IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT
v.	)	Crim. App. Dkt. No. 20110679
Specialist (E-4) **Travis D. Jones,** United States Army, Appellant	)	USCA Dkt. No. 14-0071/AR

Reynaldo Martinez
Supervised Law Student
Florida International University
College of Law

Eric R. Carpenter
CAAF Bar No. 34138
Assistant Professor of Law
Florida International University
College of Law
11800 SW 8th St., Miami, FL 33199
(305) 348-4560
ercarpen@fiu.edu

INDEX OF BRIEF

TABLE OF AUTHORITIES

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE'S MOTION TO SUPPRESS APPELLANT'S STATEMENT TO THE MILITARY POLICE.

Statement of Statutory Jurisdiction

Amicus Curiae adopt Appellant's Statement of Statutory Jurisdiction as set forth on page 1 of Appellant's brief.

Statement of the Case

Amicus Curiae adopt Appellant's Statement of the Case as set forth on pages 1-2 of the Appellant's brief.

Statement of the Facts

Amicus Curiae adopt Appellant's Statement of the Facts as set forth on pages 2-7 of Appellant's brief. Additional facts in the record will be referenced where appropriate.

Summary of Argument

Article 31(b) applies when: the questioner is a person subject to the Code; the questioning amounts to an

interrogation; and the person being asked the questions is an accused or is suspected of an offense. *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006). This brief will only deal with the first issue - whether the questioner is a "person subject to the Code."

Specialist Ellis (Ellis) was a person subject to the code because he held a law enforcement position; his duties were closely coordinated with law enforcement; and he had a law enforcement purpose, among others, for questioning the Appellant. In addition, the Appellant objectively perceived the questioning to be official and not a casual conversation because the Appellant was not friends with Ellis; Ellis used a stern voice and cuss words; there was no small talk; the Appellant did not voluntarily bring up the criminal conduct; and the Appellant initially resisted answering the questions. Therefore, this Court should find that the first requirement of Article 31(b) was satisfied under the facts of this case.

Argument

The phrase "person subject to the Code" is a term of art. Military appellate courts have rejected a literal interpretation of that phrase and have instead used a narrower definition that reflects the reason for Article 31(b), which is to protect service members in those "situations in which, because of military rank, duty, or other similar relationships, there might

be *subtle pressure* on a suspect to respond to an inquiry." *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981) (emphasis added); *Cohen*, 63 M.J. at 49 (*citing United States v. Gibson*, 14 C.M.R. 164, 170 (C.M.A. 1954)).

A person is subject to the Code if "the questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity." *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991); *Cohen*, 63 M.J. at 49; *Duga*, 10 M.J. at 210. If the questioner was acting officially, then the person being questioned must objectively perceive the questioning to be official and not a casual conversation. *Duga*, 10 M.J. at 211-12; *United States v. Price*, 44 M.J. 430, 433 (C.A.A.F. 1997).

Courts decide whether the questioner is acting in an official capacity and whether the questions were perceived as more than a casual conversation by looking at the totality of the circumstances. *Good*, 32 M.J. at 108; *Duga*, 10 M.J. at 211-12; *Cohen*, 63 M.J. at 49-50; *United States v. Pittman*, 36 M.J. 404, 407 (C.M.A. 1993).

The military judge's conclusions as to whether the questioner was acting in an official capacity and whether the questioning was perceived as official are conclusions of law that this Court reviews *de novo*. *United States v. White*, 48

M.J. 251, 257 (C.A.A.F. 1998). The military judge's findings of fact are reviewed under a clearly erroneous standard. *Id.*

Ellis Was Acting in an Official Capacity

In *Duga*, the Court defined "official capacity" as requiring the questioner to be acting on behalf of a law enforcement or disciplinary agent. *Duga*, 10 M.J. at 210-11. Cases that clearly satisfy the requirement include those where the questioner is an informant, undercover agent, or person making a pretext phone call.[1]

In *Duga*, the Court stated that where the questioning is "entirely unconnected" with law enforcement, meaning that law enforcement "neither directed nor advised [the questioner]" to ask questions, then this factor is not satisfied. *Duga*, 10 M.J. at 211. In this case, no one gave Ellis the direct task of questioning the Appellant.

The Court has moderated this position over time. Now, even if the questioner was not directed by a law enforcement agent to do the specific task of questioning, this factor is still satisfied if the questioner has a connection to law enforcement. *United States v. Loukas*, 29 M.J. 385, 389 (C.M.A. 1990) (*quoting*

[1] *See Gibson, 14 C.M.R. 164; United States v. Harvey*, 37 M.J. 140 (C.M.A. 1993); *White*, 48 M.J. 251; *United States v. Rios*, 48 M.J. 261 (C.A.A.F. 1998).

Gibson, 14 C.M.R. at 170).[2] This connection can be direct or indirect. *United States v. Moore*, 32 M.J. 56, 60 (C.M.A. 1991).[3]

I

At times, this connection to law enforcement or discipline comes from the nature of the questioner's position. The questioner is subject to the code if he has *any* law enforcement or disciplinary responsibilities, *Cohen*, 63 M.J. at 52 (inspector general's duties "were primarily administrative, but they were not exclusively so"); or, if her duties require "close coordination with base legal and investigative personnel" *Brisbane*, 63 M.J. at 113.

Here, not only were Ellis' duties as an infantryman not exclusive, these duties were actually completely excluded by his law enforcement duties. He was a military police augmentee. All he did was law enforcement for five months. JA-13. The law does not require that he receive law enforcement training, or wear a complete MP uniform (although he wore a police belt with a 9mm pistol and sometimes handcuffs, JA-14) - the law only

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[2] In the following cases, the Court found that the questioner was subject to the code even though the questioner was not directed to do that task by law enforcement: *United States v. Guyton-Bhatt*, 56 M.J. 484 (C.A.A.F. 2002); *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002); *Cohen*, 63 M.J. 45; *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006).

[3] There is a body of law for civilian criminal investigations and when those agents must read Art. 31. *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988); *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991); *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997). These cases use their own test and are not useful here. There is another body of law, like *Moore*, for non-law enforcement, military, civilian employees who ask the questions. *See also Brisbane*, 63 M.J. at 113, *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993). This second body of law has a test that is very similar to the *Duga* test and those cases do inform this problem.

requires that he have some law enforcement duties. The issue is not whether all of his duties were law enforcement. The issue is whether any of his duties involved law enforcement. Again, the law does not require that he have been directed to question the Appellant; rather it only requires that he have some role in law enforcement.

Further, Ellis had much closer coordination with law enforcement than the Family Advocacy manager in *Brisbane*. His senior supervisors for five months were military police. JA-12,24. At their direction, he did walk patrols, security checks, vehicle searches, traffic control, responded to reports of stolen vehicles, and otherwise made "sure nobody was doing anything bad." JA-13-15.

He closely coordinated with law enforcement on this very incident, unlike what happened in *Duga*, where the questioner was not working in coordination with law enforcement. *Duga*, 10 M.J. at 207 (only told to pass on information if he gets it). Ellis' supervisors coordinated for him to show up at this exact robbery scene, even clearing up that they initially sent him to the wrong place. JA-15. He was directed to secure the area and look for the perpetrators of the robbery. JA-16. He and his full-time MP partner (JA-20-21) searched "anything and everything" for "a good while." JA-15-16. Sergeant Dubois, the NCOIC of the Provost Marshal's Office, then gave them a

description of the suspects and sent them to the flight line to do consent searches in an effort to find this large amount of currency. JA-18-20.

This Court reviews the military judge's conclusion that Ellis was not acting in an official capacity *de novo*. Even more than in *Cohen*, Ellis' duties were exclusively law enforcement. Even more than in *Brisbane*, he closely coordinated with law enforcement, not just in general, but on this very case. He was acting in an official capacity.

II

When those two conditions are not met, the Court relies heavily on the questioner's motivation or purpose for the questioning to check for a connection to law enforcement or discipline. The test is whether the questioner had a law enforcement purpose for the questioning or did so solely for another reason. *Duga*, 10 M.J. at 210, *Cohen*, 63 M.J. at 49-50.

When the questioner has a mixed-purpose for the questioning (law enforcement or discipline along with another reason), then the questioner is still a person subject to the Code – even if another reason is the driving purpose for the questioning. The other reason must be the *exclusive* reason in order for Article 31 not to apply. *Duga*, 10 M.J. at 210-11 ("[I]n each case it is necessary to determine whether [first] a questioner . . . was acting in an official capacity in his inquiry or *only* had a

personal motivation" and the questioner "was *solely* motivated" by another reason) (emphasis added). *See also Brisbane*, 63 M.J. at 112 (rejecting the primary purpose test).

When the questioner asks those questions *solely* for that other reason, then that questioner is not a person subject to the Code. *Cohen*, 63 M.J. at 50 ("This Court has also interpreted Article 31(b) in a manner that recognizes the difference between questioning focused *solely* on [other reasons] and questioning [for disciplinary purposes]") (emphasis added). The Court resolves many of these cases on this prong, finding this other reason - operational, medical, safety, administrative,[4] or, as in *Duga*, a personal reason like curiosity[5] - is the *sole* reason for the questioning. Note that the Court did not decide these cases based on whether the questioner had been directed to do the task of questioning by law enforcement.

If the questioner has a law enforcement purpose, the questioner can still be subject to the code even if there was no prior coordination at all with law enforcement. The questioner can independently come up with the law enforcement purpose; ask

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[4] *See Loukas*, 29 M.J. at 389; *United States v. Bowerman*, 39 M.J. 219, 221 (C.M.A. 1994); *United States v. Moses*, 45 M.J. 132, 136 (C.A.A.F. 1996); *United States v. Bradley*, 51 M.J. 437, 439, 441-42 (C.A.A.F. 1999)); *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994).

[5] *See generally United States v. Jones*, 24 M.J. 367 (C.M.A. 1987); *Pittman*, 36 M.J. 404; *United States v. Norris*, 55 M.J. 209 (C.A.A.F. 2001).

the questions; and then report to law enforcement.[6] The key is the existence of the law enforcement purpose.

Here, Ellis had a law enforcement purpose for the questioning. He said so directly: "I wanted to help with the case", JA-50, "[a]t first, because I was involved with it, I was one of the first to arrive at the scene." JA-53.

Further, he did what the Family Advocacy manager in *Brisbane* did. There, "According to her testimony, the reason for her interview was to decide if they had sufficient evidence to proceed . . . with a case against Appellant." *Brisbane*, 63 M.J. at 113. Ellis testified that he did the same thing: "I just wanted to clarify . . . if they did it and if they didn't do it", JA-22, with the intent that if they did do it, he would "take it to the next level . . . and say, 'Hey, this is what I know' and then go from there." JA-23. In *Brisbane*, that reflected a law enforcement purpose, and it does here, too.

Other facts demonstrate his law enforcement purpose. This Court has found no law enforcement purpose when the questioner does not report quickly. *Duga*, 10 M.J. at 207 (three days later); Pittman, 36 M.J. at 406 (several days later); *Norris*, 55 M.J. at 214 (two days later). Here, Ellis reported what he learned to his supervisor "maybe a minute" after finishing his second interview. JA-28. Unlike in *Norris* and *Duga*, where the

[6] *Guyton-Bhatt*, 56 M.J. 484; *Benner*, 57 M.J. 210.

questioners had no intent to report when conducting the questioning (*Norris*, 55 M.J. at 214; *Duga*, 10 M.J. at 208), Ellis had that intent. JA-23. Unlike in Duga, where the criminal topic came up casually and later in the conversation and was brought up by the suspect (*Duga*, 10 M.J. at 211), here Ellis brought up the criminal topic immediately in a forceful way. Unlike in Pittman, where the questioner had no idea what the accused might have done, (*Pittman*, 36 M.J. at 406), here Ellis did. JA-52.

The military judge found that Ellis did have two reasons for conducting the questioning: an investigative purpose and personal motivation. JA-58. The military judge appeared to have used a "primary purpose" test. JA-125. This Court reviews the military judge's conclusion that Ellis was not acting in an official capacity *de novo*. While Ellis may have had some other reasons, like personal curiosity or trying to do the right thing as a person, JA-53, those reasons were not his *sole* reason for conducting the questioning, as is required by *Duga*. He had a law enforcement purpose; therefore, he was acting in an official capacity.

Objective Perception of Casual Conversation.

This prong was developed directly from *Gibson*, 14 C.M.R. 164, a case about a prison informant. This prong creates an exception for those circumstances where there is a law

enforcement purpose but the questioner is an informant, undercover agent, or person making a pretext phone call. Without this exception, informants would have to read Article 31(b) rights to suspects, essentially shutting down these investigative methods.[7]

Reflective of the purpose for this prong, this Court frequently does not use this prong when finding that the questioning was for a law enforcement purpose and where there is no informant issue - even though *Duga* seems to require that the Court reach that issue - most notably in *Cohen*, 63 M.J. at 51-52, and *Brisbane*, 63 M.J. at 111-13.[8] And in those cases that do not involve informants but where the Court does discuss the second *Duga* prong, the Court had already found that the questioner did not have a law enforcement or disciplinary purpose and could have ended the analysis there.[9] Therefore, whether this prong has utility outside of the informant context is questionable.

Regardless, in this case, the Appellant did perceive and could objectively perceive that this was more than a casual conversation. First, there is nothing fatal about the questioner

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[7] *See also Harvey*, 37 M.J. 140; *White*, 48 M.J. 251; *Rios*, 48 M.J. 261.
[8] *See also Good*, 32 M.J. 105; *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000); *Guyton-Bhatt*, 56 M.J. 484; *Benner*, 57 M.J. 210.
[9] *Duga*, 10 M.J. at 211-12; *Price*, 44 M.J. 430; *Norris*, 55 M.J. 209.

being equal or junior in rank to the accused.[10] That is just one fact to consider.

This Court finds casual conversations when there is a strong friendship or relationship between the parties. *Pittman*, 36 M.J. at 406 (friends, to include off-duty socializing with family and sharing of confidences); Duga, 10 M.J. at 207 (they knew each other between one and two years, lived in same building, and shared social evenings); *Norris*, 55 M.J. at 210 (attended the same church, the accused visited the questioner's quarters several times a week, frequently ate dinner with the family, and spent several nights a month at house). Here, we find the opposite. Ellis barely knew the Appellant. JA-104. Ellis testified that he rarely socialized outside of work as he was a "CHU rat." JA-33.

This Court also looks to the nature of the conversation. A casual conversation is marked by small talk and other various things (*Duga*, 10 M.J. at 207; *Norris*, 55 M.J. at 213), calm voices (*Duga*, 10 M.J. at 207; *Norris*, 55 M.J. at 213), addressing each other in non-military terms (*Norris*, 55 M.J. at 213), and unlocked doors (*Id.*). In addition, in a casual conversation, the suspect approaches the questioner (*Duga*, 10 M.J. at 207; *Harvey*, 37 M.J. at 143) and the suspect is the one

[10] *Guyton-Bhatt*, 56 M.J. 484 (Court found violation where questioner was junior in rank).

that voluntarily brings up the criminal conduct (*Duga*, 10 M.J. at 207).

If the conversation in this case was casual, we would see this: The Appellant sees Ellis in the mess hall and walks up to him. They are good friends. They start having small talk about various things. They address each other by first names. Then the Appellant says, "Guess what? Two other guys and I robbed an Iraqi for almost $400,000."

The opposite happened. Ellis, fresh from investigating the most intense case he has worked, JA-18, sees the Appellant walking, not towards him but in his direction, and says, "Hey Jones, come here. Let me ask you a question." JA-22. Ellis is not the Appellant's friend. In fact, the Appellant knows that Ellis is a non-corruptible "good cop" because Ellis turned down the offer to join the crime. Ellis takes the Appellant into Ellis' room. The Appellant locks the door, probably because he knew this was about to be a serious conversation. There was no small talk - instead, Ellis launches immediately into "JONES don't fucking lie to me what the fuck happened and why in the fuck did you do it?" JA-121. Ellis used a "stern voice," JA-135, and he only uses the Appellant's last name.

Further, unlike in *Duga*, where the accused "felt comfortable enough to tell [the questioner] that he was looking for a place to hide [the contraband]", Duga, 10 M.J. at 211,

here the Appellant initially denied knowing anything about the crime and it was only after another round of curse-laden questions did he say, "All right, we did it." JA-24. And even then, the Appellant would not say who the other co-conspirators were. JA-24.

Again, *Duga*, 10 M.J. at 211: "Certainly, had he perceived that [the questioner] was questioning him as a security policeman, or had known that [he] had spoken to the OSI, he would not have told [him] that he was looking for a place to hide his [contraband]." Here, the Appellant did the opposite - he denied involvement in the crime - so he must have perceived that this was questioning by a law enforcement agent.

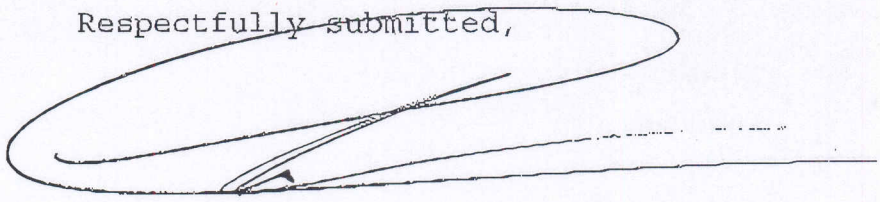
This Court reviews the military judge's conclusion that this was a casual conversation (JA-139) *de novo*. The facts show that this was much more than a casual conversation; rather, the Appellant reasonably perceived that this was law enforcement questioning by a non-corruptible "good cop."

Conclusion

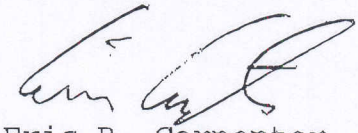
This case embodies a situation in which, because of military duty, there was much more than subtle pressure on the Appellant to respond to questioning. This Court should find that the first requirement of Article 31(b) was satisfied, in that Ellis was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity,

and the Appellant objectively perceived the questioning to be official and not a casual conversation.

Respectfully submitted,



Reynaldo Martinez
Supervised Law Student
Florida International University
College of Law



Eric R. Carpenter
CAAF Bar No. 34138
Assistant Professor of Law
Florida International University
College of Law
11800 SW 8th St., Miami, FL 33199
(305) 348-4560
ercarpen@fiu.edu

CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 21(b) because this brief contains 3,326 words.

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Eric R. Carpenter
CAAF Bar No. 34138
Assistant Professor of Law
Florida International University
College of Law
11800 SW 8th St., Miami, FL 33199
(305) 348-4560
ercarpen@fiu.edu

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing motion was electronically filed with the Court, Government Appellate Division, and Defense Appellate Division on March 21, 2014.

Eric R. Carpenter
CAAF Bar No. 34138
Assistant Professor of Law
Florida International University
College of Law
11800 SW 8th St., Miami, FL 33199
(305) 348-4560
ercarpen@fiu.edu