IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	USCA Dkt. No. 14-0071/AR
Specialist (E-4) **TRAVIS D. JONES,** United States Army, Appellant	)	Crim.App. Dkt. No. 20110679

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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.

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

Granted Issue

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

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

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[1] UCMJ, Art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, Art. 67(a)(3), 10 U.S.C. § 867(a)(3).

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one (1) specification of conspiracy to commit burglary and one (1) specification of burglary in violation of Articles 81 and 129 of the Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 929 (2008) [hereinafter UCMJ].[3] The panel sentenced appellant to be confined for two (2) years and to be discharged from the service with a bad-conduct discharge.[4] The convening authority approved the sentence as adjudged.[5]

On July 31, 2013, the Army Court affirmed the findings and sentence.[6] This Court granted appellant's petition for grant of review of the Army Court's decision on January 16, 2014.

Statement of Facts

Appellant deployed with his military police company to Al Asad Airbase in Iraq. Appellant and his unit were scheduled to redeploy late on or about 1 April 2011.[7]

A. Forming the conspiracy to commit robbery.

Approximately a week prior to the robbery, and appellant's redeployment, he and his roommate, SPC Elliott Carrasquillo (SPC Carrasquillo), invited Private First Class John Ellis (PFC

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[3] SJA 9.
[4] SJA 10.
[5] JA 7.
[6] JA 8.
[7] JA 35.

Ellis)[8] to their living quarters.[9] When PFC Ellis arrived in the room, appellant and his roommate asked him to lock the door behind him, which PFC Ellis thought unusual.[10] Nevertheless he complied with their request and locked the door.[11]

After they were assured of complete privacy, appellant and SPC Carrasquillo attempted to recruit PFC Ellis in a criminal conspiracy to commit a robbery.[12] PFC Ellis assumed they were joking, but immediately rejected the proposal as "absurd".[13] Although he thought it was a joke, he warned both to forget such thoughts and focus on their impending redeployment instead.[14] Shortly after their discussion, PFC Ellis left appellant's room.[15]

Undeterred by PFC Ellis' rejection, appellant and SPC Carrasquillo pursued their ill advised criminal scheme. On the evening of 31 March 2011, appellant asked PFC James A. Backes (PFC Backes) if he would help "toss some cash over a wall once he [appellant] got through his checks at customs."[16] Appellant and his roommate informed PFC Backes that they intended to go to

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[8] Private First Class Ellis was promoted to Specialist during the deployment, but at the time of the events relevant to this case, he was a Private First Class (E-3). SJA 2.
[9] JA 34.
[10] JA 34-35.
[11] JA 35.
[12] JA 35.
[13] JA 35.
[14] JA 35.
[15] JA 35.
[16] JA 62.

a certain local national's room and take a large amount of money from a safe he kept.[17] They also informed PFC Backes of the fact that they had previously discussed this idea with PFC Ellis.[18] However, unlike PFC Ellis, PFC Backes accepted their invitation and entered the criminal conspiracy.[19]

B. The scope of PFC Ellis's ability to conduct law enforcement duties.

PFC Ellis was an infantryman who was attached to a military police company on Al Asad Air Base.[20] He served as an augmentee for approximately five months prior to the robbery.[21] PFC Ellis augmented the military police unit because it was short-staffed and needed additional personnel.[22] He and the other seven augmentees worked at the direction of a military police officer that they were partnered with and acted as "backup" for.[23]

PFC Ellis was not trained as an investigator or military policeman and did not receive any kind of formal training.[24] He was not allowed to do any military police duties outside the presence of his partner.[25] Moreover, even when he was with his military police partner, he was not authorized to conduct

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[17] JA 63-63; JA 88.
[18] JA 63-64.
[19] JA 62-63; JA 89.
[20] JA 12-13.
[21] JA 12.
[22] JA 13; SJA 3.
[23] JA 13.
[24] JA 13; JA 30.
[25] JA 30.

interrogations or take sworn statements.[26] PFC Ellis was instructed that when he was on duty, he was an augmentee for the military police, but when he was off-duty, he was an infantryman and was not authorized to perform any military police functions.[27]

C. The Robbery of Mr. DA by appellant and his co-conspirators.

In the early morning of 1 April 2011, appellant and his two co-conspirators left for the housing unit of Mr. DA, an Iraqi national who worked on Al Asad Air Base.[28] PFC Backes took with him a loaded M-4 rifle while appellant and SPC Carrasquillo carried loaded M-9 pistols.[29] Once at Mr. DA's quarters, they pointed their loaded weapons at his head, ordered him to get on his knees, and placed a shirt over his head.[30] Next they moved Mr. DA to the bathroom where appellant stood watch over him while SPC Carrasquillo located the safe.[31] Once they obtained the key to the safe SPC Carrasquillo and appellant reentered Mr. DA's room and emerged with cash stuffed in their cargo pockets.[32] The three then fled to an abandoned laundry facility where they

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[26] JA 42-43.
[27] JA 30; JA 43.
[28] JA 68.
[29] JA 68-69.
[30] JA 76; JA 107-108.
[31] JA 76.
[32] JA 78-79.

counted the money, which totaled about $385,000.[33] They wrapped the cash in plastic and hid it under a connex.[34] The conspirators then walked back to appellant's room and discussed their next steps.[35]

D. PFC Ellis's role in the immediate aftermath of the robbery.

Later that same morning, PFC Ellis and his partner were on duty and responded to the armed robbery call.[36] When he arrived on the scene, PFC Ellis recalled the recent conversation he had with appellant and his roommate and immediately made an "assumption" that appellant may have been involved.[37] Soon after arriving on the scene, PFC Ellis was instructed to secure the area.[38] He and his partner searched the vicinity where the burglary had occurred.[39] However, PFC Ellis was never directed to go to the immediate scene of the robbery or conduct any interviews.

Eventually, PFC Ellis was given a description of the perpetrators that heightened his "assumption" that appellant and his roommate may have been involved.[40] However, PFC Ellis did

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[33] JA 82-83; 85-86. CID Agents determined that appellant and his co-conspirators took $384,800 in U.S. currency. (R. at 340).
[34] JA 86.
[35] JA 87.
[36] JA 15.
[37] JA 56.
[38] JA 16.
[39] JA 16-17.
[40] JA 18-19.

not report this suspicion because he was uncertain and did not want to falsely accuse appellant.[41]

After receiving the description of the suspects, PFC Ellis was next dispatched to the flight line to ask redeploying personnel if they would consent to a search of their belongings. Soon after performing the consent searches, PFC Ellis's shift ended and he was dismissed for the day.[42]

E. The confrontation between appellant and PFC Ellis.

After completing his shift, PFC Ellis headed back to his living quarters.[43] Prior to reaching his room, PFC Ellis saw appellant approaching and called him over.[44] PFC Ellis suggested going back to his room to talk and appellant agreed.[45] PFC Ellis extended this invitation because he wanted to determine whether his hunch about the theft was correct.[46] Absent appellant's and SPC Carrasquillo's invitation to rob someone, PFC Ellis would not have thought appellant was involved in the robbery.[47]

At the time, PFC Ellis was not with his partner and not authorized to perform any military police functions.[48] Moreover, PFC Ellis was not wearing a military police belt or brassard; in

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[41] JA 100.
[42] JA 21-22; JA 101.
[43] JA 21-22; JA 100.
[44] JA 22.
[45] JA 24; JA 31-32.
[46] JA 51.
[47] JA 56.
[48] JA 30-31. Appellant, whose unit PFC Ellis had augmented would likely have known the limitations imposed on all the augmentees.

contrast, appellant may have been wearing his military police brassard.[49]

Once in the room, PFC Ellis never prevented appellant from leaving. In fact, it was appellant who shut and locked the door after both had entered the room.[50] Once appellant secured the door, PFC Ellis confronted him about the robbery.[51] No one instructed PFC Ellis to question appellant; he did so on his own initiative and in the privacy of his living quarters.[52] In response, appellant admitted his involvement in the theft but asked PFC Ellis not to tell anyone.[53]

After his conversation with appellant, PFC Ellis changed and walked outside his room where he ran into three other members of the departing military police company.[54] While the four discussed their impending redeployment, SPC Carrasquillo approached and engaged the group.[55] As PFC Ellis began to leave, SPC Carrasquillo told him he had a box of cigars for him.[56] A few minutes after PFC Ellis returned to his living quarters, SPC Carrasquillo knocked, walked in and handed PFC Ellis a box

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[49] JA 29-30; JA 32.
[50] JA 32-33.
[51] JA 24.
[52] JA 32.
[53] JA 102.
[54] JA 33.
[55] JA 25-26; JA 33.
[56] JA 26; JA 33.

of cigars.[57] PFC Ellis thought it was "awkward" that SPC Carrasquillo would offer him a box of cigars. He set the cigars aside and confronted SPC Carrasquillo about the robbery. SPC Carrasquillo admitted that he, appellant, and PFC Backes had committed the robbery.[58] After admitting to their involvement, SPC Carrasquillo asked PFC Ellis to keep it all a secret.[59]

However, almost immediately after SPC Carrasquillo left the room, PFC Ellis went to his immediate chain of command, Sergeant Jonathan Goodrich, another infantryman assigned to the military police company.[60] PFC Ellis informed him about the entire conspiracy to rob Mr. DA and the two alerted law enforcement.[61]

Granted Issue

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

Summary of Argument

The military judge did not abuse his discretion when he denied appellant's motion to suppress the statement he made to PFC Ellis. His findings that PFC Ellis was not acting in an official capacity when he questioned appellant was amply

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[57] JA 26.
[58] JA 26-27.
[59] JA 28.
[60] JA 28.
[61] JA 28; SJA 1.

supported by facts in the record. PFC Ellis was personally motivated by appellant's earlier attempt to recruit him into the same criminal conspiracy. Moreover, the conversation between the peers was informal and appellant had neither a duty to respond, nor did he perceive such a duty. Therefore, Article 31(b) did not apply to the conversation. In addition, even if the military judge had erred in his decision, any such error would have been harmless beyond a reasonable doubt because the evidence, including testimony of a co-conspirator, established overwhelming proof of appellant's guilt.

Standard of Review

A military judge's denial of a motion to suppress evidence is reviewed for an abuse of discretion.[62] This court reviews a military judge's findings of fact "under the clearly-erroneous standard and conclusions of law under the de novo standard."[63] The abuse of discretion standard calls "for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'"[64]

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[62] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[63] *Ayala*, 43 M.J. at 298.
[64] *United States v. White*, 69 M.J. 236, 239 (C.A.A.F 2010)(quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

Law and Analysis

In pertinent part Article 31(b) provides that it first "applies to persons subject to the UCMJ. Second and third, the article applies to interrogation or requests for any statements from 'an accused or a person suspected of an offense.' Fourth, the right extends to statements regarding the offense(s) of which the person questioned is accused or suspected."[65]

However, this court and its predecessor recognized long ago that if Article 31(b) was applied literally, it would potentially have a comprehensive and unintended reach into all aspects of military life and mission.[66] After a careful study of the Article's purpose and legislative history, the court concluded that Congress did not intend a literal application of that provision.[67] Instead, it found that the purpose of Article 31(b) is to provide servicepersons with protection from what was deemed as the subtle pressures that exists in military society.[68]

Specifically, the court reasoned that "[b]ecause of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain

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[65] *United States v. Cohen,* 63 M.J. 45, 50-59 (C.A.A.F. 2006).
[66] *Cohen,* 63 M.J. at 50 (citing *United States v. Gibson,* 3 M.J. 746, 752 (C.M.A. 1954)).
[67] *United States v. Duga,* 10 M.J. 206, 209 (C.M.A. 1981).
[68] *Duga,* 10 M.J. at 210 (citing Index and Legislative History, Uniform Code of Military Justice, Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st Sess., H.R. 2498, pp. 984-85 (1949)).

circumstances is the equivalent of a command.[69] Consequently, Article 31(b) "applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry."[70] Therefore, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry, as opposed to a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.[71] Unless both prerequisites are met, Article 31(b) does not apply.[72]

A. PFC Ellis was not acting in an official capacity.

Based upon his essential findings of fact, the military judge ruled that PFC Ellis was acting in a personal capacity during his conversation with appellant, rather than in an official capacity.[73] Therefore, PFC Ellis was not required to advise appellant of his Article 31(b) rights because he was not investigating appellant on behalf of law enforcement.

The "purpose and legislative history of Article 31(b) demonstrated that Congress did not intend that provision to apply to every conversation between members of the armed forces

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[69] *Duga*, 10 M.J. at 209.
[70] *Duga*, 10 M.J. at 210.
[71] *Id;*
[72] *Id.; see also United States v. Price,* 44 M.J. 430, 432 (C.A.A.F. 1996).
[73] JA 138.

regardless of the circumstances."[74] Among other limitations, Article 31(b) does not require that an individual be advised of his right to remain silent unless the person questioning him is participating in an official or law enforcement investigation.[75] If the questioner is not acting in a law enforcement or disciplinary capacity, rights warnings are generally not required."[76] Whether the questioner is acting in a law-enforcement or disciplinary capacity and the individual's perception of the nature of the questioning are evaluated objectively in light of all the facts and circumstances.[77]

On the morning of 1 April 2011, when PFC Ellis encountered appellant, PFC Ellis was neither with his partner nor wearing a military police brassard or belt because he was off duty.[78] PFC Ellis was not a special agent or detective charged with investigating the robbery, and his conversation with appellant was not pursuant to an official law-enforcement investigation. Indeed, PFC Ellis was not even a military policeman.[79] Rather, he was simply an infantryman assigned to augment the military

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[74] *United States v. Norris,* 55 M.J. 209, 215 (C.A.A.F. 2001).
[75] United States v. *Swift,* 53 M.J. 439, 446 (C.A.A.F. 2000).
[76] *Cohen,* 63 M.J. at 49-50.
[77] *United States v. Good,* 32 M.J. 105, 108 (C.A.A.F. 1991); *see also Cohen,* 63 M.J. at 50.
[78] JA 31.
[79] JA 13. At trial, even appellant's defense counsel acknowledged that PFC Ellis was an Infantryman and not a Military Policeman: "Because you are not a military policeman, right?" "You're actually an infantryman, one of seven infantryman that were detailed over to the military police unit". SJA 6

police in the performance of some duties. His duties did not include investigations.[80] As such PFC Ellis was not an investigator and was not acting pursuant to the investigation when he took it upon himself to question appellant.[81]

PFC Ellis was appellant's peer and neighbor, and, as the military judge found, PFC Ellis wanted to find out for himself whether appellant had robbed Mr. DA because appellant had previously asked him to participate in the robbery.[82] The military judge found in his written decision: "[T]he evidence here indicates that SPC Ellis was not acting in any official capacity."[83] Based on the facts, the findings by the military judge can hardly be described as arbitrary or clearly unreasonable.

The fact that PFC Ellis had been assigned to search for the stolen money in the vicinity where the robbery occurred as well as the flight line does not elevate his role to that of an investigator.[84] He remained an infantryman who may have augmented a military police company, but had no law enforcement authority, particularly after his shift was over.[85]

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[80] JA 13.
[81] JA 24; JA 31-32; JA 101.
[82] JA 34; JA 31-32.
[83] JA 138.
[84] JA 16-17; JA 21-22.
[85] JA 30.

PFC Ellis was not a CID agent, and his role never changed to that of lead (or even secondary) investigator of the theft. Furthermore, PFC Ellis was not instructed by CID or anyone else to interview appellant pursuant to any formal investigation.[86] He was simply not acting in concert with law enforcement or at their behest.[87]

In *Duga,* military law enforcement investigators questioned a security policeman, regarding anything he knew which connected Duga, the appellant, to certain thefts.[88] The security policeman, who was an acquaintance of the appellant, agreed to contact the agents if he learned anything that implicated the appellant. Later the same day, while the security policeman was on duty at a post gate, the appellant entered and they struck up a conversation. During the conversation the security policeman asked questions to which the appellant provided him with certain incriminating admissions related to the thefts.[89] The security policeman's motivation partly stemmed from a curiosity about appellant's alleged illegal activities.[90] No Article 31(b) warning had preceded any of the questions asked by the security policeman. Nonetheless, the security policeman later reported the appellant's admissions to law enforcement.

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[86] JA 31-32.
[87] JA 31-32.
[88] *Duga,* 10 M.J. at 207.
[89] *Id.*
[90] *Id.*

Despite the fact that the security policeman questioned a known suspect while he was on duty performing a law enforcement function, the court found that he was not acting in an official capacity.[91] Essentially, the court in *Duga* reasoned that because there was no pressure related to military rank, duty, or other similar relationship, this was an informal conversation between peers who had known each other for over a year.[92] Furthermore, the court found that the fact that the security policeman later reported the appellant's admissions revealed nothing more than what any good citizen should do.[93]

Article 31 requires warnings only when questioning is done for the purpose of "an official law-enforcement investigation or disciplinary inquiry."[94] As the security policeman in *Duga* did, PFC Ellis acted out of a personal motivation to discover whether appellant, someone he worked with and lived next door to for months was involved in the robbery. Moreover, unlike the security policeman in *Duga*, PFC Ellis was not a policeman, was not on duty, and never received a request from law enforcement

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[91] *Duga*, 10 M.J. at 211.
[92] *Duga*, 10 M.J. at 208.
[93] *Duga*, 10 M.J. at 208.
[94] *United States v. Loukas*, 29 M.J. 385, 393 (C.M.A. 1990)("warnings clearly are not required" in "a situation in which a close friend is engaged in a personal conversation with the accused as a friend"); *see also Duga*, 10 M.J. at 211 (holding that statements made in response to questions posed by *a* friend of the accused, who was not acting in an official capacity or at the behest of investigative authorities, were not within the purview of Article 31(b)).

to provide them information on appellant's involvement in the robbery.

As the military judge properly noted, PFC Ellis was not primarily motivated by a law enforcement purpose but had personal reasons to confront appellant. The military judge stated in his written decision: "The Accused knew SPC Ellis personally; so personally, in fact, that the Accused had previously asked SPC Ellis if he would like to participate in the robbery. It follows then, that any subsequent conversations concerning the robbery could reasonably be viewed as being personally motivated."[95]

The fact that PFC Ellis was reluctant to report his fellow soldiers despite his "assumptions", supports the conclusion he acted chiefly out of personal motivation.[96] Although PFC Ellis plainly stated that he was partially motivated by the natural desire to assist in determining who committed the crime, the military judge found that PFC Ellis was also motivated by a personal desire to prove to himself whether appellant had committed the robbery.[97] The military judge found PFC Ellis's personal curiosity understandable in light of the fact that appellant had (unsuccessfully) recruited him to participate in the conspiracy: "The fact the Accused had previously engaged SPC

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[95] JA 138.
[96] JA 49.
[97] JA 60; JA 138).

Ellis in a conversation where the Accused and SPC Carrasquillo invited SPC Ellis to participate in the robbery also indicates the personal nature of the casual conversation."[98] Appellant has not shown that the military judge clearly erred in so finding.

For these reasons, the military judge did not clearly err in finding that PFC Ellis was not acting in an official capacity when appellant made his inculpatory statements. As such, there was no requirement for PFC Ellis to advise appellant of his Article 31(b) rights, and the military judge did not abuse his discretion in not suppressing appellant's statements to PFC Ellis.

B. PFC Ellis's questions were perceived as casual conversation and not for law enforcement or disciplinary reasons by appellant.

Appellant did not perceive PFC Ellis to be acting in an official capacity and did not believe that their interaction constituted interrogation.[99] This Court has previously held that Article 31(b) warnings are required only when the questioner is acting in an official capacity and the suspect reasonably perceives the questioning as official.[100] The warning requirement of Article 31(b) "applies only to situations in which, because of military rank, duty, or other similar

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[98] JA 139.
[99] *See Rhode Island v. Innis,* 446 U.S. 291, 300 (1980)(holding that interrogation must "reflect a measure of compulsion above and beyond that inherent in custody itself.").
[100] *Cohen,* 63 M.J. at 50.

relationship, there might be subtle pressure on a suspect to respond to an inquiry."[101]

Here, it is readily apparent that appellant did not believe that PFC Ellis was acting in an official or law-enforcement capacity when he spoke with appellant. Nor did appellant believe that any questions PFC Ellis posed were official questions. Rather, he astutely determined that PFC Ellis' inquiries were personally motivated because appellant had earlier attempted to recruit him to rob Mr. DA.[102]

In fact, the conversation between appellant and PFC Ellis, albeit direct and perhaps intense, was informal with no military customs or courtesies being observed.[103] As the military judge correctly found in his written order: "no evidence shows that SPC Ellis implied or used any authority over the Accused during the conversation."[104] The military judge further found that nobody "could reasonably infer that the Accused felt coerced or pressured to answer SPC Ellis's questions after the Accused had

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[101] Duga, 10 M.J. at 210; *Cohen*, 63 M.J. at 50 ("an informal exchange would not implicate the interrogation or statement predicate of Article 31(b) or Congress' concern that, in the military context, junior enlisted personnel might feel undue pressure to make incriminating statements.").
[102] *United States v. White*, 48 M.J. 251, 257 (C.A.A.F. 1998) (finding that the second prong was not met and Article 31(b) did not apply because the appellant perceived the call from an acquaintance, who was also law enforcement informant, as causal).
[103] JA 32.
[104] JA 138-139.

previously solicited SPC Ellis to participate in a crime and was engaged in a subsequent conversation concerning that crime."[105]

Appellant also has not alleged, much less proven, that PFC Ellis coerced him into making a statement or that he felt forced to do so in any way.[106] It is worth noting that appellant outranked PFC Ellis at the time of their conversation.[107] Therefore appellant cannot claim that PFC Ellis had any supervisory or disciplinary role over him. Furthermore, PFC Ellis never prevented appellant from leaving the room that he willingly entered.[108]

Appellant offered no evidence that he thought the questioning was an official interrogation or that he believed that PFC Ellis was acting in an official or law-enforcement capacity. Rather, all of the evidence indicated that appellant believed that he was simply participating in a casual conversation with another soldier whom he had known for months

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[105] JA 139. As to the possibility that PFC Ellis's conversations with appellant were a pretext for law a enforcement sanctioned interrogation, appellant has not alleged, much less demonstrated, that PFC Ellis was acting under orders of the military police when he questioned appellant or that their conversation was merely a covert police interrogation.

[106] Appellant's perception of the situation is also relevant to the analysis. *Good,* 32 M.J. at 108. Notably, appellant did not offer any evidence that he thought PFC Ellis was acting in a law enforcement capacity when he spoke to him. Appellant also offered no evidence that he perceived the questions to be for a law enforcement purpose or that he believed he was a suspect at the time of their conversation.

[107] JA 37; SJA 2.

[108] JA 32.

and had previously tried to recruit into a criminal enterprise.[109]

In making his determination, the military judge took into consideration the fact that appellant knew PFC Ellis, and had a personal relationship with him before the discussion in question.[110] Indeed, appellant previously had invited PFC Ellis to join the conspiracy to commit the theft.[111] The military judge noted that the admission occurred during a "personal conversation, without an MP belt, without a brassard, without any of the indicia of law enforcement," and thus PFC Ellis was not required to advise appellant of his Article 31(b) rights before participating in the conversation.[112] In addition, after hearing testimony on the matter and argument from both parties, the military judge reaffirmed his written decision in an oral ruling from the bench:

> [I] t' s clear to this court that the actions of then PFC Ellis, were triggered primarily by the fact he had been solicited as a co-conspirator...[H]e wasn't doing it in the context of a law enforcement investigation. He was doing it, really because he suspected his friends were involved in this conduct and he didn't want to report his friends until he had confronted

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[109] *See Duga*, 10 M.J. at 211. Even if appellant had offered evidence that he believed he was being interrogated, any such belief would have been unreasonable insofar as appellant knew that PFC Ellis was not a military policeman, knew that PFC Ellis was not in his chain of command, and knew that he outranked PFC Ellis.

[110] JA 33.

[111] JA 45.

[112] JA 59.

> them to see if they had in fact been involved...The supplemental record shows that Specialist Ellis was not operating in a law enforcement capacity or as part of a disciplinary investigation. He certainly could not have been viewed as coercive when he was already approached to be a co-conspirator and he was junior in rank to Specialist Jones.[113]

Furthermore, it is important to note the circumstances surrounding the conversation. For example, it took place in PFC Ellis' room, which is hardly a place where an official interrogation would occur. The location would have caused appellant to perceive that this was simply another casual conversation about the same robbery. Appellant could also see that PFC Ellis was not on duty which was further evidence of its unofficial nature.[114] Appellant also closed and locked the door to the room before their conversation.[115] As the military judge noted, appellant's "actions in locking the door indicate that he thought a private, informal conversation would be taking place."[116] In addition, during the conversation, appellant specifically asked PFC Ellis not to reveal to anyone that appellant was involved in the theft.[117] This further

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[113] JA 45-46.
[114] There is no question that the appellant's Fifth and Sixth Amendment rights were not violated, because there was no "custodial interrogation" of the appellant and because the questions by SPC Ellis did not interfere with the appellant's right to counsel. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *see also United States v. Henry*, 447 U.S. 264 (1980).
[115] JA 32-33.
[116] JA 139.
[117] JA 102.

demonstrates that appellant did not think this was a formal interview (which necessarily would be shared with others), and believed that it was simply two peers further confiding in each other.

The military judge's factual findings are not clearly erroneous and are amply supported by the evidence. Accordingly, because appellant did not perceive PFC Ellis's questions as interrogation by a superior or as being propounded for a law enforcement or official purpose, the military judge correctly held that appellant's statements to PFC Ellis were admissible.

At best, appellant has shown that he has an opinion that differs from the military judge's decision to admit his statement. However, he has failed to show that the military judge's decision to admit his statement fell outside the range of reasonableness such that it was clearly erroneous and an abuse of discretion.[118]

C. Even if the military judge erred, the error was harmless.

Although the military judge did not err, even if he had erred in admitting appellant's statements to PFC Ellis, any

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[118] *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range).

error would have been harmless beyond a reasonable doubt.[119] The failure to suppress evidence obtained in violation of Article 31(b) is a constitutional error and is reviewed for harmlessness beyond a reasonable doubt.[120] However, "[t]o say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to be erroneous."[121] It is rather, "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."[122]

Here, any error would have been harmless because the panel would have still heard PFC Ellis testify that appellant had attempted to recruit him to rob Mr. DA.[123] They would have also heard how SPC Carrasquillo admitted to PFC Ellis that appellant had participated in the robbery.[124]

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[119] *United States v. Guyton-Bhatt*, 56 M.J. 484, 487 (C.A.A.F. 2002) (finding that the erroneous admission of an accused's statement in violation of Article 31 can be harmless error).
[120] *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009); see also *Chapman v. California*, 386 U.S. 18, 24 (1967)("[B]efore a federal constructional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.")
[121] *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991).
[122] *Id. see Arizona* v. *Fulminante*, 499 U.S. 279, 295-96 (1991) (holding that admission of evidence obtained in violation of *Miranda* is subject to harmless error analysis).
[123] JA 35.
[124] JA 26.

In addition, Mr. DA's testimony also implicates appellant. DA testified through an interpreter that he had been watching television when he heard a noise and opened the door.[125] His description of his assailants also fits appellant's physical characteristics.[126]

Most damning was the testimony of co-conspirator, PFC Backes, who testified that he committed the robbery alongside appellant.[127] PFC Backes testified under a grant of testimonial immunity that appellant was a willing participant of the conspiracy and never sought to leave it.[128] The bland restatement of appellant's admission by PFC Ellis paled in comparison to the detailed testimony of PFC Backes, a co-conspirator who directly participated in the crime. PFC Backes told the panel that appellant was the first to approach him on 31 March 2011 to assist in the conspiracy to rob Mr. DA.[129] He described in detail the conspiracy, the burglary, and the robbery.[130]

PFC Backes testimony by itself was overwhelming evidence of appellant's guilt. Even if the admission of PFC Ellis's statements was erroneous, such error was harmless beyond a

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[125] SJA 7.
[126] SJA 7-8.
[127] JA 62-87.
[128] SJA 4-5.
[129] JA 62.
[130] JA 62-87.

reasonable doubt because the government presented overwhelming proof of appellant's guilt from multiple independent sources.[131]

[131] *Guyton-Bhatt,* 56 M.J. at 487 (admission of accused's statement in violation of Article 31 was harmless error because nearly all of the information contained in that statement was also admitted at trial through independent sources); *United States v. Price,* 516 F.3d 597, 605 (7th Cir. 2008) (holding that an erroneous admission of evidence was harmless because the jury heard "substantially similar evidence").

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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March 23, 2014

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I certify that the original and seven copies of the foregoing were delivered to the Court on the ____ day of March 2014, and that a copy of the foregoing was delivered to appellate military defense counsel on the 24 day of March, 2014.

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