IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	Crim. App. Dkt. No. 20160786
	)	USCA Dkt. No. 17-0408/AR
Sergeant First Class (E-7) **ERIK P. JACOBSEN**, United States Army, Appellee	)	

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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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 Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter pursuant to 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 for review."

Statement of the Case

Appellee is charged with rape and sexual assault, in violation of Article 120, UCMJ. (JA 1–2). Appellee pled not guilty to the charge and its specifications, elected to be tried by an enlisted panel, and the court was assembled on November 7, 2016. (JA 3–4, R. at 54).

On November 8, 2016, the military judge issued a verbal and written ruling regarding testimony from CID Special Agent (SA) RVW. (JA 21–24; App. Ex. XXII). On November 9, 2016, the government filed its notice of appeal. (JA 49). In conjunction with a previous request from the trial counsel, the military judge re-issued his written ruling with additional findings of fact and conclusions of law. (JA 45–48).

On February 6, 2017, the Army Court dismissed the government's appeal. (JA 50–51). The government subsequently filed a motion for reconsideration and suggestion for en banc consideration, as well as a separate motion for oral argument. (JA 52). On March 16, 2017, the Army Court denied the motion for oral argument, declined to adopt the suggestion for en banc reconsideration, and granted the request for reconsideration. (JA 52–53). Upon such reconsideration, the Army Court again dismissed the government's appeal. (JA 52–53). On May 15, 2017, a certificate for review signed by the Judge Advocate General was filed to this Honorable Court, accompanied by a supporting brief on behalf of appellant.

Statement of Facts[1]

During trial, the government opened its case-in-chief with the direct examination of the alleged victim, Senior Airman (SrA) MRV. (JA 8). During her testimony, SrA MRV admitted making numerous statements where she did not tell "the full truth." (JA 45; R. at 193–94, 207–08). During cross examination, the defense counsel asked SrA MRV about her prior statements, including several of the statements referenced by the government during direct examination. (JA 10–12). SrA MRV agreed each of these statements were "different" from her trial testimony. (JA 10). One of these prior statements involved her statement to CID, and SrA MRV agreed this statement also differed from her testimony during trial. (JA 13, 15).

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[1] For this section, appellee specifically highlights the limited scope of the certified issue. The lone question presented to this Honorable Court is whether trial counsel certification is "*conclusive* for purposes of establishing appellate jurisdiction under Article 62(a)(1)(B), [UCMJ]." (Emphasis added).

However, in its brief, the government made numerous arguments outside the scope of the certified issue. For example, the government said, "the evidence excluded by the military judge constituted substantial proof that Appellee sexually assaulted the victim," and "[b]ecause the panel could not adequately address the witness's credibility without the excluded rehabilitation evidence, the evidence is substantial proof of a fact material in the proceeding." (Gov't. Br. 12, 14).

As such arguments are not relevant to the certified issue, appellee has not included all of the facts necessary to attack these positions. Instead, appellee simply notes that he firmly disputes the government's contention that the military judge's ruling "excludes evidence that is *substantial* proof of a fact *material* in the proceeding." Article 62(a)(1)(B), UCMJ (emphasis added).

Following the testimony of several additional witnesses, the government sought to call SA RVW to testify about SrA MRV's statement to CID, and the defense objected on multiple grounds. (JA 16–20). After a recess to further research the issue, the military judge issued a verbal ruling in favor of the defense. (JA 21–22, 24). The trial counsel asked the military judge to reconsider his ruling. (JA 21–25). After receiving written pleadings from both parties, the military judge issued a written ruling, which re-affirmed his previous ruling. (App. Ex. XXII). Following this written ruling, the trial counsel asked the military judge "to make some specific additional findings of fact or conclusions of law" and explained the government would be filing a notice of appeal. (JA 29–30). Pursuant to this request, the military judge re-issued his written ruling with additional findings and conclusions. (JA 45–48).

On February 6, 2017, the Army Court dismissed the government's appeal, as "the military judge did not issue '[a]n order or ruling which excludes evidence that is a *substantial* proof of a fact *material* in the proceeding.'" (JA 50) (quoting Article 62(a)(1)(B), UCMJ) (emphasis in original). In its ruling, the Army Court analyzed the differences in the plain language of 18 U.S.C. § 3731 and Article 62, UCMJ. (JA 50). Through this analysis, the Army Court determined that 18 U.S.C. § 3731 "vests the determination of materiality of the excluded evidence solely with the United States Attorney," but "in this important respect, Article 62, UCMJ, is

not analogous." (JA 50). Instead, "the plain language of Article 62(a)(1), UCMJ, confers appellate jurisdiction for orders or rulings that meet specified criteria," and "we will not abdicate our responsibility to ensure proper jurisdiction." (JA 50–51).

After granting a motion for reconsideration, the Army Court again dismissed the government's appeal for lack of jurisdiction. (JA 52–54). In this ruling, the Army Court provided a lengthier analysis of the textual differences between the statutes, and cited language from *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) and *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). (JA 52–54). The Army Court also provided an overview of legislative intent:

> . . . Congress intended the "decision to appeal [to] be made by the trial counsel or a superior as representative of the government[,]" but the "*determination as to whether the appeal meets the criteria of Article 62, [UCMJ, to] . . . be subject to review by appellate authorities*." S. Rep. No. 98-53, at 23 (1983).

(JA 54) (emphasis in original) (alterations in original).

Thus, the Army Court again reiterated that mere certification by a trial counsel does not conclusively establish appellate jurisdiction under Article 62, UCMJ. (JA 54).

As necessary, additional facts relevant to the issue presented are included in the relevant subsections below.

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.

Summary of Argument

The government asserts that a trial counsel's "certification of the appeal conclusively establishes jurisdiction in the appellate courts." (Gov't. Br. 4). Such a position is inconsistent with the plain language and legislative history of Article 62, glosses over the textual and systemic differences between military and civilian criminal prosecutions, and would provide trial counsel with the unilateral ability to certify appellate review of *any* evidentiary ruling excluding evidence. Critically, Congress did not even grant such unfettered authority to United States Attorneys, as 18 U.S.C. § 3731 does not authorize appeals of evidentiary rulings during trial. Thus, while Section 3731 provides an appeal "shall" lie to the court of appeals "if" the United States Attorney certifies that a "decision or order" excludes qualifying evidence, it contains a temporal restriction that Article 62 does not. These differences reflect the separation of powers and procedural differences between the two systems. Again, absent such differences, trial counsel would have the exact same authorities – yet none of the limitations – as United States Attorneys.

Standard of Review

This Court reviews issues of jurisdiction and statutory interpretation de novo. *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014) (citing *United States v. Daly*, 69 M.J. 485, 486 (C.A.A.F. 2011); *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).

Law

"Federal courts, including courts in the military justice system established under Article I of the Constitution, are courts of limited jurisdiction." *Wuterich*, 67 M.J. at 70 (citing *Lopez de Victoria*, 66 M.J. at 69 (C.A.A.F. 2008) (noting that such jurisdiction "is conferred ultimately by the Constitution, and immediately by statute")). Furthermore, "[i]n criminal cases, prosecution appeals are not favored and are available only upon specific statutory authorization." *Id*. (citations omitted). *See also Will v. United States*, 389 U.S. 90, 96, (1967) ("[I]n the federal jurisprudence, at least, appeals by the Government in criminal cases are something *unusual, exceptional, not favored . . .*") (citation omitted) (emphasis added).

In 18 U.S.C. § 3731, Congress authorized several categories of interlocutory government appeals in federal civilian criminal cases. *Wuterich*, 67 M.J. at 70. As the Army Court noted, 18 U.S.C. § 3731 states certain appeals "shall lie" with an Article III court of appeals upon certification by a United States Attorney, an officer of the executive branch. (JA 54). Congress similarly authorized

interlocutory prosecution appeals during cases tried by courts-martial under Article 62, UCMJ, and both statutes include mechanisms for the government to appeal evidentiary rulings. *Id*. However, when compared to 18 U.S.C. § 3731, the military justice system dispenses with a temporal requirement unsuitable for courts-martial and does not impose an inapt separation of powers model onto Article I courts. To that extent, Article 62(a)(1)(B), UCMJ, states:

> (1) 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 (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):
>
> (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

Article 62(a)(2), UCMJ, states that a trial counsel must provide written notice of appeal "within 72 hours of the order or ruling" and "[s]uch notice shall include a certification by the trial counsel that the appeal is not taken for the purposes of delay and . . . that the evidence excluded is substantial proof of a fact material in the proceeding."

The applicable section of 18 U.S.C. § 3731 states:

> An 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* or requiring the return of seized property in a criminal proceeding, *not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information*, 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.

(emphasis added).

Basically, under 18 U.S.C. § 3731, the government can appeal any ruling "suppressing or excluding evidence" in a federal civilian criminal trial (if the United States Attorney certifies it meets the applicable standard), unless it was "made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information." Put most simply, "[w]hat the statute forbids is the interruption of trial." *United States v. Kington*, 801 F.2d 733, 735 (5th Cir. 1986). The statute expressly empowers the officer exercising the executive function to certify the appropriate standard has been met, and further explains its language "shall be liberally construed to effectuate its purposes." 18 U.S.C. § 3731.

In *Wuterich*, this Court analyzed "[t]he relationship between Article 62, UCMJ, and 18 U.S.C. § 3731." 67 M.J. at 71–72. After outlining the legislative history of Article 62, this Court stated, "Federal court decisions interpreting 18 U.S.C. § 3731 constitute guidance, not binding precedent, in the interpretation of Article 62, UCMJ." *Id.* at 71. While Congress "clearly intended to afford the government a right to appeal which, to the extent practicable . . . parallels 18 U.S.C. § 3731," any analysis of Article 62 must also "take into account the

structural differences between courts-martial and trials in federal district court, as well as the textual similarities and differences with respect to Article 62, UCMJ, and 18 U.S.C. § 3731." *Id*. (internal quotation marks omitted). A few of the structural differences that must be taken into account include the allocation of powers among convening authorities, staff judge advocates, trial counsel, and military judges, all of whom belong to the executive branch and some of whom have no close parallel within the civilian system of standing courts.

Furthermore, an appeal must satisfy one of the stated criteria under Article 62(a)(1) to create appellate jurisdiction. While the military statute requires certification by the prosecution, it does not state such a certification is conclusive as to appellate jurisdiction. In *United States v. Bradford*, this Court found the trial counsel's appeal did not meet the statutory criteria, and then held the lower court did not have jurisdiction to review the substance of the appealed ruling. 68 M.J. 371, 373 (C.A.A.F. 2010). *See also United States v. Anderson*, 69 M.J. 176 (C.A.A.F. 2010); *United States v. Borgman*, 69 M.J. 84 (C.A.A.F. 2010).

As necessary, additional legal principles, cases, and authorities are included in the relevant subsections below.

Argument[2]

As outlined above, the government's position remains inconsistent with the plain language and legislative history of Article 62, glosses over several textual differences between Article 62 and 18 U.S.C. § 3731 and structural differences between courts-martial and federal civilian criminal cases, and would provide trial counsel with the same authorities – yet none of the stated limitations – as United States Attorneys. Such a position remains untenable. Instead, the two statutes construct separate mechanisms for interlocutory appeals of evidentiary rulings.

A. The plain language and legislative history of Article 62, UCMJ, support appellate review of whether an appeal meets the stated statutory criteria.

"As a first step in statutory construction, we are obligated to engage in a 'plain language' analysis of the relevant statute." *United States v. Tucker*¸ ___ M.J. ___ (C.A.A.F. 2017) (citing *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (internal quotation marks omitted) (citations omitted).

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[2] Based on the specific language of the certified issue ("Whether the trial counsel's certification is 'substantial proof of a fact material in the proceeding' *is conclusive for purposes of establishing appellate jurisdiction under Article 62(a)(1)(B)*, [UCMJ]") (emphasis added), this Court previously addressed this question in *Bradford*. *See* 68 M.J. at 373 ("The statute at issue in the present appeal authorizes the Government to pursue an interlocutory appeal of '[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.' Article 62(a)(1)(B), UCMJ"). Despite involving the same statute with the same certification requirements, this Court specifically held the lower court lacked jurisdiction. *Id*. However, out of an abundance of caution, appellee is arguing under a broader interpretation of the certified issue.

As outlined by the Army Court, "the plain language of Article 62(a)(1), UCMJ, confers appellate jurisdiction for orders or rulings that actually meet specified criteria." (JA 50). Essentially, the plain language of Article 62, UCMJ, prescribes the mechanisms for an interlocutory government appeal, but if a Court of Criminal Appeals finds the appeal does not fall within the stated criteria, then it lacks jurisdiction.

Such an interpretation remains consistent with *Bradford*, where this Court held "the lower court did not have jurisdiction" to review the appeal, as it did not actually fall within the stated criteria of Article 62(a)(1)(B). 68 M.J. at 373. If a trial counsel's "certification of the appeal conclusively establishes jurisdiction in the appellate courts" – as the government alleges in its brief – then a timely appeal under Article 62, UCMJ, could *never* be dismissed on jurisdictional grounds by an appellate court. (Gov't. Br. 4) (*See also* Gov't. Br. 11) ("Under Article 62, UCMJ, as under 18 U.S.C. § 3731, the trial counsel's certification is conclusive for purposes of establishing jurisdiction").[3] This position is directly contradicted by *Bradford*. *See also Anderson*, 69 M.J. at 176; *Borgman*, 69 M.J. at 84.

[3] In a later portion of its brief, the government states, "[T]he 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." (Gov't. Br. 15). While appellee agrees an appeal must "[meet] the listed statutory bases for appeal," he rejects the remainder of the government's arguments for the reasons outlined in the next section.

Such an interpretation also remains consistent with legislative intent. As the Army Court noted in its ruling on reconsideration (JA 57), Congress intended for the determination of whether an appeal meets the criteria of Article 62, UCMJ, to be subjected to appellate review:

> *The determination as to whether the appeal meets the criteria of Article 62, as proposed, will be subject to review by appellate authorities.* The decision to appeal will be made by the trial counsel or a superior as 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 the Courts of Military Review under Article 70, before an appeal is filed.

(S. Rep. No. 98-53, at 23 (1983)).

B. Article 62, UCMJ, and 18 U.S.C. § 3731 construct separate mechanisms for interlocutory appeals of evidentiary rulings.

Any analysis of Article 62, UCMJ, must also "take into account the structural differences between courts-martial and trials in federal district court, as well as the textual similarities and differences with respect to Article 62, UCMJ, and 18 U.S.C. § 3731." *Wuterich*, 67 M.J. at 71. To that extent, the numerous textual differences between these two statutes construct separate frameworks for interlocutory appeals of evidentiary rulings.

First, the two statutes contain different standards for the type of evidentiary rulings that can be appealed. While 18 U.S.C. § 3731 authorizes appeals of any ruling "suppressing or excluding *evidence*," Article 62(a)(1)(B) only authorizes

appeals of "[a]n order or ruling which excludes *evidence that is substantial proof of a fact material in the proceeding*." (emphasis added). As such, Article 62 contains a higher standard for establishing appellate jurisdiction.

Second, as noted by the Army Court, the certification requirements within Article 62, UCMJ, "are listed separate and apart from the jurisdictional basis." (JA 54). The grounds for jurisdiction are listed in Article 62(a)(1), UCMJ, while the certification requirements are listed in Article 62(a)(2). Because this type of "structural separation of jurisdictional basis from certification requirements" does not occur in 18 U.S.C. § 3731, Congress' placement of the criteria under paragraph (a)(1) and the certification requirement under (a)(2) supports the conclusion that certification by a trial counsel – by itself – does not conclusively establish appellate jurisdiction. (JA 54).

Third, for appeals of evidentiary rulings, the two statutes give different effect to the "certification." While both statutes require a certification that "the appeal is not taken for purpose of delay" and "the evidence is a substantial proof of a fact material in the proceeding," the statutes differ over the level of personnel required to make such a certification. More specifically, 18 U.S.C. § 3731 lists the certification authority as "the United States attorney," while Article 62, UCMJ, only lists "the trial counsel." The government's brief highlights that R.C.M. 908 does not mandate any additional certifications from higher ranking personnel.

(Gov't. Br. 7). Furthermore, Article 62(b) says an appeal shall be "forwarded" to the Court of Criminal Appeals. By contrast, Section 3731 provides such an appeal "shall lie" to a court of appeals "if" a United States Attorney – the executive branch officer representing the United States in the Article III court – provides the necessary certification.[4]

Fourth, 18 U.S.C. § 3731 does not authorize the appeal of any evidentiary ruling "made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information." Put another way, "[w]hat the statute forbids is the interruption of trial." *United States v. Kington*, 801 F.2d 733, 735 (5th Cir. 1986). *See also United States v. Harshaw*, 705 F.2d 317, 319 (8th Cir. 1983) ("It is apparent from these and other legislative statements that Congress intended the phrase 'after a defendant is put in jeopardy and before a verdict or finding on an indictment or information' to represent the start and finish of an ongoing trial"). In *United States v. Centracchio*, the Seventh Circuit—in a ruling from Judge Posner—reiterated this temporal restriction under 18 U.S.C. § 3731, then further held that judges should not even empanel a jury in such circumstances:

[4] Federal courts have held a United States Attorney can delegate this responsibility. *See, e.g.*, *United States v. Wallace*, 213 F.3d 1216, 1218 (9th Cir. 2000); *United States v. Smith*, 532 F.2d 158, 160 (10th Cir. 1976); *United States v. Wolk*, 466 F.2d 1143, 1146 n.2 (8th Cir. 1972). However, this does not change appellee's point regarding the textual difference between the statutes.

> Section 3731 requires the government, in appeals based on the second paragraph of the section (appeals from orders "suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding"), to file the notice of appeal before jeopardy attaches to the defendant. In a jury trial that occurs when the jury is sworn . . .
>
> . . .
>
> The district judge in this case said that he would not swear in the jury, merely empanel it . . . . But empaneling the jury is not the kind of pretrial preparation that should be permitted to go forward while the government's appeal from an evidentiary ruling is pending in the court of appeals. *The decision of such an appeal can take months—in fact is bound to take months from the filing of the notice of appeal to the final decision by the court of appeals. During that time, the jurors will be in a kind of limbo.*

236 F.3d 812, 813–14 (7th Cir. 2001) (emphasis added).

Fifth, the applicable version of Article 62, UCMJ, does not contain the liberal construction mandate of 18 U.S.C. § 3731.[5] In light of this key textual difference, this Court stated in *Wuterich*, "[I]t would be inappropriate to apply the liberal construction mandate of section 3731 when interpreting Article 62, UCMJ." 67 M.J. at 72. This Court further explained, "We treat cases interpreting parallel

[5] Pursuant to the National Defense Authorization Act for Fiscal Year 2017, Article 62 was recently amended to include this same provision. Pub. L. 114–328, §5326, 130 Stat. 2000 (2016). However, this amendment "shall take effect on the date designated by the President, which date shall be not later than the first day of the first calendar month that begins two years after the date of the enactment of this Act." Pub. L. 114–328, §5542, 130 Stat. 2000 (2016). Even further, this amendment "shall not apply to any case in which charges are referred to trial by court-martial before the effective date of such amendments." *Id*.

provisions of 18 U.S.C. § 3731 as guidance, not as mandates; and we apply that guidance only to the extent consistent with an interpretation of Article 62 that is not dependent upon the liberal construction admonition." *Id*.

Thus, when read in conjunction, the textual differences between 18 U.S.C. § 3731 and Article 62, UCMJ, construct two separate frameworks for interlocutory appeals of evidentiary rulings.

Under 18 U.S.C. § 3731, a United States Attorney may obtain appellate review of a ruling "suppressing or excluding *evidence*" by proper certification, but the statute includes a temporal restriction of which rulings can be appealed ("not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information"). This statute should also be read in the context of its liberal construction mandate.

By contrast, under Article 62, UCMJ, a trial counsel may seek appellate review of evidentiary rulings excluding "evidence *that is substantial proof of a material fact in the proceeding*" at any stage of trial. However, whether an appeal meets this jurisdictional standard is subject to appellate review. While Article 62, UCMJ, requires certification by the trial counsel, such certification does not conclusively establish appellate jurisdiction, and the statute should not be read in the context of a liberal construction mandate.

In its ruling on reconsideration, the Army Court held, "Considering these textual differences, the plain meaning of Article 62, UCMJ, is the excluded evidence must actually be substantial proof of a material fact, not merely evidence that is certified as such." (JA 54).[6] Such a position perfectly synthesizes the textual differences between the two statutes.[7]

C. The government's position would provide trial counsel with the same authorities – but none of the limitations – as United States Attorneys.

The government asks this Court to "follow federal precedent and hold that the trial counsel's certification is sufficient to confer jurisdiction on the appellate court." (Gov't. Br. 10–11). Appellant has two responses.

First, "[f]ederal court decisions interpreting 18 U.S.C. § 3731 constitute guidance, not binding precedent, in the interpretation of Article 62, UCMJ." *Wuterich*, 67 M.J. at 71. Furthermore, this Court should "take into account the structural differences between courts-martial and trials in federal district court, as

[6] While Appellee acknowledges this Honorable Court conducts a de novo review of issues of jurisdiction and statutory interpretation, he specifically adopts this position from the Army Court as part of his argument. (JA 54).

[7] While the government cites the "pool of evidence" test from *Wuterich* and *Vargas*, these cases analyzed the clause "excludes evidence," as opposed to the conjoining clause "that is substantial proof of a fact material in the proceeding." (Gov't. Br. 15–16). Whether an appeal satisfies the former clause is a different analysis from whether it satisfies the latter. And both of these questions remain completely separate from whether a trial counsel's certification "is *conclusive* for purposes of establishing appellate jurisdiction under Article 62(a)(1)(B)," which was the only question certified to this Honorable Court. (emphasis added).

well as the textual similarities and differences with respect to Article 62, UCMJ, and 18 U.S.C. § 3731." *Wuterich*, 67 M.J. at 71. Appellee again emphasizes the numerous textual differences between the statutes regarding appeals of evidentiary rulings. These textual differences matter, particularly in the context of the certified issue.

Second, the government's argument heavily relies on the "certification requirement" in both statutes, while ignoring their larger contexts. However, as the government itself points out, jurisdiction is not "determined by teasing out a particular provision of the statute and reading it apart from the whole." (Gov't Br. 16) (citing *Lopez de Victoria*, 66 M.J. at 69). To that extent, the government's position that a trial counsel's "certification of the appeal *conclusively* establishes jurisdiction in the appellate courts" remains wholly disconnected from the entirety of the statute, particularly when viewed in juxtaposition with 18 U.S.C. § 3731 . (Gov't. Br. 4; *see also* Gov't. Br. 11) (emphasis added).

Through its narrow focus on the certification requirements, the government argues that trial counsel have the unilateral ability to mandate appellate review of *any* evidentiary ruling excluding evidence at any time before or during a trial, as long as they certify such evidence meets the applicable standard. Again, such unfettered authority is not even granted to United States Attorneys. Plain and simple, the similar certification requirements within the two statutes does not

obviate their clear textual differences, nor the structural differences between courts-martial and federal civilian criminal prosecutions.

In sum, the plain language, legislative history, and textual and systemic differences between military and civilian criminal prosecutions all support the conclusion that certification by a trial counsel does not "conclusively" establish appellate jurisdiction under Article 62(a)(1)(B), UCMJ.

Conclusion

WHEREFORE, appellee respectfully requests this honorable court affirm the ruling of the Army Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Jacobsen*, Crim. App. Dkt. No. 20160786, USCA Dkt. No. 17-0408/AR, was delivered to the Court and Government Appellate Division on May 25, 2017.

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