-7 (C.A.A.F. 2014). In this case, the military judge's ruling excluded evidence the Government sought to admit as a part of its case in chief. (JA 26-27). Because the Government appealed the appropriate type of ruling contemplated by Article 62, the appeal falls within the jurisdictional scope of the statute.

Appellee cites *United States v. Bradford*, 68 M.J. 371, 373 (C.A.A.F. 2010), for the proposition that where a trial counsel's appeal does not meet statutory criteria, the appellate court does not have jurisdiction over that appeal. (Appellee's Br. 10). In *Bradford*, this Court addressed an Article 62 appeal arising from a military judge's ruling that the Government could not *preadmit* evidence. *Bradford*, 68 M.J. at 372. As the *Bradford* Court noted, at the time of the appeal, the parties had not made opening statements and neither party had offered any evidence on the merits. *Id.* at 371. The ruling in question merely denied the Government motion to preadmit because the Government could not successfully lay the foundation for the evidence at a pretrial hearing. *Id.* at 372. Accordingly, the *Bradford* Court rejected the government appeal because it neither excluded evidence nor terminated the proceedings with respect to any charge or specification. *Id.* at 373. Thus, *Bradford* addressed a situation where the military judge's ruling affected the evidence, but did not actually exclude it. Had the military judge made a ruling that the evidence could not come in at trial despite a proper foundation, then the government appeal would likely have succeeded because such a ruling would limit the Government's "pool of evidence" as contemplated by *Wuterich*.

To be sure, a court of criminal appeals has a duty to ensure it has jurisdiction over the appeal by applying the "pool of evidence" test to determine if the military

judge's ruling is the right *type*, i.e., one that excludes evidence. The trial counsel's certification does not bear on that question. What the court may not do, however, is second-guess the trial counsel's certification on the *quality* of the evidence, i.e., whether the evidence is substantial proof of a fact material in the proceedings. On those points the trial counsel's certification is conclusive. *United States v. Scholz*, 19 M.J. 837, 840 (N.M.C.M.R. 1984); *United States v. Pacheco*, 36 M.J. 530, 533 (A.F.C.M.R. 1992) (citing *Scholz*, 19 M.J. at 840).

In the instant case, the government appeal stems from a ruling in which the military judge determined that the Government's witness could not testify to admissible evidence. (JA 26-27). The ruling excludes evidence within the meaning of Article 62(a)(1) and limits the "pool of evidence" available to the Government to prove its case beyond a reasonable doubt. UCMJ art. 62(a)(1); *Wuterich*, 67 M.J. at 73. In this case—unlike *Bradford*—the trial on the merits has already begun and the Government has no other opportunity to present or perfect its case. *Bradford*, 68 M.J. at 373. The trial counsel properly certified the quality and importance of the evidence. Because the Government's appeal in this case contests the right type of ruling at the right time in the procedural posture of the case, the appellate court has jurisdiction over the appeal under Article 62.

II. There is no compelling military rationale for interpreting the Government's right to interlocutory appeals under Article 62, UCMJ, differently from the right of interlocutory appeal granted to the federal government under 18 U.S.C. § 3731.

Absent compelling reasons to the contrary, this Court should apply Article 62, UCMJ, in a manner similar to the federal practice under 18 U.S.C. § 3731 (2012) as Congress intended. Congress intended for Article 62 appeals "to be conducted under procedures similar to [those governing] an appeal by the United States in federal civilian prosecution." *Browers*, 20 M.J. at 359 (quoting S. Rep. No. 98-53, at 6); *accord Wuterich*, 67 M.J. at 71; *United States v. Lopez de Victoria*, 66 M.J. 67, 70-71 (C.A.A.F. 2008); *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1996); *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995); *True*, 28 M.J. at 3. Congress repeatedly articulated this principle when revising the UCMJ under the Military Justice Act of 1982.[1] "Article 62, UCMJ, ensures that

[1] S. Rep. No. 98-53, at 6 (1983) ("The bill allows appeal by the government under procedures similar to an appeal by the United States in a federal civilian prosecution."); S. Rep. No. 98-53, at 23 (1983) ("To the extent practicable, the proposal parallels 18 U.S.C. § 3731, which permits appeals by the United States in federal prosecutions."); S. Rep. 98-549, at 16, 19 (1983) ("The amendment would permit interlocutory appeal by the government under standards similar to those applicable in federal civilian law."); *Hearing on S. 974 to Amend Chapter 47 of Title 10, United States Code (the Uniform Code of Military Justice), to Improve the Quality and Efficiency of the Military Justice System, to Revise the Laws Concerning Review of Courts-Martial, and for Other Purposes Before the Military Personnel and Compensation Subcomm.of the H. Comm. on Armed Services*, 98th Cong. 98-9, 40 (1983) (Statement of Hon. William H. Taft IV, General Counsel, Department of Defense) ("This bill permits interlocutory appeal by the government under standards similar to those applicable in federal civilian law under 18 U.S.C.

the Government has the same opportunity to appeal adverse trial rulings that the prosecution has in federal civilian proceedings." *Lopez de Victoria*, 66 M.J. at 71. Consequently, this Court should follow the guidance set by federal civilian courts in evaluating the Government's certification that the evidence excluded by the military judge is substantial proof of a fact material in the proceeding.

This Court should not construe the certification requirements of Article 62, UCMJ, differently from those detailed in 18 U.S.C. § 3731 without some compelling rationale based in the difference between military and civilian practice. While this Court takes the differences between the two systems into account when interpreting Article 62, UCMJ, there is no structural or procedural difference between the two appeals that justifies treating the Government's certification of an appeal differently in the military.[2] *Wuterich*, 67 M.J. at 71. Both statutes provide

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§ 3731."); *Hearings Before the Subcomm. on Manpower and Personnel of the S. Comm. on Armed Services*, 97th Cong. 18-25 (1982) (Statement of Hon. William H. Taft IV, General Counsel, Department of Defense) ("Both [the House and Senate] bills allow appeal by the Government under procedures similar to the right of appeal by the United States in Federal civilian prosecutions."); *Hearings Before the Subcomm. on Manpower and Personnel of the S. Comm. on Armed Services*, 97th Cong. 18-151 (1982) (Statement of Hon. Robinson O. Everett, Chief Judge, Court of Military Appeals) ("It is clear that the federal government does have a right to appeal a decision or order of a district court suppressing or excluding evidence in a criminal proceeding. In my opinion, this statute should be the model for any government appeals statute enacted for the military justice system.").

[2] During the committee hearings for the Military Justice Act of 1982, Judge Everett, Chief Judge, United States Court of Military Appeals, supported the inclusion of a certification process but saw "no justification as a matter of military necessity or otherwise" for treating the two statutes differently. *Hearings Before*

similar grounds for appeal, require that the Government certify that the evidence excluded is substantial proof of a fact material in the proceedings, and require the Government to prosecute its appeal "diligently" to minimize the impact on trial. *Compare* UCMJ art. 62 *with* 18 U.S.C. § 3731. Neither Appellee's brief nor the opinions of the Army Court of Criminal Appeals offer any structural or policy-based reason for interpreting the two statutes differently where Congress clearly intended to impose similar standards on both systems. That is because there exists no compelling reason to make such a distinction.

III. Sufficient procedural checks exist to prevent the abuse of Government appeals.

Contrary to Appellee's assertion that a ruling in the Government's favor will give the Government "unfettered" power over interlocutory appeals, sufficient checks exist within the military justice system to prevent the abuse of Government interlocutory appeals. The framework established by Article 62, UCMJ, Rule for Courts-Martial [hereinafter R.C.M.] 908, and applicable service regulations

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the Subcomm. on Manpower and Personnel of the S. Comm. on Armed Services, 97th Cong. 18-153 (1982) (Statement of Hon. Robinson O. Everett, Chief Judge, Court of Military Appeals) ("More importantly, a certification procedure is provided in 18 U.S.C. § 3731 to discourage frivolous, unmeritorious, or dilatory appeals by the government with respect to suppression motions . . . . no justification as a matter of military necessity or otherwise has been offered to support the express omission of the certification requirement."). Based on this legislative history, it is reasonable to infer that Congress *added* the certification requirement—which substitutes the trial counsel for the U.S. Attorney—in order to mirror the federal statute.

sufficiently prevent frivolous appeals by establishing both a certification procedure and requirements for approval of appeals by appellate counsel. *See* UCMJ art. 62(a)(2); R.C.M. 908(b); *see also*, *e.g.*, Army Regulation 27-10, *Legal Services—Military Justice*, para. 12-3(a) (May 11, 2016); Department of the Navy, JAG Instruction 5800.7F, *Manual of the Judge Advocate General*, Section 0140(a) (June 26, 2012); Department of the Air Force, *Air Force Instruction 51-201*, Section 8.16 (August 3, 2016). Congress intended for R.C.M. 908 and the service regulations to modify Article 62, UCMJ: "The decision to appeal will be made by the trial counsel or a superior as a representative of the government. The Manual for Courts-Martial and service regulations will provide procedural requirements for approval by appellate counsel, who represent the government . . . before an appeal is filed." S. Rep. No. 98-53, at 23 (1983).

In addition to the service regulations, the very nature of Article 62 interlocutory appeals discourages abuse by the Government. Interlocutory appeals result in an automatic stay of proceedings for any charges affected by the appeal. R.C.M. 908(b)(4). Regardless of the timing of the appeal—be it pretrial or during trial—the appeal results in substantial delay and cost to the Government. In many cases, the appeal will upset trial dockets and incur additional resource costs. While R.C.M. 908(c)(2) dictates that Article 62 appeals should have priority in the appellate courts, it cannot guarantee immediate resolution of the appeal in the

appellate court. Over the course of an appeal, the Government may suffer the loss of counsel, witnesses, and evidence. Put simply, the risk of incurring significant cost and delay weighs heavily against filing a notice of appeal. When combined with the certification process in Article 62, the framework of R.C.M. 908, and the service regulations, this risk acts as a significant check on the Government and ensures that the Government files its notice of appeal only in cases where such appeal is warranted by the materiality of the evidence excluded by the military judge. Because so many factors weigh against the Government's decision to file an appeal, this Court should find that the Government's certification of the substantive nature of an appeal is sufficient to confer jurisdiction upon the appellate courts.

Conclusion

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

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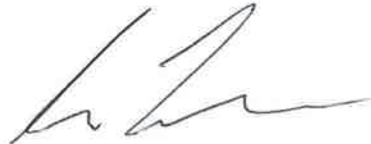

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I certify that the foregoing brief in the case of *United States v. Sergeant First Class Erik P. Jacobsen*, Crim. App. Dkt. No. ARMY MISC 20160768, USCA Dkt. No. 17-0408AR, was electronically filed with the Court (efiling@armfor.uscourts.gov) on June 4 2017 and contemporaneously served on the Defense Appellate Division.

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