IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Michael B. GILBREATH Corporal (E-4) U.S. Marine Corps, Appellant	APPELLANT'S BRIEF USCA Dkt. No. 14-0322/MC Crim.App. No. 201200427

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

JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
Appellate Defense Division
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-8587
john.j.stephens@navy.mil
Bar No. 36142

SUBJECT INDEX

TABLE OF AUTHORITIES

Other Sources

Issues Presented

I.

WHETHER INDIVIDUAL READY RESERVISTS, SUBJECT TO PUNISHMENT UNDER THE UCMJ, ARE ENTITLED TO THE PROTECTIONS OF ARTICLE 31(b) WHEN QUESTIONED BY SENIOR SERVICE MEMBERS ABOUT SUSPECTED MISCONDUCT COMMITTED ON ACTIVE DUTY.

II.

WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT APPELLANT'S STATEMENTS WERE ADMISSIBLE UNDER ARTICLE 31(b), UCMJ, AND MILITARY RULE OF EVIDENCE 305.

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a punitive discharge. Accordingly, his case fell within the Article 66(b)(1), Uniform Code of Military Justice (UCMJ), jurisdiction of the Navy-Marine Corps Court of Criminal Appeals.[1] Appellant invokes this Court's jurisdiction under Article 67, UCMJ.[2]

Statement of the Case

A general court-martial, composed of officer and enlisted members, convicted Corporal (Cpl) Michael B. Gilbreath, U.S. Marine Corps, contrary to his plea, of violating Article 121, UCMJ,[3] and him sentenced him to reduction to pay-grade E-1, forfeiture of all pay and allowances, and a bad-conduct

---

[1] 10 U.S.C. § 866(b)(1) (2006).
[2] 10 U.S.C. § 867 (2006).
[3] 10 U.S.C. § 921 (2006).

discharge. The Convening Authority (CA) approved the adjudged sentence and, except for the bad-conduct discharge, ordered it executed.

On November 15, 2013, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed.[4] The NMCCA decision was mailed to Appellant on November 15, 2013, in accordance with Rule 19(a)(1)(B) of this Court's Rules of Practice and Procedure. Appellant filed a timely petition for review on January 10, 2014, which this Court granted on June 27, 2014.

Statement of Facts

A. The investigation into the missing pistol.

On January 2, 2011, Cpl Gilbreath transferred from the active duty to the Individual Ready Reserve (IRR), and returned home to his family farm in Oklahoma.[5] His final active duty billet was armory custodian, Force Recon Company, 1st Reconnaissance Battalion, 1st Marine Division, in Camp Pendleton, California.[6] A few months after Cpl Gilbreath left, an M1911 .45 caliber pistol (pistol) was discovered missing.[7] Captain (Capt) John Collins, the Commanding Officer (CO) of

[4] JA 1-10; *United States v. Gilbreath*, No. 201200427, 2013 WL 5978034 (N-M. Ct. Crim. App. Nov. 12, 2013).
[5] JA at 302, ¶ 12(b).
[6] JA at 154.
[7] JA at 36, 65.

Force Recon Company,[8] immediately ordered his company training chief, Sergeant (Sgt) Nicholas Muratori to investigate the pistol's disappearance.[9]

For some time, the pistol was accounted for by only a paper receipt, known as a "WIR" or "Weapon-In-Repair" receipt.[10] This receipt would indicate to anyone doing a regular inventory of the armory that the pistol was delivered to a higher-echelon maintenance shop for repair and, consequently, could be physically located at that maintenance shop.

Sgt Muratori interviewed a few witnesses and reviewed the pistol's paperwork at the 1st Reconnaissance Battalion's supply shop.[11] Based on this investigation, and his personal knowledge of Cpl Gilbreath (one of his Marines when Cpl Gilbreath was on active duty), Sgt Muratori suspected he stole the pistol and used a WIR receipt to do so.[12]

B. Corporal Gilbreath answers questions from his Sergeant without the benefit of Article 31(b) warnings.

Sgt Muratori ordered two of his Marines to call Cpl Gilbreath.[13] He instructed them to contact him, but not to accuse him of anything or "put him on the defensive" so that Sgt

---

[8] Capt Collins was Force Recon Company's Executive Officer and, at the time, the acting Commanding Officer.
[9] JA at 174.
[10] JA at 65-66.
[11] JA at 65, 175.
[12] JA at 171.
[13] JA at 66, 158, 168-69.

Muratori he could "get as much information as he could" out of Cpl Gilbreath.[14] After receiving multiple voice-mail messages, Cpl Gilbreath returned a call to one of Sgt Muratori's Marines.[15] During the phone call, Sgt Muratori took the phone and began questioning Cpl Gilbreath.[16]

Cpl Gilbreath immediately knew several details about which pistol. To Sgt Muratori, this was a "dead give away" that he had stolen the pistol.[17] Sgt Muratori told Cpl Gilbreath "a lot of Marines had their ass on the line" including himself and the CO.[18] He asked Cpl Gilbreath's to "shoot straight with [him]" and tell him "where the 1911 was."[19] After a few seconds of silence, Cpl Gilbreath admitted he had the pistol.[20] Sgt Muratori relayed this information to the CO.[21]

The CO ordered Sgt Muratori to find out Cpl Gilbreath's exact address and not to "tip him off to what was happening."[22] Sgt Muratori called Cpl Gilbreath back and then handed the phone

---

[14] JA at 66, 168-69.
[15] JA at 66, 158-59.
[16] JA at 66.
[17] JA at 66, 194.
[18] JA at 66, 159, 244.
[19] JA at 66.
[20] *Id*.
[21] *Id*
[22] *Id*.

to the CO.[23] The CO questioned Cpl Gilbreath and the latter again admitted he stole the pistol.[24]

Immediately after the phone conversation, the CO contacted the Commanding Officer of the 1st Reconnaissance Battalion, who then contacted the Naval Criminal Investigative Service (NCIS) and the Chief of Staff of the 1st Marine Division.[25] NCIS interviewed Sgt Muratori.[26] NCIS then had Sgt Muratori, acting as a confidential informant, conduct pre-text phone calls to Cpl Gilbreath, and received text messages from him.[27] Cpl Gilbreath confirmed his prior admissions and also answered questions to facilitate the ability of law enforcement to retrieve the pistol.[28] A sting operation was conducted and Sgt Muratori accompanied two NCIS agents to Texas to meet with Cpl Gilbreath to retrieve the pistol.[29] In the interim, Cpl Gilbreath informed Sgt Muratori that the pistol was with his civilian attorney in Dallas, Texas.[30] An agent from the NCIS office in Dallas took possession of the pistol from the attorney.[31] At no time did anyone ever administer Article 31(b), UCMJ, warnings to Cpl Gilbreath.

---

[23] JA at 66.
[24] *Id*.
[25] JA at 37.
[26] JA at 64-67, 172.
[27] JA at 179-80; 323-328 (Pros. Ex. 17).
[28] JA at 179.
[29] JA at 252-54.
[30] JA at 254.
[31] JA at 184, 264-65.

C. The Government involuntarily recalled Cpl Gilbreath to active duty and prosecuted him at a general court-martial.

Armed with Cpl Gilbreath's admissions, the CO of 1st Reconnaissance Battalion sought, and received, court-martial authority from the Secretary of the Navy under Article 3, UCMJ.[32] On February 3, 2014, Cpl Gilbreath received his orders for his involuntary transfer from the IRR to active duty.[33] Cpl Gilbreath was charged with violating Article 121, UCMJ, and was referred to a general court-martial.[34] The primary evidence against him were his admissions to Sgt Muratori and evidence derived from those admissions.

Further facts necessary to the resolution of the presented issues are detailed below.

Summary of Argument

Individual Ready Reservists (IRR) are subjected to punishment under the UCMJ, but are also afforded its protections. Articles 2 and 3, UCMJ, list the persons subject to the UCMJ, and under what circumstances there is personal jurisdiction for court-martial. These Articles are meant to be read together. Congress, in response to an overhaul of the Armed Forces, amended these Articles to create an avenue to discipline Reservists and to make attachment of personal

[32] JA at 315 (Pros. Ex. 14).
[33] JA at 320 (Pros. Ex. 14).
[34] JA 11-12 (Charge Sheet).

jurisdiction possible in certain cases. Congress did not intend to exempt Reservists from the protections of Article 31(b), simply because jurisdiction over them was created pursuant to Article 3. The lower court's infusion of a "coercive military environment" test invites unnecessary and confusing judicial policy-making despite clear Congressional intent.

The original meaning and text of Article 31(b), UCMJ, is clear and unambiguous. It only focuses on the jurisdictional status of the questioner. Here, at the time of the questioning, Sgt Muratori was subject to the UCMJ. Therefore, he was required to advise Cpl Gilbreath of his rights under Article 31(b). The policy behind Article 31(b), UCMJ, is to combat pressure, even if it is subtle, that exists in military society. IRR Marines are part of military society and are susceptible to such pressures and are therefore entitled to rights warnings.

Sgt Muratori was subject to the UCMJ and acting in an official capacity as part of a law-enforcement or disciplinary inquiry when he questioned Cpl Gilbreath. Even though Cpl Gilbreath was in the IRR, he was entitled to a rights advisement under Article 31(b), but did not receive one. Therefore, his statements were involuntary and cannot be admitted. Additionally, all the evidence derived from those involuntary statements must also be suppressed because the Government cannot

show it would have discovered this evidence absent its unlawful conduct.

Argument

I.

AN INDIVIDUAL READY RESERVIST IS SUBJECT TO PUNISHMENT UNDER THE UCMJ FOR MISCONDUCT THAT OCCURRED WHILE ON ACTIVE DUTY. UNDER ARTICLE 31(b), WHEN A SERVICE MEMBER IS QUESTIONED BY A PERSON SUBJECT TO THE UCMJ, THE PERSON QUESTIONED IS ENTITLED TO RIGHTS WARNINGS. WHEN SERGEANT MURATORI, A PERSON SUBECT TO THE CODE, QUESTIONED CORPORAL GILBREATH ABOUT HIS SUSPECTED MISCONDUCT WHILE ON ACTIVE DUTY, HE WAS REQUIRED TO ADVISE HIM OF HIS ARTICLE 31(b) RIGHTS.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion.[35] When there is a motion to suppress a statement on the ground that rights' warnings were not given, this Court reviews the military judge's findings of fact on a clearly-erroneous standard, and reviews conclusions of law *de novo*.[36] This Court, in reviewing Article 31(b), UCMJ, suppression motions, reviews *de novo* whether a military questioner was acting in a law-enforcement or disciplinary capacity.[37]

[35] *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010).
[36] *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000).
[37] *Swift*, 53 M.J. at 448; *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991).

The "scope and meaning" of an article of the UCMJ "is a matter of statutory interpretation, a question of law reviewed *de novo*" by this Court.[38]

Principles of Law

The protections of Article 31(b), UCMJ, were deemed necessary by Congress because of the "subtle pressures which existed in military society," even though at the time of the Uniform Code's enactment such protections were "almost unknown in American courts."[39]

Article 31(b) provides that:

> No person subject to this chapter may interrogate, or request any statement from, an accused or a 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.[40]

This Court has historically interpreted Article 31(b), UCMJ, to require warnings "when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the

[38] *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).
[39] *United States v. Duga*, 10 M.J. 206, 209 (C.M.A. 1981).
[40] Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2012).

statements regard the offense of which the person questioned is accused or suspected."[41]

In passing and later amending Articles 2 and 3, UCMJ, Congress clarified who is subject to the UCMJ and under what circumstances.[42] In interpreting statutes, this Court's duty is to "implement the will of Congress, so far as the meaning of the words fairly permit."[43] This Court "is not involved in the merits of policy;"[44] it interprets statutes and "any attempt to make it clearer is a vain labor and tends to obscurity."[45]

Discussion

A. Articles 2 and 3, UCMJ, when read together, demonstrate that Corporal Gilbreath Appellant is entitled to Article 31(b), UCMJ, protections as an Individual Ready Reservist.

Article 2 lists thirteen different categories of persons subject to the UCMJ. The lower court and the military judge held that because IRR Marines were not found in this list, Article 31(b) did not apply to Cpl Gilbreath.[46] A divided lower court believed because Cpl Gilbreath was "far removed in time

---

[41] *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006).
[42] *Lawrence v. Maksym*, 58 M.J. 808, 812 (N-M.C.C.A. 2003).
[43] *Nerad*, 69 M.J. at 151 (Stucky, J., dissenting) (citing *Sec. & Exch. Comm'n. v. Joiner*, 320 U.S. 344, 351 (1943)).
[44] *United States v. Weiss*, 36 M.J. 224, 234 (C.M.A. 1992) (citing *United States v. Henderson*, 34 M.J. 174, 178 (C.M.A. 1992)).
[45] *United States v. Ortiz*, 36 C.M.R. 3, 5 (C.M.A. 1965) (citing 50 Am Jur, Statutes § 225 at 207).
[46] JA 148-52; JA 1-10, *United States v. Gilbreath*, No. 201200427, 2013 WL 5978034 (N-M. Ct. Crim. App. Nov. 12, 2013).

and place from the coercive military environment contemplated by Congress"[47] that Article 31(b) did not apply to him.

The lower court cited *United States v. Gibson* in justifying its "coercive military environment" test.[48] It believed an IRR Marine is far removed from the military environment that "might operate to deprive (him) of his free election to speak or to remain silent."[49] But *Gibson* does not support this conclusion. In referring to Article 31, the *Gibson* Court stated, "Taken literally, this Article is applicable to interrogation by all persons included within the term 'persons subject to the code' as defined by Article 2 of the Code, supra, 50 USC § 552, ***or any other who is suspected or accused of an offense***."[50]

"Congress' power to subject a person to trial by court-martial, under its constitutional authority [t]o make Rules for the Government of the armed forces, depends upon whether military jurisdiction exists over both the person and the act."[51] The text of Article 31 requires only the questioner to be subject to the Code. This is logical because of the implicit assumption that at the time of the questioning, subject matter military jurisdiction exists over the misconduct being

---

[47] JA at 6, *Gilbreath* at *3.
[48] *Id*.
[49] *Id*. (citing *United States v. Gibson*, 14 C.M.R. 164, 172 (C.M.A. 1954)).
[50] *Gibson*, 14 C.M.R. at 170.
[51] *Wickham v. Hall*, 12 M.J. 145, 150 (C.M.A. 1981) (citing U.S. Const. art. I, § 8, cl. 14) (internal quotations omitted).

investigated and the "accused or person suspected of an offense" is subject to the UCMJ's personal jurisdiction. If at the time of questioning, the suspect is not subject to the Code, but the subject matter is, the assumption is that personal jurisdiction over the suspect will later attach. The only reason Article 31(b) warnings are required is because the suspect is in danger of being tried before a court-martial.

In 1986 and 1992, Congress amended Article 3, UCMJ, to allow persons to be involuntarily recalled to active duty. Article 3(a), UCMJ, amended in 1992, states:

> [a] person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

Before 1992, involuntarily personal jurisdiction against a member of the IRR was very limited. It could only attach if the alleged active duty misconduct could not be tried in civilian Federal or State courts and was an offense punishable under the UCMJ by confinement for five years or more.[52]

[52] 10 U.S.C. § 803 (1988). The last published version of Article 3(a), prior to amendment.

In *United States v. Caputo*,[53] the appellant was a member of a U.S. Naval Ready Reserve unit in Staten Island, New York. In February, 1983, he was ordered to perform his 14 days of annual training in Hawaii. During that period, he was arrested by civilian authorities for drinking in public and was searched incident to arrest during which police discovered narcotics. Caputo was in civilian custody for two days and returned to his unit. Five days after being released from civilian custody, his annual training orders expired and he returned to New York. Both the Hawaii and Staten Island commands were aware of the misconduct prior to his release from annual training.

When Caputo reported for his next monthly reserve training in Staten Island, he was advised of the charges against him and placed into pretrial confinement. He was given Article 31(b) warnings.

Ultimately, the Court of Military Appeals (CMA) found there was no personal jurisdiction over Caputo because his term of active duty expired before he could be charged.[54] The CMA advised Congress that it:

> may wish to consider whether express authority should be granted for the Armed Services to order a reservist to active duty for the purposes of court-martial with respect to an offense that has occurred during an

[53] *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984). All the facts discussed from *Caputo* can be found at *Caputo*, 18 M.J. at 261.
[54] *Caputo*, 18 M.J. at 267-68.

> earlier period of military service and which falls within the purview of Article 3(a).[55]

Congress took the CMA's advice. In 1986, and again in 1992, it amended Article 3. Not only did Congress intend to solve the problem in *Caputo*, it demonstrated a desire to reform Articles 2 and 3 to better reflect the realities of the modern U.S. military in the era of Goldwater-Nichols.[56]

In 1986, Congress amended Article 3(d), UCMJ, to its present form:

> A member of a reserve component who is subject to this chapter is not, by virtue of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.[57]

In that same year, the President also signed Executive Order No. 12586 § 1b,[58] resulting in R.C.M. 204(d),[59] which reflects the statutory language of Article 3(d), UCMJ.

---

[55] *Caputo*, 18 M.J. at 267-68.
[56] "Goldwater-Nichols Department of Defense Reorganization Act of 1986," PL 99-433, October 1, 1986.
[57] Article 3(d), UCMJ, 10 U.S.C. § 803(d) (2012).
[58] 52 Fed. Reg. 7104.
[59] R.C.M. 204(d): "A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while on active duty or inactive-duty training, is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense. This subsection does not apply to a person whose military status was completely terminated after commission of an offense."

In 1998, this Court unanimously decided *Willenbring v. Nuerauter*.[60] The Court held that Article 3 allowed a Reservist to be activated for disciplinary purposes when the misconduct occurred while on a previous period of either regular active duty or Reserve duty. In doing so, the *Willenbring* Court summarized the relevant legislative history behind the 1986 and the 1992 amendments. In 1986, the House Armed Services Committee's report stated the change in Article 3(d) "'would conform the UCMJ to the same total-force policy by subjecting members of the reserve components in Federal status to the *same disciplinary standards as their regular component counterparts*.'"[61]

Part of the Government's argument in *Willenbring* was that Article 2(d)[62] subjected reservists to court-martial jurisdiction regardless of any break in service, even one that "completely terminated the person's military service."[63] This Court

---

[60] 48 M.J. 152 (C.A.A.F. 1998).

[61] *Willenbring*, 48 M.J. at 169 (quoting H.R. Rep No. 718, 99th Cong., 2d Sess. 225 (1986)) (emphasis added in *Willenbring*).

[62] "A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 81 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of (A) investigation under section 832 (article 32): (B) trial by court-martial; or (C) nonjudicial punishment under section 815 of this title (article 15)." Art. 2(d)(1), UCMJ, 10 U.S.C. § 802(d)(1).

[63] *Willenbring*, 48 M.J. at 171. The appellant's position was that Article 2(d) only allowed for the involuntary recall of

summarily rejected that theory, noting that the Government's view depended on there being "no relationship between Articles 2(d) and 3(a)."[64] This unacceptable theory is precisely the erroneous reasoning of both the military judge and the lower court. To accept it now "would produce an anomalous distinction between reservists and regulars."[65]

Nowhere does the legislative history of the Article 3 amendments suggest that IRR service members be deprived of their Article 31(b) rights, or any other rights under the UCMJ. Such a conclusion is illogical and conflicts with the integrated total-force concept envisioned by Congress. It is also irrational that Congress would see a need to further amend Articles 2 or 3 to ensure that Reservists, subject to punishment under the UCMJ, would be entitled to Article 31(b) protections when being questioned about suspected misconduct committed while on active duty or inactive-duty training. The reason is simple – a plain reading of Article 31(b) does not exclude Reservists from its protections. Moreover, it is illogical to separate Articles 2 and 3, as the Government attempted to do in *Willenbring*. This Court should do the same with the lower court's current attempt.

"reservists only as to offenses committed while on active duty in a reserve component." The Court rejected this theory, too.

[64] *Willenbring*, 48 M.J. at 171.

[65] *Id*.

B. The lower court's "coercive military environment" test results in disparate outcomes where some service members are subject to the UCMJ, but not protected by it.

The lower court relied largely on its analysis that Cpl Gilbreath, as a member of the IRR, was not in a "coercive military environment" and did not need Article 31(b), UCMJ, warnings. The lower court's failure to read Articles 2 and 3 together results in disparate outcomes for service members based on their service status at the time of questioning. This leads to erosion, by judicial fiat, of some service members' constitutional rights against self-incrimination.

Ambiguity in criminal statutes should be resolved, or strictly construed, in favor of the accused.[66] Even when "the legislative intent is ambiguous, [this Court] resolve[s] the ambiguity in favor of the accused."[67] Here, the lower court's resolution, relying on its misreading of the "officiality test"[68] and its creation of a "coercive military environment" test, creates some possibilities that directly contradict the text of Article 2 and the lower court's reliance on it.

---

[66] *United States v. Wilson*, 66 M.J. 39, 52 (C.A.A.F. 2008) (Baker, J., dissenting) (citing *Hughey v. United States*, 495 U.S. 411, 422 (1990) ("Longstanding principles of lenity . . . demand resolution of ambiguity in criminal statutes in favor of the defendant.")).

[67] *United States v. Beaty*, 70 M.J. 39, 44-45 (C.A.A.F. 2011) (citing *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007)).

[68] *Gibson*, 14 C.M.R. at 170.

Some simple hypothetical scenarios plainly show the lower court's flawed logic in relying on the "coercive military environment" test. First, a battalion commander in the U.S. Marine Corps Forces Reserve (MARFORRES) could be employed full-time as a civilian planner for the staff of a Marine Corps Service Component Command.[69] The battalion commander's headquarters and reserve training center could be less than a mile from the military base where he works full-time. If NCIS agents from the base approached him at his place of employment and explained to his uniformed and civilian supervisors that they wished to question him about alleged misconduct committed during a recent drill weekend, would there be a lack of a "coercive military environment?" Under the lower court's interpretation he would not be afforded Article 31(b) warnings because he is not among the persons in Article 2. Would this not be fairly considered a "coercive military environment"?

Second, consider a Marine Reservist approaching the gate of his reserve training center to commence a drill weekend. What

[69] The 4th Assault Amphibian Battalion (AAB), an SMCR unit, is headquartered in Tampa, Florida, less than a mile from MacDill Air Force Base (AFB). A tenant command at MacDill AFB is U.S. Marine Forces Central Command (MARCENT), where the 4th AAB CO is employed as a civilian planner with the MARCENT G-5 staff. *See* Commanding Officer, 4th AAB Official Biography, *available at* http://www.marforres.marines.mil/MarineForcesReserveLeaders/BiographyView/tabid/9216/Article/150003/commanding-officer-4th-assault-amphibian-battalion.aspx (last visited Aug. 12, 2014).

if he encountered a senior staff non-commissioned officer of the Inspector-Instructor staff and his Reserve Company First Sergeant waiting to speak with him about his alleged misconduct from the prior month's drill weekend? What if they stop his car and ask to speak to him before he enters the reserve center? Would this constitute a "coercive military environment?" The lower court and the military judge have potentially foreclosed the possibility that Article 31(b) warnings are required in each circumstance because of its limited reading of Article 2 and its refusal to consider the relationship between Article 2 and Article 3.

But what if a retired Sergeant Major (SgtMaj), living in a remote cabin in Montana, was questioned by a Sergeant from CID over the telephone about the SgtMaj's alleged active duty misconduct from five years ago? It is unlikely there would be a "coercive military environment." Yet, under Article 2, he would clearly be entitled to Article 31(b) warnings.

An employee of the National Oceanic and Atmospheric Administration (NOAA) assigned to a military unit would be entitled to Article 31(b) warnings when questioned by an NCIS agent about alleged misconduct. Neither party has any duty of military customs or courtesies toward one another. Where is the "coercive military environment" under those facts?

A Marine Reserve Officer Training Corps (ROTC) cadet in the midst of training could not be held accountable under the UCMJ for "speaking discourteously" to his Marine Officer Instructor (MOI), refusing the MOI's order to muster for training, or throwing a rifle "in a local swimming hole."[70] The ROTC cadet is not subject to the UCMJ under Article 2 and cannot become subject to the UCMJ under Article 3.[71] Is it reasombale to believe that the ROTC cadet is in a "coercive military environment" during his training and instruction?

All of the above scenarios demonstrate the problems with failing to read Articles 2 and Article 3 together. The "coercive military environment" test -- as an offshoot of the officiality test -- "tends to obscurity"[72] and leaves military justice practitioners unsure of when and why a suspect is entitled to rights warnings.

Even the present scenario could show the absurdity of reliance on the "coercive military environment" test. If Cpl

---

[70] JA at 4, *Gilbreath* at *2 ("In May of 2011, if the appellant had spoken discourteously to his former XO, failed to obey an order to return to base, or thrown the pistol in the local swimming hole, he could not be charged with violations of Article 91, 92, or 108, UCMJ.").

[71] *Woodrick v. Divich*, 24 M.J. 147, 150 (C.M.A. 1987) (Air Force ROTC cadets not subject to UCMJ); *Allison v. United States*, 426 F.2d 1324, 6th Cir. 1976) (cadet enrolled in Senior Reserve Officer' Training Corps (ROTC) not eligible for Servicemen's Group Life Insurance (SGLI) upon death due to lack of UCMJ jurisdiction).

[72] *Ortiz*, 36 C.M.R. at 5 (citing 50 Am Jur, Statutes § 225 at 207).

Gilbreath was merely on terminal leave in Oklahoma, and had not yet transferred to the IRR, he would still have been entitled to Article 31(b) warnings simply because he was still, technically, on active duty.

Articles 2, 3, and 31(b), when read together, do not ask military courts to examine whether there is a coercive military environment. Rather, they do two things. First, they impose an obligation on persons subject to the UCMJ who want to ask questions about alleged misconduct punishable under the Code. And second, they afford rights warnings to those who may be prosecuted at a court-martial. The underlying policy justification is because of the military's unique environment where persons subject to the UCMJ could believe they are required to answer questions. Military courts cannot use the underlying trait of the "coercive military environment" as a justification to replace the plain language of the statute. The role of the judiciary is to "apply the statute as written - even if [it] thinks some other approach might accor[d] with good policy."[73]

C. The original meaning of Article 31(b), UCMJ, focused on the status of the questioner.

The first textual predicate of Article 31(b), UCMJ -– "a person subject to the UCMJ" -- means simply anyone who is listed

[73] *Burrage v. United States*, 134 S.Ct. 881, 892 (2014).

in Article 2, UCMJ. Among those listed as subject to the Code are "members of a regular component of the armed forces." Sgt Muratori was subject to the UCMJ at the time of his phone conversations with Cpl Gilbreath, as was the company commander. Thus, the first predicate for Article 31(b) warnings is met.

Article 2 does not act as an iron-clad limitation on the scope of the rights warnings. Early interpretations of Article 31(b) focused on the status of the questioner in determining whether rights warnings were required.[74] Just after passage of Article 31, the CMA, in *United States v. Grisham*, indicated that French authorities were not bound by Article 31(b), but pointed out they would have been had they been operating pursuant to military authority.[75] The CMA warned:

> However, to make crystal clear that which must be implicit in the view expressed here, we need only observe that "person[s] subject to this code" may not, in the course of an investigation, evade by subterfuge the duty imposed by this Article. If one so "subject" were to utilize the services of a person not subject to the Code as an instrument for eliciting disclosures without warning, we would, without hesitation, deal sternly with such a disregard of a salutary feature of the legislation.[76]

The CMA looked to the legislative history of Article 31(b) to justify its promise of "stern" treatment for those who would

---

[74] *E.g.*, *United States v. Grisham*, 16 C.M.R. 268 (C.M.A. 1954). *See also United States v. Quillen*, 27 M.J. 312, 314 (C.M.A. 1988). Mil.R.Evid. 305(b)(1).
[75] *Grisham*, 16 C.M.R. at 270.
[76] *Id.* (citing *Feldman v. United States*, 322 U.S. 487, 494 (1944); *Byars v. United States*, 273 U.S. 28, 32 (1927)).

disregard its "salutary feature." The CMA found no significant discussions of why Congress limited the warning requirements to those subject to the Code.[77] However, the CMA relied on the intent of Congress to apply "more than the usual protection" of the "constitutional provision" against self-incrimination.[78] The CMA concluded that any evasion of Article 31(b), based solely on a hyper-technical reliance on the text of Article 2 would be "logically and morally indefensible."[79]

The CMA initially followed the plain meaning of Article 31(b) in deciding whether rights warnings should be given. In *United States v. Wilson and Harvey*,[80] the Court suppressed the statements of two soldiers to a military policeman that implicated the pair in the murder of a Korean national. The CMA simply determined the military policeman was subject to the Code and the two soldiers were suspected of the shooting.[81] The CMA observed the provisions on the face of Article 31(b) are "as

---

[77] *Grisham,* 16 C.M.R. at 270-71 ("Although this question was discussed in the Congressional hearings upon the Uniform Code of Military Justice (see pages 983-993 of the House Hearings), there appears to have been no general agreement on the subject.").
[78] *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing Before the H. Subcomm. on Armed Services*, 81st Cong. 986 (1949) (statement of Felix Larkin, Asst. Gen. Counsel, Office of Sec. of Defense.
[79] *Grisham*, 16 C.M.R. at 271.
[80] *United States v. Wilson and Harvey*, 8 C.M.R. 48 (C.M.A. 1953).
[81] *Wilson and Harvey*, 8 C.M.R. at 55.

plain and unequivocal as legislation can be."[82] The CMA recognized, correctly, that Article 31(b), UCMJ, was an extension of Article of War 24, with the new law extending rights warnings to suspects, rather than only to an accused.[83] The CMA stated that it was "beyond the purview of this Court to pass on the soundness of the policy."[84]

Judge Latimer's dissent, which became the basis for the present state of the law, expressed his concern that Article 31(b) would "prevent all legitimate inquiries" such as in a "preliminary inquiry."[85] In his view, three conditions should be met before the warnings were required: (1) the questioner party should "occupy some official position in connection with law enforcement or crime detection," (2) the questioning should be "in furtherance of some official investigation," and (3) the "facts be developed far enough that" the questioner would have "reasonable grounds" to suspect the person interrogated has committed an offense.[86] This test is wholly inconsistent with Congressional intent –- especially for Judge Latimer's first prong -- and is reflective of his own preference rather than the Congressional record.

---

[82] *Wilson and Harvey*, 8 C.M.R. at 55.
[83] *Id.*
[84] *Id.*
[85] *Wilson and Harvey*, 8 C.M.R. 48, 60-61 (Latimer, J., dissenting).
[86] *Id*. at 61 (Latimer, J., dissenting).

Judge Latimer's test more closely tracks with (and predicts) *Miranda v. Arizona*,[87] in that it requires warnings where law enforcement officials interrogate individuals in custody. The main problem with the "officiality test" was that it failed to recognize the unique military culture where subtle pressures can create an environment where individual service members feel compelled to answer questions.

The literal interpretation, and respect for Congressional intent, was short-lived. Just two years later, the "officiality test" became the basis for interpreting Article 31(b), in *United States v. Gibson.*[88] In *Gibson* the CMA declined to suppress statements obtained by a jailhouse-rat acting as an agent of the Criminal Investigative Division (CID). The CMA concluded warnings were not required because the jailhouse-rat did not use "superior rank or official position" to pressure the appellant, and that the appellant did not, and could not, perceive such pressure.

Two decades after the officiality test supplanted the literal interpretation, in *United States v. Duga*[89] the CMA added the requirement that the "person questioned perceived that the

[87] 384 U.S. 436 (1966).
[88] *Gibson*, *14* C.M.R. at 170. The C.M.A. stated that the legislative history of Article 31(b) showed no "no intention to extend the requirement to other than 'official investigations.'"
[89] 10 M.J. 206.

inquiry involved more than a casual conversation."[90] The *Duga* test depended on "whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation."[91] Over time, this Court narrowed the field of when rights warnings are required based on the officiality test.[92] However, this Court recently rejected the second, subjective prong of the *Duga* test, because it had "been eroded by more recent cases articulating an objective test."[93]

The "salutary feature" of Article 31(b) is as "plain and clear as legislation can be" and asks this Court to only consider whether Sgt Muratori was subject to the UCMJ at the time of questioning. He was, and so therefore, Cpl Gilbreath, like every IRR service member who is questioned about suspected misconduct occurring while on active duty, is entitled to Article 31(b) protections.

---

[90] *Duga*, 10 M.J. at 210.
[91] *Id*.
[92] *See*, *e.g.*, *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990) (superior's questioning of C-130 crew member believed to be under influence of drugs during flight not required to have rights warnings because questioning concerned operational duties).
[93] *United States v. Jones*, 73 M.J. 357 (C.A.A.F. 2014) (citing *United States v. Swift*, 53 M.J. at 446; *United States v. Good*, 32 M.J. at 108).

D. The subtle pressure that Congress wished to relieve with Article 31(b), UCMJ, still exists for an Individual Ready Reservist.

IRR service members are entitled to Article 31(b) protections when being questioned about misconduct committed on active duty because "subtle pressures which exist in military society," still exist in the IRR. Nearly all enlisted Marines sign initial enlistment contracts obligating them to four years of active duty service and four additional years of service in the Ready Reserve component of U.S. Marine Corps Forces Reserve (MARFORRES). The Ready Reserve[94] consists of two types of Marines: those that are "drilling reservists" that are part of the Select Marine Corps Reserve (SMCR) and those belonging to Mobility Command (MOBCOM) and listed as part of the Individual Ready Reserve (IRR), such as Cpl Gilbreath.

Marines in the IRR are, by statute, part of the military society.[95] They are required to notify MOBCOM of their address and employment status. They are required to be present at periodic administrative musters and must maintain Marine Corps height and weight standards. IRR Marines are also required to notify MOBCOM about any foreign travel or employment. IRR Marines may also transfer to an SMCR unit and become "drilling

[94] Marine Corps Order 1001R.1K, Marine Corps Reserve Administrative Management Manual, Mar. 22, 2009, Chapter 1, "Marine Corps Reserve Organization."
[95] 10 U.S.C. § 12304.

reservists," return to temporary active duty as an Individual Mobilization Augmentee or as part of the Active Reserve program. Finally, an IRR Marine can sometimes even return to full-time active duty.

"The reserve components perform a critical role in the national defense policy of the United States."[96] The current National Military Strategy discusses the goal of achieving the "appropriate balance between uniformed, civilian, and contract professionals, and active and reserve components" adding that, the "Reserve component, too, is essential as it provides strategic and operational depth to the Joint Force. In turn, preserving it as an accessible, operational force also requires sustained attention."[97]

Over time, particularly during the amendments to Article 3, UCMJ, in 1986 and 1992, the Reserves have become an integral part of the larger military society. In 1986, as part of the UCMJ revisions considering Reservists, Article 137 was amended to "require" certain sections of the UCMJ to be "carefully explained" to service members within fourteen days after their initial entry on active duty, or "the member's initial entrance

[96] *Willenbring v. Neurauter*, at 156 (citing 10 U.S.C. § 10102).
[97] The National Military Strategy of the United States, February 8, 2011, at 17.

into a duty status with a reserve component."[98] The Articles that must be carefully explained include Articles 2, 3 and 31.[99]

IRR Marines are simply not exempt from the subtle pressures inherent in military society. While it may be subtle, the pressure on an IRR Marine, a retired Marine (who is also part of MARFORRES), or a drilling reservist in his off-duty hours, that pressure still exists. That pressure is precisely what Congress sought to avoid in drafting Article 31(b).

Conclusion

The military judge abused his discretion by failing to apply the plain text and meaning of Article 31(b), UCMJ. He also failed to properly consider the logical relationship between Articles 2 and 3, UCMJ, as it pertains to the personal jurisdiction over a person suspected of an offense. Additionally, the NMCCA's majority opinion erroneously established a "coercive military environment" test for service members whose jurisdiction arises under Article 3, UCMJ. Therefore, this Court should reverse the lower court's decision.

[98] Article 137, UCMJ 10 U.S.C. § 937 (2012).
[99] Article 137(a)(3), UCMJ 10 U.S.C. § 937 (2012).

II.

STATEMENTS OBTAINED IN VIOLATION OF ARTICLE 31(b), UCMJ, AND MILITARY RULE OF EVIDENCE 305 ARE INVOLUNTARY. INVOLUNTARY STATEMENTS AND ALL DERIVATIVE EVIDENCE THEREFROM, MAY NOT BE RECEIVED IN EVIDENCE. CORPORAL GILBREATH PROVIDED STATEMENTS AND DERIVATIVE EVIDENCE FROM QUESTIONING IN VIOLATION OF HIS RIGHTS UNDER ARTICLE 31(b) AND MILITARY RULE OF EVIDENCE 305. THE MILITARY JUDGE ERRED IN ADMITTING THEM.

Standard of Review

When there is a motion to suppress a statement on the ground that rights' warnings were not given, this Court reviews the military judge's findings of fact for clear error, and reviews conclusions of law *de novo*.[100] "[O]n a mixed question of law and fact . . . a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect."[101]

Principles of Law

Under Article 31, UCMJ, "No person subject to [the UCMJ] may interrogate, or request any statement from, an accused or a person suspected of an offense" without advising the person of his right to remain silent.[102] This Court has interpreted the second textual predicate–-the "interrogates or requests any statement" clause--as requiring rights warnings if the

[100] *United States v. Swift*, 53 M.J. at 446.
[101] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[102] Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2012).

questioning is part of an official inquiry, such as an "official law enforcement or disciplinary capacity"[103] rather than stemming from the questioner's personal motivations.[104] Whether questioning is part of an official inquiry is determined by asking whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."[105]

Under M.R.E. 305, statements obtained in violation of Article 31 are considered involuntary.[106] Involuntary statements, and all derivative evidence therefrom, are excluded from court-martial under M.R.E. 304.[107] The derivative evidence from the involuntary statement may only be admitted if it would have been obtained even if the statement had not been made.[108]

---

[103] *United States v. Cohen*, 63 M.J. at 50 (quoting *Swift*, 53 M.J. at 446).
[104] *United States v. Price*, 44 M.J. 430, 432 (C.A.A.F. 1996).
[105] *Cohen*, 63 M.J. at 50 (quoting *Swift*, 53 M.J. at 446) (internal quotation marks omitted)).
[106] MIL.R.EVID. 305(a) ("A statement obtained in violation of this rule is involuntary and shall be treated under Mil. R. Evid. 304.").
[107] MIL.R.EVID. 304(a) ("Except as provided in subsection (b), an involuntary statement or any derivative evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.").
[108] MIL.R.EVID. 304(b)(3).

Discussion

A. Sergeant Muratori's actions clearly show he was engaged in a law-enforcement or disciplinary inquiry.

Whether Sgt Muratori's questioning was part of an official inquiry is determined "by asking whether he was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."[109] This Court considers whether a "reasonable man in the suspect's position" could have considered Sgt Muratori to be acting in a law-enforcement or disciplinary capacity.[110] The answer is a resounding "yes."

By his own admission, Sgt Muratori was conducting an official inquiry into the circumstances surrounding the missing pistol.[111] He was ordered to conduct this inquiry by his Commanding Officer.[112] Once Cpl Gilbreath indicated a suspicious level of familiarity with the missing weapon, Sgt Muratori suspected Cpl Gilbreath of stealing the pistol.[113] Sgt Muratori was acting on orders to locate the pistol and find out who was

---

[109] *Cohen*, 63 M.J. at 50 (quoting *Swift*, 53 M.J. at 446) (internal quotation marks omitted)).
[110] *United States v. Good*, 32 M.J. 105 (C.M.A. 1991). The CMA said this test differed from the "purely subjective" test from *Duga*, which this Court recently rejected in *United States v. Jones*, 73 M.J. 357. *Id*. at 108, FN2. This test is the same as the Supreme Court's test in *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) for determining custodial interrogation for *Miranda* purposes.
[111] JA at 174.
[112] JA at 174.
[113] JA at 66.

responsible for it being missing or stolen.[114] Sgt Muratori is simply not comparable to a social worker,[115] a doctor,[116] nurse,[117] or psychiatrist[118] attempting to treat a patient, or someone asking questions to fulfill an operational responsibility, such as ensuring that no crew members of a C-130 are under the influence of drugs during a flight mission.[119] Sgt Muratori was

---

[114] JA at 65, 157, 174.
[115] *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993) (psychiatric social worker at Army hospital not required to give rights warnings when accused gave statements concerning sexual assault of underage female); *United States v. Gooden*, 37 M.J. 1055 (N.M.C.M.R. 1993) (county social worker and Naval hospital social worker not required to give rights advisements before interview with accused concerning possible child abuse allegations).
[116] *United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994) (physician questioning parent of injured child not required to give rights warnings when questioning to ascertain and treat injuries to child); *United States v. Hill*, 13 M.J. 882 (A.C.M.R. 1982) (rights warnings not required of medical doctors and related personnel who question solely to obtain information for medical diagnosis and treatment).
[117] *United States v. Schoolfield*, 36 M.J. 545 (A.C.M.R. 1992) (nurse at military base not required to give rights warnings when questioning concerning accused's HIV virus infection); *United States v. Moore*, 32 M.J. 56 (C.M.A. 1991) (nurse at military hospital not required to give rights warnings when questioning accused about sexual abuse of stepdaughters after accused complained of depression after watching video deposition of stepdaughter's allegations).
[118] *United States v. Collier*, 36 M.J. 501 (A.F.C.M.R. 1992) (purpose of psychiatric interview of accused was for treatment after hospital admission); *United States v. Dudley*, 42 M.J. 528 (N.M.Ct.Crim.App. 1995) (statements to psychiatrist made for diagnosis of suicide risk and not requiring rights advisement).
[119] *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990) (superior's questioning of C-130 crew member believed to be under influence of drugs during flight not required to have rights warnings because questioning concerned operational duties).

also certainly not motivated solely by his own personal curiosity, whether to inquire about an intensely personal family matter[120] or simply how Cpl Gilbreath came to have possession of a pistol.[121] He was ordered, by his Company Commander, to locate the pistol because "asses were on the line."[122]

Sgt Muratori's actions amount to a Preliminary Inquiry (PI). The Department of the Navy's Manual of the Judge Advocate General[123] (JAGMAN) covers, among other things, PIs. The Naval Justice School's handbook on conducting JAGAMN investigations states in its PI checklist that the investigator should "Advise any military witness who may be suspected of an offense, misconduct, or improper performance of duty, of his/her rights under Article 31, UCMJ."[124] Moreover, "when military property is unaccounted for, it raises the possibility that those

---

[120] *United States v. Norris*, 55 M.J. 209 (C.A.A.F. 2001) (E-7 questioning E-4 about sexual relationship between E-4 and E-7's thirteen-year-old daughter done in personal capacity).
[121] *United States v. Duga*, 10 M.J. 206 (rights warnings not required when questioner solely motivated by personal curiosity of how accused came into possession of stolen canoe).
[122] JA at 66.
[123] *See* JAGINST 5800.7F, June 26, 2012, at 0126, *available at* http://www.jag.navy.mil/library/instructions/jagman2012.pdf (last visited Aug. 12, 2014).
[124] *See* Naval Justice School Handbook at II-1, II-4, *available at* http://www.public.navy.mil/comusnavso-c4f/Documents/JAG/JAGMANInvestigationHandbook.pdf (last visited Aug. 12, 2014).

responsible for the property could be subject to disciplinary action."[125]

For the Government to assert this conversation was merely in furtherance of an administrative task, or a "paperwork discrepancy," shows unfamiliarity with its own armed forces, especially the United States Marine Corps. In a garrison environment, few things are as consequential to a U.S. Marine as a lost weapon. Weapons accountability is ingrained into every Marine from the very beginning of recruit training. There is no such thing as a casual discussion about a missing or stolen weapon in the Marine Corps.

B. The involuntary statements, and all evidence derived therefrom, are inadmissible, because no exception exists under the Military Rules of Evidence.

The Government relied on Cpl Gilbreath's statements to Sgt Muratori to obtain all of its other evidence used at the court-martial. Cpl Gilbreath's statements are involuntary under M.R.E. 305 because they were obtained in violation of Article 31, UCMJ. Here, the Government obtained the following evidence as a result of the initial questioning of Cpl Gilbreath: (1) text messages from Cpl Gilbreath to Sgt Muratori admitting that he stole the pistol,[126] (2) audio recordings and a transcript[127] of later pre-text phone calls between Cpl Gilbreath and Sgt

[125] JA at 9, *Gilbreath* at *5 (Fisher, J., concurring).
[126] JA at 273-279 (Pros. Ex. 1).
[127] JA at 323-328 (Pros. Ex. 17).

Muratori where Cpl Gilbreath admitted to stealing the pistol and made arrangements to return it to Sgt Muratori, and (3) the upper and lower receiver,[128] the interior parts[129] of the pistol and its carrying case.[130]

According to the testimony of former NCIS SA John Burge,[131] he and SA Rick Rendon drove with Sgt Muratori from California to Texas to conduct a covert seizure of the pistol using Sgt Muratori as a confidential witness for the seizure. En route, the agents determined they could not use Sgt Muratori because the weapon was likely going to be at Cpl Gilbreath's home in Oklahoma rather than in Texas. The agents also learned en route that Cpl Gilbreath had retained an attorney in Dallas, Texas, who had possession of the pistol. SA Burge took custody of the weapon in Dallas from a local NCIS agent who had retrieved it from Cpl Gilbreath's attorney.

The entire NCIS investigation and all the physical evidence it produced stemmed from Cpl Gilbreath's unwarned statements. The initial questioning led to the subsequent conversation with Capt Collins. The conversation with Capt Collins led to the pre-text phone calls with Sgt Muratori that were monitored by

[128] JA at 279-81 (Pros. Ex. 3).
[129] JA at 282-84 (Pros. Ex. 4).
[130] JA at 285 (Pros. Ex. 5).
[131] JA at 252-54.

NCIS, and the pre-text phone calls resulted in the Government retrieving the pistol from Cpl Gilbreath's civilian attorney.

Evidence derivative of an unlawful search, seizure, or interrogation is commonly referred to as the "fruit of the poisonous tree" and is generally not admissible at trial.[132] The only possible exception under M.R.E. 304 would be if there was some inevitability to the Government's discovery of the pistol.

For inevitable discovery to apply, the Government would have to demonstrate by a preponderance of the evidence that "'when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner.'"[133] The entire sting operation that led to the seizure of the pistol was predicated on Cpl Gilbreath's involuntary statement to Sgt Muratori in the initial phone conversation. "Mere speculation and conjecture" is insufficient when applying this exception.[134] This Court has flatly rejected a "could have-would have"[135] approach to the doctrine of inevitable discovery.

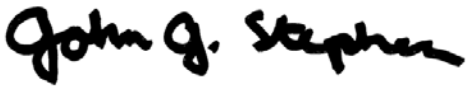
---

[132] *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)).
[133] *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (quoting *United States v. Dease,* 71 M.J. 116, 122 (C.A.A.F. 2012) (quoting *United States v. Kozak,* 12 M.J. 389, 394 (C.M.A. 1982))).
[134] *Wicks*, 73 M.J. at 103 (citing *United States v. Maxwell,* 45 M.J. 406, 422 (C.A.A.F. 1996)).
[135] *United States v. Wallace*, 66 M.J. 5, 11 (C.A.A.F. 2008) (Baker, J., concurring); *see also United States v. Wicks*, 73

Any argument the Government would have obtained the pistol by lawful means, even without Cpl Gilbreath's initial involuntary statements, is speculative, and thus, meritless.

Conclusion

The military judge erred in concluding that Sgt Muratori was not engaged in an official law enforcement or disciplinary capacity when he contacted Cpl Gilbreath upon the order of his Commanding Officer. Cpl Gilbreath's statements were involuntary because he never received warnings under Article 31(b), UCMJ. These involuntary statements, and the evidence derived therefrom, were inadmissible under Article 31(b), UCMJ, and M.R.E. 305.



JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
Appellate Defense Division
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-8587
john.j.stephens@navy.mil
Bar No. 35706

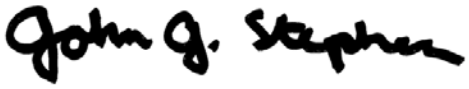
M.J. 93 (C.A.A.F. 2014); *United States v. Dease*, 71 M.J. 116 (C.A.A.F. 2012).

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on August 12, 2014.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,401 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word version 2010 with 12-point-Courier-New font.



JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
Appellate Defense Division
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-8587
john.j.stephens@navy.mil
Bar No. 36142