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 REPLY TO APPELLEE'S BRIEF** 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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Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Senior Airman Hank W. Robinson, the Appellant, hereby replies to the government's brief concerning the granted issues, filed on October 18, 2017.

Argument

Appellant's conviction is grounded in evidence found on his cell phone. Investigators only discovered this evidence by requesting Appellant's passcode after he had requested a lawyer and while he remained in a custodial setting. These circumstances are remarkably similar to those in *United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017), and warrant a similar conclusion. The government attempts to distinguish this case by arguing that Appellant's consent somehow nullified the investigators' violation of his Fifth Amendment privileges. (Gov't Br. at 23). The government then argues, in the alternative, that Appellant's provision of his passcode was not sufficiently testimonial or compelled to invoke protection under *Edwards v. Arizona*, 451 U.S. 477 (1981) or the Fifth Amendment. (Gov't Br. at 28-30). These contentions misconstrue and subvert *Mitchell*'s ultimate holding: once an accused in a custodial setting requests a lawyer, the government may not engage in

express questioning or actions that it should know are reasonably likely to elicit an incriminating response.

1. WHETHER APPELLANT CONSENTED TO THE SEARCH IS IRRELEVANT UNDER *MITCHELL*.

The *Mitchell* holding did not turn on whether SGT Mitchell consented to the search or was compelled. In fact, this Court explicitly declined to determine whether SGT Mitchell was "compelled" to provide his passcode. 76 M.J. at 419. Instead, this Court's analysis focused on whether SGT Mitchell was in custody and subject to interrogation after invoking his right to counsel. *Id.* at 418-419. Noting that it was enforcing "the 'prophylactic' [*Miranda v. Arizona*, 384 U.S. 436 (1966)] right to counsel, and the 'second layer of prophylaxis' established in *Edwards*," this Court concluded "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. . ." *Id.* at 419. Utilizing this analysis, this Court found that SGT Mitchell was in custody and that the investigator's request for SGT Mitchell's passcode qualified as an

interrogation because it was "an express question, reasonably likely to elicit an incriminating response." *Id.* at 418.

Applying *Mitchell*'s rationale to the present case, it is irrelevant whether Appellant consented to the search of his phone. It is undisputed that Appellant was in custody when he invoked his right to counsel.[1] Appellant then remained in custody after investigators indicated they still had some administrative matters to complete. (JA 192). It was in this custodial setting that the investigator asked Appellant for his cell phone's passcode, a request the investigator believed might result in the discovery of incriminating evidence. (JA 037.) Under the *Mitchell* framework, this is sufficient to establish an *Edwards* violation and no further analysis – except with regard to remedy – is required.

2. A REQUEST FOR A PASSCODE DOES NOT QUALIFY AS AN ADMINISTRATIVE, "BOOKING" QUESTION.

The government attempts to limit *Mitchell* from applying to consent cases, comparing the request for a passcode to "booking questions for the purposes of [effecting] a consent search." (Gov't Br. at 25). Not

only does the government's argument ignore *Mitchell's* express conclusion – that a request for a passcode is an interrogation (76 M.J. 418) – it misinterprets the primary case upon which its contention relies: *Rhode Island v. Innis*, 446 U.S. 291 (1980).

Contrary to the government's assertions, *Innis* is consistent with *Mitchell*. *Innis* does not suggest that an interrogation following a consent to search request after the invocation of counsel is permissible or of an administrative nature. *Id.* Rather, *Innis* emphasizes that once warnings have been given and the individual states he/she wants an attorney, all interrogation must cease until an attorney is present. *Id.* at 297-298. *Innis*, citing *Miranda*, explains that the fundamental import of the privilege while an individual is in custody is not whether the individual is allowed to talk to the police without counsel, but whether he/she can be interrogated. *Id.* at 300. Voluntary statements initiated by the individual are not prohibited by *Innis* (or *Mitchell*), nor are booking questions. What is prohibited are express questions or actions that investigators should know are reasonably likely to elicit an incriminating

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[1] The military judge determined that Appellant was in custody when he invoked his rights. (JA 202-207.) Neither the Government nor the Air Force Court challenged this determination.

response. *Mitchell*, 76 M.J. at 418 (quoting *Innis*, 446 U.S. at 301).

Moreover, as the government argued in Govt. Br. 16, "booking" questions are those necessary to secure biographical data (e.g. name, birth information, address, height, weight) in order to complete *the booking or pretrial services*. (Emphasis added.) Requesting a cellphone passcode is not comparable to such administrative queries because the latter does not "furnish a link in the chain of evidence needed to prosecute." *Mitchell*, 76 M.J. at 418. (citing *Hoffman v. United States,* 341 U.S. 479, 486 (1951) and *United States v. Hubbell*, 530 U.S. 27, 37-38 (2000)).

3. THE GOVERNMENT'S "ALTERNATIVE" ARGUMENT IS AN ATTEMPT TO RE-LITIGATE *MITCHELL*.

In its "alternative" argument, the government contends Appellant's provision of his passcode was "not sufficiently testimonial to warrant Fifth Amendment privilege," nor incriminating. (Gov't Br. at 28). The government further posits that Appellant's ownership and access to his phone were forgone conclusions and thus his passcode disclosure was not testimonial. (Gov't Br. at 28). Each of these positions directly conflicts

with *Mitchell*.

The government rests its Fifth Amendment argument on the presumption that the privilege protects "only against compelled, incriminating, and testimonial communications." (Gov't Br. at 29). Accordingly, the government directs this Court to "first determine whether the communication at issue actually qualifies for Fifth Amendment protection. . . [i]n other words, was such communication was [sic] compelled, incriminating, and testimonial." (Gov't Br. at 28). In *Mitchell*, however, this Court purposefully declined to address whether the accused's delivery of his cell phone's passcode was "testimonial" or "compelled." *Mitchell*, 76 M.J. at 419. Rather, it held that because the appellee endured a custodial interrogation after requesting a lawyer, the government "endangered his Fifth Amendment privilege against self-incrimination and violated the protective rule created in [*Edwards*, 451 U.S. at 484-485]." *Mitchell*, 76 M.J. at 419. In making this determination, this Court refused to adopt the position now proffered by the government: Fifth Amendment protections are limited to "testimonial communications." *Id.* This Court instead chose to enforce "the 'prophylactic' *Miranda* right to counsel, and the 'second layer of

prophylaxis' established in *Edwards*, both of which are constitutionally grounded measures taken to protect the core Fifth Amendment privilege." *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176-177 (1991)) (further citations omitted).

Applying *Miranda* and *Edwards* to the custodial interrogation in *Mitchell*, this Court held:

> 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, and Appellee has demonstrated that entry of his passcode was an "incriminating response" that the Government should have known they were "reasonably likely to elicit."

Mitchell, 76 M.J. at 419 (internal citations omitted). The government ignores this holding by arguing that Appellant's delivery of his passcode – which, like *Mitchell*, occurred during a custodial interrogation – was not incriminating. (Gov't Br. at 36). Similarly absent from the government's argument is this Court's explicit finding that asking for a passcode "involves more than a mere consent to search; it asks Appellee to provide the government with the passcode itself, which is incriminating information in the Fifth Amendment sense, and thus privileged."

Mitchell, 76 M.J. at 418.

The government concludes its "alternative" argument by asking this Court utilize the foregone conclusion doctrine to assist in determining "whether an act or communication is testimonial." (Gov't Br. at 32). As illustrated in *Mitchell*, however, a foregone conclusion analysis is unnecessary. It is undisputed that Appellant was in custody when he invoked his right to counsel, and it was during this period that SA Lapre asked for Appellant's passcode. Under *Mitchell*, this is sufficient to establish an *Edwards* violation.

Should this Court nevertheless entertain the government's invitation to apply the foregone conclusion doctrine, Appellant respectfully adopts the position articulated by the Army Appellate Defense Division: the foregone conclusion "exception was developed as a limit on the act of production privilege, and was not intended for application to actual testimonial statements made in response to custodial interrogation or Article 31 questioning." (Amicus Brief at 3). The government's argument also fails from a purely factual perspective, as OSI never independently verified Appellant owned or otherwise operated his cell phone prior to asking him for his passcode. *Cf. United*

States v. Gavegnano, 305 Fed. Appx. 954, 956 (4th Cir. 2009) (finding no Fifth Amendment violation because "[a]ny self-incriminating testimony that [the suspect] may have provided by revealing the password was already a 'foregone conclusion' because the Government independently proved that [the suspect] was the sole user and possessor of the computer"). It was only through a post-rights invocation, custodial interrogation of Appellant that AFOSI was able to "furnish a link in the chain of evidence" to show Appellant owned the cell phone and – given it was password-protected – was likely its sole operator. This Court came to the same conclusion in *Mitchell*:

> As even the dissent concedes, [SGT Mitchell's] response constitutes an implicit statement "that [he] owned the phone and knew the passcode for it." And the fact that [the investigators] could have testified to this act confounds any contention that "entering the passcode—was not incriminating."

Mitchell, 76 M.J. at 418 (internal citations omitted).

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

Mil. R. Evid. 311(a)(1) requires the defense to make a timely

objection at trial to suppress the results of an unlawful search and seizure. Mil. R. Evid. 311(d)(2)(A) further provides that a failure to raise a suppression motion constitutes waiver of the issue. However, "there is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege." *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008) (internal quotation marks and citation omitted).

Contrary to the government's assertions, Appellant did not intentionally relinquish any right to challenge the constitutionality of AFOSI's search of his cell phone. (Gov't Br. at 44). Appellant timely moved to suppress the text messages investigators recovered from his phone because his consent was not voluntary. (JA 074-075). Although trial defense counsel could have been more precise in describing the objection, he addressed AFOSI's coerciveness (JA 026-088) and Appellant's subsequent revocation (JA 089). This presentation was sufficient to place both the trial counsel (JA 083, 096) and the military judge (JA 095) on notice that the overall voluntariness of Appellant's consent was at issue.

Whether a consent to search is voluntary or "the product of duress or coercion, express or implied, is a question of fact" that a military judge must determine from the totality of circumstances. *Schneckloth v. Bustamante*, 412 U.S. 218, 227 (1973). The "Fourth Amendment can. . . be violated by guileful as well as by forcible intrusion into a constitutionally protected area." *Hoffa v. United States*, 385 U.S. 293, 300 (1966) (citing *Gouled v. United States*, 255 U.S. 298 (1928)). Consequently, deception or trickery by a government agent should be "considered as part of the totality of circumstances in determining whether consent was gained by coercion or duress." *United States v. Harrison*, 639 F.3d 1273, 1278-1279 (10th Cir. 2011).

By promising Appellant AFOSI would "just look through [Appellant's] phone, that's all," SA Lapre deceived Appellant regarding his true intent: to copy the phone and search it at a later date. (JA 192). The AF IMT 1364 did not cure this misrepresentation, as it also failed to indicate AFOSI's intent to copy Appellant's entire phone. (JA 182). Even if this form is viewed as somehow notifying Appellant of the true scope of AFOSI's intended search, SA Lapre's verbal assurances vitiated this notification. *Cf. Securities and Exchange Commission v. ESM*

Government Securities, Inc., 645 F.2d 310, 316 (5th Cir. Unit B, May 18, 1981) ("We believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably. When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to [evidence] which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust").

Such a blatant misrepresentation from SA Lapre represents a form of coercion, and should have been included in the military judge's totality of the circumstances analysis. *See*, *e.g.*, *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (holding that a misrepresentation by uniformed officers that they possessed a search warrant was a form of coercion). Instead, the military judge plainly erred by not only failing to address the misrepresentation, but finding that AFOSI did not use any deceptive tactics.

Given these circumstances, Appellant respectfully renews his request that this Court find that he did not waive any objections

regarding the scope of his consent and, further, that the military judge plainly erred when he found that AFOSI did not induce Appellant's consent through deception or coercion.

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 October 30, 2017 and that a copy was served on the Air Force Appellate Government Division electronically on October 30, 2017.

CERTIFICATE OF COMPLIANCE WITH RULES 24 AND 37

This filing complies with the volume limitation of Rule 24(c) because it contains 2,259 words. Additionally, this filing complies with the typeface and type style requirements of Rule 37.

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