**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br>Appellant | ) | APPELLANT'S REPLY BRIEF |
| v. | ) | |
| | ) | Crim. App. Dkt. No. 20150776 |
| Sergeant (E-5)<br>**EDWARD J. MITCHELL II,**<br>United States Army,<br>Appellee | ) | USCA Dkt. No. 17-0153/AR |


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

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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, arguing that the investigators' request for the PIN violated his Fifth Amendment privilege and the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). (JA 289-324). The motion did not assert that the investigators' question regarding whether Appellee had a phone violated his rights, only the request for the PIN. (JA 299-300). The military judge suppressed the phone and evidence investigators found on it. (JA 403-412, 477-85).

## 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 *Edwards*.

### I. The Fifth Amendment privilege and the prophylactic rule of *Edwards* require separate analyses.

Throughout his brief, Appellee merges analysis of whether his Fifth Amendment privilege was violated with analysis of whether the *Edwards* rule was violated. This merging of the two concepts is error because the legal tests are different. The core Fifth Amendment privilege is only violated when the communication at issue is "testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). On the other hand, the *Edwards* rule, which concerns a suspect's right to counsel, is that an accused, "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 communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85. *Miranda* is a prophylactic rule designed to protect the Fifth Amendment privilege, and the *Edwards* protection is "a second layer of prophylaxis." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). The two concepts are not the same, and to merge the two is to confuse the law.

For example, in addressing the first *Hiibel* requirement, whether the communication was "compelled," Appellee addresses whether the investigators violated the *Edwards* rule. (Appellee's Br. 16-17). But the test for whether a communication is compelled is whether the alternative to speaking is "so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession.'" *South Dakota v. Neville*, 459 U.S. 553, 562-63 (1983) (citing *Schmerber v. California*, 384 U.S. 747, 765 n.9 (1966)). The test for whether *Edwards* was violated is whether investigators initiated a generalized conversation about the offense following the suspect's request for counsel. The two tests are not the same, nor are they even similar.

Elsewhere, Appellee argues that the forgone conclusion doctrine only applies "to the context of a judicial or a quasi-judicial order of production, where there is an appropriate remedy immediately available in the form of a motion to quash." (Appellee's Br. 21). Appellee goes on to argue that the forgone

conclusion doctrine does not apply to this case because the investigators violated *Edwards*. (Appellee's Br. 21-22). Again, the core Fifth Amendment privilege and the *Edwards* rule are different, and must be analyzed differently. In analyzing the Fifth Amendment privilege, the Supreme Court does not draw any distinction between whether the encounter at issue was "judicial or quasi-judicial" or whether a motion to quash is immediately available. *See Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (plurality opinion) (requiring a suspect to affirmatively invoke the privilege during the course of an interview to claim its benefit); *Hiibel*, 542 U.S. at 180-81, 189-90 (applying the Fifth Amendment privilege to a roadside police encounter); *Neville*, 459 U.S. at 554-55, 562-63 (same).

The question, instead, is whether Appellee's communication was testimonial under *Hiibel*. If the information in the communication was a foregone conclusion, the communication was not testimonial, and so was not protected by the privilege. *Fisher v. United States*, 425 U.S. 391, 411 (1976). Whether the interaction violated the double-layer, prophylactic *Edwards* rule is an entirely different question, bound up in whether Appellee was in custody and whether the investigators asked to interrogate him. The two questions are handled separately by courts and have been posed separately by the Judge Advocate General. This Court should answer them separately.

**II. Appellee did not challenge the investigators' question about whether he had a phone.**

In a number of places, Appellee argues that the military judge's ruling was correct because the investigators' asked Appellee if he had a phone on his person. (Appellee's Br. 14-15, 26-27). But Appellee's motion never challenged this act of the investigators. Instead, Appellee relied exclusively on the investigators' act of asking for the phone's PIN in his motion. (JA 299-300). The issue of whether the investigators' question about whether Appellee had a phone was never put before the military judge, and she did not rely on that fact in her ruling. "A motion shall state the grounds upon which it is made . . . ." Rule for Courts-Martial 905(a). "[T]he law 'does not require the moving party to present every argument in support of an objection, but does require argument sufficient to make the military judge aware of the specific ground for objection, if the specific ground was not apparent from the context.'" *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014) (quoting *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005)) (applying the "not apparent from the context" test to an instructional objection); *cf.* Mil. R. Evid. 304(f)(6) (for motions to suppress statements, "the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence."); Mil. R. Evid. 311(d)(5)(C) (for motions to suppress evidence discovered through a search or seizure, "the burden on the prosecution extends to

the grounds upon which the defense moved to suppress or objected to the evidence.").

Here, the investigators' question regarding whether Appellee was then in possession of a phone was not put before the military judge as a basis for suppressing the phone and its contents. Accordingly, evidence in the record of that question does not save the military judge's ruling from being erroneous.

**III. Whether the substance of a communication was a foregone conclusion is a question of law reviewed de novo.**

Appellee argues that the question of whether any information the Government learned from his unlocking of his phone was a foregone conclusion is one of fact reviewed by this Court only for clear error. (Appellee's Br. 22-23). In this regard, he correctly notes that the Eighth and Ninth circuits apply the clearly-erroneous standard of review to foregone-conclusion questions. *United States v. Norwood*, 420 F.3d 888, 895 (8th Cir. 2005) (citing *United States v. Doe*, 465 U.S. 605 (1984)); *United States v. Bright*, 596 F.3d 683, 690 (9th Cir. 2010) (citing *Norwood*, 420 F.3d at 895)). However, there is a circuit split on this issue: the Eleventh Circuit reviews the question de novo. *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d 1335, 1338 (11th Cir. 2012). Under the Eleventh Circuit's view, the issue is a mixed question of law and fact, under which a trial court's factual findings are reviewed under the clearly-erroneous standard and the application of the privilege is reviewed de novo. *Id.* (citing *Doe*, 465 U.S.

at 613-14; *United States v. Hernandez*, 141 F.3d 1042, 1049 (1998)). In *Doe (In re Grand Jury Subpoena Duces Tecum)*, the court reviewed a trial court's application of the foregone conclusion doctrine and reversed, without discussion of whether any findings of fact were "clearly erroneous." *Id.* at 1349 ("The 'foregone conclusion' doctrine does not apply under these facts.").

This Court should adopt the Eleventh Circuit's approach because it is most in line with this Court's prior precedent. As this Court has repeatedly established, a motion to suppress presents a mixed question of law and fact. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014). It involves a question of fact because the trial court must initially determine the historical facts underlying the motion. *See United States v. Ayala*, 69 M.J. 63, 65 (C.A.A.F. 2010) (holding that the question of a commander's "primary purpose" in conducting an examination is one of "historical fact" reviewed for clear error). Thus, for example, one of the disputed issues at the trial level in this case was the manner in which Appellee unlocked his phone: by PIN or thumbprint? The military judge, as a matter of historical fact, found that he unlocked the phone with a PIN. That finding will not be upset by this Court unless it is clearly erroneous. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

On the other hand, the application of the Fifth Amendment privilege is a question of constitutional law reviewed de novo. *United States v. Castillo*, 74 M.J.

160, 165 (C.A.A.F. 2015). When this Court faces a mixed question of law and fact, it accepts the military judge's findings of historical fact unless they are clearly erroneous, but reviews the application of the law to those findings of fact de novo. *United States v. Melanson*, 51 M.J. 1, 2 (C.A.A.F. 2000) (citing *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999) ("When an accused contests personal jurisdiction on appeal, we review that question of law *de novo*, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record."). Thus, the military judge's conclusions of law are reviewed de novo. *United States v. Piren*, 74 M.J. 24, 27 (C.A.A.F. 2015) (citations omitted). So, for example, the question of whether Appellee's unlocking of the phone with a PIN violated his Fifth Amendment privilege is reviewed by this Court de novo, with no deference given to the military judge on that issue.

The legal question of whether the Fifth Amendment applies to a given set of facts is answered with reference to, *inter alia*, whether the act was "testimonial." *Hiibel*, 542 U.S. at 189. As a matter of law, a communication is not testimonial if its substance was a "foregone conclusion." *Fisher*, 425 U.S. at 411. A communication is a foregone conclusion if the Government already knows the information with "reasonable particularity." *Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1344. "Reasonable particularity" is a legal standard. Thus, whether the Government's knowledge amounted to "reasonable

particularity" is a legal conclusion, reviewed de novo. Accordingly, the military judge determines historical facts—what information the Government possessed—subject to the clearly-erroneous standard of review on appeal. Then, the military judge makes a legal conclusion—whether the Government's knowledge amounted to "reasonable particularity—subject to the de-novo standard on appeal.

Here, the military judge made no finding as to the relevant historical facts, i.e., what the Government knew before the purportedly compelled disclosure. Under the emerging Massachusetts and Florida view, the relevant historical facts are only what the Government knew of Appellee's possession and access to the phone. *See Commonwealth v. Gelfgatt*, 468 Mass. 512 (2014); *State v. Stahl*, No. 2D14-4283, 41 Fla. L. Weekly D 2706 (Fla. Dist. Ct. App. 2016). Under the Eleventh Circuit's view, the relevant historical facts are what the Government knew of the existence, location, and authenticity of the phone's contents. *Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1349 n.28. Under either view, the military judge here made no finding of fact pertinent to the inquiry. All she did was conclude that the Government's knowledge did not make the purportedly compelled communication a foregone conclusion (albeit without articulating the "reasonable particularity" standard). (JA 411-12). That is a legal conclusion, reviewed de novo by this Court, and there is no factfinding to defer to.

Accordingly, this Court should review de novo the constitutional question of whether Appellee's unlocking his phone was testimonial.

**IV. Each of the facts Appellee argues were implied by his act of production were a foregone conclusion.**

Appellee lists eight facts that were implied by his act of unlocking his phone: (1) that he owned an iPhone; (2) that the phone was encrypted; (3) that those who did not know the PIN could not access the phone; (4) that Appellee knew the PIN; (5) that Appellee could access his phone; (6) that Appellee did not wish to disclose the PIN; (7) that Appellee knew how to change the phone's security settings; and (8) that the phone contained certain files. (Appellee's Br. 19). The final three of these facts can be dismissed out of hand. The sixth, that Appellee would not tell others his PIN, was not implied by his entry of the PIN; instead, it was expressed by his statement that he would not disclose the PIN, which statement was not challenged by the motion to suppress. The seventh fact, that Appellee could change the security features, whether or not testimonial, is simply not incriminating in any sense. Appellee's eighth fact, that his unlocking the phone somehow implied that certain files were on the phone, is illogical and wholly unsupported by the record.

This Court should apply the Massachusetts-Florida view of the foregone-conclusion doctrine to the remaining five facts Appellee suggests were implied by his act of unlocking the phone. Under that view, the forgone conclusion doctrine is

to be applied to the facts inherent in the act of producing the digital media, not to the contents of the media. *Gelfgatt*, 468 Mass. 516; *Stahl*, 41 Fla. L. Weekly D 2706. This view is superior to the competing view, that of the 11th Circuit, which asks whether the Government already knew of the contents of the media. *Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1346.

The 11th Circuit concluded that the foregone conclusion doctrine considers the contents of the media by drawing the analogy to the production of certain documents, which is controlled by *Fisher* and *United States v. Hubbell*, 530 U.S. 27 (2000). But this analogy is ill-fitting where the suspect merely unlocks his entire phone. A suspect who responds to a subpoena requesting certain documents asserts that he possessed the documents and that the documents he has produced are those requested by the subpoena. However, a suspect who unlocks his phone with a PIN asserts nothing about the contents of the phone. Indeed, he may have no idea what is on the phone; he has only implied that he knows the PIN. For example, a person who occasionally borrows his sister's phone and unlocks it in response to a request asserts that he knows the PIN, but does not assert that he knows what is on the phone. *See* 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. Instead, it is as if Appellee unlocked the door to an office where his papers reside and permitted investigators to search through them, without selecting any specific documents. Accordingly, the Massachusetts-Florida view of the foregone conclusion doctrine is the correct one: the doctrine should be addressed only to those aspects of the suspect's act of production that imply some fact.

Applying this approach to the facts Appellee suggests were implied in this case, each was a foregone conclusion. First, the Government already knew that Appellee possessed an iPhone 6 before he unlocked it. The investigators had just taken the phone off of Appellee's person when he unlocked it, so they already knew that he had it. Second, the investigators already knew that the phone was encrypted. The investigators' request for the PIN, about which Appellee complains, was triggered by the investigators' realization that the phone was encrypted. Third, investigators knew that those who did not know the PIN could not access the phone because that is true of all encrypted devices. Fourth and fifth, investigators knew that Appellee knew the PIN because anyone who possesses a phone almost certainly can access that phone. The only reasonable inference to be drawn from Appellee's possession of the phone is that it was a device he could use, and not merely a very expensive paper weight. The foregone conclusion doctrine

thus applies to all of the facts implied by Appellee's act of unlocking the phone, so the privilege does not apply.

## V. The distinction between "to unlock" and "to decrypt" has no legal significance in this case.

Amici correctly note that there is a technical difference between unlocking a phone and decrypting a phone (although, in the case of an iPhone 6, one will always accompany the other). (Br. of the Electronic Frontier Foundation et al. as Amicus Curiae 5-8). However, that distinction has no legal significance in this case because Appellee did not provide the PIN to the investigators. To be testimonial, a communication must actually transmit information from the suspect to the Government. (Appellant's Br. 13-15). Appellee never told the investigators what his PIN was, and the Government still does not know it. Thus, Appellee's act of entering the PIN—whether it unlocked the phone, decrypted it, or both—was not testimonial. To be sure, being forced to tell the Government one's PIN would be testimonial. *See United States v. Kirschner*, 823 F.Supp.2d 665, 668 (E.D. Mich. 2010); *SEC Civil Action v. Huang*, NO. 15-269, 2015 U.S. Dist. LEXIS 127853, at *2 (E.D. Pa. Sep. 23, 2015); *cf. United States v. Hubbell*, 530 U.S. 27, 42 (2000) (ascribing constitutional significance to the difference between being forced to surrender the key to a strong box and being forced to disclose the combination to a wall safe). But that is not what occurred in this case, and it makes no difference that the PIN would have decrypted the phone.

Nor does the distinction affect the analysis if one views Appellee's act as having produced the phone's internal contents. For such acts of production, courts apply a two prong test, asking first whether the suspect made "extensive use of 'the contents of his own mind' in identifying" the documents and, second, whether any facts implied by the production were a forgone conclusion. *Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d at 1345-46. Here, that Appellee both unlocked and decrypted the phone makes no difference to either inquiry. Appellee did not make extensive use of his mind in producing the unencrypted contents of his phone because he did not have to cull through the contents to select those documents that were responsive to the request; he simply surrendered all of the phone's contents in an unencrypted form. *See In re Welsh*, no. 13-02457-8-SWH, 2013 Bankr. LEXIS 4716 (Bankr. E.D. N.C. 2013); *Sallah v. Worldwide Clearing, LLC*, 855 F.Supp.2d 1364, 1373 (S.D. Fl. 2012). Somewhat obviously, whether Appellee decrypted the phone also has no bearing on what knowledge the Government had of the testimonial aspect of Appellee's act of production under the foregone conclusion doctrine. Thus, the distinction, while technically accurate, is irrelevant in this case.

**VI. Whether a person was in custody is a question of law reviewed de novo.**

Appellee argues that this Court should leave undisturbed the military judge's ruling that he was in custody when the investigators asked for his PIN because it is

a finding of fact that is not clearly erroneous. (Appellee's Br. 33). However, whether a person was in custody is a legal conclusion reviewed de novo.

> A military judge's denial of a motion to suppress a confession is reviewed for an abuse of discretion. *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003). [This Court] will not disturb a military judge's findings of fact unless they are clearly erroneous or unsupported by the record. *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). However, [this Court] review[s] *de novo* any conclusions of law supporting the suppression ruling, including: (1) whether someone is in custody for the purposes of *Miranda* warnings, *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) . . . .

*United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). As with the foregone conclusion doctrine, this Court grants the military judge substantial deference in findings of historical fact, but no deference on the legal question of whether those facts constitute "custody" under *Miranda*. Thus, this Court owes the military judge in this case no deference on that question.

**VII. The test for unlawful police contact following a suspect's invocation of his right to counsel is whether the police asked to ask questions.**

Appellee argues that the test for impermissible police contact following a suspect's invocation of his right to counsel is whether the police *interrogated* the suspect, but also that police may never ask for consent to search. (Appellee's Br. 29). Appellee's formulation of the test is simultaneously overly broad and overly narrow. It was once this Court's opinion that *Edwards* is only violated when police interrogate the suspect following his invocation of the right to counsel.

*United States v. Roa*, 24 M.J. 297, 301 (C.M.A. 1987) (Everett, C.J., concurring in the result). However, since then, the Supreme Court has explained that "we are not talking about 'interrogating' the suspect; we are talking about *asking his permission* to be interrogated." *Maryland v. Shatzer*, 559 U.S. 98, 115 (2010). Consistent with this understanding of what level of police contact violates *Edwards*, this Court has held that *Edwards* was violated when police engaged in conduct that was short of interrogation. *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013). However, at the same time, this Court noted that the test considers "all the surrounding circumstances," and re-affirmed that a request for consent to search does not constitute interrogation. *Id.* at 299 n.10 (citing *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992)). While the United States would perhaps prefer Appellee's suggested rule—that *Edwards* is only violated when police *interrogate* the suspect—as it would narrow the class of cases in which valuable evidence is suppressed, courts have made clear that that is not the law.

Instead, under *Shatzer*, the question is whether the police asked Appellee's permission to interrogate him. Put another way, the test is whether, under all of the surrounding circumstances, the investigators asked to ask questions about the offense. As *Hutchins* shows, such a request for permission may be express or implied by the circumstances. Here, the investigators did not ask Appellee for permission to interrogate him or ask to ask him questions, they asked for the PIN

to his phone. The circumstances did not imply a request for further interrogation, and so *Edwards* was not violated. Accordingly, the military judge abused her discretion in suppressing the evidence under *Edwards*.

## VIII. *Edwards* violations do not result in the suppression of derivative evidence.

Appellee argues that the exclusionary rule extends to bar evidence derived from *Edwards* violations under Mil. R. Evid. 305. (Appellee's Br. 35-39). Mil. R. Evid. 305 does not extend suppression to derivative evidence for two reasons. First, the *Edwards* derivative evidence language in the rule is a scrivener's error and the drafter's analysis shows an intent to make no substantive change. Where there is evidence that the language of a statute or rule is the result of a scrivener's error courts may look to the legislative history to discern the lawmaker's intent. *See Lamie v. United States Tr.*, 540 U.S. 526, 539-40 (2004). *See also id.* at 542-43 (Stevens, J., concurring in the judgment) ("Whenever there is . . . a plausible basis for believing that a significant change in statutory law resulted from a scrivener's error, I believe we have a duty to examine legislative history."). Additionally, the President's authority to prescribe rules of evidence comes with the caveat that he "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ." UCMJ art. 36(a).

Here, there is a more than plausible basis to conclude that the language on which Appellee relies in Mil. R. Evid. 305 contains a scrivener's error, as a literal interpretation would break sharply from civilian practice. Mil. R. Evid. 305(c)(2) is entitled "Fifth Amendment Right to Counsel." However, its text reads, "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). This part of the rule is directly contrary to the limits of the Fifth Amendment right to counsel, as conclusively interpreted by the Supreme Court in *United States v. Patane*, 530 U.S. 630 (2004), which held that the exclusionary rule does not extend to violations of *Miranda* and its progeny. So, despite purporting to state the rule for the Fifth Amendment, the literal language of the rule states something else.

The history of the rule confirms that this was a mistake that should not be given effect. Previously, the rule was entitled "Custodial interrogation," while the Sixth Amendment counterpart was entitled "Post-preferral interrogation." Mil. R. Evid. 305(e)(1), (2), *reprinted in Manual for Courts-Martial, United States* (2008 ed), pt. III, III-7. Subsection (e)(1) read, "Absent a valid waiver of counsel under subdivision (g)(2)(B), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under

subsection (d)(1)(A) of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed." Mil. R. Evid. 305(e)(1), *reprinted in Manual for Courts-Martial, United States* (2008 ed), pt. III, III-7. Thus, the rule made no mention whatsoever of suppression of derivative evidence.

The drafters' analysis confirms that the 2013 amendment was not intended to have any substantive effect at all, and certainly was not meant to break from Supreme Court doctrine. With respect to the new subsection (c)(2), the drafters explained:

> The committee changed the titles of subsections (c)(2) and (c)(3) to "Fifth Amendment Right to Counsel" and "Sixth Amendment Right to Counsel" respectively because practitioners are more familiar with those terms. In previous editions, the subsections did not expressly state which right was implicated. Although the rights were clear from the text of the former rules, the new titles will allow practitioners to quickly find the desired rule.

*Supplement to Manual for Courts-Martial, United States* (2012 ed.), app. 22, A22-19. The drafters specifically noted an intent to expand protections for the accused beyond what is provided by the Supreme Court for the *Sixth* Amendment. *Id.* (noting an intent to expand protection beyond what is provided by *Montejo v. Louisiana*, 556 U.S. 778 (2009) and *Berghuis v. Thompkins*, 560 U.S. 370 (2010)). The drafters noted no such intent as to the *Fifth* Amendment right, and did not mention *Patane*. *Id.* Otherwise, the drafters "revised this rule for stylistic reasons

and to ensure that it addressed admissibility rather than conduct . . . . In doing so, the committee did not intend to change any result in any ruling on evidence admissibility." *Id.* Thus, the 2013 change was not intended to overrule *Patane* by rule.

Second, by its own terms, Mil. R. Evid. 305 only bars derivative evidence that is the result of *interrogation*. Whatever the merits of Appellee's argument that the investigators violated *Edwards*, there is no argument that they "interrogated" him by asking for his PIN. *Cf. Frazier*, 34 M.J. at 137. Accordingly, even if Mil. R. Evid. 305 provides for the suppression of derivative evidence, it only does so in the case of "interrogation," not in the case of asking for permission to interrogate under *Edwards*.

Accordingly, the President did not intend to overrule *Patane* in the military by rule. For this reason, violations of *Edwards* do not result in the suppression of derivative evidence, and the military judge erred in suppressing Appellee's phone and its contents.

**IX. The evidence would have inevitably been discovered.**

Appellee argues that the evidence would not have been inevitably discovered through use of the Touch ID functions because the Government did not check to see if the phone had Touch ID enabled until after the motion to suppress was filed, and because the Government used its purportedly unlawful access to the

phone to determine that Touch ID was enabled. (Appellee's Br. 40). But this is evidence that the Government *knew to check for Touch ID.* Had Appellee refused to enter his PIN, the Government, so far stymied in its effort to access the phone, would have known to check whether Touch ID was enabled. The Government would have done so by requiring Appellee to provide his fingerprints for use on the phone. If the fingerprints unlocked the phone, the Government would have realized that Touch ID was enabled. Because the Government in fact confirmed that Touch ID was enabled, the Government showed that this tactic would have worked. Where there is evidence that the Government sought a suspect's fingerprints and could have compelled the suspect to provide them, the exclusionary rule does not apply under the inevitable discovery doctrine. *See United States v. Allen*, 34 M.J. 228, 231-32 (C.M.A. 1992). Recent cases confirm that the Government may compel a suspect to provide his fingerprints in an attempt to access a phone through Touch ID. *See State v. Diamond*, No. A15-2075, 2017 Minn. App. LEXIS 9 (Minn. Ct. App. 2017). Accordingly, the same evidence would inevitably have been discovered, and this Court should set aside the military judge's ruling.

## Conclusion

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

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A.G. COURIE III
Lieutenant Colonel, Judge Advocate
Attorney for Appellee
February 8, 2017

# Appendix

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A15-2075**

State of Minnesota,
Respondent,

vs.

Matthew Vaughn Diamond,
Appellant.

**Filed January 17, 2017**
**Affirmed**
**Smith, Tracy M., Judge**

Carver County District Court
File No. 10-CR-14-1286

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark Metz, Carver County Attorney, Eric E. Doolittle, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Smith, Tracy M., Judge.

## S Y L L A B U S

A district court order compelling a criminal defendant to provide a fingerprint to unlock the defendant's cellphone does not violate the Fifth Amendment privilege against compelled self-incrimination.

## OPINION

**SMITH, TRACY M.**, Judge

Appellant Matthew Vaughn Diamond appeals his convictions of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property following a jury trial. On appeal, Diamond argues his convictions must be reversed because: (1) police seized his property in violation of the Fourth Amendment; (2) the district court violated his Fifth Amendment privilege against compelled self-incrimination by ordering him to provide his fingerprint so police could search his cellphone; and (3) the state's circumstantial evidence was insufficient. We affirm.

## FACTS

On October 30, 2014, M.H. left her Chaska home between 10:30 and 10:45 a.m. to run errands. M.H. returned home around noon and noticed that the attached garage's side-entry door appeared to have been kicked in from the outside. M.H. called the police after discovering that a safe, a laptop, and several items of jewelry were missing from her home. While waiting for police to arrive, M.H. found an envelope in her driveway that had the name of S.W. written on it. Police took photographs and measurements of the shoeprints left on the garage's side-entry door.

Detective Nelson of the Chaska Police Department used state databases to determine S.W.'s car model and license plate number and that S.W. had pawned several pieces of jewelry at a Shakopee pawn shop on October 30. M.H. later verified that the pawned jewelry was stolen from her home. On November 4, police located S.W.'s car, which Diamond was driving at the time. Diamond was arrested on an outstanding warrant

unrelated to this case. He was booked at the Scott County jail, where staff collected and stored his property, including his shoes and cellphone.

The following day, Detective Nelson went to the jail and viewed the property that was taken from Diamond. Detective Nelson observed similarities between the tread of Diamond's shoes and the shoeprints left on the garage's side-entry door. Detective Nelson informed the jail staff that she was going to seek a warrant to seize Diamond's property and gave instructions not to release the property to anyone. Later that day, S.W. attempted to collect Diamond's property but was told that it could not be released.

On November 6, Detective Nelson obtained and executed a warrant to search for, and seize, Diamond's shoes and cellphone. On November 12, Detective Nelson obtained an additional warrant to search the contents of Diamond's cellphone. Detective Nelson was unable to unlock the cellphone. She returned the warrant on November 21.

In December, the state filed a motion to compel Diamond to provide his fingerprint on the cellphone to unlock the phone. The motion was deferred to the contested omnibus hearing. Following that hearing, the district court issued an order, filed February 11, 2015, concluding that the warrant to search Diamond's cellphone was supported by probable cause and that compelling Diamond to provide his fingerprint to unlock the cellphone does not violate his Fifth Amendment privilege against compelled self-incrimination. The district court granted the state's motion to compel and ordered Diamond to provide a fingerprint or thumbprint to unlock his cellphone. Diamond refused to comply. On April 3, the district court found Diamond in civil contempt and informed him that

compliance with the order would remedy the civil contempt. Diamond provided his fingerprint, and police immediately searched his cellphone.

At a second omnibus hearing Diamond challenged the refusal to release his cellphone and shoes to S.W., arguing that it constituted a warrantless seizure not justified by any exception to the warrant requirement. The district court's April 3 order concluded that the seizure was justified by exigent circumstances and was tailored to protect against the destruction of evidence while a warrant was sought and obtained. Diamond thereafter brought a pro se motion to suppress all evidence derived from his cellphone and shoes, which the district court denied, relying on the previous orders from February 11 and April 3.

At Diamond's jury trial, S.W. testified that: (1) she believed she was working the day of the burglary; (2) the envelope found in M.H.'s driveway belonged to S.W., and it was in her car the last time she saw it; (3) S.W. sometimes let Diamond use her car when she was working; and (4) on the day of the burglary, Diamond gave her M.H.'s stolen jewelry, and the two of them traveled to the Shakopee pawn shop, where she sold the jewelry. In addition, the state also introduced evidence that: (1) Diamond's wallet and identification card were found in S.W.'s car; (2) Diamond and S.W. exchanged phone calls and text messages throughout the day of the burglary; (3) Diamond's cellphone pinged off cell towers near M.H.'s residence on the day of the burglary; (4) the tread pattern on Diamond's shoes was similar to the shoeprints on the garage's side-entry door; and (5) while in jail, Diamond told S.W. "the only thing that [the state is] going to be able to charge

me with is receiving stolen property" and that his attorney said the case would be dismissed if S.W. did not testify or recanted her statement.

The jury found Diamond guilty of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property. The district court sentenced Diamond to 51 months in prison for the second-degree burglary and to 90 days in jail for the fourth-degree criminal damage to property.

Diamond appeals.

## ISSUES

I. Did the district court err by not suppressing evidence obtained following the temporary seizure of Diamond's property?

II. Did the district court err by ordering Diamond to provide his fingerprint so police could search his cellphone?

III. Does the record contain sufficient evidence to support the jury's conclusion that Diamond committed second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property?

## ANALYSIS

### I. The temporary seizure of Diamond's property did not violate the Fourth Amendment.

Diamond argues that the district court erred in denying his suppression motion because Detective Nelson's directions to jail staff not to release Diamond's property while she sought a warrant constituted an unreasonable seizure in violation of the Fourth Amendment. The district court concluded that the exigency exception to the warrant requirement applied. Diamond argues that the exigency exception is inapplicable because

Detective Nelson "searched" Diamond's property at the jail before providing instructions to jail staff.

In evaluating a pretrial order on a motion to suppress, we review factual findings for clear error and legal conclusions de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). When reviewing the applicability of the exigency exception, we look at the totality of the circumstances. *State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016). The state has the burden of showing that exigent circumstances justified the seizure. *Id.*

The Fourth Amendment protects the right of the people to be free from "unreasonable searches and seizures" of their "persons, houses, papers, and effects" by the government. U.S. Const. amend. IV; *see Mapp v. Ohio*, 367 U.S. 643, 655-56, 81 S. Ct. 1684, 1691-92 (1961) (incorporating the Fourth Amendment and the consequences for violating it into the Due Process Clause of the Fourteenth Amendment). A "seizure" of property within the meaning of the Fourth Amendment occurs when a government official meaningfully interferes with a person's possessory interest in the property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984). "In general, warrantless searches and seizures are unreasonable in the absence of a legally recognized exception to the warrant requirement." *Horst*, 880 N.W.2d at 33.

A temporary seizure may be permissible under the Fourth Amendment "when needed to preserve evidence until police are able to obtain a warrant." *State v. Holland*, 865 N.W.2d 666, 670 n.3 (Minn. 2015). The United States Supreme Court has approved the temporary seizure of an individual to prevent him from destroying drugs before police could obtain and execute a warrant. *Illinois v. McArthur*, 531 U.S. 326, 331-32, 121 S. Ct.

946, 950 (2001). The Minnesota Supreme Court has observed that, "when law-enforcement officers 'have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant,' the officers may seize the property, 'pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it.'" *Horst*, 880 N.W.2d at 33-34 (quoting *United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641 (1983)).

Here, Detective Nelson instructed jail staff not to release Diamond's property while she sought a warrant. Detective Nelson's instructions to jail staff were meant to ensure that Diamond's shoes and cellphone, which Detective Nelson considered potential evidence, were not lost or destroyed. The following day, Detective Nelson obtained and executed a warrant to seize Diamond's shoes and cellphone.

In *Horst*, the Minnesota Supreme Court deemed a similar warrantless seizure lasting only one day to be justified. *Id.* at 34-35. There, police had seized the defendant's cellphone when she was interviewed at the police station prior to her arrest, and police obtained a warrant the following day. *Id.* The supreme court concluded that the seizure was justified by exigent circumstances because, as the United States Supreme Court had recently observed, "the owner of a cellphone . . . can quickly and easily destroy the data contained on such a device." *Id.* at 35 (citing *Riley v. California*, 134 S. Ct. 2473, 2486 (2014)). Thus, the temporary seizure of Diamond's cellphone at the jail was justified by exigent circumstances. The need to protect physical evidence from loss or destruction similarly justified the temporary seizure of Diamond's shoes. *See McArthur*, 531 U.S. at 331-32, 121 S. Ct. at 950.

Diamond argues that the exigent-circumstances exception does not apply because Detective Nelson "searched" Diamond's property at the jail prior to the seizure. As an initial matter, we observe that Diamond did not argue to the district court that the evidence should be suppressed because Detective Nelson's act of viewing his property at the jail constituted a "search" rendering the exigency exception for the seizure inapplicable. An appellate court generally will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). This rule applies to constitutional questions. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on appeal from a termination of parental rights).

But even if Diamond's district court argument could be read expansively so as to encompass this argument, we still find it unpersuasive. Diamond does not provide any support for his conclusory assertion that Detective Nelson's act of viewing his property at the jail prior to obtaining a search warrant constituted a "search" under the Fourth Amendment. *See State v. Johnson*, 831 N.W.2d 917, 922 (Minn. App. 2013) ("A 'search' within the meaning of the Fourth Amendment occurs upon an official's invasion of a person's reasonable expectation of privacy." (citing *Jacobsen*, 466 U.S. at 114, 104 S. Ct. at 1656)), *review denied* (Minn. Sept. 17, 2013). Nor does he argue that such action was unreasonable.

As articulated in *McArthur*, we must determine whether "police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." 531 U.S. at 332, 121 S. Ct. at 950. In *McArthur*, the United States Supreme Court

determined that the proper balance between law-enforcement needs and personal privacy permitted police to seize the defendant while they sought a warrant to search his trailer. *Id.* at 332, 121 S. Ct. at 950-51. Here, Detective Nelson properly balanced law-enforcement needs with Diamond's personal privacy. Diamond concedes that his property was lawfully seized and inventoried when he was booked into jail on November 4. The following day, Detective Nelson viewed Diamond's property and observed similarities between the tread of Diamond's shoes and the shoeprints left on M.H.'s garage's side-entry door. Recognizing the possibility that these items could be lost or destroyed, Detective Nelson instructed jail staff to maintain custody of the property and immediately sought a warrant. On November 6, Detective Nelson executed the warrant, seizing the cellphone and shoes. Before attempting to access the cellphone's contents, which plainly constitutes a search within the meaning of the Fourth Amendment, Detective Nelson obtained the November 12 search warrant. *See Riley*, 134 S. Ct. at 2495.

We conclude that the temporary seizure of Diamond's property was justified by exigent circumstances and that the district court did not err in denying Diamond's suppression motion.

## II. Diamond's Fifth Amendment privilege was not violated when the district court ordered him to provide his fingerprint so police could search his cellphone.

Diamond argues that the district court's order to provide his fingerprint to unlock his cellphone violated his Fifth Amendment privilege against compelled self-

incrimination.[1] This is an issue of first impression for Minnesota appellate courts. Whether the district court violated Diamond's Fifth Amendment privilege against self-incrimination is a question of law, which this court reviews de novo. *State v. Kaquatosh*, 600 N.W.2d 153, 156 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999).

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see Malloy v. Hogan*, 378 U.S. 1, 8, 84 S. Ct. 1489, 1493-94 (1964) (incorporating Fifth Amendment protections into the Due Process Clause of the Fourteenth Amendment). "The essence of this basic constitutional principle is the requirement that the [s]tate which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle v. Smith*, 451 U.S. 454, 462, 101 S. Ct. 1866, 1872 (1981) (quotation and emphasis omitted). The Supreme Court has explained that "the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Fisher v. United States*,

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[1] Diamond also argues that the search of his cellphone violated the Fourth Amendment because, he asserts, the police did not have a valid warrant at the time his cellphone was searched in April 2015. Diamond maintains that "no search warrant existed" in April because Detective Nelson had previously returned the November 12 search warrant on November 21 after unsuccessfully attempting to access the contents of the cellphone. However, Diamond did not make this argument at the contested omnibus hearing, where he challenged the probable cause supporting the November 12 warrant and opposed the state's motion for an order compelling him to provide his fingerprint. Instead, Diamond waited until two days before trial to present this argument to the district court, asserting it for the first time during oral argument on his pro se motion to suppress evidence. Because Diamond did not raise this argument at the omnibus hearing, the argument was not timely raised and is not reviewable on appeal. *See State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985).

425 U.S. 391, 409, 96 S. Ct. 1569, 1580 (1976). Here, the record establishes that Diamond was compelled to produce his fingerprint to unlock the cellphone. The record also reflects that police obtained incriminating evidence once the cellphone was unlocked. Therefore, the question before this court is whether the act of providing a fingerprint to unlock a cellphone is a "testimonial communication."

In examining its application of Fifth Amendment principles, the Supreme Court has established that, "in order to be testimonial, [a criminal defendant's] communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S. 201, 210, 108 S. Ct. 2341, 2347-48 (1988). The Supreme Court has further noted that

> [t]his understanding is perhaps most clearly revealed in those cases in which the Court has held that certain acts, though incriminating, are not within the privilege. Thus, a suspect may be compelled to furnish a blood sample; to provide a handwriting exemplar, or a voice exemplar; to stand in a lineup; and to wear particular clothing.

*Id.* at 210, 108 S. Ct. at 2347 (citing *United States v. Dionisio*, 410 U.S. 1, 7, 93 S. Ct. 764, 768 (1973) (voice exemplar); *Gilbert v. California*, 388 U.S. 263, 266-67, 87 S. Ct. 1951, 1953 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218, 221-22, 87 S. Ct. 1926, 1929 (1967) (lineup); *Schmerber v. California*, 384 U.S. 757, 765, 86 S. Ct. 1826, 1832-33 (1966) (blood sample); *Holt v. United States*, 218 U.S. 245, 252-53, 31 S. Ct. 2, 6 (1910) (clothing)). In addition, the Supreme Court has recognized that "both federal and state courts have usually held that [the Fifth Amendment] offers no protection against compulsion to submit to fingerprinting." *Schmerber*, 384 U.S. at 764, 86 S. Ct. at 1832;

*see Doe*, 487 U.S. at 219, 108 S. Ct. at 2352 (Stevens, J., dissenting) ("Fingerprints, blood samples, voice exemplars, handwriting specimens, or other items of physical evidence may be extracted from a defendant against his will."); *State v. Breeden*, 374 N.W.2d 560, 562 (Minn. App. 1985) ("The gathering of real evidence such as blood samples, fingerprints, or photographs does not violate a defendant's [F]ifth [A]mendment rights.").

Diamond relies on *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335 (11th Cir. 2012), to support his argument that supplying his fingerprint was testimonial. In *In re Grand Jury*, the court reasoned that requiring the defendant to decrypt and produce the contents of a computer's hard drive, when it was unknown whether any documents were even on the encrypted drive, "would be tantamount to testimony by [the defendant] of his knowledge of the existence and location of potentially incriminating files; of his possession, control, and access to the encrypted portions of the drives; and of his capability to decrypt the files." *Id.* at 1346. The court concluded that such a requirement is analogous to requiring production of a combination and that such a production involves implied factual statements that could potentially incriminate. *Id.*

By being ordered to produce his fingerprint, however, Diamond was not required to disclose any knowledge he might have or to speak his guilt. *See Doe*, 487 U.S. at 211, 108 S. Ct. at 2348. The district court's order is therefore distinguishable from requiring a defendant to decrypt a hard drive or produce a combination. *See, e.g.*, *In re Grand Jury*, 670 F.3d at 1346; *United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010) (holding that requiring a defendant to provide computer password violates the Fifth Amendment). Those requirements involve a level of knowledge and mental capacity that

is not present in ordering Diamond to place his fingerprint on his cellphone. Instead, the task that Diamond was compelled to perform—to provide his fingerprint—is no more testimonial than furnishing a blood sample, providing handwriting or voice exemplars, standing in a lineup, or wearing particular clothing. *See Doe*, 487 U.S. at 210, 108 S. Ct. at 2347-48.

Diamond argues, however, that the district court's order effectively required him to communicate "that he had exclusive use of the phone containing incriminating information." This does not overcome the fact that such a requirement is not testimonial. In addition, Diamond provides no support for the assertion that only his fingerprint would unlock the cellphone or that his provision of a fingerprint would communicate his exclusive use of the cellphone.

Diamond also argues that he "was required to identify for the police which of his fingerprints would open the phone" and that this requirement compelled a testimonial communication. This argument, however, mischaracterizes the district court's order. The district court's February 11 order compelled Diamond to "provide a fingerprint or thumbprint as deemed necessary by the Chaska Police Department to unlock his seized cell phone." At the April 3 contempt hearing, the district court referred to Diamond providing his "thumbprint." The prosecutor noted that they were "not sure if it's an index finger or a thumb." The district court answered, "Take whatever samples you need." Diamond then asked the detectives which finger they wanted, and they answered, "The one that unlocks it."

It is clear that the district court permitted the state to take samples of all of Diamond's fingerprints and thumbprints. The district court did not ask Diamond whether his prints would unlock the cellphone or which print would unlock it, nor did the district court compel Diamond to disclose that information. There is no indication that Diamond would have been asked to do more had none of his fingerprints unlocked the cellphone. Diamond himself asked which finger the detectives wanted when he was ready to comply with the order, and the detectives answered his question. Diamond did not object then, nor did he bring an additional motion to suppress the evidence based on the exchange that he initiated.

In sum, because the order compelling Diamond to produce his fingerprint to unlock the cellphone did not require a testimonial communication, we hold that the order did not violate Diamond's Fifth Amendment privilege against compelled self-incrimination.[2]

**III. The record contains sufficient evidence to support Diamond's convictions.**

Diamond argues that his convictions must be reversed because the state's circumstantial evidence does not exclude the rational hypothesis that Diamond merely committed the crime of transferring stolen property. When evaluating the sufficiency of circumstantial evidence, the reviewing court uses a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). "The first step is to identify the circumstances proved." *Id.* "In identifying the circumstances proved, we defer to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted

[2] We express no opinion regarding whether, in a given case, a defendant may be compelled to produce a cellphone password, consistent with the Fifth Amendment.

with the circumstances proved by the [s]tate." *Id.* at 598-99 (quotation omitted). The reviewing court "construe[s] conflicting evidence in the light most favorable to the verdict and assume[s] that the jury believed the [s]tate's witnesses and disbelieved the defense witnesses." *Id.* at 599 (quotation omitted). "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted).

Here, Diamond was convicted of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property. A person is guilty of second-degree burglary if the person enters a dwelling without consent and with the intent to commit a crime. Minn. Stat. § 609.582, subd. 2(a) (2014). A person is guilty of theft if the person "intentionally and without claim of right takes . . . movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property." Minn. Stat. § 609.52, subd. 2(a)(1) (2014). A person is guilty of fourth-degree criminal damage to property if the person intentionally causes damage to another's physical property without the other person's consent. Minn. Stat. § 609.595, subd. 3 (2014).

The circumstances proved support the jury's conclusion that Diamond committed these crimes. On October 30, 2014, M.H. returned home after running errands and discovered that someone had kicked in her garage's side-entry door and had stolen jewelry and a number of other items. Police recovered an envelope in M.H.'s driveway that had S.W.'s name written on it. S.W. testified that this envelope was in her car the last time she saw it. S.W. also testified that she believed she was working on the day of the burglary, and that she sometimes let Diamond use her car when she was working. Diamond's

cellphone pinged off cell towers near M.H.'s residence on the day of the burglary. S.W. also testified that, on the day of the burglary, Diamond gave her M.H.'s stolen jewelry, and the two of them traveled to the Shakopee pawn shop, where she sold the jewelry. Finally, Detective Nelson testified regarding consistencies between the tread of Diamond's shoes and the shoeprints on M.H.'s garage's side-entry door.

Diamond argues that certain circumstances do not exclude the possibility that he did not commit the crimes at issue. This argument is unconvincing. Diamond considers the individual circumstances proved in isolation. But the evidence as a whole firmly supports the jury's conclusion that Diamond kicked down M.H.'s garage's side-entry door, entered her dwelling without consent and with the intent to commit a crime, and stole M.H.'s property. Together, the circumstances proved are inconsistent with any other rational hypothesis. Therefore, we conclude that the record contained sufficient evidence to support the jury's conclusion that Diamond committed the offenses of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property.

## DECISION

The district court did not err in denying Diamond's suppression motion because the temporary seizure of his property was justified by exigent circumstances and, therefore, did not violate the Fourth Amendment. The district court did not violate Diamond's Fifth Amendment privilege against self-incrimination by ordering him to provide his fingerprint so police could search his cellphone because such an order does not require a testimonial communication. Finally, the record contains sufficient evidence to support the jury's

conclusion that Diamond committed second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property.

**Affirmed.**

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 10th day of February, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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