

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

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

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 the Case

On January 19, 2016, this Honorable Court granted appellant's petition for review. On February 17, 2016, appellant filed his final brief with this Court. The government responded on March 15, 2016. This is appellant's reply.

Argument

The government claims *Kerr*¹ is the proper test to evaluate Article 31(b), Uniform Code of Military Justice (UCMJ) violations because “it was the most recent, well-reasoned precedent” and the *Brisbane*² test “has shown to be unworkable.” (Gov’t Br. 10). However, the government does not explain exactly why it believes *Brisbane* is unworkable. Nor does the government even attempt to distinguish *Upham*, *Crudup*, and *Gardinier*, which have all employed the *Brisbane* test. *United States v. Upham*, 66 M.J. 83 (C.A.A.F. 2008); *United States v. Crudup*, 67 M.J. 92 (C.A.A.F. 2008); *United States v. Gardinier*, 67 M.J. 304 (C.A.A.F. 2009). Indeed, during its last term, the Supreme Court decided *Davis v. Ayala*, 576 U.S. ____ (2015), reiterating for constitutional error, the harmless beyond a reasonable doubt test in *Chapman*, upon which *Brisbane* is based, is still alive and well. *Chapman v. California*, 386 U.S. 18 (1966); *See also United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009) (holding Article 31(b), UCMJ violations are a constitutional error).

Without Major (MAJ) Hite’s testimony, there was simply insufficient evidence to affirm the false official statement specification for submitting the x-ray. (Gov’t Br. 10). The government had no evidence that appellant’s statement,

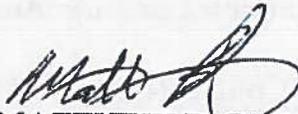
¹ *United States v. Kerr*, 51 M.J. 401 (C.A.A.F. 1999)

² *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006)

false or otherwise, was of an official nature. The mere meeting with MAJ Hite indicated appellant followed the order of his superior and rater to meet; it did not indicate, as the government claims, he submitted the x-ray, let alone indicate it was a false *official* statement. (Gov't Br. 10). Additionally, the government claims its case was strong because Colonel (COL) Fowler testified that appellant did not have a record of dental treatment in Afghanistan. (Gov't Br. 10). However, COL Fowler's testimony proved little. Colonel Fowler testified he did not know the dental practices in Afghanistan and had never seen an x-ray from Afghanistan in the computer repository system. (JA at 89). The government's perfunctory argument fails to show the error was harmless beyond a reasonable doubt.

Conclusion

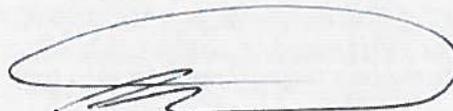
Wherefore, appellant requests that this Honorable Court set aside the finding of guilty for Specification 2 of Charge I.



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 forgoing in the case of United States v. Evans, Crim. App. Dkt. No. 20130646, Dkt. No. 16-0019/AR, was delivered to the Court and Government Appellate Division on March 23, 2016.


MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736