No. 08-1133

In the Supreme Court of the United States

FRANK D. WUTERICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Article 62(a)(1)(B) of the Uniform Code of Military Justice, 10 U.S.C. 862(a)(1)(B), which authorizes the government to appeal a military judge's order that "excludes evidence," encompasses a pretrial order quashing a government-issued subpoena to obtain what is believed to be material evidence.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Grand Jury Empanelled, In re, 597 F.2d 851 (3d Cir. 1979) 5, 8
Grand Jury Subpoena, In re, 175 F.3d 332 (4th Cir. 1999) 7
Grand Jury Subpoena, In re, 646 F.2d 963 (5th Cir. 1981) 8
Grand Jury Subpoena Duces Tecum, In re, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105 (1997) 7
Kiefaber, In re, 774 F.2d 969 (9th Cir. 1985), vacated as moot, 823 F.2d 383 (9th Cir. 1987) 8
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 9
United States v. *Brooks*, 42 M.J. 484 (C.A.A.F. 1995) 8
United States v. *Browers*, 20 M.J. 356 (C.M.A. 1985) . 5, 8, 9
United States v. *Denedo*, No. 08-267 (June 8, 2009) 10
United States v. *Drogoul*, 1 F.3d 1546 (11th Cir. 1993) 9
United States v. *Lincoln*, 42 M.J. 315 (C.A.A.F. 1995) 8
United States v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) 8
United States v. *Smith*, 135 F.3d 963 (5th Cir. 1998) 7

Cases—Continued: Page

United States v. *True*, 28 M.J. 1 (C.M.A. 1989) 8
United States v. *Watson*, 386 F.3d 304 (1st Cir. 2004) 9
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9, 10

Constitution, statutes and rules:

U.S. Const. Amend. I 3
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
10 U.S.C. 862 (Art. 62) 4, 5, 6, 8, 9, 10
10 U.S.C. 862(a)(1)(B) (Art. 62(a)(1)(B)) . . . . . *passim*
10 U.S.C. 862(a)(2) (Art. 62(a)(2)) 4, 10
10 U.S.C. 862(a)(3) 10
10 U.S.C. 862(b) 10
10 U.S.C. 862(c) 10
10 U.S.C. 892 (Art. 92) 2
10 U.S.C. 919 (Art. 119) 2
10 U.S.C. 928 (Art. 128) 2
10 U.S.C. 934 (Art. 134) 2
18 U.S.C. 3731 . . . . . 5, 6, 7, 8, 9
Fed. R. Evid. 403 7
Rules for Courts-Martial:
Rule 703 3
Rule 703(f)(1) 3
Rule 707(b)(3)(C) 10
Rule 908(b)(3) 4

Miscellaneous: Page

S. Rep. No. 53, 98th Cong., 1st Sess. (1983) 8

In the Supreme Court of the United States

No. 08-1133

FRANK D. WUTERICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-50a) is reported at 67 M.J. 63. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 52a-65a) is reported at 66 M.J. 685.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2008. A petition for reconsideration was denied on December 12, 2008 (Pet. App. 51a). The petition for a writ of certiorari was filed on March 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a staff sergeant in the United States Marine Corps, is charged with dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice, in violation of Articles 92, 119, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 919, 928, and 934. Pet. App. 4a. The government issued a pretrial subpoena to the CBS Broadcasting Company (CBS). The military judge quashed the subpoena. *Id.* at 5a-9a. The government appealed that ruling to the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) under UCMJ Article 62(a)(1)(B), 10 U.S.C. 862(a)(1)(B). Pet. App. 9a. The N-MCCA vacated and remanded. *Id.* at 52a-65a. The United States Court of Appeals for the Armed Forces (CAAF) vacated and remanded. *Id.* at 1a-50a.

1. On November 19, 2005, petitioner led a squad of Marines on a convoy patrol in Haditha, Iraq. A roadside bombing killed one Marine and wounded others. In the aftermath of that bombing, the convoy's response resulted in the deaths of numerous Iraqi civilians. Pet. App. 3a-4a, 53a.

Following a military investigation, petitioner was charged with various crimes under the UCMJ, including dereliction of duty and voluntary manslaughter, in connection with the deaths of the Iraqi civilians. In October 2006, after being charged, petitioner was interviewed by Scott Pelley, a correspondent for the CBS television program *60 Minutes*. On March 18, 2007, *60 Minutes* broadcast a half-hour segment entitled "The Killings in Haditha" that included parts of Pelley's interview of petitioner. Pelley explained that petitioner had agreed to be interviewed because he wanted "to tell the truth"

about his role in the killings. The program aired only a small portion of the several hours of interview footage. Pet. App. 4a-5a, 53a.

2. On January 16, 2008, the government, pursuant to Rule for Courts-Martial (R.C.M.) 703, issued a subpoena to CBS for all audio and videotapes of petitioner's statements that were in CBS's possession. The government asserted that petitioner's statements would be admissible as party admissions under the military rules of evidence. Pet. App. 5a-6a.

CBS moved to quash the subpoena on the grounds that it was unreasonable and oppressive under the First Amendment and military law. The government opposed. Petitioner initially took no position, but later indicated that he would object if the government sought to admit into evidence petitioner's aired statements only. The military judge viewed the *60 Minutes* segment, but he did not review the unaired outtakes that were the basis of the government's subpoena. Pet. App. 6a-8a.

The military judge quashed the subpoena for lack of necessity under R.C.M. 703(f)(1). The military judge stated that the contents of petitioner's statements in the outtakes were speculative and that the statements would be cumulative to petitioner's statements already possessed by the government. The government moved for reconsideration of the ruling and moved the military judge to conduct an in camera review of the disputed statements to determine whether they were cumulative, inasmuch as the military judge had not reviewed the subpoenaed material. The military judge denied the motion without explanation. Pet. App. 8a-9a.

3. Relying on UCMJ Article 62(a)(1)(B), the government appealed. Article 62(a)(1)(B) provides that the government may appeal "[a]n order or ruling which ex-

cludes evidence that is substantial proof of a fact material in the proceeding." 10 U.S.C. 862(a)(1)(B).[1] Petitioner and CBS opposed the government's appeal on both jurisdiction and the merits.

The N-MCCA ruled that the military judge's pretrial order was appealable under Article 62(a)(1)(B) as an order that "excludes evidence." Pet. App. 52a-57a. It also ruled that petitioner, unlike CBS, lacked standing to participate in the appeal. *Id.* at 57a-58a. On the merits, the N-MCCA vacated the ruling below on the ground that the military judge abused his discretion in quashing the subpoena on cumulativeness grounds without first conducting an in camera review of the evidence. *Id.* at 60a-65a.

4. The CAAF vacated the decisions below and remanded. Pet. App. 1a-50a.

As an initial matter, the CAAF held that petitioner had standing to participate in the appeal. Pet. App. 13a-14a.

---

[1] Article 62 states, in relevant part:

> (a)(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.

10 U.S.C. 862. Pursuant to Article 62(a)(2), the government must certify that "the evidence excluded is substantial proof of a fact material in the proceeding." 10 U.S.C. 862(a)(2); accord R.C.M. 908(b)(3). The government did so in this case. Pet. App. 57a.

As to appellate jurisdiction, the CAAF held that the order quashing the subpoena was appealable under Article 62(a)(1)(B) as an order that "excludes evidence." The CAAF explained that Congress enacted Article 62 against a legal landscape that requires government appeals to be authorized by statute. Pet. App. 15a-16a. It further explained that Congress had modeled Article 62 on 18 U.S.C. 3731 and intended that military courts interpreting Article 62 would be guided by federal-court precedent interpreting analogous Section 3731—though federal authorities would not always control in light of Section 3731's "liberal construction" clause.[2] Pet. App. 17a-19a. The CAAF stated that the statutory term "excludes evidence" in Article 62(a)(1)(B) was similar to the term "suppressing or excluding evidence" in Section 3731. It then noted that federal courts of appeals had concluded that the term "excluding evidence" included an order quashing a grand jury subpoena. Pet. App. 20a-22a (citing, *e.g.*, *In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 856 (3d Cir. 1979)).

The CAAF distinguished its prior decision in *United States* v. *Browers*, 20 M.J. 356 (C.M.A. 1985), which held that an order denying a continuance was not an order that "excludes evidence" under Article 62(a)(1)(B). The

---

[2] Section 3731 provides, in relevant part:

> 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 * * * 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. * * * The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C. 3731.

court distinguished *Browers* on the ground that *Browers* had involved a trial scheduling issue, not an order excluding evidence. The CAAF also stated that *Browers* did not prevent it from relying on federal cases interpreting Section 3731. Pet. App. 22a-27a. The court concluded that the military judge's order "was appealable under Article 62, UCMJ, because it had a direct effect on whether the outtakes would be excluded from consideration at the court-martial." *Id.* at 29a-30a.

On the merits, the CAAF held that petitioner's statements in the outtakes "constitute a potentially unique source of evidence that is not necessarily duplicated by any other material." Pet. App. 34a. The court held that the military judge thus abused his discretion in quashing the subpoena without first conducting an in camera review of the subpoenaed material to determine whether petitioner's statements were cumulative. *Id.* at 30a-34a. The CAAF directed the military judge on remand to conduct an in camera inspection of the subpoenaed material and to consider any claim of privilege raised by CBS. *Id.* at 34a-36a.

Judge Ryan, joined by Judge Erdmann, dissented on appellate jurisdiction. In their view, the "excludes evidence" language in Article 62(a)(1)(B) does not include the quashing of a subpoena. Under *Browers*, they argued, the CAAF had adopted a narrow interpretation of Article 62 in which the test is whether the military judge's order rendered the evidence "inadmissible." They also contended that the federal grand-jury subpoena cases were inapposite because those cases relied on Section 3731's "liberal construction" clause and that the majority's decision would threaten the speedy trial rights of soldiers. Pet. App. 36a-50a.

ARGUMENT

Petitioner contends (Pet. 8-14) that UCMJ Article 62(a)(1)(B) does not authorize a government appeal from a military judge's pretrial order quashing a subpoena. The CAAF's decision correctly reached a result consistent with the rule in federal court under 18 U.S.C. 3731, and its decision does not conflict with another decision of the CAAF or any other court. Court-martial proceedings since the CAAF's decision also may render the underlying dispute moot. Further review of the CAAF's interlocutory decision is therefore unwarranted.

1. a. The CAAF's ruling that an order quashing a subpoena is an order that "excludes evidence" within the meaning of Article 62(a)(1)(B) is correct. The practical effect of the military judge's order was to exclude petitioner's pretrial statements from the court-martial. In both common parlance and legal usage, an order that prevents evidence from being introduced at trial on the ground that it is cumulative to other evidence is an order that excludes that evidence. See Fed. R. Evid. 403 (providing that cumulative evidence may be "excluded").

The CAAF's interpretation of the "excludes evidence" language of Article 62(a)(1)(B) is consistent with federal appellate decisions construing the analogous "suppressing or excluding evidence" language of 18 U.S.C. 3731. In *United States* v. *Smith*, 135 F.3d 963, 967 (1998), the Fifth Circuit held that Section 3731 authorized a government appeal from a pretrial order quashing a subpoena to a television station for statements of the defendant. Other federal courts of appeals have held that an order quashing a grand-jury subpoena is appealable under Section 3731. See, *e.g.*, *In re Grand Jury Subpoena*, 175 F.3d 332, 336-337 (4th Cir. 1999); *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910,

914 (8th Cir.), cert. denied, 521 U.S. 1105 (1997); *In re Kiefaber*, 774 F.2d 969, 972-973 (9th Cir. 1985), vacated as moot, 823 F.2d 383 (9th Cir. 1987); *Colucci*, 597 F.2d at 855-856 (3d Cir.); see also *In re Grand Jury Subpoena*, 646 F.2d 963, 967-968 (5th Cir. 1981).

The CAAF properly relied on those cases. The legislative history of Article 62 confirms that Congress intended for the CAAF to rely on analogous federal-court decisions. Congress modeled Article 62 on Section 3731. The phrase "excludes evidence" in Article 62(a)(1)(B) is virtually identical to the "excluding evidence" text in Section 3731. Further, Congress expressly stated that Article 62 would permit an appeal "under procedures similar to an appeal by the United States in a federal civilian prosecution" and that Article 62 "[t]o the extent practical * * * parallels 18 U.S.C. § 3731." S. Rep. No. 53, 98th Cong., 1st Sess. 6, 23 (1983). The CAAF itself has consistently recognized the interpretive relationship between the two provisions. See Pet. App. 17a-18a; see also, *e.g.*, *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. 1995); *United States* v. *Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995); *United States* v. *True*, 28 M.J. 1, 3 (C.M.A. 1989); *United States* v. *Browers*, 20 M.J. 356, 359 (C.M.A. 1985).

Petitioner, echoing the dissent, contends (Pet. 9-10) that the absence in Article 62 of the clause in 18 U.S.C. 3731 that "[t]he provisions of this section shall be liberally construed" means that Article 62 must be interpreted more narrowly. Even if so, not all the federal appellate decisions rely on the "liberal construction" clause of Section 3731 in concluding that an order quashing a subpoena is immediately appealable. Indeed, in *Smith*, the case most factually and procedurally similar

to this one, the Fifth Circuit did not even mention it. Moreover, a "liberal construction" clause in a federal criminal statute merely "seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply [the statute] to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993). The CAAF's ruling that Article 62(a)(1)(B) covers an order quashing a trial subpoena was not at the outer reaches of the statute, and therefore the CAAF did not have to rely on a "liberal construction" clause to justify its holding.

b. Contrary to petitioner's contention (Pet. 8), the CAAF's decision does not conflict with its prior decision in *Browers*. In *Browers*, the Court of Military Appeals (the predecessor to the CAAF) held that a trial judge's denial of a continuance was not an order "exclud[ing] evidence" under Article 62(a)(1)(B). 20 M.J. at 360. In this case, the CAAF properly distinguished *Browers* on the ground that the denial of a continuance in that case did not exclude evidence because it merely affected the scheduling of a trial. The First Circuit drew a similar distinction in *United States* v. *Watson*, 386 F.3d 304 (2004), holding that the denial of a continuance (where the government sought time to take a foreign deposition) was not appealable under Section 3731, while acknowledging that denial of an order authorizing foreign depositions was immediately appealable under Section 3731. *Id.* at 312 (citing *United States* v. *Drogoul*, 1 F.3d 1546 (11th Cir. 1993)). In any event, this Court does not grant review to decide whether a court of appeals has

properly applied its own precedents. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). That principle is equally valid with respect to any internal tension among CAAF precedents.

c. Petitioner's contention (Pet. 11-13) that this case warrants further review because the CAAF's interpretation of Article 62 threatens efficiency and the speedy trial rights of soldiers is also unfounded. Any interlocutory appeal authorized by Article 62 causes a trial delay; that is not an issue unique to orders quashing a subpoena. More importantly, military law has adequate safeguards to prevent interlocutory appeals by the government from becoming too numerous or from violating the speedy trial rights of soldiers. As noted above (note 1, *supra*), the government may pursue an appeal under Article 62(a)(1)(B) only if it certifies that "the evidence excluded is substantial proof of a fact material in the proceeding." 10 U.S.C. 862(a)(2). That requirement necessarily limits the pool of such appeals. Moreover, Article 62 prescribes that such appeals "shall be diligently prosecuted" and "shall, whenever practicable, have priority over all other proceedings." 10 U.S.C. 862(a)(3) and (b). Although R.C.M. 707(b)(3)(C) provides that the 120-day clock ordinarily will be reset after a government appeal, it (like Article 62(c), 10 U.S.C. 862(c)) specifies that the delay caused by such an appeal will not be excluded if it was taken solely for purposes of delay and with knowledge that the appeal was frivolous and without merit.

2. Petitioner suggests (Pet. 13-14), in the alternative, that this Court hold his petition for *United States* v. *Denedo*, No. 08-267, which was decided on June 8, 2009. In *Denedo*, the Court held that the military appellate courts have statutory jurisdiction under the UCMJ to

hear a petition for a writ of error coram nobis filed by a former service member whose conviction had become final. Slip op. 5-13. The Court's decision in *Denedo* affords no assistance to petitioner's argument and in no way impinges on the correctness of the CAAF's decision upholding appellate jurisdiction in this case.

3. Because this case involves the pretrial quashing of a subpoena, this case is in an interlocutory posture. Arguably, the decision whether interlocutory jurisdiction for the government's appeal existed is, itself, final. But the underlying dispute involving the evidence sought by the subpoena is the subject of ongoing proceedings, which strongly counsels against review. The CAAF's decision required the military judge to review the subpoenaed interview outtakes in camera. Pet. App. 34a-36a. Although the military judge on remand concluded that some of the subpoenaed footage was material, he quashed the subpoena on another ground (*i.e.*, newsgathering privilege). See 3/12/09 Tr. 46-53. An appeal of that ruling is currently pending before the N-MCCA. If the military judge's ruling is upheld, this Court's resolution of the question presented would have no impact on this case. Even if the government's pending appeal is successful and the subpoena ultimately executed, petitioner might later be acquitted at his court-martial—thereby obviating petitioner's need for the Court's intervention. The question concerning CAAF's jurisdiction over interlocutory appeals is not so pressing as to warrant review when the underlying evidentiary dispute may be mooted by later events.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney

AUGUST 2009