IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* *v.* Senior Airman (E-4) **HANK W. ROBINSON,** United States Air Force, *Appellant.*	**APPELLANT'S BRIEF IN SUPPORT OF THE GRANTED ISSUES** USCA Dkt. No. 17-0504/AF Crim App. No. ACM 38942

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Issues Presented

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SUPPRESS ALL THE EVIDENCE OBTAINED FROM APPELLANT'S CELL PHONE.

II.

WHETHER THE AIR FORCE COURT ERRED IN HOLDING APPELLANT WAIVED OBJECTIONS REGARDING INVESTIGATORS EXCEEDING THE SCOPE OF APPELLANT'S CONSENT.

Statement of Statutory Jurisdiction

The lower court had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §866(b)(1). The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3).

Statement of the Case

On July 1, 2015 and August 17-21, 2015, Appellant was tried at a general court-martial comprised of officer and enlisted members at Beale Air Force Base, California. In accordance with his pleas, Appellant was acquitted of one charge and two specifications in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one charge and three specifications in

violation of Article 128, UCMJ, 10 U.S.C. § 928. (JA 176.) Contrary to his pleas, Appellant was found guilty of one charge and specification in violation of Article 120b, UCMJ, 10 U.S.C. § 920b, for communicating indecent language to a minor. (JA 176.)

The panel sentenced Appellant to be reduced to the grade of E-1, to be confined for one month, and to be discharged from the service with a bad conduct discharge. (JA 177.) The convening authority approved the sentence as adjudged. (JA 18-21.)

On May 15, 2017, the Air Force Court affirmed the findings and sentence. *United States v. Robinson*, 76 M.J. 663 (A.F. Ct. Crim. App. 2017) (JA 1-14.) Appellant petitioned this Court for review on July 12, 2017, and this Court granted review on August 18, 2017.

Statement of Facts

On December 22, 2014, Appellant was escorted by two law enforcement agents of the Air Force Office of Special Investigations (OSI) into a small, private, windowless room for questioning at approximately 0753. (JA 192.) Special Agent (SA) J.P. Lapre directed Appellant to sit in the corner opposite to the door, introduced himself

and SA K. Dean, and closed the door. (*Id.*) Both agents were about five feet from Appellant, sitting between him and the room's only exit. (*Id.*)

After approximately five minutes, SA Lapre described to Appellant what OSI does. (*Id.*) He explained that although there are rumors "out there" that OSI is "out to get people," that "is not the case at all." (*Id.*) OSI are "simply fact collectors." (*Id.*) SA Lapre clarified they "collect facts, [] put them in a report, and send the report out" and that is all they do. (*Id.*)

SA Lapre assured Appellant, OSI does "not get people in trouble." (*Id.*) Then, SA Lapre told Appellant this was his "one opportunity" to tell his side of the story. (*Id.*) SA Lapre said that if he were in Appellant's shoes, he would make a statement. (*Id.*)

After telling Appellant what he would do in his situation, SA Lapre read him his rights under Article 31, UCMJ, 10 U.S.C. § 831, and mentioned he was investigating the offense of "sexual assault of a child." (*Id.*)

After acknowledging he understood his rights, SA Lapre asked Appellant if he was willing to answer questions. (*Id.*) Appellant responded, "I was instructed by my lawyer to have a lawyer present

during questioning." (*Id.*) The following exchange then occurred:

> SA Lapre: Ok, just need a yes or no answer. So, are you willing to answer questions?
>
> Appellant: With a lawyer present.
>
> SA Lapre: Ok, so that's a no? I just want to make sure I understand what you're… you can stop the questioning at any time. So, if you don't feel comfortable with a question, it's your Fifth Amendment right not to answer that question. So it's completely up to you.
>
> Appellant: Yes, I'll answer questions.
>
> SA Lapre: Ok. And the last question is, do you want a lawyer?
>
> Appellant: Yes.
>
> SA Lapre: Ok. Um… So keep in mind, let me just… just to clarify that, um… so you're willing to answer questions but you want a lawyer? It's…
>
> Appellant: I was instructed by…
>
> SA Lapre: So you have a lawyer?
>
> Appellant: Yes. I have a public defender that was appointed to me by Yuma County who instructed me that if any law enforcement wished to ask me questions to have a lawyer present.
>
> SA Lapre: Ok, so you have a lawyer. So, if you have a lawyer, and he instructed you to do that, do you want to follow those instructions?

Appellant: Yes.

SA Lapre: Ok. So then, we cannot talk to you. I just want to make sure you understand that. Ok?

Appellant: Yes.

SA Lapre: Ok.

(*Id.*) SA Lapre informed Appellant OSI still had some administrative matters to complete, such as taking Appellant's photograph and fingerprints. (*Id.*)

Before completing these administrative matters, but after Appellant's invocation of his rights, SA Lapre asked for Appellant's consent specifically to "look through [his] phone." (*Id.*) Appellant replied he did not mind, but asked SA Lapre what they were looking for in his phone. (*Id.*) SA Lapre specified they were looking for evidence "related to the offense under investigation", at which point Appellant verbally consented to OSI "looking through" his phone replying "[t]here's nothing…yeah." (*Id.*)

After Appellant's invocation of rights and SA Lapre's request for consent to look through Appellant's phone, the OSI agents continued to ask questions to Appellant. SA Lapre asked Appellant where L.

Brannon lived. (*Id.*) L. Brannon was Appellant's girlfriend, a witness OSI was trying to locate but had exhausted all investigative leads. (JA 49, 51-52, 208-209.) SA Lapre later acknowledged at a motions hearing this question was not administrative in nature. (JA 49.) As SA Lapre took photographs of Appellant, still in the interrogation room, he asked him the meaning of his tattoos. (JA 192.) The agents then asked Appellant what type of cell phone he had and its phone number, asked him about his plans for Christmas, and asked questions about his work/leave schedule. (*Id.*)

At approximately 08:11:20 hours, SA Lapre showed Appellant the Air Force form for obtaining consent to search and seize evidence, the AF IMT 1364 (JA 182.) (*Id.*) When explaining this form to Appellant, he specified signing the form gave OSI consent to "just look through your phone, that's all." (*Id.*) SA Lapre described the top part of the form and once again clarified to Appellant the form gave them permission "to look through" his phone. (*Id.*)

After hearing the agent's explanation regarding what he was consenting to, Appellant read the form for approximately eight seconds

and signed it. (*Id.*) The form contains additional standard language that was not explained to Appellant and differs from what the agent explained to him. (JA 53-54, 182, 192.)

SA Lapre left the room after Appellant signed the form to provide the phone to another agent, but returned within a minute and asked Appellant: "Just so we don't mess up your phone or anything, can you give us the password to your phone?" (JA 38, 146, 192.) Appellant verbally provided the password. (JA 192.) SA Lapre then provided the password to another agent, who performed the extraction. (JA 38, 40.)

Although SA Lapre was repeatedly specific about requesting consent only to "look through" Appellant's phone, OSI utilized a Cellebrite Universal Forensic Extraction Device (UFED) to extract the contents of Appellant's phone. (JA 38, 101-102, 192.) As explained by SA Lapre, the process of extracting the contents of a cell phone generally involves connecting the phone to the UFED in order to extract the information, using a thumb drive to move the information from the UFED to a stand-alone computer, and then retrieve a report detailing the phone's contents. (JA 38-39, 101.) Neither OSI agent explained this process to Appellant, nor informed him of their intention and ability to

store his phone contents for an undetermined amount of time or of their intention and ability to search the phone contents at a later time. (JA 192.)

Appellant remained in the interview room while OSI performed the extraction outside his presence and without his knowledge. (*Id.*) At approximately 09:13:00 hours, OSI returned Appellant his cell phone and released him. (*Id.*) From the time Appellant invoked his right to counsel until his release from OSI's custody, Appellant was never provided counsel. (*Id.*)

At 1530 hours on this same day, Appellant revoked his consent. (JA 199-201.) Although the extraction of the contents of Appellant's phone was completed prior to his revocation, the Government produced no evidence showing the report was generated and reviewed prior to 1530 hours on 22 December 2014. (JA 50, 210-211.)

The extraction report contained over a thousand text messages and, among these messages was a conversation purportedly between Appellant and his then-14 year old step-daughter, AH. (JA 102, 140.) This conversation, which included phrases that appeared to be of a lewd nature, took place over a seventy-two-minute period on a single day in

August 2014 and was the basis of charge II and its specification, the only offense Appellant was convicted of. (JA 17, 102, 176, 210-211.) No other information from Appellant's phone was utilized at his trial.

Prior to trial, Appellant moved to suppress the evidence recovered from his phone. (JA 183-191.) At trial, the military judge asked trial defense counsel to clarify the basis for its motion:

> Military Judge: . . . So Defense Counsel, what exactly is it that you are challenging and what is your legal basis for doing so?
>
> Defense Counsel: Your Honor, [Mil. R. Evid.] 304 is one of the bases we find that it was an involuntary statement. The prophylactic created by *Edwards* was for precisely that. After you've been read your rights, you can exercise your rights; you don't have to answer more questions. They can't keep asking you questions. And so it was involuntary because it was after what should have been a valid rights advisement. We're also asking under just Article 31. Article 31 says you have that right to remain silent, in effect, and have the right to counsel present. He invoked that right; it wasn't respected. Also under the Fifth and Sixth Amendment, Your Honor, right to counsel, right to silence.
>
> Military Judge: Okay. So am I interpreting it correctly, then, that what you're challenging is that the statement that he made to OSI in response for the request for his phone password was involuntary?
>
> Defense Counsel: A moment, Your Honor? [Assistant defense counsel conferred with defense counsel.]

> Defense Counsel: Your Honor, not just the -- not just the password, but also the consent to search itself.
>
> Military Judge: The consent itself. Okay. So two bases?
>
> Defense Counsel: Yes, Your Honor.
>
> Military Judge: And that's where the confusion lay, because the burden of proof and persuasion cited by both parties with respect to the motion at hand was that the burden is on the government by a preponderance of the evidence; whereas, if you're challenging consent, the burden is by clear and convincing evidence to demonstrate that the consent was voluntary. So do I then understand it that you are challenging both the statement and whether or not he gave consent?
>
> Defense Counsel: Yes, Your Honor.
>
> Military Judge: Even before being asked about the password?
>
> Defense Counsel: Yes, Your Honor.

(JA 74-75.) The Government then acknowledged the defense was challenging "both the statement as well as the consent to search itself" (JA 76) and argued Appellant's consent was "knowing and intelligent under the totality of the circumstances." (JA 78.) Trial counsel further argued that Appellant's consent was not the product of "unlawful influence or enticement or inducement" (JA 78-79), but was given voluntarily. (JA 85.)

In response, trial defense counsel focused primarily on how OSI's questioning should have ceased after Appellant invoked his rights. (JA 86-89.) Trial defense counsel also referenced the importance of "informed consent" in argument and noted that Appellant revoked his consent to search the phone "just hours later." (JA 89.)

The military judge later indicated he understood the defense was challenging both Appellant's consent to the search and his subsequent statement providing OSI his phone's password:

> Military Judge: So Defense, as I understand your argument, even if this court were to find that the consent was valid and voluntarily given and established by clear and convincing evidence, your position is that doesn't end the analysis because we're looking at the statement itself?
>
> Defense Counsel: Yes, Your Honor.

(JA 95.)

The military judge ultimately ruled the government met its burden of proof that Appellant voluntarily consented to the search. (JA 202-207.) The military judge specifically found OSI did not use any deceptive tactics; rather, SA Lapre "made a straightforward request to [Appellant] for permission to search his phone." (JA 206.) The military judge further found Appellant signed the consent form "knowing that law enforcement

would search its contents." (*Id.*)

The Air Force Court in its decision found Appellant argument that the agent's search exceeded the scope of his consent was raised at appeal for the first time. (JA 11-12.) After this finding, they determined that the failure to object constituted waiver citing Mil. R. Evid. 311(d)(2)(A). (*Id.*)

Argument

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SUPPRESS ALL THE EVIDENCE OBTAINED FROM APPELLANT'S CELL PHONE.

Standard of Review

A military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion, viewing the evidence in the light most favorable to the party prevailing below. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016) (citing *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015)). An appellate court reviews a military judge's findings of fact for clear error, but his/her conclusions of law are reviewed de novo. *Id.*

Law & Analysis

A. OSI's request of Appellant's cell phone password after his repeated request for counsel violated the Fifth Amendment and Mil. R. Evid. 305(c)(2).

In a manner consistent with the unlawful actions of law enforcement described in *United States v. Mitchell*, ___ M.J. ___, 2017 CAAF LEXIS 856 (C.A.A.F. August 30, 2017), the Government violated Appellant's Fifth Amendment right to counsel as protected by *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), when SA Lapre asked Appellant to provide his cellphone passcode after his repeated request for counsel.

"No person…shall be compelled in any criminal case to be a witness against himself […]" U.S. Const. Amend. V. The right to have counsel present during an interrogation is "indispensable to the protection of the Fifth Amendment privilege." *Miranda*, 384 U.S. at 469.

Once a suspect in custody expresses his/her desire to have counsel present during law enforcement questioning, he/she cannot be subject to any interrogation by law enforcement until counsel has been made available to him. *Edwards*, 451 U.S. at 484-485. Just as it was the case with the appellant in *Mitchell*, there is no question Appellant was in

custody when OSI asked him for his password and that he had requested counsel several times prior to OSI asking him this question.

Appellant did not report voluntarily to OSI. He was brought in as a subject for booking and questioning regarding an offense OSI was investigating. (JA 192.) He was escorted by two law enforcement agents into a small, windowless room, where he was directed to sit in a corner and where the agents positioned themselves between him and the only exit to the room. (*Id.*) After Appellant declined to answer questions without a lawyer present, SA Lapre informed him they still had "administrative things" to do, like taking his fingerprints and photograph, before he was released. (*Id.*)

The custodial nature of the setting remained unchanged after requesting counsel, and while Appellant was not free to go, OSI asked him to provide his passcode, among other non-administrative in nature questions. At the time Appellant was asked his passcode, they had not taken his fingerprints or completed the "administrative" steps SA Lapre previously mentioned they had to complete before Appellant was free to leave. Additionally, neither agent re-advised him of his rights prior to asking him to provide his passcode.

In this custodial setting, the agent's request for the passcode followed a request for consent to search his cell phone. While the request for consent to search Appellant's phone was arguably permissible under *United States v. Frazier*, 34 M.J. 135 (CMA 1992), the question about his cell phone's passcode was not.

As this Court stated in *Mitchell*, asking Appellant to state his cell phone passcode involves more than a mere consent to search and asking this question after a request for counsel qualifies as interrogation because it is a question reasonably likely to elicit an incriminating response. *Mitchell*, 2017 CAAF LEXIS 856, at *10. The privilege under the Fifth Amendment does not extend solely to answers that would support a conviction, but also to answers who would furnish a link in the chain of evidence needed to prosecute. *Id.* (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). The answer to the question "can you give us the passcode to your phone?" implicitly states he owns the phone and knows its passcode, and this information is privileged under the Fifth Amendment given that Appellant requested counsel's presence during any law enforcement questioning.

Because *Edwards* forbids interrogation following the

> invocation of the *Miranda* right to counsel, not just interrogation that succeeds,[…] it follows that those who seek *Edwards* protection do not need to establish that the interrogation produced or sought a testimonial statement in order to establish a violation. Rather, only interrogation itself must be established […]

Mitchell, 2017 CAAF LEXIS 856, at *13 (citations omitted).

In Appellant's case, minutes after he repeatedly requested counsel to be present during interrogation, he was asked to provide the passcode to his cell phone. (JA 192.) The passcode to his cell phone was not the only question Appellant was asked after invoking his right to counsel. For example, prior to getting to the passcode question, Appellant was asked to provide the address of L. Brannon, a witness OSI could not locate and was looking to question in his case. (JA 51-52, 192.) The moment each of these instances of interrogation occurred, the violation of Appellant's rights under *Edwards* was complete. (See *Mitchell*, 2017 CAAF LEXIS 856, at *13-14.)

Having established an *Edwards* violation, analysis then turns to the appropriate remedy. Mil. R. Evid. 305(c)(2) states the remedy in this situation is suppression of all the "evidence derived from the interrogation" after the request of counsel.

In Appellant's case, the only appropriate remedy under the current state of the law is suppression of all the evidence derived from his cell phone search. Prior to using Appellant's passcode to search his phone, OSI had no information regarding offenses that may have been contained on his phone. (JA 43, 139.) AH never disclosed the text messages to anyone before OSI obtained the texts from Appellant; in fact, she had forgotten about the conversation. (JA 170-171.) Even if OSI had otherwise obtained and attempted to search Appellant's cell phone, it was password protected with enabled security features that would have prevented a "brute force" attack. (JA 59-60, 66-67.) It was thus highly improbable, if not impossible, for investigators to have been able to hack the phone.

WHEREFORE, this Court should find the military judge abused his discretion by not suppressing all the evidence derived from Appellant's cellphone search and, accordingly, set aside the findings and sentence.

B. OSI's search exceeded the scope of the limited consent they had to "just look through" Appellant's cell phone by copying and retaining the contents of his cell phone.

The search of property may be conducted if a person who exercises control of the property gives their consent. Mil. R. Evid. 314(e)(1)-(2).

However, consent does not give investigators carte blanch; rather, the scope of a search may not exceed the scope of actual consent given. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

Mil. R. Evid. 314(e)(3) "implements the limited scope rule of [*Schneckloth v. Bustamonte,* 412 U.S. 218, 248-49 (1973)] which requires investigators to account for any express or implied limitations on a consent to search." *United States v. Wallace*, 66 M.J. 5, 8 (C.A.A.F. 2008). The scope of consent is determined by what an objective person would reasonably expect in a given situation. *Florida v. Jimeno*, 500 U.S. at 251; *see also United States v. McMahon,* 58 M.J. 362, 366 (C.A.A.F. 2003).

In this case, Appellant never provided OSI consent to copy all the contents of his phone, nor did he consent to searches of his phone in perpetuity. Appellant's consent was predicated on SA Lapre's repeated assurance that OSI would "just look through [Appellant's] phone that's all." (JA 192.) Based on this representation, an objective person would reasonably expect the investigators to summarily flip through the contents of Appellant's phone.

Neither SA Lapre nor any other OSI agent intimated—let alone informed—Appellant of the process by which the cell phone's data would be "looked through." Namely, SA Lapre did not inform Appellant that OSI would copy the contents of the phone onto a thumb drive, transfer the data to a separate computer, and then retain that data for an indeterminate time to be searched at any point in the future. (JA 38-40, 192.) Instead of actually looking through Appellant's phone, OSI conducted a wholesale forensic examination of Appellant's phone.

Similarly to SA Lapre's verbal minimization of the search for which he sought Appellant's consent, the AF IMT 1364 signed by Appellant failed to explain the scope of this extraction method. (JA 182.) Two reasons are apparent from Appellant's interview.

First, the form does not authorize investigators to copy and retain *all* of the phone's information, whether incriminating or not, for an indeterminate period, to be searched at any later date. Instead, the form's standard language provides that the person giving consent authorizes a person identified on the form "and whomever may be designated to assist, to *search* the following place(s) in the daytime/nighttime," and then lists the item/property to be searched.

(*Id.*) (emphasis added.) The language "in the daytime/nighttime" suggests the item listed can be searched during a specific, pre-determined period of time and not in perpetuity.

Second, SA Lapre's verbal minimization of the scope of consent narrowed the scope from what the face of the form otherwise suggests. The form states that the signer gives investigators "permission to take any letters, papers, materials, articles, or other property that *they consider to be evidence of an offense*. . ." (*Id.*) (emphasis added.) Although the form includes this language, when explaining this form to Appellant, SA Lapre explained signing the form gave OSI consent specifically to "just look through your phone, that's all." (JA 192.)

The consent Appellant provided was for the agents to search his phone and then seize any incriminating information, if found. (JA 182.) OSI did the opposite: they seized Appellant's phone by copying its entirety (without his consent), then later searched it for incriminating evidence. This seizure included all of the contents of Appellant's phone, not just "evidence associated w Article 120, Sexual Assault of child." (*Id.*) Objectively, this method exceeded the scope of Appellant's consent.

WHEREFORE, this Court should find the military judge abused his

discretion by not finding OSI exceeded the scope of the consent given by Appellant and suppressing all the evidence derived from Appellant's cell phone search accordingly. In light of this, this Court should set aside the findings and sentence.

C. The government failed to show they completed the search of the contents of Appellant's cell phone prior to his revocation of consent.

Mil. R. Evid. 314(e)(3) provides "[c]onsent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time." This Court has held that this language is plain: "'Consent . . . may be withdrawn at any time,' provided of course that the search has not already been conducted." *United States v. Dease*, 71 M.J. 116, 120 (C.A.A.F. 2012). This Court has further recognized that searches of electronic media constitute two distinct intrusions into privacy interest: (1) procurement/seizure and (2) analysis/search. *Id.* at 120-21 (citing *Wallace*, 66 M.J. at 8).

In this case, OSI effectively seized Appellant's cell phone when it extracted the phone's contents and transferred them to a separate computer. The same day, Appellant revoked his consent. (JA 48-49, 199-201.) Appellant had a privacy interest in both the search of his

phone and its seizure. *Dease*, 71 M.J. at 120. OSI inverted the order in this case, accomplishing the seizure of Appellant's phone prior to his revocation of consent. (JA 50.) Appellant's privacy interest in the search of his phone nevertheless remained extant, and the Government was required to prove that OSI conducted the search prior to Appellant's revocation. Mil. R. Evid. 314(e); *see also Schneckloth*, 412 U.S. at 223 (holding that the burden of proving consent rests with the government). It produced no such evidence, thus failing to meet its burden.

WHEREFORE, this Court should find the military judge abused his discretion by not suppressing all the evidence derived from Appellant's cell phone search and, accordingly, set aside the findings and sentence.

II.

THE AIR FORCE COURT ERRED IN HOLDING APPELLANT WAIVED OBJECTIONS REGARDING INVESTIGATORS' EXCEEDING THE SCOPE OF APPELLANT'S CONSENT.

Standard of Review

Whether an accused has waived an issue is a question of law this Court reviews *de novo*. *See United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citing *United States v. Rosenthal*, 62 M.J. 261, 262

(C.A.A.F. 2005)).

Law & Analysis

Under Mil. R. Evid. 103, in order to preserve an objection regarding an admission of evidence, the objecting party must make "a timely objection or motion to strike . . . in the record, stating the specific ground of the objection, if the specific ground was not apparent from the context." Mil. R. Evid. 103(a)(1). Mil. R. Evid. 103 "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)). The application of this rule "should be applied in a practical rather than formulaic manner." *United States v. Reynoso*, 66 M.J. 208, 210 (C.A.A.F. 2007).

In this case, Appellant timely moved to suppress the evidence from his cell phone because his consent was not voluntary. (JA 74-75.) Although trial defense counsel's objection primarily focused on how the investigator's questioning should have ceased after Appellant

requested counsel (JA 86-89), trial defense counsel nevertheless addressed the vagueness of OSI's request (JA 90) as well as Appellant's subsequent revocation of his consent "just hours later" (JA 89). Trial defense counsel also discussed how the coerciveness of Appellant's interview by OSI played a factor. (JA 86-88.) Accordingly, it was the overall voluntariness of Appellant's consent – not just whether Appellant's right to counsel was violated – that was at issue.

Trial counsel acknowledged the defense's objections, arguing that Appellant's consent was "knowing and intelligent under the totality of the circumstances" (JA 83, 96) and not the product of "unlawful influence or enticement or inducement" (JA 78-79). The military judge then addressed in his ruling the overall voluntariness of Appellant's consent to the search, which included findings on the coercive nature of OSI's tactics. (JA 202-207.) S*ee also* JA 95 (military judge acknowledging that he understood he must determine whether the consent was valid and voluntarily given by clear and convincing evidence.) Each of the parties, therefore, understood that the defense's objections were not limited to the Government's violation of Appellant's rights by asking him for consent after rights invocation.

WHEREFORE, this Court should find the Air Force Court erred when it concluded Appellant waived consideration of this objection and remand accordingly.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on September 18, 2017 and that a copy was served via electronic mail on the Air Force Appellate Government Division on September 18, 2017.

Respectfully Submitted,

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