IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Sergeant (E-5) **EDWARD J. MITCHELL II,** United States Army, Appellee	)	Crim. App. Dkt. No. 20150776
	)	USCA Dkt. No. _____

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Issues Presented:

1. WHETHER THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN A SUSPECT VOLUNTARILY UNLOCKS HIS PHONE WITHOUT GIVING HIS PERSONAL IDENTIFICATION NUMBER TO INVESTIGATORS.

2. WHETHER THE *EDWARDS* RULE IS VIOLATED WHEN INVESTIGATORS ASK A SUSPECT, WHO HAS REQUESTED COUNSEL AND RETURNED TO HIS PLACE OF DUTY, TO UNLOCK HIS PHONE INCIDENT TO A VALID SEARCH AUTHORIZATION.

3. WHETHER, ASSUMING INVESTIGATORS VIOLATED [APPELLEE'S] FIFTH AMENDMENT PRIVILEGE OR THE *EDWARDS* RULE, THE MILITARY JUDGE ERRED BY SUPPRESSING THE EVIDENCE.

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(2), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

Statement of the Case

On August 17, 2015, the convening authority referred numerous specifications against Appellee to a general court-martial, most of which deal with Appellee's sexual assault and subsequent harassment of the victim, his ex-wife.[1] (JA 92-99). On October 29, 2015, the military judge issued a ruling suppressing Appellee's iPhone "and any evidence derived therefrom." (JA 412). On November 1, 2015, the trial counsel filed a notice of appeal of this ruling under

[1] Appellee is charged with two specifications of stalking, five specifications of disobeying a lawful order, one specification of assault consummated by battery, one specification of child endangerment, one specification of indecent broadcasting of intimate images, three specifications of harassment, one specification of communicating a threat, two specifications of online impersonation, one specification of obstructing justice, one specification of indecent broadcasting, three specifications of conspiracy, one specification of going from an appointed place of duty, one specification of disrespect of a superior officer, one specification of solicitation of another to violate a lawful order, and two specifications of sexual assault, in violation of Articles 120a, 90, 128 134, 120c, 81, 86, 89, and 120, UCMJ.

Rule for Courts-Martial 908. (JA 399). On March 18, 2016, the Army Court set aside the military judge's ruling and remanded the case to the trial court for additional factfinding on whether Appellee entered a personal identification number (PIN) into his phone to unlock it, whether Appellee was in custody when investigators approached him, and any other relevant matter. (JA 6-8) (*Mitchell I*).[2] On May 17, 2016, the military judge issued "clarified" findings and again suppressed the evidence. (JA 477-85). The trial counsel again filed a notice of appeal. (JA 486). The Army Court denied the United States' appeal in a summary disposition. (JA 6-8) (*Mitchell II*). On October 24 , 2016, the Army Court denied the United States' motion to reconsider its decision en banc. (JA 9). On December 22, 2016, the United States filed the Judge Advocate General of the Army's certificate for review of *Mitchell II* with this Court.

Statement of Facts

Despite a number of "no contact" orders, Appellee harassed the victim in this case, his ex-wife, "by communications through applications" on his electronic devices, including his iPhone 6. (JA 370). Over the course of just one week, Appellee unlawfully contacted the victim through over 250 phone calls and 300 text messages. (JA 370). The victim knew Appellee was the culprit because the

[2] On March 23, 2016, Appellee petitioned this Court for review of the Army Court's decision in *Mitchell I*. Appellee subsequently moved to withdraw that petition, and this Court granted Appellee's motion on June 1, 2016.

messages he sent referred to personal matters "only [Appellee] would know," such as inside jokes and the victim's painful childhood memories. (JA 370). The victim reported the harassment to police. (JA 370).

On January 8, 2015, Investigator BT advised Appellee of his rights under Article 31(b), UCMJ, and *Miranda v. Arizona*, 384 U.S. 436 (1966) at the military police station. (JA 404, 478). Appellee invoked his right to counsel and was released from the station. (JA 404, 478). During the course of the aborted interview, the investigator saw Appellee take his phone out of his pocket to check the date. (JA 392). Appellee then returned to his place of duty near his company commander's office. (JA 196).

After Appellee left the military police station, investigators obtained a verbal search and seizure authorization from a military magistrate to search Appellee's person for his iPhone 6. (JA 404). The search authorization also allowed the investigators to search the internal contents of the phone for certain evidence. (JA 403-404). The military judge ruled that the search authorization was supported by probable cause and "sufficiently and particularly described the places to be searched and the items to be seized." (JA 407).[3] Upon learning that investigators wished to speak to Appellee, a member of Appellee's unit was directed to find and

[3] The military judge's ruling on the search authorization is not a subject of this appeal.

bring Appellee to the commander's office. (JA 479). Investigator BT and another investigator, Investigator JC, went to Appellee's company area to find him and execute the search authorization. (JA 405, 479). They found him in the commander's office with the commander, and the commander left shortly thereafter to allow them to conduct their business. (JA 479).

The investigators told Appellee that they had a verbal search and seizure authorization for his electronic media. (JA 479). Appellee handed his iPhone 6 to the investigators. (JA 480). Investigator BT asked Appellee for his PIN, but Appellee refused to provide it. (JA 480). The military judge found as a fact that the investigators next said, "'[I]f you could unlock it, great, if you could help us out. But if you don't, we'll wait for a digital forensic expert to unlock it,' or words to that effect." (JA 480). Appellee refused to provide his PIN, but unlocked the phone and gave it back to the investigators. (JA 480).

An iPhone 6 can be unlocked by entering a passcode or by placing a previously recorded fingerprint on a sensor, a feature known as Touch ID. (JA 205, 480). The Government learned that Appellee saved two fingerprints to his phone's Touch ID feature. (JA 445-47). However, the military judge found that Appellee unlocked the phone by entering his PIN, rather than by using the Touch ID function. (JA 480). Regardless, the Government to this day does not know Appellee's PIN. (JA 481).

The defense moved to suppress the contents of Appellee's phone. (JA 289-324). In the United States' response to the motion, the trial counsel offered to avoid presenting any evidence that Appellee unlocked the phone or to provide Appellee with testimonial immunity for his act of unlocking the phone. (JA 366). The military judge suppressed the phone and evidence investigators found on it. (JA 403-412, 477-85).

Summary of Argument

This Court should reverse the Army Court's decision and set aside the military judge's ruling because the three requirements for a Fifth Amendment Self-Incrimination Clause violation are not present together in a way that requires suppression of the contents of the phone: Appellee's unlocking his phone was not compelled, testimonial, and incriminating. Additionally, the investigators did not violate the *Edwards* rule because Appellee was not in custody when they requested that he unlock the phone and their request for his PIN was not contact sufficient to implicate *Edwards* protections. Finally, even assuming a violation of the Fifth Amendment Privilege or the *Edwards* rule, the military judge erred by suppressing the contents of Appellee's phone because suppression is not an available remedy for evidence derived from *Edwards* violations and because the inevitable discovery doctrine applied.

Standard of Review

"In an Article 62, UCMJ, [appeal], this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citing *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011)). "'In reviewing a military judge's ruling on a motion to suppress, [this Court] review[s] factfinding under the clearly erroneous standard and conclusions of law under the de novo standard.'" *Id.* (quoting *Baker*, 70 M.J. at 287-88). "[O]n mixed questions 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.'" *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Thus, this Court is "bound by the military judge's findings of fact unless they were clearly erroneous," *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007), but reviews conclusions of law de novo, *United States v. Piren*, 74 M.J. 24, 27 (C.A.A.F. 2015) (citations omitted).[4]

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[4] In discussing the standard of review, the Army Court stated, "To overturn the trial court's ruling on appeal, it must be 'arbitrary, fanciful, clearly unreasonable or clearly erroneous[,]'" (JA 8) (quoting *United States v. Taylor*, 53 M.J. 195, 199 (C.A.A.F. 2000)), and, "'The abuse of discretion standard calls for more than a mere difference of opinion[,]'" (JA 8) (quoting *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)). The *Taylor* and *Stellato* version of the "abuse of discretion" standard is inapplicable in this case. *Taylor* involved a military judge's decision to give a cautionary instruction about a certain exhibit rather than redact it. *Taylor*, 53 M.J. at 199. In *Stellato*, this Court considered a military judge's

Law and Analysis

The military judge abused her discretion in ruling that Appellee's act of unlocking his cell phone violated his Fifth Amendment privilege or the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981).

I. This Court should set aside the military judge's ruling because the investigators did not violate Appellee's Fifth Amendment privilege.

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. "To qualify for the Fifth Amendment privilege a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). The same standards apply to the privilege provided by Article 31, UCMJ. *See United States v. Oxfort*, 44 M.J. 337, 340 (C.A.A.F. 1996). In this case, the investigators' request for Appellee to unlock his phone did not satisfy all of these three requirements.

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factual findings and his decision to choose a particular remedy among a number of possible remedies for a discovery violation. *Stellato*, 74 M.J. at 482-83, 488. While a military judge's factual findings or choice among remedies is due deference, the application of constitutional law is a question of law reviewed de novo by this Court. *United States v. Castillo*, 74 M.J. 160, 165 (C.A.A.F. 2015) ("We review questions of constitutional law de novo."). Following the United States' reconsideration motion, the Army Court asserted that it applied a de novo review. (JA 9).

A. Appellee's unlocking of the phone was not compelled.

"[T]he Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher v. United States*, 425 U.S. 391, 397 (1976). This physical or moral compulsion does not exist simply because the Government requires a criminal suspect to choose between speaking and some other option. *South Dakota v. Neville*, 459 U.S. 553, 562-63 (1983). Instead, the alternative to speaking must be so bad that the testimony is actually coerced, such as where the only other options are to risk perjury, contempt, or some other alternative that is "so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession.'" *Id.* (citing *Schmerber v. California*, 384 U.S. 747, 765 n.9 (1966)). For example, in *Neville*, the state offered suspected drunk drivers the choice between taking a blood alcohol test or having their refusal to take the test used against them at trial, and the Court held that the defendant's refusal was not "compelled" in violation of the Fifth Amendment. *Id.* at 562.

Here, Appellee was under no physical or moral compulsion to provide his PIN. The military judge found that the investigators approached Appellee in or outside his commander's office, relieved him of his phone pursuant to a lawful search and seizure authorization, and, noticing the phone was password protected, asked, "'[C]ould you help us out,' or words to that effect.'" (JA 405). The

investigators also noted that if Appellee did not unlock the phone, a digital forensic examiner would do so. (JA 405). Appellee chose to unlock the phone for the investigators. (JA 405-06). This Court is bound by these findings, which are not clearly erroneous. *Cossio*, 64 M.J. at 256. Appellee's choice between unlocking his phone or having someone else do so falls far short of showing compulsion akin to choosing between speaking and perjury, contempt, or some alternative that is "so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession.'" *Id.* (citing *Schmerber*, 384 U.S. at 765 n.9). Appellee merely complied with a request from investigators in the relative comfort and safety of his place of duty, surrounded by the members of his company.

Accordingly, the military judge abused her discretion in two respects. First, she was influenced by an erroneous view of the law because she believed "[t]he accused had an inviolable right not to incriminate himself and cannot be required *or even requested* to do so." (JA 410) (emphasis added). Very much to the contrary, under *Hiibel*, a communication does not violate the Fifth Amendment unless it is compelled, and investigators may lawfully request the accused to incriminate himself under *Neville*. Indeed, they routinely do so, subject to certain safeguards. *See Miranda*, 384 U.S. at 467-70 (establishing constitutional standards

for the manner in which investigators may request that suspects incriminate themselves); Article 31(b), UCMJ (establishing statutory standards).

Second, the military judge's conclusion of law was in error. The military judge found that the investigators merely asked Appellee to unlock his phone and did not order him to do so. The "choice" they presented him was between doing it himself or waiting for someone else to do so. This was neither moral compulsion nor a choice between impossible options. This Court should therefore set aside the military judge's ruling.

B. Appellee's unlocking of the phone was not testimonial.

Even assuming the investigators' asking Appellee to "help [them] out" by providing his PIN constituted constitutional compulsion, neither Appellee's entry of the PIN nor his act of producing the contents of the phone was testimonial. "The difficult question whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case." *Doe v. United States*, 487 U.S. 201, 2214-15 (1988). "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* at 211. Here, the military judge improperly conflated Appellee's entry of his PIN, as an act unto itself, with the result that act achieved, the production of the phone's contents. (JA 409-410). This Court must distinguish between the two to determine

whether any testimonial communication was compelled in this case. *See Oxfort*, 44 M.J. at 339, 342 (considering, first, whether the Appellee's turning over classified documents was accompanied by a testimonial communication and, second, whether the act of producing the documents was itself testimonial); *Doe*, 487 U.S. at 215 (considering, first, whether an executed consent directive was itself testimonial and, second, whether the act of executing the form was testimonial). One potential Fifth Amendment problem occurs when a suspect is called as a witness before a grand jury and asked, "What is the PIN for your phone?" *See, e.g., United States v. Kirschner*, 823 F.Supp.2d 665, 668 (E.D. Mich. 2010) (analyzing subpoena requiring respondent to testify to the password used on his computer). A distinctly different problem occurs if a suspect is called before a grand jury with a subpoena *duces tecum* for all electronic media contained on an iPhone 6. *See, e.g., United States v. Doe (In re Grand Jury Subpoena Duces Decum)*, 670 F.3d 1335, 1340 (11th Cir. 2012) (analyzing grand jury subpoena that ordered the production of the unencrypted contents of a hard drive that was not accompanied by an order to provide passcodes). Each situation, in the appropriate circumstances, could be testimonial and incriminating, but each must be analyzed separately to come to that conclusion. Here, neither Appellee's entry of his PIN nor his act of producing the contents of the phone were testimonial.

1. Appellee's entry of his PIN was not testimonial.

Appellee's entry of his PIN was not testimonial because, although the combination of the numbers that make up his PIN is a fact contained in Appellee's mind, he did not convey that fact to the investigators. To be testimonial, the information at issue not only must be a fact known to or a belief held by the accused, but that fact or belief must also be communicated to the Government. *See Doe*, 487 U.S. at 213-15. In *Doe*, the Supreme Court considered whether a suspect could be required to sign a form consenting to the disclosure of certain banking information. 487 U.S. at 204-205. The Court explained, "[The] policies [underlying the Fifth Amendment privilege] are served when the privilege is asserted to spare the accused from having to *reveal*, directly or indirectly, his knowledge of facts relating him to the offense or from having to *share* his thoughts and beliefs *with the Government*." *Id.* at 213 (emphasis added).

As this passage indicates, it is the compelled *transmission* of facts or beliefs from the mind of the accused to the Government that offends the Fifth Amendment. Affirming the lower court's decision, the Court later in its opinion stated, "We agree with the Court of Appeals that [the order to sign the consent form] would not [have testimonial significance], because neither the form, nor its execution, *communicates* any factual assertions, implicit or explicit, or *conveys* any information *to the Government*." *Id.* at 215 (emphasis added). Throughout the

Court's opinion in *Doe* it requires that the information at issue be actually transmitted to the Government. *See id.* at 210, 213 (the communication must "relate a factual assertion or disclose information" and must "convey information."). Other Supreme Court precedents are in accord. *See Schmerber*, 384 U.S. at 761 ("the privilege protects an accused only from being compelled to testify against himself, or otherwise *provide the State with evidence* of a testimonial or communicative nature") (emphasis added); *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (statement is not testimonial where the suspect was not required "to *disclose* any knowledge he might have") (emphasis added); *Curcio v. United States*, 354 U.S. 118, 128 (1957) (statement is testimonial when the Government forces the suspect "to *disclose* the contents of his own mind") (emphasis added).

The requirement that the compelled information actually enlighten the Government as to some fact known to the accused is confirmed by the Supreme Court's "foregone conclusion" doctrine.[5] *See Fisher*, 425 U.S. at 411. In *Fisher*, the Government served a taxpayer's lawyer with a summons for certain tax documents, but the Government already knew that the documents existed and were

[5] The application of the foregone conclusion doctrine to Appellee's act of producing the contents of his phone is addressed below.

under the taxpayer's control. *Id.* Holding that the production of the documents was not testimonial, the Court stated:

> The existence and location of the papers are a forgone conclusion and *the taxpayer adds little or nothing to the sum total of the Government's information* by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender."

Id. (quoting *In re Harris*, 221 U.S. 274, 279 (1911)) (emphasis added). Accordingly, to be testimonial, compelled information must add "to the sum total of the Government's information . . . ." *Id.*

Here, Appellee's entry of his PIN to unlock the phone was not testimonial because he did not communicate the PIN to the investigators. The Government to this day does not know Appellee's PIN. To reverse a hypothetical used by the Supreme Court, Appellee's entry of the PIN on his phone out of the investigators' sight was like being forced to surrender the key to a strong box, not like telling an inquisitor the combination to a wall safe. *Cf. United States v. Hubbell*, 530 U.S. 27, 42 (2000). Accordingly, Appellee's entry of his PIN to unlock the phone was not testimonial and the military judge abused her discretion by conflating, on the

one hand, telling the government one's PIN with, on the other hand, producing the contents of one's phone.[6]

2. Appellee's act of producing the contents of the phone was not testimonial.

Apart from his "providing" the PIN, Appellee's act of producing the internal contents of his phone was not testimonial because it did not require him to use the extensive contents of his mind, and because Appellee's access to his own phone and the phone's contents were a foregone conclusion. The act of producing documents may be testimonial when it implicitly communicates statements of fact. *Hubbell*, 530 U.S. at 36. "By 'producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.'" *Id.* (quoting *Doe*, 465 U.S at 613 n.11). The potential for a Fifth Amendment violation comes from the act of production itself, not from the contents of the documents produced, as "a person may be required to produce specific documents even though they contain incriminating assertions of

[6] The military judge was also influenced by an erroneous view of the law. The military judge believed that this Court "intimated" that a request to provide a password violates a suspect's privilege against self-incrimination or right to counsel in *United States v. Huntzinger*, 69 M.J. 1, 6 n.1 (C.A.A.F. 2010). (JA 408). The *Huntzinger* footnote stated, "Appellee does not contend that [Captain] Miller's request for his password violated either his privilege against self-incrimination or his right to counsel." *Id.* This summary of an argument *not made* by the Appellee advances no opinion of this Court as to the merits of the non-argument, and the military judge was in error in believing otherwise.

fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege." *Id.* (citing *Fisher*, 425 U.S. at 409-10).

However, the act of production is only testimonial when the witness must "make extensive use of 'the contents of his own mind' in identifying" the documents responsive to the production order. *See id.* at 43 (citing *Curcio*, 354 U.S. at 128; *Doe*, 487 U.S. at 210). Additionally, an act of production is not testimonial when the existence and location of the documents produced are a foregone conclusion. *Fisher*, 425 U.S. at 411. Here, Appellee did not make extensive use of the contents of his mind in responding to the investigators' request, and the existence, location, and authenticity of the media on the phone was a foregone conclusion.

(a) *Appellee did not make extensive use of the contents of his mind or convey any fact by unlocking his phone.*

In *Hubbell*, the prosecutor served Mr. Hubbell with a subpoena for eleven broad categories of documents, and he was forced to respond by compiling 13,120 documents from among his papers. 530 U.S. at 41. Holding that this act of production was testimonial, the Court noted that "the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources." *Id.* The Court explained, "Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering

a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad categories." *Id.* Mr. Hubbell was required to take "the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena." *Id.* at 42. This was testimonial, the Court concluded, because it was necessary for Mr. Hubbell "to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena." *Id.* at 43 (citing *Curcio*, 354 U.S. at 128; *Doe*, 487 U.S. at 210). "The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." *Id.* (citing *Doe*, 487 U.S. at 210 n.9).

Additionally, when a witness's verbal act of granting the Government access to documents does not convey any fact it is not testimonial. *Doe*, 487 U.S. at 215-16. In *Doe*, the Court considered whether the witness's act of granting the Government access to his banking records through the consent form was a testimonial act, even though the form itself had no testimonial aspect. *Id.* at 215. The Court held that it was not, because the verbal act did not communicate that any bank accounts actually existed or that the witness had any control over them and, even if the banks were to produce account records, the witness's consent form would not authenticate those records. *Id.* at 216.

Courts have applied the act of production rationale to electronic media to delineate which acts of production make extensive use of the respondent's mind and which do not. *See United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1345-46; *In re Welsh*, No. 13-02457-8-SWH, 2013 Bankr. LEXIS 4716 (Bankr. E.D. N.C. 2013). In *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, prosecutors investigating child pornography possession served Mr. Doe with a subpoena requiring him to decrypt and produce terabytes worth of data found within several hard drives, and "any and all containers or folders thereon." 670 F.3d at 1339. The hard drives were encrypted with a program such that it was partitioned, so that even if one part of the hard drive was accessed, the remaining parts would remain encrypted. *Id.* at 1340. Applying *Hubbell*, the court held that the decryption and production would be testimonial because it would provide the Government with Mr. Doe's "knowledge of the existence and location of the potentially incriminating files; of his possession, control, and access to the encrypted portions of the hard drive; and of his capability to decrypt the files." *Id.* at 1346.[7]

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[7] Certain passages in *Doe (In re Grand Jury Subpoena Duces Tecum)* could be read to indicate that *any* mental effort by a witness that communicates a fact to the government is testimonial. *See id.* at 1345-46. The case should not be so read, for three reasons. First, to say that any mental effort involved in the production of documents, however slight, is testimonial, is to ignore *Hubbell*'s focus on the witness's "extensive" use of the contents of his mind. Second, a rule that makes any non-extensive mental effort testimonial would conflict with *Doe*, where the

On the other hand, in *Welsh*, the court found that the act of production of an objectively ascertainable group of electronic media requiring no logical calculus by the witness was not testimonial. There, the debtor was asked to produce (1) all communications between him and a certain person during a certain date range and (2) any documents he possessed relating to his relationship with the person. *Id.* at *16-18. The court held that the first act of production was not testimonial, but that the second was. *Id.* As to the first category, the court explained:

> Here, the debtor was requested to produce an objectively ascertainable group of documents that will not require him to make any implicit or explicit factual assertions or analyses in order to comply . . . . The act of producing these documents does not require the debtor to reveal the contents of his mind or employ some type of logical calculus in order to comply; instead, he is merely surrendering the key to the strongbox.

Id. at *16-17 (citing *Doe*, 487 U.S. at 210 n.9). By contrast, the court ruled that the second category of requested documents was not objectively ascertainable, and that their production would be testimonial because the debtor would have to sort through all of his writings, determine which explicitly or implicitly relate to the person, and then determine whether the writing related to his relationship with her.

Court held that the witness's compelled signing of a consent form was not testimonial, an act that surely involved mental effort, but non-extensive mental effort. Third, such a broad reading of the privilege would conflict with *Welsh*, where the court delineated which acts of production relied on the witness's extensive use of the contents of his mind, and which did not.

Id. at *18-19. Similarly, other lower courts have found the privilege inapplicable where producing the documents requested takes no serious mental effort. *See Sallah v. Worldwide Clearing, LLC*, 855 F.Supp.2d 1364, 1373 (S.D. Fl. 2012) (overruling a party's Fifth Amendment objection to discovery where the requests "call for objectively determinable universes of documents," did not require the respondent "to choose what documents might be responsive to the requests," and the respondent "need not exercise any judgment to respond to the request.").

Here, Appellee's act of unlocking his phone was not testimonial because it did not require him to extensively make use of the contents of his mind and did not communicate any fact. Unlike *Hubbell*, the government did not rely on Appellee to sort through all of the media he possessed and use his mind to compile and produce certain media from among the phone's contents. Instead, Appellee merely unlocked the phone, handed it over, and left the searching and compiling to the investigators. Analogizing this case to *Hubbell*, it is as if Appellee merely entered the door code to his office, allowed investigators entry, and allowed the investigators to search through all of his papers to find the 13,120 responsive documents themselves. The Government did not make use of Appellee's assistance "to identify potential sources of information and produce those sources," and Appellee provided no "accurate inventory;" he only provided access. *Hubbell*,

530 U.S. at 41. Thus, "[t]he question is not one of testimony but of surrender." *Harris*, 221 U.S. at 279.

This case is also unlike *United States v. Doe (In re Grand Jury Subpoena Duces Tecum*). In that case, the respondent would have been required to decrypt a massive amount of data–piece by piece, partition by partition–in effect telling the Government of his knowledge of and access to the incriminating files within the media. Here, Appellee merely opened the door for the investigators and let them take over. Similarly, this case is unlike the second category of requested media in *Welsh*, in that Appellee was not required to search through all of his media and pick out those messages or documents the Government sought.

Instead, this case is like the first category of documents in *Welsh* and the requested documents in *Sallah*, an objectively ascertainable group of media requested for production, requiring no logical calculus for Appellee to comply. Even more so than in those cases, where the respondent at least had to determine which of his media fit the objectively ascertainable categories, Appellee's unlocking the phone required almost no thought at all. The investigators simply presented Appellee with a request for access to *all* of the media contained on the phone they had just seized from him and Appellee unlocked the phone for them. The investigators did all of the thinking after that. The "universe" of media requested was everything on the phone, which Appellee unlocked and promptly

surrendered. Accordingly, Appellee's act of producing the contents of his phone by unlocking it did not require the extensive use of the contents of his mind.

Additionally, this case is like *Doe*, in that Appellee's act of granting the Government access to his phone communicated no fact to the Government. Like the signing of the consent decree in *Doe*, Appellee's act of unlocking his phone told the Government nothing about the existence of any messages on the phone, and cannot authenticate them. Like in *Doe*, any authentication will have to come from the investigators' testimony as to the chain of custody of the phone, and the forensic examiner's testimony as to what he found on it. Accordingly, even though Appellee's unlocking the phone was, strictly speaking, verbal, in that he entered some combination of numbers into his phone, as with the verbal signing of the consent form in *Doe*, it "is analogous to the production of a handwriting sample or voice exemplar: it is a nontestimonial act." *Doe*, 487 U.S. at 217. Appellee's unlocking of his phone was therefore not testimonial, and the military judge abused her discretion in suppressing its contents.

(b) *The existence, location, and authenticity of the contents of the phone were a foregone conclusion.*

An act of production is not testimonial where "[t]he existence and location of the papers are a foregone conclusion and the [witness] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Fisher*, 425 U.S. at 411. The foregone conclusion doctrine extends to

acts of production that express the authenticity of the media produced as well. *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1344; *see Hubbell*, 530 U.S. at 44-45.[8] The forgone conclusion doctrine does not require the Government to "identify exactly the documents it seeks, but it does require some specificity in its requests–categorical requests for documents simply will not suffice." *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1347. Courts have established that the Government must show "reasonable particularity" as to its prior knowledge of the media sought to invoke the foregone conclusion doctrine. *Id.* at 1344 & n.20 (citing *United States v. Ponds*, 454 F.3d 313, 320-21 (D.C. Cir. 2006); *In re Grand Jury Subpoena*, 383 F.3d 905, 910 (9th

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[8] Professor Kerr takes the position that the Eleventh Circuit has erred in applying the foregone conclusion to the contents of the media on the device, and that instead the Government should only have to show its prior knowledge that the suspect knew how to unlock the phone. Orin Kerr, *The Fifth Amendment Limits on Forced Decryption and Applying the 'Foregone Conclusion' Doctrine*, *The Volokh Conspiracy*, THE WASHINGTON POST (June 7, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/the-fifth-amendment-limits-on-forced-decryption-and-applying-the-foregone-conclusion-doctrine/?utm_term=.6d6733a4f08c. At least two states have followed this approach. *See Commonwealth v. Gelfgatt*, 468 Mass. 512 (2014) (limiting foregone conclusion analysis to the facts of the suspect's ownership and control of the computers and their contents; his knowledge of the fact of encryption; and his knowledge of the encryption key); *State v. Stahl*, No. 2D14-4283, 2016 Fla. App. LEXIS 18067 (Fla. Dist. Ct. App. Dec. 7, 2016). Under this view, Appellee's ability to unlock his phone was a foregone conclusion because the Government saw him use the phone to check the date and found the phone on his person in executing the search authorization. (JA 392, 480). A reasonable inference to be drawn from the facts that Appellee possessed and used the phone is that Appellee could access the phone.

Cir. 2004)). With electronic media, the Government must meet the reasonable particularity standard to show that it knew that "(1) the file exists in some specified location, (2) the file is possessed by the target of the subpoena, and (3) the file is authentic." *Id.* at 1349 n.28 (citing *United States v. Norwood*, 420 F.3d 888, 895-96 (8th Cir. 2005)).

Courts have applied the reasonable particularity standard to require the production of electronic media even where the Government has only partial information about the media sought. *See In re Boucher*, No. 2:06-mj-91, 2009 U.S. Dist. LEXIS 13006, at *3 (D. Vt. Feb. 19, 2009); *United States v. Fricosu*, 841 F. Supp. 2d 1232 (D. Colo. 2012). In *Boucher*, a Government agent searched a suspect's computer and found images with file names that suggested child pornography, the suspect admitted that he sometimes accidentally downloaded child pornography, and the suspect granted the agent access to an encrypted portion of the computer, allowing him to see some images of child pornography. 2012 U.S. Dist. LEXIS 11083, at *4-6. The Government sought to compel the suspect to decrypt the rest of the computer over his Fifth Amendment objection, noting that it would authenticate the files without using his act of production, and the court ruled that the forgone conclusion doctrine applied. *Id.* at *6, *10-11.

Similarly, in *Fricosu*, the Government seized a laptop labeled by the defendant's first name, and surreptitiously recorded a phone call in which she

implicitly admitted that some sort of incriminating files were on the laptop. 841 F.Supp.2d at 1234-35. The Government moved for an order requiring the defendant to decrypt the laptop, the defendant asserted the Fifth Amendment privilege, and the court granted the Government's request, holding that the foregone conclusion doctrine applied. *Id.* at 1237-38. In *Fricosu*, the Government granted the defendant immunity as to her production of the media such that it could not authenticate the files with her act of production, but would do so independently. *Id.* at 1238.

In this case, the defense did not contest that probable cause supported the search for and of Appellee's phone, and the military judge ruled that the search authorization particularly described the data to be searched for on the phone. (JA 407). In the Fourth Amendment context, "[p]robable cause exists where 'the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (alterations in original) (quoting *Carrol v. United States*, 267 U.S. 132, 162 (1925)). However, the military judge summarily ruled that the Government had not met its forgone conclusion burden without articulating what standard of proof she had applied. (JA 411-412).

The military judge abused her discretion by determining that the search authorization provided probable cause to search for the messages on Appellee's phone and that the search authorization particularly described the evidence to be searched for and the place to be searched, but that the Government had not met its forgone conclusion burden. With their shared focus on reasonableness and particularity, the probable cause standard and the reasonable particularity standard are co-extensive with each other. Under each standard, the Government's level of knowledge must be reasonable and particular, but not conclusive. *Compare Brinegar*, 338 U.S. at 175 n.14 *with United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1347. Logically, therefore, the military judge could not have found both (1) that there was probable cause to search the phone for the harassing messages and (2) that the Government did not know of the existence, location, and authenticity of the messages with reasonable particularity. Yet, she did. Accordingly, she was influenced by an erroneous view of the law as to the standard of proof and abused her discretion in applying the facts to the law. This Court should set aside her ruling.

Even if the two standards are not precisely co-extensive, the military judge abused her discretion in determining that the forgone conclusion doctrine did not apply. The Government knew that the victim received text messages and phone calls, because she reported as much. (JA 370). She also reported that the caller

and sender was Appellee, because the messages referenced things that only Appellee would know, such as the couple's inside jokes and the painful childhood memories she had only told Appellee. (JA 370). The Government also knew that Appellee used an iPhone 6, since they seized it from him in executing the lawful search. (JA 481). Before Appellee unlocked his phone, the Government knew, with reasonable particularity, that (1) the calls and messages existed, (2) that they were on the Appellee's phone, and (3) that the messages are authentic, which is to say they are what the Government purports that they are, messages sent by Appellee. *See* Military Rule of Evidence [hereinafter Mil. R. Evid.] 901(a); *United States v. Sideman & Bancroft, LLP*, 704 F.3d. 1197, 1203 (9th Cir. 2013).

The Government therefore met all three prongs of the forgone conclusion doctrine established by *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*. The Government proved these prongs at least as certainly as they were proved in *Boucher* and *Fricosu*. Accordingly, the military judge abused her discretion by ruling that the foregone conclusion doctrine did not apply. This Court should therefore set aside her ruling.

C. The military judge's remedy was overbroad.

The military judge's suppression of the phone and its contents was overbroad because she had no rationale for suppressing the physical phone and because only Appellee's ability to access his phone was incriminating.

1. The military judge had no reason to suppress the physical phone.

The military judge determined that the search and seizure authorization was supported by probable cause and particularly described the places to be searched and the evidence to be seized. (JA 407.). The investigators' seizure of the phone was thus lawful. Next, the military judge determined that the investigators obtained access to the *internal contents* of the phone by violating the Fifth Amendment privilege and by violating Appellee's Fifth Amendment right to counsel. (JA 408-410). However, as a remedy for unlawfully obtaining the internal contents of the phone, the military judge suppressed the phone's contents *and the phone itself.* (JA 412). The military judge provided no reason for this and had none, and thus acted arbitrarily. For this reason, she abused her discretion, and this Court should set aside at least that portion of her ruling suppressing the phone.

2. The military judge's suppression of the phone's contents was overbroad.

Even assuming Appellee's act of unlocking his phone was compelled and testimonial, only the fact that Appellee *could* unlock his phone was compelled, testimonial, and incriminating. Accordingly, the military judge's suppression of more than the evidence that Appellee unlocked his phone was an overbroad remedy. Because the Fifth Amendment is only violated when compelled, testimonial, and incriminating evidence is admitted against the accused at trial, the military judge should have only precluded the Government from admitting

evidence that Appellee unlocked the phone. Because she did more, she abused her discretion.

(a) *Only the fact that Appellee was able to unlock his phone could be constitutionally compelled, testimonial, and incriminating.*

Assuming for the sake of argument that Appellee's act of unlocking his phone was compelled and testimonial, the only aspect of the act that was incriminating is that it shows that he could access and use the phone. As incriminating as the messages and calls on the phone may be, they were not compelled at the time Appellee created them. *Hubbell*, 530 U.S. at 36 (citing *Fisher*, 425 U.S. at 409-10).

"The privilege afforded not only extends to answers [to questions] that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citing *Blau v. United States*, 340 U.S. 159 (1950)). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87. Thus, a suspect who could be subject to prosecution for racketeering need not answer questions about his business activities or knowledge of the location of his business associates, *id.* at 487-88, and

a suspect subject to prosecution for being a member of the Communist Party need not answer questions about her employment by or knowledge of the party. *Blau*, 340 U.S. at 160-61.

At first blush, it would seem that the *Hoffman* definition of "incriminating" would capture the internal contents of Appellee's phone, since the purportedly compelled and testimonial act of unlocking his phone led to the Government's access to it. However, the privilege only protects against disclosures that would serve to assist the prosecutor in proving the charges at trial; it does not protect against disclosures that simply assist investigators in discovering other evidence. *See Fisher*, 425 U.S. at 412-13. In *Fisher*, after holding that the compelled production of the tax preparation documents was not testimonial, the Court provided an alternative holding: the act of production would not be incriminating.

> Moreover, assuming that these aspects of producing the accountant's papers have some minimal testimonial significance, surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact existence [sic] of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.
>
> As for the possibility that responding to the subpoena would authenticate the workpapers, production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. The taxpayer would be no more competent to authenticate the accountant's workpapers or reports by producing them

> than he would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination.

Id.

As the Court's application of the law to the facts in *Fisher* demonstrates, the "link in the chain" principle applies to prevent compelled testimony that itself adds to the prosecutor's case against the witness at a future trial, not evidence that provides investigators with different, additional evidence. The privilege prevents evidentiary incrimination, not causal incrimination. *Hoffman* protects against testimony that provides a logical link *within* the evidence, not testimony that provides a causal link *to* other evidence. Obviously, the subpoena in *Fisher* and the respondent's compliance therewith was a "link" to the incriminating workpapers in the metaphorical sense. But in the legal sense provided by *Fisher*, the respondent's compliance with the subpoena added nothing to the prosecutor's case in a future criminal trial. It would have been fruitless for the prosecutor to argue, "You should find him guilty because he complied with the subpoena." Therefore the act of complying with it was not incriminating. *Hoffman*'s "link in the chain" language only means that compelled testimony that does not completely establish guilt, but only tends to establish guilt, such as the *Hoffman* defendant's

associations with other mobsters, is protected by the privilege. *Hoffman* does not stand for the proposition that any compelled testimony that results in the Government gaining access to other incriminating evidence is protected by the privilege, and *Fisher* establishes that the privilege extends only to compelled testimony that can be admitted in court to prove guilt.

Given this understanding of "incriminating," the only way Appellee's compliance with the investigators' request was arguably incriminating was in that it permits the factfinder to draw the following inference: (1) there were messages on the iPhone 6, (2) the messages were to Appellee's ex-wife, (3) Appellee was ordered not to send messages to his ex-wife, (4) the iPhone 6 was Appellee's, (5) the messages were sent by someone who could access the iPhone 6, (6) Appellee unlocked the iPhone 6 and so could access it, therefore (7) Appellee sent the messages. Assuming Appellee's unlocking of the phone was compelled and testimonial, it is only in this way that there could be a concurrence of compulsion, testimony, and incrimination. It makes no difference that the investigators were able access the messages because of Appellee's act of unlocking the phone. That provided causal incrimination, but not evidentiary incrimination. The only kind of incrimination contemplated by *Fisher* is the limited incrimination that comes from drawing the inference that Appellee was able to access the phone because he

unlocked it for the investigators, and that therefore he was the one who sent the messages.

(b) *The military judge's suppression of all of the phone's contents suppressed evidence that was not compelled, testimonial, and incriminating.*

Even assuming that Appellee's unlocking of the phone was both compelled and testimonial, the military judge's remedy–suppression of all of the phone's contents–was overbroad in relation to the Fifth Amendment violation at issue. The Fifth Amendment is not violated unless and until the compelled incriminating testimony is admitted at a criminal trial. *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion); *id.* at 778 (Souter, J., concurring in the judgment). Accordingly, any remedy must be tailored to the violation at hand. *See Chavez*, 538 U.S. at 767 (plurality opinion); *id.* at 778 (Souter, J., concurring in the judgment). In *Chavez*, the Court declined to allow a money damages suit for a plaintiff whose confession had been compelled, but who had never faced trial and had that confession admitted against him. *Chavez*, 538 U.S. at 767 (plurality opinion); *id.* at 778 (Souter, J., concurring in the judgment).

Further, the exclusionary rule is strong medicine, not to be extended without good reason. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

> Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have

> therefore been "cautio[us] against expanding" it, *Colorado v. Connelly*, 479 U.S. 157, 166 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvania Bd. Of Probation and Parole v. Scott*, 524 U.S. 357, 364-65 (1998). We have rejected "[i]ndiscriminate application" of the rule, *Leon*, *supra*, at 908, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," *United States v. Calandra*, 414 U.S. 338, 348 (1974)–that is, "where its deterrence benefits outweigh its 'substantial social costs," *Scott*, *supra*, at 363 (quoting *Leon*, *supra*, at 907).

Id.

In the context of the compelled production of electronic media, courts have held that, where the incriminating aspect of an act of production will not be admitted at trial, the Fifth Amendment is not violated. *Fricosu*, 841 F.Supp.2d at 1238. *Boucher*, 2012 U.S. Dist. LEXIS 11083, at *10-11. In *Fricosu*, the Government provided the defendant immunity against its use of her act of producing the unencrypted contents of her computer, and the court issued a writ compelling her to decrypt the computer. *Id.* at 1238. Similarly, in *Boucher*, the Government asserted that it would not use the respondent's act of producing the media to prove its authenticity, one possible source of incrimination, and the court ordered the production. 2012 U.S. Dist. LEXIS 11083, at *10-11.

Here, assuming Appellee's unlocking of the phone was compelled and testimonial, the proper remedy was to preclude the Government from admitting

evidence at trial that Appellee unlocked the phone.[9] To do so would entirely cure the Fifth Amendment violation by preventing the factfinder from drawing the incriminating inference that, because Appellee could access the phone, he was the one who sent the messages to the victim. In that way, under *Chavez*, no Fifth Amendment violation would occur at all, because no compelled and incriminating testimony would be admitted at trial. The military judge's remedy of suppressing all of the contents of the phone was thus an abuse of discretion, for two reasons. First, her focus on what the investigators found *because of* Appellee's unlocking the phone, the phone's contents, showed that she was influenced by an erroneous view of the law. Her suppression of the contents of the phone shows that she adopted the metaphorical, causal view of "a link in the chain of evidence" that is inconsistent with *Fisher*. Second, her decision to suppress a great deal of useful and important evidence was in violation of Supreme Court precedent. To impose such an overbroad remedy is to drastically expand the exclusionary rule far beyond

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[9] There are several ways a military judge could accomplish this. The *Boucher* method is to require the Government to avoid admitting any evidence that the suspect decrypted the media, which is a method the trial counsel suggested in this case. (JA 366). A second possibility is to enter a limited order suppressing any evidence that the suspect decrypted the media. Finally, if the Government wishes to admit evidence that the suspect decrypted the media despite the privilege, the *Fricosu* method is to provide testimonial immunity to the suspect for the act of decrypting the media, thereby curing any Fifth Amendment problem. *See Kastigar v. United States*, 406 U.S. 441 (1972); *Sideman*, 704 F.3d at 1204 (discussing "act-of-production immunity").

the right it is meant to protect, contrary to *Chavez* and *Hudson*. Accordingly, even if this Court holds that the investigators' request to Appellee compelled a testimonial act, the military judge abused her discretion by expanding her remedy beyond the harm done by the violation. Accordingly, this Court should set aside the military judge's ruling.

II. This Court should set aside the military judge's ruling because the investigators did not violate the *Edwards* rule.

The military judge abused her discretion in suppressing the phone and its contents as a violation of the Fifth Amendment right to counsel because Appellee was not in custody at the time the investigators asked for his PIN and the investigators' request did not badger Appellee into submitting to interrogation. Under the Fifth Amendment, a person who is subject to custodial interrogation must be warned, among other things, of his right to counsel. *Miranda*, 384 U.S. at 469-70. A suspect, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85.

A. Appellee was not in custody when the investigators asked him to unlock his phone.

"In every case involving *Edwards*, the courts must determine whether the suspect was in custody when he requested counsel *and* when he later made the statements he seeks to suppress." *Shatzer*, 559 U.S. at 112 (emphasis added). For purposes of *Miranda*, a person is in custody if "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Courts consider all of the circumstances of the interrogation to determine whether a reasonable person in the suspect's position would feel free to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Restraint on freedom of movement is a necessary but not sufficient aspect of custody; there must be some additional factor that implicates the coercive concerns on which *Miranda* rested. *Shatzer*, 559 U.S. at 112-13. This Court applies several factors in considering whether a suspect was in custody, including:

> (1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred . . . (3) the length of the questioning . . . [(4)] "the number of law enforcement officers present at the scene and [(5)] the degree of physical restraint placed upon the suspect."

United States v. Chatfield, 67 M.J. 432, 438 (C.A.A.F. 2009) (quoting *United States v. Mittel-Carey*, 493 F.3d 36, 39 (1st Cir. 2007)).

Here, first, while the military judge found that Appellee's commander directed that he be brought to the office, this fact is insufficient to render Appellee's contact with the investigators "custody." Under *Shatzer*, some other factor beyond a restriction on the freedom of movement must exist to implicate *Miranda*'s concerns about coercion. Additionally, even if Appellee was ordered to go to the commander's office, he was not ordered to answer any questions or cooperate in any way. *Cf. Chatfield*, 67 M.J. at 438 (holding that the suspect was not in custody, noting that he had not been ordered to answer questions).

Second, the location and environment of the questioning was not custodial. Where a suspect is released from custody and returned to his daily life, he is not in custody any longer, even if his daily life involves a restriction of his movement. *See Shatzer*, 559 U.S. at 113. In *Shatzer*, the suspect was serving a prison sentence following a lawful conviction. *Id.* at 100-101. He was brought to speak with a detective about an unrelated crime and asserted his right to counsel, at which point he was released back into the general prison population. *Id.* at 101. The Court concluded that this constituted a break in the defendant's custody. *Id.* at 113. The Court explained:

> Interrogated suspects who have previously been convicted of crime live in prison. When they are released

> back into the general prison population they return to their accustomed surroundings and daily routine–they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.
>
> Their detention, moreover, is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing.

Id.

Here, whatever coercive pressures were present when the investigators asked Appellee for his PIN were far below those present in *Shatzer*, and the military judge abused her discretion in failing to distinguish this case from *Shatzer*. Like prisoners, servicemembers' daily life keeps them restrained to wherever their superiors have established as their place of duty. *See* Article 86, UCMJ. However, also like prisoners, this baseline level of restraint constitutes a soldier's "accustomed surroundings and daily routine . . . ." *Shatzer*, 599 U.S. at 113. Like the prisoner in *Shatzer*, when Appellee was released from the military police station he "regain[ed] the degree of control [he] had over [his life] prior to the interrogation." *Id.* Also like the *Shatzer* prisoner, Appellee was not isolated with his accusers but instead was returned to the relative comfort of his unit and the other members of his company. The "restraint" imposed upon him by having to be

at his place of duty was far less than what was imposed on the incarcerated prisoner in *Shatzer*, and, like the *Shatzer* prisoner, it had nothing to do with his prior unwillingness to cooperate and its duration was not controlled by his interrogator. Further, Appellee was in his commander's office rather than an interrogation room and the investigators were not accusatory during the exchange; they merely executed the search authorization and asked for Appellee's PIN. *Cf. Chatfield*, 67 M.J. at 439 (noting that the suspect was in an office with normal furnishings, rather than an interrogation room, and that the officer was not accusatory).

Third, the exchange was very brief. Staff Sergeant Knight brought Appellee from the police station to the company area. (JA 479). Staff Sergeant Knight then spoke to the commander in his office for some time, and then left to attend a meeting. (JA 479). While SSG Knight was in the meeting, the exchange between the investigators and Appellee occurred in the commander's office. (JA 479). Staff Sergeant Knight's meeting lasted 45 minutes. (JA 479). After this meeting, SSG Knight escorted Appellee to his car. (JA 479). The exchange in the office therefore lasted less than 45 minutes. *Cf. Chatfield*, 67 M.J. at 439 (holding express questioning was not custodial where it lasted "less than one hour.").

Fourth, only two law enforcement officers were present. *Cf. Mittel-Carey*, 493 F.3d at 39-40 (holding suspect was in custody where eight officers were

present). Fifth, Appellee was not subject to any physical restraint. Given these factors, Appellee was not subject to custody, and so the military judge erred in ruling otherwise. This Court should therefore set aside her ruling.

B. The investigators did not badger or coerce Appellee into submitting to interrogation.

Edwards clearly prohibits "interrogation" of a custodial suspect after he has invoked the right to counsel unless counsel is present. But "interrogation" is narrowly defined only as express questioning or "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Prior decisions of this Court establish that the investigators' request of Appellee to provide his PIN following the lawful seizure of his phone was not "interrogation," because their request was no different than a request for consent to search. *See United States v. Frazier*, 34 M.J. 135, 137 (C.M.A. 1992) (holding that a request for consent to search does not "infringe upon Article 31 or the Fifth Amendment safeguards against self-incrimination because such requests are not interrogations and the consent given is ordinarily not a statement); *United States v. Roa*, 24 M.J. 297, 299 (C.M.A. 1987) (Cox, J.); *Roa*, 24 M.J. at 301 (Everett, C.J., concurring in the result) (holding a request for consent to search Appellee's locker following his invocation of the right to counsel was not "interrogation" and did not violate *Edwards*).

Before the Supreme Court's decision in *Shatzer*, many courts held that *Edwards* only prevented the "interrogation" of suspects following their invocation of the right to counsel. *See Roa*, 24 M.J. at 301 (Everett, C.J., concurring in the result); Kit Kinports, *What Does* Edwards *Ban?: Interrogating, Badgering, or Initiating Contact?* (April 11, 2016), Northern Kentucky University Law Review (forthcoming) 1 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763240) (last visited January 21, 2016). However, in *Shatzer*, the Court described *Edwards* as protecting against "coerc[ing] or badger[ing]," "subsequent attempts" at interrogation, "requests for interrogation," "any efforts to get [the suspect] to change his mind," and "asking the suspect whether he would like to waive his *Miranda* rights" to "'wear down the accused.'" *Shatzer*, 559 U.S. at 98, 105, 108, 113 n.8 (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam)). The Court explained, "[W]e are not talking about 'interrogating' the suspect; we are talking about *asking his permission* to be interrogated." *Id.* at 115. Thus, the Court indicated that contact initiated by the police short of interrogation that seeks to push the suspect toward submitting to interrogation is barred by *Edwards*.

Following *Shatzer*, this Court held that, in certain extraordinary circumstances, an investigator's request for consent to search may violate *Edwards*. *United States v. Hutchins*, 72 M.J. 294, 298-99 (C.A.A.F. 2013). In

Hutchins, the Appellee was warned of his rights and invoked the right to counsel, at which point the questioning stopped. 72 M.J. at 296. After this, he was placed under guard in a trailer in a combat zone with no access to the outside world. *Id.* at 296-97. After a week in these conditions and with no access to counsel, the same investigator approached the Appellee to request his consent to search his personal belongings. *Id.* at 297. The investigator provided the Appellee with a consent form that reminded the Appellee that he was under investigation for conspiracy, murder, assault, and kidnapping. *Id.* In response, the Appellee asked the investigator if he could still talk to him about the offense, and subsequently provided a detailed written confession. *Id.*

This Court re-affirmed that a request for a search is generally not "interrogation," and that "[n]ot all communications initiated by an accused or law enforcement will trigger the protections of *Edwards*." *Id.* at 297-98. This Court noted that Supreme Court precedent distinguished between inquiries that "represented a desire to open a more 'generalized discussion relating directly or indirectly to the investigation' and those 'inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship.'" *Id.* at 298 (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983)). This Court concluded that *Edwards* prohibits contact short of

interrogation,[10] and that the question was whether the investigator initiated a generalized discussion relating to the investigation. *Id.* Under the facts before it in *Hutchins*, this Court determined that *Edwards* had been violated, focusing particularly on the conditions of the Appellee's custody, his isolation, the investigator's purpose of furthering the investigation, and the accusatorial nature of the consent form. *Id.* at 298-99.

Reading *Shatzer* in conjunction with *Hutchins*, the rule that emerges is that, after a suspect has invoked the right to counsel, the police may not engage in contact with the suspect that (1) amounts to more than the routine incidents of custodial interrogation and that, (2) under the circumstances, constitutes badgering or coercing the suspect into permitting interrogation without a lawyer, even if (3) the contact amounts to less than "interrogation." Under this reading, *Shatzer* is in harmony with this Court's decision in *Hutchins*, because the conditions of the appellant's confinement without counsel and the accusatory nature of the consent request form in *Hutchins* operated to badger the appellant into submitting to interrogation.

Applying these principles here, and assuming Appellee was in custody in his commander's office, Appellee was not badgered into submitting to interrogation.

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[10] In contrast, Mil. R. Evid. 305(c)(2), by its own terms, applies only to "interrogation," and is thus inapplicable to the investigators' request for Appellee's PIN, which is like a simple request to search under *Frazier*.

As the investigators described, their request for Appellee's PIN was a standard practice, and thus was a "routine incident" of the custodial relationship. (JA 480). Even if it were not, none of the extraordinary circumstances that were present in *Hutchins* were present in this case. Appellee was not confined and isolated without access to the outside world for an extended period of time and the investigators did not implicitly re-accuse him of his crimes by asking for his PIN. They did not ask to ask him questions about the offense without his lawyer; they asked for the PIN to his phone.

Contrary to this, the military judge, relying on *United States v. Bondo*, ACM 38438, 2015 CCA LEXIS 89 (A.F. Ct. Crim. App. March 18, 2015) (unpublished), ruled, "Once the investigator reinitiated 'communications, exchanges, or conversations' about matters more than a routine incident of the custodial relationship, he was in violation of *Edwards* and the accused's Fifth Amendment right to counsel." (JA 411).[11] Like the court in *Bondo*, the military judge applied the wrong test. *Hutchins* did not provide that *all* police-to-suspect communications, exchanges, or conversations that rise to a level beyond the routine incidents of custody per se violate *Edwards*. If that were the test, this Court would not have had any reason to focus on the unique circumstances present

[11] The military judge was also influenced by an erroneous view of the law in her *Edwards* analysis in her belief that this Court expressed an opinion on the merits in its footnote in *Huntzinger*. (JA 408).

in that case, because it could have just determined whether or not requesting consent to search was a routine incident of custody. Instead, though, this Court placed heavy emphasis on the circumstances of the confinement and the nature of the consent request form. This Court explained:

> It is hard to imagine a situation where [*Edwards*] would be more of a concern than in the present case, i.e., while deployed to a foreign country in a combat environment Hutchins was held in essentially solitary confinement in a trailer for seven days after invoking his right to counsel; despite his request for counsel, no attorney was provided during this period and no explanation was provided to Hutchins as to why; he was held incommunicado . . .; and he was not allowed to use a phone, the mail system, or other means of communication to contact an attorney, family, friends, or anyone else.

Hutchins, 72 M.J. at 298 n.5.

Further, this Court twice emphasized the importance of the accusatory nature of the consent request form. In discussing its reasons for holding that *Edwards* was violated by the police contact, this Court said, "Importantly, the search authorization again reminded Hutchins that he was under investigation for conspiracy, murder, assault, and kidnapping" *Id.* at 298. In responding to the dissent, this Court explained:

> Although a request for consent to search is not in itself an interrogation under *Frazier*, we do not agree with the dissent's suggestion that such a request has no bearing on the separate legal question as to whether, *under all the surrounding circumstances*, the Government reinitiated a communication under *Edwards* and *Bradshaw* . . . . In

> this case, for example, the communication was more than a simple request for consent to search, but instead included an implicit accusatory statement.

Id. at 299 n.10 (emphasis added). None of this analysis would have been necessary if, as the military judge determined, the sole test to be applied was whether the police-initiated contact was a routine incident of custody. Instead, *Hutchins* turned on its unique facts, not a per se test. *See United States v. Maza*, 73 M.J. 507, 522-23 (N.M. Ct. Crim. App. 2014).

Finally, the military judge's per se test fails to give meaning to *Shatzer*. As that case makes clear, the concern is not the protection of the suspect from *all* forms of contact, but from the police coercing or badgering the suspect into submitting to interrogation. *Shatzer* established that *Edwards* prevents the police from asking to ask questions. *Hutchins* implemented this concern by finding that the extreme nature of the suspect's isolation and the accusatory nature of the consent form in that case amounted to the investigator badgering the suspect into submitting to interrogation. The military judge's per se test, based on the flawed reasoning of *Bondo*, failed to give this concern any effect.

For these reasons, the military judge applied the wrong legal test to the investigators' request to Appellee for his PIN. She thus abused her discretion by being influenced by an erroneous view of the law and by coming to an incorrect conclusion of law. Accordingly, this Court should set aside her ruling.

III. This Court should set aside the military judge's ruling because she abused her discretion in applying the exclusionary rule.

Even assuming for the sake of argument that the investigators' conduct violated either Appellee's Fifth Amendment privilege or the *Edwards* rule, the military judge abused her discretion by applying the exclusionary rule as a remedy. The exclusionary rule does not apply to evidence derived from an *Edwards* violation and the inevitable discovery doctrine applied to the evidence on Appellee's phone.

A. There is no "fruit of the poisonous tree doctrine" for *Edwards* violations.

When the government obtains evidence derived from a violation of the Fourth Amendment it is not admissible under the "fruit of the poisonous tree" doctrine. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). However, there is no such rule for evidence derived from violations of *Miranda*'s prophylactic rule. *United States v. Patane*, 530 U.S. 630, 637 (2004) (plurality opinion); *id.* at 644-45 (Kennedy, J., concurring in the judgment). In *Patane*, police officers arrested the defendant but failed to give him a complete *Miranda* warning. 530 U.S. at 635 (plurality opinion). An officer interrogated the defendant anyway, and the defendant told him that he owned an illegal pistol. *Id.* The officer seized the pistol and the district court suppressed it. *Id.* Noting that *Miranda* provides only a prophylaxis against violations of the Fifth Amendment,

the Court held that the fruit of the poisonous tree doctrine does not apply to *Miranda* violations, and reversed the suppression of the pistol. *Id.* at 637, 644 (plurality opinion); *id.* at 644-45 (Kennedy, J., concurring in the judgment). In the same vein, a second confession derived from a first confession obtained in violation of *Miranda* is not per se inadmissible, *Oregon v. Elstad*, 470 U.S. 298, 313 (1985), and the testimony of a witness derived from a confession obtained in violation of *Miranda* is not inadmissible, *Michigan v. Tucker*, 417 U.S. 433, 450-51 (1974).

The *Edwards* protection is "a second layer of prophylaxis." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). Because *Patane* established that no fruit of the poisonous tree doctrine applies to the *Miranda* prophylaxis, it follows that no such rule applies to violations of *Edwards*' second-layer protection. *Maza*, 73 M.J. at 527-28.

This result is not changed in military courts by the 2013 stylistic changes to Mil. R. Evid. 305. The rule provides, "If a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, *or evidence derived from the interrogation after such request*, is inadmissible against the accused unless counsel was present for the interrogation." Mil. R. Evid. 305(c)(2). The prior version of the rule made no mention of derivative evidence in its subsection on the Fifth Amendment right to

counsel. Mil. R. Evid. 305(e), *reprinted in Manual for Courts-Martial, United States* (2008 ed.), pt. III, p. III-7. As the drafters of the rule explain, their only intent in re-wording the rule was to clearly delineate the separate rights to counsel under the Fifth and Sixth Amendments by re-labeling the appropriate subsections. *Manual for Courts-Martial, United States* (2012 ed.), app. 22, p. A22-19. The drafters have duly noted where the President intended to provide rights beyond what is required by the Constitution. *See id.* (noting an intent to extend protections beyond what is provided by *Montejo v. Louisiana*, 556 U.S. 778 (2009) and *Berghuis v. Thompkins*, 550 U.S. 370 (2010)). The drafters noted no intention to overrule *Patane* in the military through executive order, and military decisions since the revision have affirmed that the rights provided by the Military Rules of Evidence are co-extensive with *Patane*. *Maza*, 73 M.J. at 528. Accordingly, there is no fruit of the poisonous tree doctrine for violations of *Edwards*, and the military judge abused her discretion by providing a remedy with no basis in law.

B. The evidence on Appellee's phone would inevitably have been discovered.

"Evidence that would otherwise be suppressed is admissible if . . . it 'inevitably would have been discovered during police investigation without the aid of the illegally obtained evidence.'" *Wicks*, 73 M.J. at 103 (quoting *United States v. Runyan*, 275 F.3d 449, 466 (5th Cir. 2001)). The exception applies both to core violations of the Fifth Amendment privilege, *United States v. Kiser*, 948 F.2d 418,

422-23 (8th Cir. 1991); *United States v. Streck*, 958 F.2d 141, 145 (6th Cir. 1992); *State v. Hazelwood*, 866 P.2d 827, 831-32 (Alaska 1993), and to violations of the *Edwards* prophylactic rule, *Roa*, 24 M.J. at 302-03 (Everett, C.J. and Sullivan, J., concurring in the result).

A suspect may be ordered to provide fingerprints without violating the Fifth Amendment. *See Schmerber*, 384 U.S. at 764. Additionally, the Fourth Amendment permits a military suspect to be ordered, without a warrant, to provide fingerprints. *United States v. Fagan*, 28 M.J. 64, 70 (C.M.A. 1989). "A servicemember simply has no basis to withhold fingerprints from military authorities, provided that the manner of collecting them is reasonable." *Id.* at 69.

Where investigators have narrowed their focus to a particular individual, and the *Fagan* procedure is available to them, the Government meets its burden of showing that the fingerprints would have inevitably been obtained. *See United States v. Allen*, 34 M.J. 228, 231-32 (C.M.A. 1992). In *Allen*, a victim was attacked by an unknown assailant, and the Government came to believe the appellant was the assailant. The Government required the appellant to remain on board a ship, at which point it obtained his fingerprints. The appellant argued that his having to remain on board the ship constituted an illegal seizure requiring the suppression of his fingerprints. *Id.* at 231. This Court noted that investigators had already identified the appellant as a suspect and desired his fingerprints, and that

"under easily complied with procedures, the [investigators] could have compelled appellant to produce his fingerprints . . . ." *Id.* at 232 (citing *Fagan*). On these facts, this Court held that the Government carried its burden to show that the fingerprints would inevitably have been discovered, and affirmed the conviction. *Id. See also United States v. Owens*, 51 M.J. 204, 211 (C.A.A.F. 1999) (holding that evidence found in a car that was the subject of an unlawful search would inevitably have been discovered where the officer had probable cause to search the car because, "[w]hen the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation.").

Here, even assuming the investigators violated Appellee's Fifth Amendment privilege or the *Edwards* rule, they would inevitably have discovered the contents of Appellee's phone because they were solely focused on him as the culprit and could have easily used the *Fagan* procedure to obtain his fingerprint to access the phone. The victim stated that only Appellee could have sent the harassing messages, and the investigators determined to search the phone in seeking the authorization. When the question of whether Appellee's unlocking the phone was lawful arose, the trial counsel knew to check if it had Touch ID capabilities. Like in *Allen*, the investigators could have "easily" used the *Fagan* procedure to compel Appellee to press his finger to the phone and thereby unlock it. His doing so

would then have given the investigators access to the phone's contents. Like in *Allen*, these facts show by a preponderance of the evidence that the Government would inevitably have obtained the same evidence the military judge suppressed. Accordingly, the military judge abused her discretion by applying the exclusionary rule, and this Court should set aside her ruling.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court set aside the military judge's ruling.

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