IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), because Appellant's approved sentence included a bad-conduct discharge. This Court has jurisdiction in this case based on Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of larceny of military property of a value in excess of $500.00 in violation of Article 121, UCMJ, 10 U.S.C. § 921 (2012). The Members sentenced Appellant to reduction to pay grade E—1, forfeiture of all pay and allowances, and a bad-conduct discharge. The Convening Authority approved

the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed. On November 12, 2013, the lower court affirmed the findings and sentence. *United States v. Gilbreath*, No. 201200427, 2013 CCA LEXIS 954 (N-M. Ct. Crim. App. Nov. 12, 2013). Appellant filed a petition for review, which this Court granted on June 27, 2014.

Statement of Facts

A. Prior relationship between Appellant and Sgt Muratori before Appellant left active duty status.

Appellant received his DD-214 on December 17, 2010. (J.A. 41, 302.) Appellant's discharge from active duty took effect on January 2, 2011. (J.A. 41, 302, 148 Finding of Fact (FoF) (c), 149 FoF (d).) Upon discharge from active duty, Appellant became a member of the Individual Ready Reserve (IRR). (J.A. 41 ¶ 12(b), 149 FoF (d), 155, 302.) Prior to his discharge from active duty Appellant and Sgt Muratori, along with their wives, shared an off-base residence for approximately six months immediately prior to Appellant's discharge. (J.A. 149 FoF (h), 154.)

Sgt Muratori and Appellant ate dinner together nearly every evening during that period and spent a significant amount of their liberty time together in and around the house during that six-month period. (J.A. 155.) They had a good personal relationship, there was no concept of rank distinction between

the two, and they referred to each other by their first names. (J.A. 155, 170.) Appellant moved out of the house when he left active duty and returned to Oklahoma. (J.A. 154, 169.)

Sgt Muratori had known Appellant for several years prior to them sharing a residence. (J.A. 153.) They served within the same command but never in the same platoon or section. (J.A. 145, 149 FoF (g) and (i), 158.) Although the lower court's opinion states that Sgt Muratori supervised Appellant, in fact the Record does not clearly support this. *United States v. Gilbreath*, No. 201200427, 2013 CCA LEXIS 954, *3 (N-M. Ct. Crim. App. Nov. 12, 2013). The Record indicates only that the two worked together at Appellant's last active-duty billet despite never being in the same platoon or section together, and had a good professional relationship. (J.A. 149 FoF (i), 154, 165, 170, 241.) Even at work, they would only refer to rank between themselves if they were in the presence of their superiors. (J.A. 149 FoF (i), 155.)

B. Discovery of a discrepancy in the armory inventory report.

Several months after he was discharged, Appellant's command conducted an inventory of the armory and noted several discrepancies. (J.A. 156, 220.) There were approximately twenty-five discrepancies in the paperwork pertaining to twelve difference pieces of equipment in the armory. (J.A. 156-57.)

One of the discrepancies pertained to an M–1911 pistol that was unaccounted for. (J.A. 156, 149 FoF (j) and (i).)

The Executive Officer directed Sgt Muratori to resolve the paperwork discrepancies including the discrepancy pertaining to the M–1911 pistol. (J.A. 149 FoF (k), 156, 174.) The Executive Officer selected Sgt Muratori because he had been assigned to the command the longest and as the training chief had the most interaction with the armory. (J.A. 154, 157.) Discrepancies were so common in First Force Reconnaissance Company armory inventories that Sgt Muratori had never seen an inventory report without them. (J.A. 157, 219.) The discrepancies were generally the result of human error in data entry or paperwork processing. (J.A. 157, 219, 220). First Force Reconnaissance Company's armory was particularly busy because four different platoons, all operating independently and executing different missions, were supplied from this single armory. (J.A. 157.) Sgt Muratori had dealt with many armory inventory discrepancies in the past and they had always been the result of a paperwork errors or data entry errors. (J.A. 157.)

C. Contacting Appellant about the discrepancy in the armory inventory report.

Sgt Muratori took the same steps with this inventory discrepancy that he had with other inventory discrepancies in the past. (J.A. 157.) He summoned the armory custodian and

went through all the paperwork in an effort to reconcile all the noted discrepancies. (J.A. 149 FoF (l), 157-58, 220.) The paperwork tracing the location of the M—1911 pistol contained conflicting information. (J.A. 158, 220.)

Some paperwork showed the pistol was transferred to the custody of a particular Marine Expeditionary Unit, but other paperwork showed the weapon as having malfunctioned beyond repair and as such had been transferred to Quantico to be scrapped for parts. (J.A. 157.) The conflicting destinations for the pistol occurred before the current armory custodian took control. (J.A. 157.) The conflicting paperwork was dated during the time while Appellant was still the armory custodian before leaving active duty. (J.A. 149 FoF (d) and (g), 158.)

Sgt Muratori directed the current armory custodian to call Appellant. (J.A. 158.) When the current armory custodian was unsuccessful in contacting Appellant, Sgt Muratori had other subordinates place calls to Appellant at his residence in Oklahoma. (J.A. 149, 158.) His intent was to gather as much information as possible about the paperwork discrepancy and he thought Appellant might have information. (J.A. 149 FoF (l), 169, 176.) Sgt Muratori testified he asked his subordinates to not put Appellant on the defensive, because “any time there’s CMR involved and a serialized item goes missing pretty much everybody is very quick to throw their hand[s] up and say, oh

well. I don't want to deal with that because it's such a serious deal."[1] (J.A. 169.)

The subordinates left messages for Appellant explaining the purpose of the call. (J.A. 149 FoF (m), 159.) Sgt Muratori was not surprised when Appellant did not immediately return the calls as he was a civilian and had been out of the Marine Corps for several months. (J.A. 159.) Sgt Muratori understood Appellant had no obligation to answer the calls or return the calls as Sgt Muratori had no authority over him. (J.A. 165.)

Despite having no obligation to do so, Appellant returned the call later that day and spoke with Sgt Muratori. (J.A. 149 FoF (m) 159, 170.) The two spoke on a first name basis. (J.A. 149 FoF (n), 162.) When he spoke with Appellant, Sgt Muratori did "not suspect that Appellant had engaged in any wrongdoing." (J.A. 160, 175.) Contrary to Appellant's contention in his Brief that Sgt Muratori suspected that Appellant before talking to Appellant, Sgt Muratori merely thought that Appellant might have some knowledge of what happened to the missing pistol. (J.A. 171.) Sgt Muratori did state, however, that in the event that if someone had stolen the pistol rather than it being a mere paperwork discrepancy, Appellant was only one of two people who had access to it. (J.A. 171.)

[1] CMR stands for Consolidated Memorandum Report. (J.A. 149.)

Sgt Muratori did not provide Article 31(b) warnings to Appellant. (J.A. 149 FoF (n), 162.) During their initial conversation, Sgt Muratori was surprised by Appellant's level of detailed knowledge he had about this particular weapon. (J.A. 160, 170.) Appellant eventually admitted he had the M–1911 pistol in question in his possession. (J.A. 149 FoF (m), 160.)

Even after learning Appellant had the missing M–1911, Sgt Muratori did not involve any other authorities as he simply wanted to get the weapon back into the armory. (J.A. 149 FoF (o), 160-61.) Over the course of a couple of phone calls Appellant and Sgt Muratori developed a plan to return the M–1911. (J.A. 160.) Appellant agreed that he would drive from Oklahoma to California with the pistol. (J.A. 160.) Appellant would then give the pistol to Sgt Muratori, who would return it to the armory over the weekend. (J.A. 160.)

D. Initiation of a formal criminal investigation and recall of Appellant to active duty to stand trial.

Sgt Muratori informed his Executive Officer that he solved the discrepancy and the M–1911 pistol would be back in the armory by Monday. (J.A. 161.) At that point, the Executive Officer decided the situation had to be handled formally and the Naval Criminal Investigative Service (NCIS) was contacted. (J.A. 178.) Sgt Muratori was interviewed by an NCIS Special

Agent and a formal investigation was initiated. (J.A. 149 FoF (p), 172, 178-79.)

The M—1911 pistol was eventually recovered by an NCIS Special Agent from Appellant's civilian defense attorney. (J.A. 184-85, 254, 264-65.) Subsequently, the Secretary of the Navy authorized recall of Appellant to stand trial for the theft of the M—1911. (J.A. 149 FoF (e), 314-20.)

E. Appellant's motion in limine seeking suppression of his statements made to Sgt Muratori.

The Military Judge denied Appellant's motion seeking suppression of his statement to Sgt Muratori. (J.A. 48, 74, 212.) Contemporaneously with his denial of the motion, the Military Judge provided his findings of fact and conclusions of law orally on the Record. (J.A. 207-12.) The Record was supplemented with the written findings of fact and conclusions of law as Appellate Exhibit XI. (J.A. 149-52.) The Military Judge concluded Appellant was not due Article 31(b) warnings as he was not subject to the Uniform Code of Military Justice (Code). (J.A. 151, 211.)

Appellant now challenges components of the Military Judge's ruling. (Appellant's Br. at 7, Aug. 12, 2014.) Specifically, he argues that the Military Judge erred by concluding that Appellant was not due Article 31(b) warnings during the initial telephone conversation as he was not subject to the Code.

(Appellant's Br. at 7.) Appellant also specifically challenges the Military Judge's subsidiary conclusion that Sgt Muratori was not acting in an official law enforcement or disciplinary capacity in speaking with Appellant. (Appellant's Br. at 7.)

Summary of Argument

Thus Article 31(b) warnings were not due to Appellant, as this Court's precedent has held that Article 31(b) applies only to those situations Congress sought to protect with the creation of Article 31(b), namely where military rank, duty, or similar relationship creates a subtle pressure to respond to an inquiry. Members of the Individual Ready Reserve are a class of persons who, as civilians no longer subject to the Code, are so attenuated from those situations Congress sought to protect that they do not merit the protections of Article 31(b).

Even if Appellant fell under the situations Congress sought to protect under Article 31(b), he was not due Article 31(b) warnings. The Military Judge did not abuse his discretion concluding Sgt Muratori was not conducting an official law enforcement or disciplinary inquiry. Sgt Muratori had no law enforcement responsibilities. Sgt Muratori contacted Appellant to complete the administrative task of resolving a paperwork discrepancy. And, Sgt Muratori lacked authority to issue orders to or impose discipline on Appellant as he was outside his chain of command and in the Individual Ready Reserve.

Argument

I.

APPELLANT WAS NOT DUE ARTICLE 31(b) WARNINGS BECAUSE AS A MEMBER OF THE INDIVIDUAL READY RESERVES HE WAS NOT SUBJECT TO THE CODE AND NOT SUBJECT TO THE SUBTLE PRESSURES JUSTIFYING APPLICATION OF ARTICLE 31(b).

Denial of a motion to suppress a confession is reviewed for an abuse of discretion. *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013); *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). The factual findings supporting a ruling on a motion to suppress are reviewed under the clearly erroneous standard and the conclusions of law are reviewed *de novo*. *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006) (quoting *United States v Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000). Statutory construction or interpretation is a question of law reviewed *de novo*. *United States v. McPherson*, 73 M.J. 393, 2014 CAAF LEXIS 842, *4 (C.A.A.F. Aug. 21, 2014); *United States v. Nerad*, 69 M.J. 138, 141-42 (C.A.A.F. 2010).

A. Article 31 warnings are not merited for members of the Individual Ready Reserve, as they face none of the "subtle pressures" that this Court has held narrows Article 31's application.

Generally, Article 31(b), UCMJ, warnings are required 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 statements regard the offense of which the

person questioned is accused or suspected. *Cohen*, 63 M.J. at 49. However, this Court has narrowed Article 31(b)'s application for practical reasons: "Although Article 31(b), UCMJ, seems straightforward, 'were these textual predicates applied literally, Article 31(b) would potentially have a comprehensive and unintended reach into all aspects of military life and mission.'" *United States v. Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *9 (C.A.A.F. July 21, 2014) (quoting *Cohen*, 63 M.J. at 49).

This Court has, in narrowing the application of Article 31(b), held that "the Article 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." *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981) *overruled in part on other grounds by Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *12 (C.A.A.F. Jul. 21, 2014); *see also Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining "words of a statute must be read in their context and with a view to their place in the overall statutory scheme).

Absent a special duty or rank relationship between the questioner and the service member being questioned, the rationale underlying the requirement to provide Article 31(b) warnings is inapplicable where no special inherent pressure or

coercion exists. *United States v. Jones*, 24 M.J. 367, 369 (C.M.A. 1987); s*ee also United States v. Rios*, 48 M.J. 261, 264 (C.A.A.F. 1998) (finding Article 31 warnings unnecessary due to absence of coercion based on military rank, duty, or other similar relationship); *see also United States v. Richards*, 17 M.J. 1016, 1019 (N.M.C.M.R. 1984)[2] (finding enlisted Sailor's criminal confession to an officer chaplain did not require Article 31 warnings because chaplain was not bearing military pressure to obtain information).

Here, and for any member of the Individual Ready Reserve, no pressure could result from military rank, duty, or similar relationship. The only order Appellant was subject to was an involuntary recall to active duty issued by the Secretary of the Navy. 10 U.S.C. §§ 802(d)(2)(a), 12302. Sgt Muratori was incapable of issuing the only order Appellant remained subject to. Furthermore, the United States is unaware of any action—except refusal to return to active duty——that Appellant could be punished for or receive nonjudicial punishment under Article 15.

Thus Appellant faced no coercive pressure from the rank held by his questioner who lacked any authority over him. *See United States v. Martin*, 21 M.J. 730, 732 (N-M.C.M.R. 1985)

[2] The LEXIS electronic database contains an error pertaining to 17 M.J. 1016. LEXIS does not recognize that *United States v. Richards* begins at 17 M.J. 1016. From the hardbound volumes the case does exist at 17 M.J. 1016.

(finding no military pressure on accused from civilian acting under direction of NIS because she lacked military authority over him); *see also United States v. Kelley*, 3 M.J. 535, 537 (A.C.M.R. 1977) (finding no military pressure on appellant who was a commissioned officer was questioned by a non-commissioned officer due to lack of authority), *rev. denied*, 8 M.J. 84 (C.M.A. 1979).

Appellant's only other ties to the military were administrative in nature to ensure the Marine Corps could effectuate a possible involuntary recall. Members of the Individual Ready Reserve are required to keep Marine Corps Mobilization Command aware of any changes of address, changes to marital status and number of dependents, civilian employment, and possible physical screenings. (J.A. 302 ¶ 18); Marine Corps Order 1001R.1K, Marine Corps Reserve Administrative Management Manual, § 6102. Members of the Individual Ready Reserve can keep Marine Corps Mobilization Command informed through simply keeping their profile current on Marine Online. Marine Corps Order 1001R.1K, § 6102.

Members of the Individual Ready Reserve that fail to provide the data can be recalled to active duty so that the information can be obtained or so they can be administratively separated. *Id*., § 6103. Accordingly, even if Appellant had been subject to the Code, which he was not, Article 31(b)

warnings were still not required. Appellant faced no pressure from military rank or duty to respond to Sgt Muratori because Sgt Muratori could not issue the only order he was subject to, an involuntary recall to active duty. *See Duga*, 10 M.J. at 210.

B. Appellant was not subject to the Uniform Code of Military Justice at the time of the call because he was not on active duty and was a member of the Individual Ready Reserve.

1. Under the plain language of Article 2, members of the Individual Ready Reserve are not persons subject to the Code, thus are not subject to any military order or discipline except recall.

The thirteen categories of persons subject to the Code are expressly listed in Article 2. 10 U.S.C. § 802. "In determining the scope of a statute, [reviewing courts] look first to its language." *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *Salinas v. United States*, 522 U.S. 52 (1997).

Following his discharge on January 2, 2011, Appellant became a member of the IRR where he received no pay or allowances. (J.A. 148 FoF (c), 149 FoF (d), 202, 302.) The IRR, of which Appellant was a member, is not a category listed in Article 2. 10 U.S.C. § 802. "There is no rule of statutory construction that allows for a court to append additional language as it sees fit." *Kearns*, 73 M.J. at 181. Accordingly,

Appellant was not subject to the Code at the time of his conversation with Sgt Muratori in April of 2011 and therefore faced none of the subtle pressures justifying the application of Article 31(b).

2. Congress deliberately excluded members of the Individual Ready Reserve from the categories of persons subject to the Code.

Under the canons of statutory construction, "*expressio unius est exclusio alterius*," inclusion of one is exclusion of others. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). When an Act of Congress contains a list or group of items that constitute an "associated group or series" the inference is drawn that items not listed were "excluded by deliberate choice." *Barnhart*, 537 U.S. at 168. Congress expressly listed thirteen categories of persons subject to the Code in Article 2. 10 U.S.C. § 802(a). The thirteen categories themselves are an associated group or series as each category has some distinct past or present affiliation with the armed services. As such, other groups of persons that had some past or present affiliation with the armed services were intentionally excluded.

If this Court were to find the whole list of thirteen categories does not qualify as an associated group or series, there is a subset of categories within the statute that constitutes a more narrow associated group. Four of the thirteen categories address members in varying stages of reserve

duty: persons lawfully called to active duty in subsection (a)(1); members of reserve components while on inactive-duty training in subsection (a)(3); retired members of a reserve component receiving hospital care in (a)(5); and members of the Fleet Reserve or Fleet Marine Corps Reserve[3] in (a)(6). 10 U.S.C. § 802(a). Those four categories constitute an associated sub-group or series because each addresses a specific type of reserve affiliation.

Congress is well aware of the existence of the IRR as another distinct group or category of reserve service as it created the category itself by separate Act. 10 U.S.C. § 10144. Accordingly, it should be inferred that Congress excluded members of the IRR by "deliberate choice" when it expressly included four other categories of reservists as subject to the Code. *See Barnhart*, 537 U.S. at 168.

3. Congress evinced its intent to exclude the Individual Ready Reserve from persons "subject to the Code" by twice expanding the reach of the statute after creating the Individual Ready Reserve, but not including them in either expansion.

Each branch of the armed forces has a Ready Reserve, a Standby Reserve, and a Retired Reserve. 10 U.S.C. § 10141. The

[3] The Fleet Reserve consists of persons who have retired upon completion of twenty years of enlisted service in the Navy or Marine Corps and have requested such designation. 10 U.S.C. § 6330(b).

Ready Reserve consists of the Selected Reserve and the Individual Ready Reserve. 10 U.S.C. § 10144. The Individual Ready Reserve came into existence on December 1, 1994, as a subset of the Reserve Component. National Defense Authorization Act (NDAA) for Fiscal Year 1995, 103 P.L 337, §§ 10141, 10144 (1994). Since creation of the Individual Ready Reserve, Congress has twice amended the categories of persons subject to the Code in Article 2.

In 2006, Congress modified subsection (a)(10), expanding its reach beyond times of war to include "contingency operations" as well. John Warner NDAA for Fiscal Year 2007, 109 P.L. 364, § 552 (2006). In 2009, Congress again expanded the reach of the Code by modifying subsection (a)(13) to include all eight categories of prisoners of war as stated in the Geneva Conventions. NDAA for Fiscal Year 2010, 111 P.L. 84, § 1803 (2009). By twice expanding the reach of persons subject to the Code and neither time including the Individual Ready Reserve in either expansion, Congress demonstrated its intent that this class of persons is not subject to the Code.

The Military Judge correctly concluded that, as Appellant was discharged from active duty when he received the call in April of 2011, he was not subject to the Code and therefore not due Article 31 warnings. (J.A. 41, 151-52, 302.) A military judge does not abuse his discretion by acting in accordance with

binding statutes. Appellant cites no case, and the United States is not aware of any case, extending the protections of Article 31 to members of the Individual Ready Reserve. *See generally Willenbring v. Neurauter*, 48 M.J. 152, 158 (C.A.A.F. 1998) (recognizing only certain categories of persons with prior military involvement remain subject to court-martial.)

Appellant's entire argument here that Appellant was due Article 31 warnings because he is part of "military society" sounds in equity. (Appellant's Br. at 7.) But as a matter of law, members of the Individual Ready Reserve are not subject to the Code or the narrowing construction this Court has applied to Article 31(b) in *Duga* and later cases, and therefore not due its protections. 10 U.S.C. §§ 802, 831.

II.

IF THIS COURT DOES NOT APPLY THE NARROWING CONSTRUCTION TO EXCLUDE MEMBERS OF THE INDIVIDUAL READY RESERVE, APPELLANT WAS NONETHELESS DUE NO ARTICLE 31 WARNINGS BECAUSE THE MILITARY JUDGE CORRECTLY FOUND THAT SGT MURATORI WAS TASKED WITH RESOLVING A PAPERWORK DISCREPANCY AND WAS NOT ACTING IN AN OFFICIAL LAW ENFORCEMENT OR DISCIPLINARY CAPACITY.

A. Standard of review.

Suppression of a confession is reviewed for an abuse of discretion. *Mott*, 72 M.J. at 329. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120,

130 (C.A.A.F. 2000). "The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *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)).

"An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008); *see also Swift*, 53 M.J. at 446. A military judge also abuses his discretion where his ultimate ruling is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (internal quotations omitted). "The abuse of discretion standard recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Mott*, 72 M.J. at 329 (internal quotations omitted). Further, the evidence is considered in the light most favorable to the prevailing party below. *E.g.*, *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

B. <u>The Military Judge did not abuse his discretion by concluding that Sgt Muratori was not acting in an official law enforcement or disciplinary capacity</u>.

Article 31(b) contains four textual predicates. *Cohen*, 63 M.J. at 49. The second and third textual predicates require an interrogation or a request for a statement from someone

suspected of an offense. *Cohen*, 63 M.J. at 49. An interrogation or request for a statement exists where the questioner is acting "in an official law enforcement or disciplinary investigation or inquiry" or could reasonably be considered to have been acting in such a capacity. *United States v. Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *10-11 (C.A.A.F. Jul. 21, 2014) (quoting *Swift*, 53 M.J. at 446). Here, the Military Judge correctly concluded Sgt Muratori was not acting in an official law enforcement or disciplinary capacity as he was only tasked with resolving a paperwork discrepancy. The applicable factual findings made by the Military Judge are well supported by the Record. The Military Judge applied the appropriate controlling legal principles to reach a reasoned conclusion.

1. <u>The Military Judge's factual findings regarding Sgt Muratori's tasking are well supported by the Record</u>.

Factual findings made by the trial court are accepted for purposes of appellate review unless they are clearly erroneous. *E.g.*, *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004). Factual findings are only clearly erroneous where they are wholly unsupported by the record. *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007); *see also United States v. Martin*, 56 M.J. 97, 105-06 (C.A.A.F. 2001) (explaining factual findings valid unless reviewing court left with a definite and

firm conviction they are wrong). Appellant declined to expressly challenge any factual finding made by the Military Judge as clearly erroneous therefore they are accepted for purposes of appellate review. *Mason*, 59 M.J. at 422.

The Military Judge made several relevant factual findings and each is well supported by the Record.[4] The Military Judge found that Appellant's discharge became effective on January 2, 2011, making him a member of the IRR. (J.A. 149 FoF (d), 302 ¶¶ 9 and 18, 311, 315.) The Military Judge found the "discrepancy with paperwork" from the armory inventory was discovered in the "Spring of 2011." (J.A. 149 FoF (j).) The Military Judge found Sgt Muratori was directed to "find out why there was a paperwork discrepancy that failed to account for one M-1911 pistol." (J.A. 149 FoF (k) and (l).)

The testimony of Sgt Muratori supported all of those factual findings. Sgt Muratori explained discrepancies on armory inventory reports were routine and that there were approximately twenty-five discrepancies on this report. (J.A. 156-57, 220.) Sgt Muratori noted he had never seen an armory inventory report without discrepancies. (J.A. 219.) Sgt

[4] Appellant did indirectly imply several factual findings made by the Military Judge were incorrect. (Appellant's Br. at 35.) If this Court were to interpret Appellant's arguments as a challenge to the Military Judge's factual findings as clearly erroneous, they are in fact well supported by the Record.

Muratori indicated the discrepancies were the result of human error in data entry and were routinely resolved by tracing the paperwork. (J.A. 157, 219, 220.) Sgt Muratori went through the paperwork with the current armory custodian and discovered conflicting paperwork pertaining to this M-1911. (J.A. 158.)

As each pertinent finding of fact made by the Military Judge is rooted in support from the Record, they are not clearly erroneous and are therefore accepted for purposes of appellate review. *See Leedy*, 65 M.J. at 213 n.4.

2. The Military Judge did not rely on an erroneous view of the law.

Appellant did not specifically allege the Military Judge relied on an erroneous view of the law as there are no allegations of omission of or misapplication of legal principles. *See Seay*, 60 M.J. at 77 (finding failure to apply binding case law an abuse of discretion); *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986) (explaining misapprehension of the law is reliance on an erroneous view of the law). Appellant challenges only the ultimate conclusion made by the Military Judge.

3. The Military Judge correctly concluded Sgt Muratori was not acting in an official law enforcement or disciplinary capacity when he spoke with Appellant on the telephone.

Whether a questioner was acting in an official law enforcement or disciplinary capacity, or could reasonably be considered to be acting in an official law enforcement or

disciplinary capacity, is a question of law reviewed *de novo*. *Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *11. The determination is made from assessing all the facts and circumstances at the time of the questioning, viewed objectively from the perspective of a reasonable person in Appellant's position. *Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *12-13 (citing *United States v. Good*, 32 M.J. 105, 108 n.2 (C.M.A. 1991)).

Questioning by a military superior in the immediate chain of command is presumed to be for disciplinary purposes. *See Swift,* 53 M.J. at 446. However, questioning for the purpose of accomplishing an administrative purpose does not require a rights advisement. *Id*. Similarly, questioning for the purpose of accomplishing an operational task does not require warnings. *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990).

a. Sgt Muratori was not acting in an official law enforcement capacity.

Whether an individual is acting in an official law enforcement capacity requires determining the scope of the individual's authority as an agent of the military. *See Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *13. Nothing in the Record here indicates Sgt Muratori's official responsibilities included any law enforcement role. Sgt Muratori explained he was the Company training chief and headquarters platoon sergeant for

First Force Reconnaissance Company. (J.A. 154, 157.) The Military Judge did not make a factual finding regarding the scope of Sgt Muratori's authority as an agent of the military. Completely unlike *Jones* where the questioner had law enforcement responsibilities, at least during his working hours, here Sgt Muratori had no law enforcement responsibilities. *See Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *14 (identifying questioner as an augmentee to military police with certain law enforcement responsibilities).

The Company Executive Officer tasked Sgt Muratori with resolving the discrepancies on the armory report because as the training chief he had the most knowledge of and interaction with the armory and its day-to-day operations. (J.A. 157.) Due to a lack of continuity both at headquarters and in the company, Sgt Muratori had the most time on station, having been there for over two years at that point. (J.A. 157.) Nothing in the Record supports a conclusion that as a training chief or as a platoon sergeant Sgt Muratori had any official law enforcement responsibilities.

The remaining circumstances, viewed objectively and in the light most favorable to the United States, as the prevailing party below, demonstrate that while Sgt Muratori was acting in his official capacity, he was not acting in a law enforcement capacity. *See Leedy*, 65 M.J. at 213 (explaining "[i]n reviewing

a ruling on a motion to suppress, [reviewing courts] consider the evidence in the light most favorable to the prevailing party."). Not every action taken in an official capacity is a law enforcement action. *See United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1999) (finding questions from military superior about security clearance status in his official capacity but an administrative as opposed to a law enforcement action).

Here, as discussed *supra*, the Military Judge found the issue with the M-1911 pistol was initially considered merely a routine paperwork discrepancy. (J.A. 149 FoF (j) and (k).) When Sgt Muratori directed his Marines to contact Appellant his goal was to gather information about the paperwork discrepancy. (J.A. 149 FoF (l), 157-58.) As the Military Judge found, Sgt Muratori spoke with Appellant on a first name basis during the call and had no intention of getting him into trouble. (J.A. 149 FoF (n) and (o), 160-62); *see Norris*, 55 M.J. at 215 (C.A.A.F. 2001) (finding questioning by military superior not done with intent "to elevate the matter to a criminal investigation and prosecution" not in official capacity).

Asking questions in an official capacity does not necessarily equate to acting in a disciplinary or law enforcement capacity. In *Loukas*, a crew chief asked a junior crew member questions about drug use when he observed erratic

behavior. *Loukas*, 29 M.J. at 386. The questioning did not require Article 31(b) warnings because it was not for law enforcement or disciplinary purposes, rather to meet his in flight operational responsibilities. *Loukas*, 29 M.J. at 387. Similarly, in *Bradley*, questions from a military superior about the status of a security clearance were for an administrative purpose, not a criminal investigation purpose, therefore no Article 31(b) warnings were required. *Bradley*, 51 M.J. at 441.

Here, as in *Bradley*, the task Sgt Muratori was accomplishing was administrative in nature. *Bradley*, 51 M.J. at 441. Sgt Muratori was merely gathering information in an effort to resolve a paperwork discrepancy when he spoke with Appellant, a finding clearly supported by the record (J.A. 149 FoF (j), (k), and (l).).

Even if Sgt Muratori's task was not administrative in nature then as in *Loukas*, Sgt Muratori was asking Appellant questions to meet the operational responsibility of weapons accountability, not as part of an official law enforcement inquiry. *See Loukas*, 29 M.J. at 387. Even if the answers to the questions resulted in incriminating information, that does not make the questions part of an official law enforcement inquiry. *See Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *13-14 (finding questions designed to elicit incriminating response did not require Article 31 warnings).

Even if this Court were to find the questions were asked for the purpose of eliciting incriminating information, Article 31 warnings were still not required. Sgt Muratori was not even akin to an undercover informant. Just as not even undercover informants do not place a suspect in a position where would they feel compelled by military rank to make admissions, here Sgt Muratori used no military pressure. *Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *11 n.5. They spoke as old friends, using first names. Appellant made admissions to his friend, Sgt Muratori, out of feelings of guilt, not out of coercion from military based pressure. As such, no Article 31 warnings were required, because just as with an actual undercover informant, the underlying rationale for the warnings was not implicated. *See Jones*, No. 14-0071/AR, 2014 CAAF LEXIS 720, *11 n.5.

b. Sgt Muratori was not acting in an official disciplinary capacity.

The presumption of acting in a disciplinary capacity is inapplicable here as it only applies where the questioning comes from a superior in the military chain of command. *Swift*, 53 M.J. at 446. In *Swift*, the questioner and the questioned were not only both on active duty, but they were in the same chain of command. *Swift*, 53 M.J. at 442. There the questioner outranked the person being questioned. *Swift*, 53 M.J. at 442. Thus the "strong presumption" that the questioner was acting in a

disciplinary capacity when questioning his military subordinate was invoked. *Swift*, 53 M.J. at 448. The *Swift* case turned on the failure to rebut that "strong presumption." *Swift*, 53 M.J. at 448.

Here, unlike *Swift*, Appellant was not in any chain of command as he was not on active duty. Therefore, the "strong presumption" that Sgt Muratori was acting in a disciplinary capacity simply does not exist. As Appellant was in the Individual Ready Reserve and not subject to any order from Sgt Muratori, no chain of command exists. 10 U.S.C. § 12302; (J.A. 149, ¶ (d).) That fact alone demonstrates Sgt Muratori was not acting in a disciplinary capacity, as even Sgt Muratori recognized, he had no authority over Appellant. (J.A. 159, 165.) Without military authority, one cannot impose military discipline.

The former military relationship between Sgt Muratori and Appellant does not establish disciplinary action either. *See United States v. Jones*, 24 M.J. 367 (C.M.A. 1987). In *Jones*, a former supervisor-supervisee relationship did not make questioning for a disciplinary purpose. *Jones*, 24 M.J. at 369. In *Jones* both were in uniform and the questioner both outranked the questionee and was a former immediate supervisor of the questionee. *Id*. Neither fact rendered the questioning for a disciplinary purpose. *Id*.

Further, as a platoon sergeant, Sgt Muratori had no actual disciplinary authority. Administering discipline is a command responsibility that "shall not be delegated to persons not in command except as provided for in the Uniform Code of Military Justice." Marine Corps Manual w/ch 1-3, § 1300, 1-29 (1980). Junior officers and non-commissioned officers contribute to maintenance of discipline through the personal example they set, but they do not administer discipline. *Id*. The lowest level of actual discipline in the fleet is nonjudicial punishment. Nonjudicial punishment can only be imposed by commanding officers or officers in charge. 10 U.S.C. §§ 815(b) and (c). As Sgt Muratori was neither a commanding officer nor an officer in charge he had no authority to impose discipline in the form of nonjudicial punishment. Sgt Muratori was only charged with setting a good example for and with training junior Marines but not with imposing discipline. Marine Corps Manual c/ch 1-3, § 1300 (b), 1-29 (1980).

c. A reasonable person in Appellant's position would understand Sgt Muratori was not acting in an official law enforcement or disciplinary capacity.

Whether an individual could reasonably be considered to be acting in an official law enforcement or disciplinary capacity is measured from the perspective of a "a reasonable man in the suspect's position." *Jones*, No. 12-0071/AR, 2014 CAAF LEXIS 720,

*12 (internal quotations omitted). The reasonable person test assumes an "objective, disinterested observer, fully informed of all the facts and circumstances" surrounding the issue. *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (explaining characteristics of the reasonable person in apparent unlawful command influence context). The reasonable person test is essentially the same in the apparent unlawful command influence context as it is in implied bias cases and in judicial disqualification cases. *Lewis*, 63 M.J. at 415; *see also United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006) (evaluating implied bias from perspective of a fully informed objective observer); *see also United States v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2011) (noting appearance of judicial partiality measured from perspective of a fully informed reasonable person). The objective reasonable person in this context should similarly be considered fully informed.

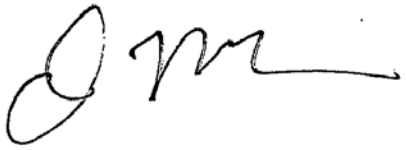
Here, the similarly situated fully informed reasonable person brings a great deal of knowledge to bear. This reasonable person knows Sgt Muratori personally and professionally. (J.A. 153-55, 170.) This reasonable person understands the scope of Sgt Muratori's military responsibilities. The fully informed reasonable person knows Sgt Muratori has no official law enforcement responsibilities. The fully informed reasonable person knows Sgt Muratori has no

disciplinary authority in general, because he is neither a commander nor an officer in charge. Further, the reasonable person understands Sgt Muratori lacks the authority to give a member of the Individual Ready Reserve any order. The fully informed, similarly situated member of the Individual Ready Reserves would not perceive Sgt Muratori to have been acting in an official law enforcement or disciplinary capacity. As such, no Article 31(b) warnings were due here.

Not only was the Military Judge's conclusion that Sgt Muratori was not acting in a law enforcement or disciplinary capacity not arbitrary, fanciful, clearly unreasonable, or clearly erroneous, his conclusion was legally correct. Accordingly, there was no abuse of discretion.

Conclusion

WHEREFORE, the United States respectfully requests that this honorable Court affirm the findings adjudged and approved below.



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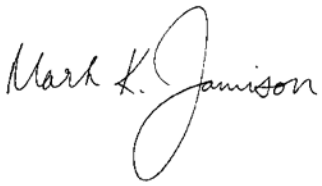

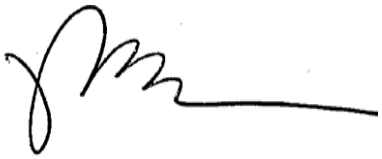

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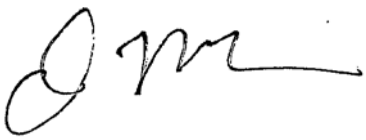

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