IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF APPELLEE
v.	Crim. App. Dkt. No. 20130647
First Lieutenant (O-2) Asa M. Evans United States Army, Appellant	USCA Dkt. No. 16-0019/AR

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Index of Brief

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?

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

Supreme Court of the United States

United States Supreme Court

United States Court of Appeals for the Armed Forces

Statutes

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of false official statement and one specification of larceny, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907 and 921 (2012).[1] The panel sentenced appellant to forfeit all pay and allowances, confinement for one month, and dismissal from the service.[2] The convening authority approved the adjudged sentence.[3]

On 17 July 2015, the Army Court found the military judge abused his discretion when he denied the defense motion to suppress because the government obtained a statement from appellant in violation of Article 31(b), UCMJ.[4] The court held the erroneously admitted statement only affected one of the false official statement specifications and ultimately dismissed Specification 1 of Charge I and affirmed the sentence adjudged.[5] This Court granted appellant's petition for grant of review of the Army Court's decision on 19 January 2016.

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[1] JA 1.
[2] JA 1-2.
[3] JA 2.
[4] JA 6-7.
[5] JA 7. The court affirmed Specification 2 of Charge I which is the false official statement from when appellant submitted the x-ray.

Statement of Facts

The battalion commander of the 1-35 Armor Regiment, Fort Bliss, Texas, initiated an Army Regulation (AR) 15-6 investigation to determine whether appellant wore unauthorized insignia on his uniform and, unrelated to the subsequent court-martial, whether he made a false official statement to a military police officer.[6] On 26 September 2011, the investigating officer submitted his report and recommended adverse action against appellant for wearing an unauthorized combat patch.[7] Appellant submitted rebuttal matters in response to the investigating officer's report.[8] Included in his rebuttal matters was a copy of an x-ray with appellant's name, the last four digits of his social security number, his date of birth, and a location of "Bagram Airfield Dental Clinic, Afghanistan."[9]

During September 2011, appellant was transferred to the S3 shop because of the investigation and reported to Major (MAJ) James Hite.[10] Major Hite knew that appellant was transferred to his section because he was under investigation for "false honors."[11] Major Hite became involved in the case after appellant had already submitted his initial rebuttal packet for the investigation.[12] Upon

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[6] JA 101.
[7] JA 101-106.
[8] JA 46-47, 111.
[9] JA 94, 111.
[10] JA 17.
[11] JA 17.
[12] JA 18-22.

reviewing the AR 15-6 investigation and appellant's rebuttal matters, MAJ James Hill, the Brigade Judge Advocate, had legitimacy and authentication concerns regarding the x-ray if the case proceeded to a court-martial.[13] Major Hill knew that appellant had invoked his right to speak to an attorney during the investigation, so his point of contact was the appellant's defense counsel, MAJ John Ratliff.[14]

Major Hill testified that after approaching MAJ Ratliff with the request, he "knew at the time that if he were to do that, . . . his client would be affirmatively stating – would be putting himself 'on the hook,' so to speak, if he were to say affirmatively that that was his x-ray."[15] Major Hill testified he had a conversation with MAJ Ratliff regarding the x-ray and MAJ Hill asked for a sworn statement from appellant to verify the x-ray.[16] Major Hill spoke with MAJ Hite, appellant's senior rater and supervisor, to collect the document from appellant.[17] Major Hite believed the investigation was already completed when he approached appellant to verify the submission of the x-ray.[18] Major Hite also believed his role was merely to ascertain whether the x-ray in question had come from appellant or another source.[19] When MAJ Hite approached appellant, he asked appellant if "this was

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[13] JA 32, 40.
[14] JA 43.
[15] JA 33.
[16] JA 33, 35.
[17] JA 29, 41.
[18] JA 22.
[19] JA 23.

the information that he previously submitted," and whether the Memorandum for Record (MFR) from defense counsel met appellant's "intent as far as what you are submitting it for?" Appellant affirmed that it did and signed the MFR.[20]

At trial, the deputy commander of the Fort Bliss DENTAC, Colonel (COL) Edward Fowler, testified about all of appellant's dental records from March 2008 to March 2012.[21] Colonel Fowler testified that there was no entry in appellant's dental records to show that he received treatment at a dental facility in Afghanistan.[22] Colonel Fowler stated that he has never seen the location of where the dental x-ray was actually taken printed on the x-ray.[23] Colonel Fowler explained that there is a corporate dental application (CDA) which is the system all dentists use to write the work they have completed on patients.[24] If a workload entry is entered by a dentist in a combat zone, individuals stateside can access the information in the CDA.[25] He also stated that there is a repository in San Antonio where the Army stores all the digital x-rays.[26] On cross-examination, COL Fowler

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[20] JA 24, 28.
[21] JA 72-77.
[22] JA 74-76.
[23] JA 79.
[24] JA 72-73, 75.
[25] JA 75.
[26] JA 78.

admitted that he did not know the practices of the Bagram dental clinics, but stated that he has never seen x-rays from Afghanistan in the repository.[27]

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Summary of Argument

This Court's analysis of statements obtained in violation of Article 31(b) has resulted in the establishment of two separate tests to determine the degree of harm that resulted from the violation. The test in *United States v. Kerr* was properly applied as it followed this Court's most recent decision on the same issue in *United States v. Gilbreath*.[28] The Army Court correctly found that the statements obtained in violation of appellant's Article 31(b) rights did not prejudice appellant. Accordingly, the Army Court did not error in applying the *Kerr* prejudice test. As such, this court should affirm the decision of the Army Court and grant appellant no relief.

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[27] JA 89.

[28] *United States v. Kerr*, 51 M.J. 401 (C.A.A.F. 1999); *United States v. Gilbreath*, No. 14-0322, 2014 CAAF LEXIS 1206 (C.A.A.F. 18 Dec. 2014)(This case is subject to editorial correction before final publication).

Standard of Review

A Court of Criminal Appeals decision is reviewed for an abuse of discretion.[29] "The lower court is deemed to have abused its discretion if its decision is based on an erroneous view of the law."[30]

Law and Argument

The Army Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[31]

A. Developments in the law regarding Article 31(b) rights violations.

This Court has held that for most constitutional errors at trial, the harmless error test in *Chapman v. California* is applied to determine whether the error is harmless beyond a reasonable doubt.[32] This test determines whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.[33] This Court has also held that prejudice from an erroneous evidentiary ruling is evaluated "by weighing: 1) the strength of the Government's case; 2) the strength of the defense case; 3) the materiality of the evidence in

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[29] *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).
[30] *Id. (quoting United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).
[31] Art. 66(c), UCMJ.
[32] *United States v. Gardinier*, 67 M.J. 304 (C.A.A.F. 2009)(citing *Chapman v. California*, 386 U.S. 18 (1967)).
[33] *Id.* at 306.

question; and 4) the quality of the evidence in question."[34] This four-pronged analysis is known as the *Kerr* test.

In August 2000, this Court decided *United States v. Swift* and held that the admission of appellant's statements to his first sergeant that were obtained in violation of his Article 31(b) rights were harmless beyond a reasonable doubt.[35] However, the opinion did not elaborate on what analysis is required to show when inadmissible evidence is harmless beyond a reasonable doubt nor did it cite any previous case law regarding the standard.[36] In April 2006, this Court utilized two different tests to evaluate the degree of harm when the evidence introduced at trial was obtained as a result of an Article 31(b) rights violation.[37] In *United States v. Cohen*, the *Kerr* test was applied; however, in *United States v. Brisbane*, the harmless beyond a reasonable doubt standard was applied to evaluate prejudice.[38]

In April 2009, *United States v. Gardinier* stated evidence admitted in violation of Article 31(b) is subject to the *Brisbane* harmless beyond a reasonable doubt standard.[39] Unlike *Cohen* and *Brisbane*, the issues in *Gardinier* did not just involve Article 31(b) rights violations, but also included violations of the

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[34] *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).
[35] *United States v. Swift*, 53 M.J. 439, 454 (C.A.A.F. 2000).
[36] *Id.* at 454-455.
[37] *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006); *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006).
[38] *Brisbane*, 63 M.J. at 116.
[39] *Gardinier*, 67 M.J. at 306.

Confrontation Clause of the Sixth Amendment.[40] The opinion in *Gardinier* did not discuss the competing standards in *Cohen* and *Brisbane*, but for the first time mentioned that an Article 31(b) rights violation was a constitutional error.[41] The opinion did not reject or overrule the *Kerr* standard that was applied in *Cohen*.[42]

The framework in *Cohen* continued to be cited in Article 31(b) rights cases such as *United States v. Jones*, which developed the objective test in determining whether the questioner was acting in an official law enforcement or disciplinary capacity.[43] In December 2014, the *Kerr* test was applied in *United States v. Gilbreath* to evaluate prejudice for an Article 31(b) rights violation.[44] This Court did not expressly overrule *Brisbane* or *Gardinier* when it relied on the analysis of *Cohen* in its opinion.[45] In addition to discussing the history of Article 31(b) rights, there was no mention of whether a violation of those rights was a considered a constitutional error.[46]

The principle of stare decisis "need not be applied when the precedent at issue is 'unworkable or . . . badly reasoned.'"[47] The opinions in the cases utilizing

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *United States v. Jones*, 73 M.J. 357, 362 (C.A.A.F. 2014).
[44] *United States v. Gilbreath*, No. 14-0322, 2014 CAAF LEXIS 1206 (C.A.A.F. 18 Dec. 2014)(This case is subject to editorial correction before final publication).
[45] *Id.* at *23-24.
[46] *Id.* at *12-19.
[47] *United States v. Quick*, 74 M.J. 332, 335-336 (C.A.A.F. 2015).

the *Brisbane* test provided little analysis as to why the Article 31(b) rights violations were harmless beyond a reasonable doubt. In fact, most opinions provided a one-sentence conclusory statement on the matter. The opinion in *Gardinier*, without citing any previous case law, was the only case that stated an Article 31(b) rights violation was a constitutional error, but failed to reconcile the competing standards from *Brisbane* and *Cohen*. As a result, the Army Court properly used the *Kerr* test in this case because the standard applied in *Gilbreath* was the most recent, well-reasoned precedent on Article 31(b) rights violations and the competing test in *Brisbane* has shown to be unworkable.

B. The Army Court did not err in affirming the remaining false official statement specification.

There was ample evidence to affirm the false official statement conviction for appellant submitting the x-ray.[48] Major Hite knew he was to meet with appellant and confirm his rebuttal submission, which indicates that appellant had already submitted the x-ray at a previous time.[49] The possibility that someone else submitted the x-ray as part of appellant's rebuttal matters is implausible. Additionally, COL Fowler testified about appellant's entire dental history and stated there was no record of treatment in Afghanistan.[50]

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[48] Specification 2 of Charge I.
[49] JA 61-63.
[50] JA 74-76.

Conclusion

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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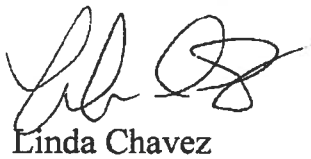

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Wumie Konteh, on 15 March 2016 and delivered to defense appellate counsel by hand on March 15, 2016.

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