IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellant	**MOTION TO DISMISS**
v.	Docket No. ARMY MISC 20200735
First Lieutenant (O-2) **SAMUEL B. BADDERS** United States Army Appellee	Tried at Fort Hood, Texas, on 21 January, 15 September, 22-24 September, 19 November 2020, before a general court-martial appointed by the Commander, 1st Cavalry Division, Colonels Douglas K. Watkins and Maureen A. Kohn, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned appellate defense counsel, pursuant to Rule 23 of this Honorable Court's Rules of Appellate Procedure, and move to dismiss this appeal for lack of jurisdiction.

Statement of Facts

On 24 September 2020, the military judge adjourned the court after sentencing appellee, First Lieutenant Samuel B. Badders. (R. at 596). On the same date, the military judge signed the Statement of Trial Results. (Statement of Trial Results). The defense counsel received the Statement of Trial Results on 25 September 2020.

PANEL NO. 4

On 19 November 2020, the military judge held a post-trial Article 39(a) session to address post-trial motions filed by the defense. (R. at 597). On 16 February 2021, the military judge issued her ruling granting the defense post-trial motion for a mistrial. (App. Ex. LXV).

On 8 April 2021, the government filed its appeal and brief in support pursuant to Article 62, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 862, asserting this court has jurisdiction under Article 62(a)(1)(A), UCMJ.

Standard of Review

Jurisdiction of an appeal filed under Article 62, UCMJ is a question of law reviewed de novo. *United States v. Wolpert*, 75 M.J. 777, 779 (Army Ct. Crim. App. 2016) (citing *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)). "The burden is on the government to prove jurisdiction by a preponderance of the evidence." *Wolpert*, 75 M.J. at 779 (citing *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002)). Statutes governing jurisdiction are read as "an integrated whole, with the purpose of carrying out the intent of Congress in enacting them." *United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008) (citations omitted).

Law

The question of jurisdiction to review the declaration of a mistrial under Article 62, UCMJ is a matter of first impression for this court. The Court of Appeals for the Armed Forces [CAAF] also has not reviewed this issue.

In a trial by general court-martial, the government may appeal "an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." Article 62(a)(1)(A), UCMJ.

Under Rule for Courts-Martial [R.C.M.] 915, a military judge may declare a mistrial as to some or all charges, and as to the entire proceedings or only the proceedings after findings. R.C.M. 915(a). A mistrial has the effect of withdrawal of charges, and generally does not prevent trial by another court-martial on the affected charges and specifications. R.C.M. 915(c).

Under R.C.M. 907, a dismissal is the termination of the proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt. R.C.M. 907(a). "A dismissal of a specification terminates the proceeding with respect to that specification…." R.C.M. 907(a) discussion.

This court has held that mistrial and dismissal are not the same. *United States v. McClain*, 65 M.J. 894, 898 (Army Ct. Crim. App. 2008). Specifically, this court determined:

> The distinction between mistrial and dismissal is more than mere semantics. After mistrial, affected charges remain "alive" for purposes of further proceedings; after dismissal, affected charges no longer exist. After dismissal, any further proceedings can only be initiated as to the conduct underlying the affected charges by starting anew, with preferral of different charges.

Id. at 899.

The provisions of Article 62 are to be liberally construed to effect its purposes. Article 62(e), UCMJ. Regardless of this liberal construction, prosecution appeals are still not favored and require specific statutory authorization. *United States v. Hill*, 71 M.J. 678, 680 (Army Ct. Crim. App. 2012) (citing *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008)). The government is granted broader authority to file interlocutory appeals because of the limitation on post-trial appeals due to the constitutional prohibition against double jeopardy. *Hill*, 71 M.J. at 680.

When interpreting a statute, the plain language controls except when the text of a statute is ambiguous. *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013). Congress intended Article 62, UCMJ to be interpreted and applied in the same manner as the Criminal Appeals Act, 18 U.S.C. § 3731, "except where the

particulars of military practice dictate a different approach." *United States v. True*, 28 M.J. 1, 3 (C.M.A. 1989) (citing *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985)); *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995) (citations omitted).

The Criminal Appeals Act provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court *dismissing* an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

18 U.S.C. § 3731 (emphasis added).[1]

In interpreting an earlier version of the Criminal Appeals Act, the Supreme Court determined the nonappealability of a trial court's mistrial ruling was consistent with Congressional action and policy. *United States v. Jorn*, 400 U.S. 470, 476 (1971). The government's ability to file an interlocutory appeal did not arise until the trial judge, after resumption of the prosecution following the mistrial declaration, barred re-prosecution due to double jeopardy. *Id*. at 476-77.

In *Dossey*, the Navy-Marine Corps Court of Criminal Appeals, in a split decision reversing its prior ruling on reconsideration, held it had jurisdiction to

[1] The term *new trial* as used in the Criminal Appeals Act is not the same as a mistrial. *See* Fed. R. Crim. P. 26.3, 33; R.C.M. 1210.

review a mistrial declaration under Article 62(a)(1)(A), UCMJ. *United States v. Dossey*, 66 M.J. 619, 621 (N.M. Ct. Crim. App. 2008). The Navy court considered whether *terminates the proceedings* means *before the particular court-martial* or all proceedings *on the charge*. *Dossey*, 66 M.J. at 623. The Navy court interpreted the term to mean *before the particular court-martial* because the court concluded the term proceedings is mostly used elsewhere in the UCMJ to mean before a particular court-martial. *Id*. at 623-24. The Navy court also relied on analyzing the Criminal Appeals Act and Congressional intent to support its conclusion. *Id*. at 624 (citing *United States v. Wilson*, 420 U.S. 332, 337 (1975)).

The dissent in *Dossey* concluded the court lacked jurisdiction to hear an appeal pursuant to Article 62, UCMJ from the declaration of a mistrial under R.C.M. 915. *Dossey*, 66 M.J. at 626 (Vollenweider, J., dissenting). In analyzing R.C.M. 915 and distinguishing mistrials from dismissals, the dissent reasons that a mistrial terminates the trial, but does not terminate the proceedings, meaning final prosecution. *Id*. at 628. The dissent similarly distinguishes the Criminal Appeals Act as permitting appeals from dismissals but not mistrials. *Id*. In finding retrial instead of appeal as the appropriate remedy for the government, the dissent reasoned that retrial is "a more efficient mechanism…. An appeal can take many months, particularly where the decision of the Court of Criminal Appeals is then

appealed to the Court of Appeals for the Armed Forces. The convening authority, on the other hand, can immediately refer the charges to a new court-martial." *Id*.

In *Flores*, the Coast Guard Court of Criminal Appeals also held it had jurisdiction under Article 62(a)(1)(A), UCMJ to review a mistrial declaration. *United States v. Flores*, 80 M.J. 501, 503 (C.G. Ct. Crim. App. 2020). Akin to *Dossey*, the Coast Guard court considered the meaning of the term *terminates the proceedings*. *Id*. at 505. The court reached its conclusion by finding a mistrial tantamount to a dismissal. *Id*. The Coast Guard court held its ruling was bolstered by Congressional intent and the ruling in two Federal Circuit cases, *Harshaw* and *Chapman*. *Id*.; *United States v. Harshaw*, 705 F.2d 317 (8th Cir. 1983); *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008). The Navy court in *Dossey*, however, specifically noted *Harshaw* did not involve an appeal from a mistrial. *Dossey*, 66 M.J. at 623, n.12.

Argument

This court does not have jurisdiction to review the instant case under Article 62(a)(1)(A), UCMJ. Contrary to the government's reliance on the narrow interpretation by other service courts, a military judge's declaration of a mistrial does not terminate the proceedings with respect to a charge or specification.

The language in Article 62, UCMJ is ambiguous as to whether or not it applies to a mistrial, and therefore its meaning must be interpreted. The term *terminates the proceedings with respect to a charge or specification* is properly interpreted to broadly apply to all proceedings on the charge or specification, not just the immediate proceeding. This conclusion is supported through an analysis of the statutory language, distinction between mistrials and dismissals, and comparison with the federal Criminal Appeals Act.

While the holdings in *Dossey* and *Flores* are not binding on this court, they are also unpersuasive. The basic flaw in the Navy court's analysis, which is echoed by the Coast Guard court, is the misreading of the language of the rule. Both courts analyze the term *terminates the proceedings*. However, the rule does not apply to just *the proceedings*, it applies to *the proceedings with respect to a charge or specification*.

In reaching its conclusion, the Navy court defined *the proceedings* in a manner that is not supported by its use throughout the UCMJ. The use of the term *the proceedings* throughout the UCMJ does not reflect happenings before a particular court-martial. Rather, a survey of the term simply demonstrates that it is broad in meaning and applicable to many types of happenings. Article 1(14), UCMJ (*proceedings* of a court-martial); Articles 2(d)(1), 15, UCMJ (addressing

proceedings under Article 15); Article 6b, UCMJ (public *proceeding* of the service clemency and parole board); Article 6b(a)(7), UCMJ (right to *proceedings* free from unreasonably delay); Article 30, UCMJ (*proceedings* conducted before referral); Article 35(b)(1), UCMJ ("no trial or other proceeding of a general court-martial…"); Article 39(d)(1), UCMJ (hearing, trial, or other *proceeding*); Article 49(c), UCMJ (a court-martial or other *proceeding*); Article 63(a), UCMJ (original *proceedings*); Article 66, UCMJ (additional *proceedings*); Article 131f, UCMJ (*proceedings* before, during or after trial of an accused).

Despite its broad use, certain distinctions can still be distilled regarding the term *proceedings*. The term is used specifically in both its singular and plural forms, as well as with an indefinite and definite article. A broader type of proceeding may encompass more narrow and specific types of proceedings. Trials and courts-martial have proceedings, but the term proceedings is not synonymous with a trial or court-martial.

In analyzing Article 62(a)(1)(A), UCMJ, the use of the definite article in *the* proceedings, as opposed to *a* proceeding, supports a broad interpretation that it is applicable to all types of proceedings instead of a specific proceeding. This same conclusion is also reached from the use of the plural proceedings, as opposed to the singular proceeding, to capture multiple proceedings instead of just the present

proceeding. Moreover, the only qualifying language for the type of proceeding is *with respect to a charge or specification*. Unlike many other provisions in the UCMJ, Article 62(a)(1)(A) does not specify court-martial or trial proceedings. This omission supports a broader interpretation of the term proceedings.

Outside of the UCMJ, the term proceedings with respect to a charge or specification is found at R.C.M. 907. In R.C.M. 907, a dismissal clearly terminates the proceedings with respect to a charge or specification. Importantly though, this language is conspicuously absent from R.C.M. 915. Instead, a mistrial serves to withdraw the charge and specification, which is characteristically different from a dismissal. Unlike the court in *Flores*, this court and the dissent in *Dossey* have found a mistrial and dismissal to have an appreciable difference. Ultimately, the charges and specifications are still alive after mistrial, but only the underlying offense still exists after a dismissal.

While *Flores* relied on multiple flawed premises, it predominately erred in its determination that mistrials and dismissals are the same. The Coast Guard court oversimplified this distinction where it highlighted that specifications can be "re-referred" to a court-martial after either a mistrial or a dismissal. *Flores*, 80 M.J. at 505. Dismissed charges cannot truly be re-referred, so new charges would have to be preferred for the same underlying offense. Ultimately though, these new

charges are different charges. Additionally, the Coast Guard court erroneously attributed weight to two Federal Circuit cases, incorrectly concluding the cases based their jurisdiction on the mistrial declaration. In *Harshaw*, jurisdiction was obtained based on the trial court's suppression of evidence, not the mistrial declaration. 705 F.2d at 319-20. Even the court in *Dossey* found *Harshaw* unpersuasive on the issue of jurisdiction. 66 M.J. at 623, n.12. Further, while the *Chapman* case discusses the mistrial declaration, ultimately its jurisdiction is derived from the subsequent dismissal by the district court. 524 F.3d at 1080.

Turning to Congressional intent, this court can only interpret and apply Article 62, UCMJ in the context of the Criminal Appeals Act to the extent it does not conflict with the particularities of military practice. The Criminal Appeals Act plainly and unambiguously only permits government appeals from dismissals, not mistrials. Therefore, the term *terminate the proceedings with respect to a charge or specification* under Article 62, UCMJ must similarly be interpreted and applied to only include dismissals, but not mistrials.

The Supreme Court in *Jorn* and the *Dossey* dissent outline a sensible explanation for the nonappealability of mistrial declarations that is consistent with the issues in the present case. Since a mistrial declaration is an interlocutory trial ruling, the government has an avenue for relief by re-referring the existing charges

and specifications to a new court-martial, or otherwise disposing of them as the convening authority sees fit. During re-prosecution of the charge and its specification, if a military judge seeks to bar prosecution on the basis of double jeopardy, such an order would be reviewable by this court at that time under Article 62(a)(1)(A), UCMJ. This interpretation is more expedient, requires trial issues to be resolved at the trial level, provides the government with recourse, and comports with the language of the statute.

Ultimately, Article 62, UCMJ does not confer jurisdiction to this court to review a mistrial declaration on a government appeal. This conclusion is supported by the statutory language of the rule, the clear distinctions between mistrials and dismissals, and a comparison with the Criminal Appeals Act.

Conclusion

WHEREFORE, appellee requests this Honorable Court grant this motion to dismiss this appeal for lack of jurisdiction.

PANEL NO. 4

MOTION TO DISMISS

GRANTED: _____

DENIED: [redacted]

DATE: _29 Sep 21__

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 28 April 2021.

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