

UNITED STATES MARINE CORPS  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	DEFENSE MOTION
	)	FOR APPROPRIATE RELIEF
JOSHUA HAWK	)	(Motion to exclude)
STAFF SERGEANT	)	
U.S. MARINE CORPS	)	17 Nov 2009
	)	
	)	
	)	

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The Accused now moves this Court to exclude photos of the victim taken immediately after the alleged assault on the basis that they are more prejudicial than probative.

The Accused also moves this Court to exclude the SF86 questionnaire purportedly authored by SSgt Hawk because there is not evidence that that document was authored by SSgt Hawk (authentication).

The Accused, per the rules, also asks that the Government demonstrate the voluntariness and admissibility of all statements made by the Accused that the Government seeks to introduce at trial.

**Facts**

1. The Accused faces Article 120 charges related to a sexual assault against a Ms. Daniel Ligon that allegedly occurred on 11 September 2008 at MCRD. The Accused also faces Article 92 and 134 charges related to the Accused allegedly not filling out a security background check properly or giving complete answers to a security clearance investigator. The Accused is also charged with various Article 107 charges

related to the Accused allegedly giving false official statements about the sexual assault incident as well as during the security clearance investigation.

2. Photographs of Ms. Daniel Ligon were taken by Government Agents on or about 19 September 2008. These photographs were taken days after the alleged assault incident and after Ms. Ligon had apparently scaled the MCRD security fence. A question exists as to whether the injuries of Ms. Ligon as depicted in those photos came from the conduct of the Accused.
3. On or about 7 October 2008, the Accused was interviewed by Government Agent Investigator Claude Carris regarding his criminal conduct and arrests as part of a security clearance background investigation. When Investigator Carris interviewed the Accused he was working for the federal government and was also aware that the Accused had or may have committed criminal misconduct. Nonetheless, without reading the Accused his Article 31b rights, Investigator Carris interviewed the Accused and obtained statements from the Accused which now form the basis of some of the charges the Accused now faces (see Charge II, Specification 5; Charge III, Specification 4; and Charge V, Specification 6).
4. The Accused must have a security clearance in order to keep his MOS as a military policeman. It is conceivable that had the Accused not submitted himself for a security clearance and answered the questions that incriminating him; he would still be facing Article 92 dereliction of duty charges.
5. On or about 15 October 2008, the Accused was interviewed by NCIS Agent Rendon and the Accused gave a video taped statement after receiving a rights warning.

#### **LAW AND ANALYSIS**

**A. The SF 86 form should be excluded**

Per MRE 901: The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Here, SSgt Hawk purportedly filled out a certain SF 86 form in October 2009. The responses to that SF 86 constitute some of the charges that the Government now charges SSgt Hawk with (See Article 92, 107 and 134 offenses).

First, the burden is on the Government to prove that SSgt Hawk knowingly and intelligently waived his right to remain silent before he incriminated himself with what he allegedly wrote on that SF 86. See MRE 304(e). Before that though, the Government must prove that the SF 86 form in question actually was authored by SSgt Hawk. The Defense asks that the Government produce evidence that SSgt Hawk (as opposed to some other person) authored that SF86, if it cannot, then the SF86 should not be admitted.

**B. Statements from the interview the Accused had with Investigator Claude Carris should be excluded.**

RCM 305(a) states that a statement obtained in violation of this rule is involuntary and shall be treated under MRE 304.

“No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.” United States v. Seay, 60 M.J. 73, 77 (C.A.A.F. 2004), citing Article 31b, UCMJ.

“Voluntariness of a confession is a question of law that an appellate court independently reviews, de novo. The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination [\*\*7] was critically impaired, use of his confession would offend due process.” United States v. Cuento, 60 M.J. 106, 108 (C.A.A.F. 2004).

NCIS agents are required to read 31b rights prior to interviewing Accuseds. See the application of this at United States v. Cuento, 60 M.J. 106, 108 (C.A.A.F. 2004). However, see also MRE 305(h) where nonmilitary interrogators do not necessarily need to read Article 31(b) rights. Indeed, some courts have found that where the investigator is not working on a military investigation, the requirement to read rights does not apply. “We affirmed the law officer's ruling admitting the exemplars because the evidence of record established that, while concurrent military and civilian investigations had been conducted, Article 31 was inapplicable as the "Secret Service investigation was independent and separate from the military investigation," and the agent was not subject to the Uniform Code.” United States v. McDonald, 9 M.J. 81, 84 (C.M.A. 1980).

In this case, Investigator Carris’s investigation was for a military purpose. Investigator Claude E. Carris, Jr, interviewed the Accused on or about 7 October 2008 after the Accused had already admitted to criminal misconduct in his question form that he submitted on 11 September 08. Investigator Carris was interviewing the Accused as part of a process for the accused to obtain a security clearance in the military for a

military purpose. No rights warnings were read to the Accused at any time during the Accused's interview with Investigator Carris.

Any statements the Accused made to Investigator Carris should not be used against the Accused at trial because the Accused was not read his Article 31b rights despite the fact that Investigator Carris knew that his questions to the Accused may elicit incriminating statements. Because Investigator Carris was interviewing the Accused for a military purpose and knew or should have known the Accused might incriminate himself, Carris should have read the Accused his 31b rights before questioning him.

Alternatively, if SSgt Hawk refused to be interviewed by Carris, then SSgt Hawk could still be facing dereliction of duty charges because he needed to complete a security clearance investigation in order to keep his MOS and have a security clearance. SSgt Hawk was put in the dilemma of speak and be prosecuted or remain silent and be prosecuted.

Because the burden is on the Government, the Accused also asks that the Government prove that the statement the Accused made to NCIS via videotape was voluntary too before this Court allows its admission. See MRE 304(e).

If this Court does allow these statements of the Accused to be admitted, then at the very least the entire statements (including those of the video taped statement of the Accused) should come in under the doctrine of completeness. See MRE 106.

**C. The photographs of Daniel Ligon after she scaled a large spiked fence should be excluded**

Per MRE 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, photographs exist of Ms. Ligon that purportedly show injuries she sustained after her interaction with SSgt Hawk and also after she scaled the very tall and spiked MCRD metal security fence while bare foot. It can't be determined one way or the other objectively that Ms. Ligon received these injuries from the fence and the fall vice from her interaction with SSgt Hawk. Too much time passed between the incident and when the photos were taken (about 8 days). Therefore, the photos should be excluded because they would confuse the members and unfairly prejudice SSgt Hawk.

#### **EVIDENCE AND BURDEN OF PROOF**

**a. The defense will submit these documents in support of its motion:**

- a. Charge Sheet
- b. Daniel Ligon Photos
- c. SF86
- d. Videotaped statement of the Accused
- e. Interview notes of Investigator Carris

**b. The defense asks the Government to produce these witnesses at the motion**

**hearing:**

- a. Ricky A. Rendon
- b. Claude Carris
- c. Ron Brundige
- d. Daniel Ligon

**c. Burden of proof:**

As to the motion to exclude, the burden of proof in proving all facts in support of this motion falls upon the moving party, the defense. The burden standard is a preponderance of the evidence to prove the validity of all facts. See R.C.M. 905.

As to the motion to exclude the statements of the Accused made to Investigator Claude Carris, the government agent; the burden falls on the Government under MRE 304(e) to prove by a preponderance of the evidence that the Accused's statements were voluntary and his rights to remain silent were properly waived.

### **RELIEF REQUESTED**

Oral argument is requested. The defense requests that this Court order as such:

1. That photographs of Daniel Ligon taken 19 September 08 be excluded at trial.
2. That the SF86 form be excluded at trial.
3. That any Statements the Accused made to Investigator Carris be excluded from evidence at trial.

Date: 17 Nov 09

/s/

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C. P. HUR  
Captain, USMC  
Detailed Defense Counsel

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Court Ruling

The motion is granted. The Court rules that:

1. That photographs of Daniel Ligon taken 19 September 08 be excluded at trial.
2. That the SF86 form be excluded at trial.
3. That any Statements the Accused made to Investigator Carris be excluded from evidence at trial.

Date:

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MILITARY JUDGE