IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Ernest M. RAMOS
Boatswain's Mate First Class (E-6)
United States Coast Guard
Appellant

BRIEF ON BEHALF OF
APPELLANT

Crim.App. Dkt. No. 1418

USCA Dkt. No. 17-0143/CG

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

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Issue Presented

WHETHER APPELLANT WAS ENTITLED TO ARTICLE 31(b), UCMJ, WARNINGS AT ANY POINT DURING HIS INTERROGATION BY CGIS, AND IF SO, WHETHER HE WAS PREJUDICED BY THE ADMISSION OF ANY OF HIS STATEMENTS.

Statement of Statutory Jurisdiction

The convening authority approved a sentence that included a punitive discharge. Accordingly, the Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over this matter pursuant to Article 66(b)(1), Uniform Code of Military Justice [hereinafter UCMJ].[1] This Court has jurisdiction over this matter pursuant to Article 67(a)(3), UCMJ.[2]

Statement of the Case

On October 6 and 27-29, 2014, Boatswain's Mate First Class Ernest Ramos [hereinafter Appellant] was tried by a special court-martial composed of officer members. Contrary to his pleas, the panel convicted Appellant of one specification of conspiracy to manufacture and distribute marijuana[3], three specifications of making a false official statement[4], and one specification of wrongful possession of

[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867(a)(3) (2012).
[3] Article 81, UCMJ, 10 U.S.C. § 881 (2012).
[4] Article 107, UCMJ, 10 U.S.C. § 907 (2012).

marijuana with intent to distribute.[5] The panel sentenced Appellant to be confined for 90 days, to be reduced to E-3, and to be discharged with a bad conduct discharge.[6]

The CGCCA dismissed two specifications of making a false official statement and affirmed the remaining findings and the sentence.[7] Appellant was subsequently notified of the CGCCA's decision. Appellant petitioned this Court for review. On February 16, 2017, this Court granted review of Appellant's petition.

Statement of Facts

1. Appellant and his wife are threatened by her business partner.

In December of 2013, Mrs. Norma Ramos, the civilian wife of Appellant, made an agreement with Mr. Cameron Hart, a civilian, to start a business for manufacturing marijuana under Washington State's recreational marijuana law.[8] Mr. Hart would supply the physical labor and know-how while Mrs. Ramos would supply $13,000 in start-up costs.[9] Appellant was not a member of the Ramos/Hart

[5] Article 112a, UCMJ, 10 U.S.C. § 912a (2012).
[6] JA at 337-38.
[7] JA at 8, *United States v. Ramos*, No. 1418 (C.G. Ct. Crim. App. Oct. 28, 2016).
[8] JA at 249-51.
[9] JA at 252-53.

limited liability company (LLC) nor did Appellant apply with the state's Liquor Control Board for a license to grow marijuana.[10]

In January 2014, Appellant accompanied Mrs. Ramos to a meeting with Mr. and Mrs. Hart and an attorney to form the LLC.[11] Appellant and Mrs. Hart were federal employees, and they made clear to the attorney that they could not be involved in their spouses' business.[12]

After four months, with the anticipated starting costs ballooning to $88,000, Mrs. Ramos told Mr. Hart she was backing out of the arrangement.[13] She also cited concerns about Mr. Hart's communication skills and other personality conflicts.[14] On April 7, 2014, Appellant accompanied his wife to the Harts' residence, where she met Mr. Hart and told him she was withdrawing from their business.[15] Upset, Mr. Hart threatened that he would get his money and would show up at Mrs. Ramos' place of business.[16] He also threatened he would sue Mrs. Ramos.[17] Unbeknownst to Appellant, the next day, "out of spite," Mr. Hart

[10] JA at 216.
[11] JA at 126-27.
[12] JA at 128.
[13] JA at 229, 254.
[14] JA at 254, 340.
[15] JA at 255-56.
[16] JA at 256.
[17] JA at 257, 338.

contacted the Coast Guard Investigative Service to report that Appellant was involved in the marijuana business.[18]

2. Appellant informs his team leader of the threat from his wife's business partner.

Fearing that he and his wife were in danger, on the morning of April 8, 2014, Appellant informed his command that he had received threats from Mr. Hart. He first approached Lieutenant (LT) Rafael Shamilov, his team leader, and told him there was a dispute between his wife and Mr. Hart because she was withdrawing from a business agreement and that Mr. Hart had made threats.[19] He then told LT Shamilov it was a marijuana growing business but that his name was not in any of the paperwork.[20] LT Shamilov perceived that Appellant was genuinely concerned about Mr. Hart's threat.[21]

3. The reported threat moves up Appellant's chain of command.

LT Shamilov brought Appellant to LT Joshua Mattulat, the operations officer of the unit.[22] Appellant repeated his story.[23] LT Mattulat then passed on what Appellant had told him to the executive officer, LT Michael Nordhausen.[24]

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[18] JA at 195, 339
[19] JA at 115-16.
[20] JA at 117.
[21] JA at 120.
[22] JA at 118.
[23] JA at 119.
[24] JA at 121.

LT Nordhausen then brought Appellant into his office to discuss the situation.[25] Appellant again volunteered that he and his wife felt threatened by Mr. Hart and that his wife was involved in a marijuana-growing business.[26] LT Nordhausen asked him directly if he was involved.[27] According to LT Nordhausen, Appellant said only that "…his wife was on the paperwork. That it's not his business."[28]

4. Appellant's executive officer notifies the Coast Guard's criminal investigators.

LT Nordhausen then contacted a Coast Guard Investigative Service (CGIS) agent, who told LT Nordhausen to send Appellant to the CGIS office for an interview.[29] Although he did not recall, LT Nordhausen likely spoke with Special Agent (SA) Helena Chavez since that was the agent whose phone number he had.[30] LT Nordhausen told the agent that there was a credible threat against Appellant and that the threat was over a civil dispute involving Appellant's wife's recreational marijuana growing business.[31]

Appellant was interviewed by SA Chavez and SA Terry Stinson on April 8, 2014, before Mr. Hart contacted CGIS. SA Stinson was the lead investigator, but

[25] JA at 122-23.
[26] JA at 123.
[27] JA at 124.
[28] JA at 124.
[29] JA at 125.
[30] JA at 48.
[31] JA at 43, 48.

SA Chavez primarily asked questions of Appellant.[32] Special Agent Stinson claimed that the agents initially were attempting only to understand the threat to Appellant.[33] However, prior to speaking with Appellant, SA Stinson and SA Chavez knew that the reported threat involved Appellant's wife's marijuana business.[34] Based on that fact, SA Stinson did suspect Appellant of a violation of the UCMJ[35] and thought that he might need to be notified of his rights under Article 31(b), UCMJ.[36] Despite that suspicion, SA Stinson did not inform Appellant of his rights under Article 31(b), UCMJ, as he continued questioning Appellant.[37] Special Agent Stinson decided that it was better not to inform Appellant of his rights rather than risk Appellant remaining silent about the threat.[38]

At the first break in the interview, SA Stinson received a phone call from Mr. Hart.[39] After speaking with Mr. Hart, SA Stinson decided to terminate his interview with Appellant.[40] When Appellant left the CGIS office, SA Stinson

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[32] JA at 54, 73.
[33] JA at 58.
[34] JA at 73, 281.
[35] JA at 282.
[36] JA at 26, 10 U.S.C. § 831 (2012).
[37] JA at 282.
[38] JA at 93.
[39] JA at 59.
[40] JA at 60.

dropped his concern for Appellant's safety and embarked on a plan to catch Appellant with evidence that he was involved in his wife's business.[41]

5. The military judge refuses to suppress Appellant's unwarned statements to SA Stinson and SA Chavez.

The convening authority charged Appellant with, among other things, a specification under Article 107, UCMJ, for telling SA Stinson that he was not involved in his wife's business.[42] Prior to trial, the defense moved to suppress all statements Appellant made to SA Stinson and SA Chavez.[43] Special Agent Stinson testified at the Article 39(a), UCMJ, session on October 6, 2014. Unlike his later testimony at trial, SA Stinson testified that he first learned of a marijuana business from the Appellant rather than from LT Nordhausen.[44] He testified that Appellant mentioned "fairly early" in the interview that his wife was involved in recreational marijuana production but that "it took a little bit" of time understanding what the nature of the business was because Appellant was referring to it as an "I-502."[45] He was also referring to the business as "we" and "ours."[46] When SA Stinson

[41] JA at 62-63.
[42] JA at 9.
[43] JA at 303-07.
[44] JA at 71.
[45] JA at 71, 74.
[46] JA at 102.

asked Appellant what an "I-502" was, Appellant told him it was a licensed marijuana operation.[47]

At the Article 39(a), UCMJ, session, SA Stinson did not have a clear memory of when in the interview Appellant said he was not a part of his wife's marijuana business. It appears the first (and possibly only) time Appellant said to SA Stinson that he was not involved with the business was when Appellant mentioned that money from the business could not be deposited at a bank, which came after Appellant used the pronouns "we" and "our" when describing the business.[48] At this point, although SA Stinson knew the nature of the business and heard Appellant use first-person, plural pronouns, SA Stinson testified that he did not immediately suspect Appellant of an offense when Appellant said he was not involved.[49] Nevertheless, SA Stinson and SA Chavez stopped the interview when Appellant mentioned that banks were reluctant to accept money from recreational marijuana businesses.[50]

The military judge denied Appellant's motion to suppress.[51] Despite acknowledging the prudence of informing Appellant of his Article 31(b), UCMJ, rights, the military judge found SA Stinson had no requirement to do so. The

[47] JA at 91.
[48] JA at 101-03.
[49] JA at 87.
[50] JA at 102-03.
[51] JA at 333.

military judge reached this conclusion claiming SA Stinson was not conducting a law enforcement or disciplinary inquiry.[52]

When SA Stinson appeared at trial, he testified that when Appellant was brought to the CGIS interview room, SA Stinson asked him why he was there.[53] SA Stinson testified that immediately Appellant assured SA Chavez and him that he had nothing to do with his wife's business.[54] He also testified that when Appellant made this assurance in the interview, he did not know the nature of Appellant's wife's business.[55] On cross-examination though, SA Stinson admitted that prior to questioning Appellant, he knew (as did SA Chavez) that Appellant's wife was involved in a marijuana business and did suspect Appellant of an offense.[56]

Further facts necessary for the resolution of the argument are provided below.

Summary of Argument

The military judge abused his discretion by not suppressing Appellant's unwarned statement that he was not involved in his wife's marijuana business. The military judge incorrectly found SA Stinson was not conducting a law

[52] JA at 332.
[53] JA at 261.
[54] JA at 261.
[55] JA at 261-62.
[56] JA at 281-82.

enforcement inquiry of Appellant and as such did not need to advise Appellant of his rights under Article 31(b), UCMJ. Under the totality of the circumstances though, SA Stinson could reasonably have been considered to engaging in a law enforcement inquiry, particularly when SA Stinson asked specific questions to Appellant about the marijuana business.

By not suppressing Appellant's unwarned statement, the prosecution improperly used it as a basis for a specification under Article 107, UCMJ. Both this Court's long-standing precedent and the Military Rules of Evidence prohibit an unwarned statement from forming the basis for a specification under Article 107, UCMJ.

Argument

APPELLANT WAS ENTITLED TO ADVISEMENT OF HIS ARTICLE 31(B), UCMJ, RIGHTS BEFORE HE TOLD THE CGIS AGENTS HE WAS NOT INVOLVED IN THE MARIJUANA BUSINESS. THE ADMISSION OF APPELLANT'S UNWARNED STATEMENT THAT HE WAS NOT INVOLVED IN THE MARIJUANA BUSINESS MATERIALLY PREJUDICED APPELLANT REGARDING THE REMAINING ARTICLE 107, UCMJ, SPECIFICATION.

Standard of Review

When a military judge denies a motion to suppress a statement on the ground that Article 31(b), UCMJ, warnings were not given, this Court reviews the military

judge's findings of fact using a clearly-erroneous standard and reviews conclusions of law *de novo*.[57]

When an erroneously admitted statement stands alone as a statutory violation, the non-constitutional test for prejudice applies.[58]

Discussion

A. Appellant was entitled to Article 31(b), UCMJ, warnings likely before the interview and most certainly immediately after Appellant explained that an "I-502" was a state-licensed recreational marijuana business.

Article 31(b), UCMJ, requires persons be informed of their rights when (1) a person subject to the UCMJ (2) suspects a person has committed an offense under the code and (3) interrogates or requests a statement from that suspect (4) which regards the offense of which the person questioned is accused or suspected.[59] Violations of Article 31(b), UCMJ, may be raised under Military Rule of Evidence 305.[60] If the questioner violates Article 31(b), UCMJ, or Military Rule of Evidence 305, then the statement of the accused obtain in violation thereof may be excluded from the court-martial under Military Rule of Evidence 304.[61]

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[57] *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000).
[58] *United States v. Evans*, 75 M.J. 302, 303 (C.A.A.F. 2016)(citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).
[59] *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014)(citation omitted).
[60] SUPPLEMENT, MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305 (2012) [hereinafter MCM].
[61] *Id.*

Here, all predicates exist, and SA Stinson was required to provide Appellant notice of his Article 31(b), UCMJ, rights likely before SA Stinson began his interrogation of Appellant and most definitely immediately after Appellant explained to SA Stinson that an "I-502" is a state-licensed marijuana business.

1. Special Agent Stinson was subject to the UCMJ.

Article 31(b), UCMJ, is a proscription that applies to the questioner.[62] The plain language of Article 31(b), UCMJ, is clear that it applies to questioners subject to the UCMJ.[63]

A person subject to the UCMJ includes a person acting as a knowing agent of a military unit or of a person subject to the UCMJ.[64] Special agents of CGIS act as knowing agents of the United States Coast Guard.[65] Therefore, at the time he was questioning Appellant, SA Stinson was a person subject to the UCMJ.

2. Special Agent Stinson suspected or reasonably should have suspected Appellant of being involved in a prohibited marijuana-growing operation.

"Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have

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[62] *United States v. Gilbreath*, 74 M.J. 11, 15 (C.A.A.F. 2015).
[63] JA at 29; 10 U.S.C. § 831 (2012).
[64] MCM, Mil. R. Evid. 305(b)(1).
[65] JA at 343; U.S. COAST GUARD, INSTR. 5520.5F, COAST GUARD INVESTIGATIVE SERVICE ROLES AND RESPONSIBILITIES, 1 (30 Nov. 2011)[hereinafter COMDTINST 5520.5F].

believed that the servicemember committed an offense."[66] Based on all the facts and circumstances developed at both the Article 39(a), UCMJ, session and at court-martial, SA Stinson believed or reasonably should have believed Appellant was illegally involved in his wife's marijuana-growing business.

Special Agent Stinson testified he suspected Appellant of an offense. However, his testimony at the Article 39(a), UCMJ, session and at trial are inconsistent with respect to when he suspected Appellant of an offense. At the Article 39(a), UCMJ, session, he testified that he suspected Appellant of an offense when Appellant explained the term "I-502."[67] Yet at trial, SA Stinson said that he knew before speaking with Appellant that the reported threat was in relation to Appellant's wife's business partner and that the business was one of marijuana production.[68] Special Agent Stinson testified that the information he had prior to interrogating Appellant was enough to raise a suspicion for him that Appellant committed a violation of the UCMJ.[69] Thus in either instance, SA Stinson believed Appellant violated Article 112a, UCMJ, before Appellant stated that he was not involved in his wife's business.

3. Special Agent Stinson interrogated Appellant as part of a law enforcement inquiry.

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[66] *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)(internal quotation and citation omitted).
[67] JA at 71-72, 74-75, 91-92.
[68] JA at 281.
[69] JA at 282.

Article 31(b), UCMJ, warnings are required if the person subject to the code is interrogating or requesting a statement from the person suspected of an offense.[70] An "interrogation" is "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning. [71]

Whether the interaction between the questioner and the suspect is an interrogation is contextual, and warnings are required when the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry.[72] All the facts and circumstances at the time of the interview must be examined to determine whether the person is acting or could reasonably be considered to be acting in an official law enforcement or disciplinary capacity.[73]

Whether SA Stinson was conducting an official law enforcement inquiry first requires determining the scope of his authority as an agent of the military.[74] Coast Guard Investigative Service agents provide Coast Guard commanders with criminal investigative support into suspected violations of the UCMJ.[75] Therefore,

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[70] JA at 26, 10 U.S.C. § 831 (2012).
[71] MCM, MIL. R. EVID. 305(b)(2).
[72] *Swift*, 53 M.J. at 446.
[73] *Id.*
[74] *Jones*, 73 M.J. at 362.
[75] JA at 343.

it was entirely within the scope of SA Stinson's authority to question Appellant as part of a law enforcement or disciplinary inquiry.

However, Coast Guard Investigative Service agents fulfill multiple mission tasks. Agents also provide force protection support by, among other means, assessing criminal threats to Coast Guard personnel.[76]

Many times, this Court has recognized a distinction between questioning focused on meeting an operational or administrative objective and questioning for a law enforcement or disciplinary purpose.[77] Sometimes, questioning contains mixed purposes, and the matter must be resolved on a case-by-case basis, looking at the totality of the circumstances, including whether the questioning was designed to evade the accused's constitutional or codal rights.[78]

The military judge found SA Stinson did not need to inform Appellant of his Article 31(b), UCMJ, rights because he was not asking questions designed to elicit incriminating responses.[79] Rather, he and SA Chavez were seeking information about Appellant's reported threat and were not engaged in a law enforcement

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[76] JA at 345.
[77] *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990); *United States v. Brown*, 40 M.J. 152 (C.M.A. 1994); *United States v. Bradley*, 51 M.J. 437 (C.A.A.F. 1999); *United States v. Guyton-Bhatt*, 56 M.J. 484 (C.A.A.F. 2002)(Sullivan, J., concurring); *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006); *United States v. Akbar*, 74 M.J. 364, 402 n. 23 (C.A.A.F 2015).
[78] *Cohen*, 63 M.J. at 50 (C.A.A.F. 2006)(quotation and citation omitted).
[79] JA at 331-32.

inquiry.[80] However, under the totality of the circumstances, SA Stinson could reasonably be considered to have been acting in an official law enforcement capacity.

This Court has recognized a strong, rebuttable presumption that questioning is done for law enforcement or disciplinary purposes when it is conducted by a military superior in the chain of command.[81] The presumption exists, in part, because of the officiality associated with superior rank.[82] Yet, rank *per se* is not as important as the role of the person questioning the accused.[83] As with superiors in the chain of command, there is an air of officiality when agents of military criminal investigative organizations (MCIO) question servicemembers suspected of offenses. Indeed, investigating criminal offenses is often the MCIOs' primary purpose.[84] Thus, a rebuttable presumption that military criminal investigators are conducting a law enforcement inquiry when questioning a servicemember suspected of an offense should also exist.

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[80] JA at 332.
[81] *Swift*, 53 M.J. at 446.
[82] *See Loukas*, 29 M.J. at 389 n. *
[83] *United States v. Mitchell*, 51 M.J. 234, 244 (C.A.A.F. 1999)(Crawford, J., dissenting)
[84] JA at 344; COMDTINST 5520.5F at 4. *See also* U.S. DEP'T OF NAVY, INSTR. 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE 3 (28 Dec. 2005);U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES 6 (9 Jun. 2004); U.S. DEP'T OF AIR FORCE, MISSION DIRECTIVE 39, AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS (AFOSI) 1 (1 Nov. 1995).

Were that presumption to apply, it could not be overcome here. Yet absent that presumption, the totality of the circumstances indicates SA Stinson was engaged in a law enforcement inquiry and deliberately avoiding Appellant's codal rights.

The length and nature of the questioning suggests that SA Chavez and SA Stinson were engaged in a law enforcement inquiry. Appellant gave SA Stinson and SA Chavez Mr. Hart's name early in their questioning as well as other identifying information about him.[85] Appellant also explained early in his questioning the relation Mr. Hart had to Appellant and his wife.[86] Although they could have continued investigating Mr. Hart without further questioning of Appellant,[87] they continued to question him for close to 45 minutes[88] without providing security personnel Mr. Hart's name or photo,[89] circumstances which undermine SA Stinson's claim that he and SA Chavez were primarily concerned with protecting Appellant.

SA Stinson's specific questions about the "I-502" and the identity of the business partners further shows that he had a law enforcement purpose for his inquiry. At the Article 39(a), UCMJ session, SA Stinson testified that his

[85] JA at 95.
[86] JA at 91.
[87] JA at 100.
[88] JA at 88, 95.
[89] JA 97-98, 100.

suspicion was established when Appellant answered his question regarding an "I-502."[90] In deciding not to exclude Appellant's statements to SA Stinson, the military judge focused his analysis solely on whether any of SA Stinson's questions were *designed* to illicit an incriminating response. He did not consider whether any of his questions were *likely to lead* to an incriminating response.[91]

Special Agent Stinson testified that he did ask questions about the business and agreed that it was likely those questions were going to elicit incriminating responses.[92]

Special Agent Stinson's question about the "I-502" was one such question. By explaining what an "I-502" was, Appellant revealed he had special knowledge of the state's licensing requirements for recreational marijuana operations, which would tend to suggest that Appellant was involved in a prohibited operation in violation of the UCMJ. Therefore, this question should have been preceded with a rights advisement.

Nevertheless, SA Stinson deliberately chose not to provide Appellant notice of his Article 31(b), UCMJ, rights when he suspected Appellant of committing a crime.[93] Significantly, after Appellant explained the nature of an "I-502," SA Stinson asked Appellant who was involved in the business even though Appellant

[90] JA at 92.
[91] JA at 331-32.
[92] JA at 77.
[93] JA at 93.

gave SA Stinson the name of Mr. Hart early in his interview.[94] That question also should have been preceded with an advisement. This question was also likely to elicit an incriminating response. However, SA Stinson decided not to inform Appellant of his rights because he thought Appellant would not provide him information about the threat.[95] Special Agent Stinson testified, though, that only a handful of times have persons who he has advised of their Article 31(b), UCMJ, rights chosen to exercise them.[96]

In denying the suppression motion, the military judge based his reasoning in part on *United States v. Moses*.[97] In that case, this Court's predecessor did not find the questioning by a chief petty officer of his friend, the appellant, during a hostage situation to have been for a law enforcement or disciplinary purpose.[98] Rather, the questioning was designed to peacefully end the stand-off.[99] Although the opinion does not address whether advising the appellant of his Article 31(b), UCMJ, rights was actually contemplated, an agent who was present during the stand-off testified at an Article 39(a), UCMJ, session that had he advised the appellant of his rights, the dialogue to end the stand-off likely would have terminated.[100]

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[94] JA at 72.
[95] JA at 93.
[96] JA at 94.
[97] 45 M.J. 132 (C.A.A.F. 1996); JA at 330.
[98] *Moses*, 45 M.J. at 136.
[99] *Id.*
[100] *Id.*

Likewise, in *United States v. Loukas,*[101] another case on which the military judge relied,[102] this Court's predecessor looked solely at the purpose of the questioning and decided that the accused was not entitled to an advisement under Article 31(b), UCMJ, because there was no law enforcement or disciplinary purpose for the superior's questioning of the subordinate.[103] Notably, the court found no evidence to suggest that the superior's inquiries were designed to evade the accused's codal rights.[104]

Both *Moses* and *Loukas* contained a real-time emergency or operational mission that is not present here. In *Moses*, law enforcement personnel were engaged in an on-going hostage situation.[105] In *Loukas*, the flight crew was in mid-flight.[106] Here, there was no similar immediacy. Appellant could calmly and deliberately report his personal concern for his and his wife's safety to four Coast Guard personnel within an hour.[107] While Appellant may have felt his personal situation required a sense of urgency, LT Nordhausen and SA Stinson felt that they had to determine whether Appellant had reported a legitimate threat before taking

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[101] 29 M.J. 385 (C.M.A. 1990).
[102] JA at 330.
[103] 29 M.J. at 289.
[104] *Id.*
[105] 45 M.J. 133-34.
[106] *Loukas*, 29 M.J. at 386-87.
[107] JA at 326-28.

action.[108] Thus, the situation at issue here was not as immediate or urgent as the real-time situations in *Moses* and *Loukas*.

Also, unlike *Moses* and *Loukas*, here, there was deliberate avoidance to inform Appellant of his rights after suspicion arose. Special Agent Stinson testified that when Appellant would mention a fact about the prohibited business, SA Stinson claimed he would redirect Appellant back to the subject of Mr. Hart, albeit without informing him of his rights.[109] This happened several times.[110] Curiously, this version of events is apparently contradicted by SA Stinson's Memorandum of Activity in which he noted twice that Appellant "did not want to discuss the business."[111]

While SA Stinson was free to collect information regarding the reported threat, his interrogation plan indicates that he was aware that Appellant would continue to provide incriminating information about the business without a rights advisement. This is not a permissible work-around of the strictures of Article 31(b), UCMJ.

Given the length of questioning, the specific questions about the "I-502" and the people involved, and the deliberate decision not to advise Appellant of his rights after suspicion actually arose, the military judge abused his discretion when

[108] JA at 40-41; 100.
[109] JA at 77, 87.
[110] JA at 77.
[111] JA at 324-25.

he ruled that SA Stinson did not have a law enforcement purpose for his interview of Appellant.

4. Appellant's statement that he was not involved in his wife's business was in relation to the offense of which he was suspected.

After Appellant explained to SA Stinson what an "I-502" was, SA Stinson asked who was involved as partners in the business.[112] Appellant told them that he was not involved in his wife's marijuana-growing business.[113] Appellant made this statement in response to SA Stinson's inquiry, which became a law enforcement inquiry after SA Stinson suspected or reasonably should have suspected Appellant of being involved with his wife's business in violation of Article 112a, UCMJ. Therefore, Appellant's statement regarding his non-involvement in his wife's business should have been excluded.

B. Appellant was prejudiced by the admission of his statement that he was not involved in the marijuana business.

Because the violation is of Appellant's Article 31(b), UCMJ, rights rather than his constitutional rights, Appellant must demonstrate prejudice under the non-constitutional standard in *United States v. Kerr*.[114] Appellant easily meets this burden.

1. The Government's case on Specification One of Charge II was based entirely on Appellant's statement.

[112] JA at 72.
[113] JA at 92.
[114] 51 M.J. 401.

For the specification of Article 107, UCMJ, in which Appellant was charged with lying to SA Stinson, the prosecution called SA Stinson to offer Appellant's statement. Special Agent Chavez was not called to corroborate any part of SA Stinson's testimony about the interview.

2. Appellant did not testify.

Appellant did not present any evidence on this specification nor did he testify. However, the fact he did not testify strengthens Appellant's claim of prejudice since the prosecution used Appellant's statement to SA Stinson in its case-in-chief and not for impeachment.[115]

3. An unwarned statement cannot be the basis for an Article 107 charge.

Most importantly, this Court's predecessor ruled almost 70 years ago that "the express language of Article 31 did not permit a false official statement prosecution to be based upon an unwarned statement.[116] This prohibition is also reflected in Military Rule of Evidence 304 which permits a statement obtained in violation of Article 31, UCMJ, to be used only for impeachment or in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.[117] Since neither purpose applied to Appellant's case, Appellant's unwarned statement should not have been admitted. With Appellant's

[115] *See Swift*, 53 M.J. at 451-52.
[116] *Id*. at 448 (citing *United States v. Price*, 23 C.M.R. 54, 7 USCMA 590 (1957)).
[117] MCM, MIL. R. EVID. 304(e).

statement properly excluded, Appellant's conviction for a false official statement cannot stand.

Conclusion

Based on the foregoing, Appellant respectfully asks this Court to set aside the finding of guilty to the remaining Article 107, UCMJ, specification; dismiss the charge; and set aside the sentence.

Respectfully submitted,

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I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 17 March 2017.

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