IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) FINAL BRIEF ON BEHALF OF) APPELLANT
v.	)
	) Army App. Dkt. No. 20130647
First Lieutenant (O-2) **ASA M. EVANS,** United States Army, Appellant	) USCA Dkt. No. 16-0019/AR

MATTHEW D. BERNSTEIN
Captain, Judge Advocate Appellate
Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0713
USCAAF No. 35859

HEATHER L. TREGLE
Captain, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36329

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Chief, Complex Litigation
Defense Appellate Division
USCAAF Bar Number 26450

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

Issue Presented

WHERE THE ARMY COURT OF CRIMINAL APPEALS FOUND EVIDENCE WAS ADMITTED IN VIOLATION OF APPELLANT'S ARTICLE 31(b), UCMJ, RIGHTS, DID THE COURT ERR IN APPLYING THE KERR PREJUDICE TEST AS OPPOSED TO THE BRISBANE HARMLESS BEYOND A REASONABLE DOUBT TEST?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On July 19, 2013 First Lieutenant (1LT) Asa M. Evans (appellant) was convicted before a panel at Fort Bliss, Texas. Contrary to his pleas, appellant was convicted of a false official statement (two specifications) and larceny, in violation of Articles 107 and 121, UCMJ. He was sentenced to forfeiture of all pay and allowances, confinement for one month and a dismissal. The convening authority approved the adjudged sentence.

On July 17, 2015, as discussed fully below, the Army Court determined the military judge abused his discretion in denying a defense motion to suppress, but determined that the taint of that error only affected one of the two false official statements. (JA at 6-7). Consequently, the Army Court dismissed only Specification 1 of Charge I and affirmed the adjudged sentence. Appellant was notified of the Army Court's decision and petitioned this Court for review on October 20, 2015. On January 19, 2016, this Honorable Court granted appellant's petition for review.

Statement of Facts

1. Facts from the Trial

Appellant's chain of command initiated an Army Regulation (AR) 15-6 investigation on August 24, 2011, concerning his wearing of a combat patch and alleged false official statements made to a military police officer. (JA at 101). On

August 29, 2011, as a result of the investigation, appellant requested a lawyer. (JA at 108). The AR 15-6 investigating officer, Captain (CPT) Jendrey, concluded that appellant had worn an unauthorized combat patch and made a false official statement to military police. (JA at 101). Captain Jendrey recommended appellant be relieved for cause, have his security clearance revoked, and be permanently barred from future promotion. (JA at 106).

Major (MAJ) James Hill, the attorney for the brigade in which appellant served (in Army parlance the "Brigade Judge Advocate"), received rebuttal matters from appellant concerning this AR 15-6 investigation. (JA at 31-32). This documentation included a dental x-ray with appellant's name, a date of May 15, 2010, and a location of Bagram Air Base Dental Clinic, Afghanistan. (JA at 32, 94). Major Hill claimed he had no reason to believe that the x-ray had not come from appellant, but since he did not physically receive the matters, he wanted appellant to submit a sworn statement to "authenticate" the document. (JA at 32-33, 39). Major Hill claimed a sworn statement was necessary because he did not know how or by whom the x-ray was submitted. (JA at 32, 38-39). Major Hill's concern was that he doubted the authenticity of the x-ray and "was concerned on an evidentiary basis for the court-martial that there would be authentication problems . . . ." (JA at 32, 40).

But MAJ Hill knew at this time that appellant was represented by counsel, and he initially contacted MAJ John Ratliff, appellant's defense counsel, to ask for a sworn statement linking appellant to the x-ray. (JA at 33, 43). In asking MAJ Ratliff for a sworn statement, MAJ Hill opined that appellant would be "on the hook" if he affirmatively stated that he had submitted the x-ray himself because otherwise it was "hard for [the unit] to connect the document back to him if [they] needed to." (JA at 33). Major Hill did not receive anything from MAJ Ratliff in response, so MAJ Hill asked MAJ James Hite, the unit operations officer (S-3) and appellant's senior rater and supervisor, to question appellant about the x-ray and have him sign a statement indicating that appellant submitted the x-ray. (JA at 27, 29, 33-34, 41). Major Hill admitted his intent was to "establish an objective chain of custody" in an effort to anticipate any authentication issues that might arise at appellant's court-martial. (JA at 45).

At MAJ Hill's request, MAJ Hite met privately with appellant and, without advising him of his Article 31(b) rights, asked if he had submitted the x-ray and also asked appellant to sign a memorandum for record (MFR) indicating that he had submitted the x-ray. (JA at 21, 23-25, 93). Major Hite claimed MAJ Hill actually provided the memo for appellant to sign. (R. at 19, 24). Major Hill denied doing so. (JA at 21, 26, 47-49).

Before discussing the x-ray with appellant, MAJ Hite was aware that appellant was accused of "false honors" and was being investigated by the command in an AR 15-6 investigation. (JA at 19-20, 22). Appellant had been moved into the S-3 shop for "good order and discipline" reasons, and MAJ Hite understood his role in discussing the x-ray with appellant as being necessary to establish the "chain of custody" for the AR 15-6 rebuttal matters and "[t]rying to find out if it actually did come from Lieutenant Evans or some other source." (JA at 20, 23).

The dental x-ray and the signed memo each formed the sole basis of the two false official statement specifications in Charge I. (JA at 9, 93-94). During pretrial motions, the defense moved to suppress appellant's statements as a violation of the Fifth Amendment and Article 31, UCMJ, rights. (JA 95-118). The military judge denied the motion. (JA at 119-122).

At trial, MAJ Hite's testimony was the only evidence regarding the x-ray. He testified appellant signed the MFR "in front of [him], indicating that the 'attached x-ray' was part of his rebuttal to the charges." (JA at 62). Major Hite authenticated the MFR and x-ray and was used to admit both documents into evidence. (JA at 63).

2. The Army Court Decision

In its decision, the Army Court found the military judge abused his discretion in failing to suppress the MFR and accompanying statement made to MAJ Hite. (JA at 6). Nonetheless, the Army Court determined the error was harmless as it pertained to the allegation appellant submitted a false dental record and did not prejudice the appellant. (JA at 7). The Army Court found the government's case was "strong." (JA at 7). The Army Court reasoned that, first, MAJ Hite identified the x-ray as the one appellant introduced. (JA at 7). Second, a dentist from Fort Bliss testified that there was no record of appellant receiving dental treatment in Afghanistan, and the same witness testified that, from his experience, dental x-rays contained no location identifying information. (JA at 7). The Army Court also found the MFR cumulative to MAJ Hite's identification of the x-ray as belonging to appellant. (JA at 7).

Summary of Argument

The Army Court erred in applying the *Kerr* prejudice test as opposed to the proper *Brisbane* harmless beyond a reasonable doubt test because the erroneous evidentiary ruling in this case involved a constitutional violation. By using the wrong test, the Army Court erred in finding that admission of appellant's unwarned statements did not prejudice the appellant as to Specification 2 of Charge I because it found this critical evidence was cumulative. When assessing

whether improperly admitted statements are harmless beyond a reasonable doubt, courts must determine whether the admissions "might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 86, 87 (1963)). Here, the inadmissible memorandum used to authenticate the x-ray serving as the basis for the false official statement likely contributed to a finding of guilty for Specification 2 of Charge 1. Had the Army Court used the proper test, Specification 2 of Charge I would have been set aside. Additionally, the memorandum obtained in violation of appellant's Article 31 rights was the only evidence establishing that the x-ray was admitted for an official purpose. The error in this case was not harmless beyond a reasonable doubt.

Argument

WHERE THE ARMY COURT OF CRIMINAL APPEALS FOUND EVIDENCE WAS ADMITTED IN VIOLATION OF APPELLANT'S ARTICLE 31(b), UCMJ, RIGHTS, DID THE COURT ERR IN APPLYING THE KERR PREJUDICE TEST AS OPPOSED TO THE BRISBANE HARMLESS BEYOND A REASONABLE DOUBT TEST?

Standard of Review

A Court of Criminal Appeals decision is reviewed for an abuse of discretion. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997). "The lower court is deemed to have abused its discretion if its decision is based on an erroneous view

of the law." *Id.* (quoting *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)(internal quotations omitted).

Law

"For most constitutional errors at trial, we apply the harmless error test set forth in *Chapman* to determine whether the error is harmless beyond a reasonable doubt." *United States v. Upham,* 66 M.J. 83, 86 (C.A.A.F. 2008). Evidence admitted in violation of Article 31, UCMJ is subject to that standard. *See United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006); *United States v. Crudup*, 67 M.J. 92, 94 (C.A.A.F. 2008). Whether a constitutional error was harmless beyond a reasonable doubt is a question of law that is reviewed de novo. *Crudup*, 67 M.J. at 94.

In assessing harmlessness of a constitutional error, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Chapman*, 386 U.S. at 23 (quoting *Fahy*, 375 U.S. 86; *see also United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009). The standard is not whether the evidence is legally sufficient to uphold the defendant's conviction without the erroneously admitted evidence. *See Fahy,* 375 U.S. at 86. To find that an error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question. *United States v. Othuru,* 65 M.J. 375, 377 (C.A.A.F. 2007).

"A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed to not have relied on such evidence on the question of guilt or innocence." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 596 (1996)(Breyer, J., concurring)(stating "nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law."); *see also United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993)(stating a trial judge "is presumed to have rested his verdict only on admissible evidence before him and to have disregarded that which is inadmissible."). In a case tried before a panel, "the prejudicial impact of testimony that arguably usurped the panel's fact finding function would be at its greatest," compared to a case tried by a military judge sitting alone who is presumed to know the well-established law. *Robbins*, 52 M.J. at 458.

For all other non-constitutional and non-Article 31(b), UCMJ erroneous admissions of evidence exclusions, this Court weighs (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

Argument

While the Army Court was correct in finding the memorandum for record and accompanying statement should have been suppressed, the Army Court erred in determining the error did not prejudice the appellant. The court failed to apply the correct harmless beyond a reasonable doubt standard in assessing whether the erroneously admitted statement contributed to the conviction. *Brisbane*, 63 M.J. at 116. Instead, the Army Court merely weighed whether the government's case was "strong" without the MFR. (JA at 6-7) (stating that even without the MFR, the government's case with respect to that specification was strong); *see Kerr,* 51 M.J. at 401, 405.

The Army Court incorrectly relied upon *Kerr* to determine how appellant was prejudiced by the impermissible evidence put before the factfinder. (JA at 7). Nowhere in the Army Court's opinion was *Brisbane* or the harmless beyond a reasonable doubt test discussed. Had the Army Court employed the *Brisbane* test, Specification 2 would have also been set aside and dismissed because the impermissible evidence reasonably contributed to the finding of guilty. The specifications are inextricably linked, and without the MFR or accompanying statement, the x-ray cannot be linked to the appellant.

Further, the error was not harmless beyond a reasonable doubt because the MFR was vital to the government's case. First, the MFR, taken in violation of

appellant's Article 31(b), UCMJ rights, authenticated the false statement, the x-ray. Major Hill understood the need for the MFR for precisely that reason. The only other evidence available to confirm appellant submitted the x-ray was the impermissible testimony by MAJ Hite. However, the military judge admonished and permanently excused MAJ Hite from the proceedings for continuing to provide inadmissible statements after the military judge instructed him to stop. (JA at 65-66).[1] Contrary to the Army Court's opinion, there was no admissible evidence pertaining to MAJ Hite's knowledge that appellant submitted the x-ray in rebuttal. (JA at 7). The admissible evidence that can be teased from MAJ Hite's testimony cannot carry the government's burden, and appears biased and lacking in credibility, thereby increasing the importance of the MFR.

In *Gardinier*, this Court found that Gardinier's incriminating statements erroneously put before the fact finder might have contributed to Gardinier's conviction. *Gardinier*, 67 M.J. at 310. "The impact of the admission . . . is problematic for the Government in its effort to establish that there is no reasonable probability that the evidence complained of might have contributed to the conviction." *Gardinier*, 67 M.J. at 308. In particular, this Court found the statements were central to the government case. *Id.* The same must be said here.

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[1] The military judge even apologized to the panel for his own display of frustration toward MAJ Hite. He characterized MAJ Hite's behavior as not "having much regard for this courtroom." (JA at 66).

Without the statement, nothing ties appellant to the x-ray, a fact the brigade judge advocate knew well. Thus, he circumvented Article 31 to make the crucial link between appellant and the x-ray.

"The amount and type of corroborating evidence are factors which may be considered by the members in deciding what weight the accused's confession or admission should receive." *United States v. Duvall*, 47 M.J. 189, 192 (C.A.A.F. 1997)(*quoting* S. Saltzburg, L. Schinasi, and D. Schleuter, *Military Rules of Evidence Manual* 166 (3d ed. 1991)). Other than MAJ Hite's inadmissible statements, the government did not submit any evidence to corroborate appellant submitted the x-ray. The MFR is therefore more probative than any other evidence and has a tendency to prove guilt over innocence to Specification 2 of Charge I.

Unlike any other government evidence, the MFR clearly links the appellant to the x-ray. It is also the only evidence that appellant submitted the x-ray in rebuttal to the AR 15-6 investigation, thus establishing the element of officiality necessary to support appellant's conviction for false official statement. *See United States v. Spicer*, 71 M.J. 470, 473 (C.A.A.F. 2013)(a false official statement is a statement that affects a military function). There was no other testimony of how the rebuttal matters were submitted or who submitted them. Colonel Fowler did not provide physical evidence indicating the appellant was not in Afghanistan, nor that appellant created the x-ray. Additionally, he testified he did not know what x-

ray printing capabilities were available at Bagram in 2010. (JA at 88-89). Finally, the government's other evidence, offered through an expert witness whose credentials were contested at trial, was speculative as to the availability of dental x-ray copies. (JA at 81). Thus, the MFR and statements by the appellant when he signed it were the only evidence available to the panel to connect appellant to the x-ray, and the only evidence that appellant submitted the x-ray for an official purpose.

The government emphasized the MFR and appellant's statements when he signed the MFR in both its opening statement and closing argument. During opening, the government referenced the MFR by stating "you will see some rebuttal evidence that First Lieutenant Evans submitted as part of that investigation, some documents that he submitted, which are the basis for the first two charged offenses . . . ." (JA at 58). Further, the government stated that MAJ Hite would testify "that he received an x-ray from Lieutenant Evans . . . along with a memorandum" linking appellant to the x-ray. (JA at 58). During closing, the Government argued the appellant "submitted those documents [MFR and x-ray] as a rebuttal." (JA at 91). It also argued MAJ Hite watched appellant "sign that memorandum for record, and two, he asked the accused, 'Do you intend to submit this as your rebuttal to this 15-6 investigation?' And the accused said, 'Yes.'" (JA at 91). The only evidence the government argued in both opening and closing to

link appellant to the x-ray was inadmissible, gathered when MAJ Hite received the MFR and x-ray from appellant.

Finally, contrary to the Army Court's erroneous application of the harmless beyond a reasonable doubt test, the panel could not have found the MFR and accompanying statement were unimportant to the false official statement. *Othuru,* 65 M.J. at 377. Based on the evidence presented to the panel, there is a reasonable probability that the MFR contributed to the conviction. *See Gardinier*, 67 M.J. at 310. It is impossible to say what credit and weight the panel gave to the MFR or statements regarding the x-ray to support the conviction. *Robbins*, 52 M.J. at 458. Thus, this Court should find that admitting the MFR was not harmless beyond a reasonable doubt and prejudiced appellant in his defense.

Conclusion

Wherefore, appellant requests that this Honorable Court set aside the finding of guilty for Specification 2 of Charge I.

MATTHEW D. BERNSTEIN
Captain, Judge Advocate Appellate
Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0713
USCAAF No. 35859

HEATHER L. TREGLE
Captain, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36329

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Chief, Complex Litigation
Defense Appellate Division
USCAAF Bar Number 26450

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Evans,* Army Dkt. No. 20130647, USCA Dkt. No. 16-0019/AR, was electronically filed with the Court and Government Appellate Division on February 17, 2016.

MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737