IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	FINAL BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. No. 38942
Senior Airman (E-4)	)	
HANK W. ROBINSON, USAF,	)	USCA Dkt. No. 17-0504/AF
Appellant.	)	

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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18 October 2017

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	)	Crim. App. No. 38942
Senior Airman (E-4)	)	
HANK W. ROBINSON, USAF,	)	USCA Dkt. No. 17-0504/AF
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SUPPRESS 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 Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This

Honorable Court has jurisdiction to review this issue under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted.

STATEMENT OF FACTS

In mid-October of 2014, the Yuba County, California Sherriff's Office notified the Beale Air Force Base detachment of the Air Force Office of Special Investigations (hereinafter "OSI") that they had received a report of child sexual abuse. (JA at 33.) Yuba County personnel identified AH as the victim, and Appellant as the perpetrator. (JA at 33.) After receiving the initial report, OSI opened their own investigation. (JA at 33.)

As part of their investigation, OSI brought in Appellant for a subject interview. (JA at 34.) The interview occurred in a 10' x 10' room.[1] (JA at 202 ¶5.) Appellant was situated at the far corner from the door, with the two OSI agents approximately five feet from him. (JA at 202 ¶6.) Neither agent directly impeded Appellant's access to the door. (JA at 202 ¶6.)

Prior to reading Appellant his rights, the agents recorded biographical information, and engaged in small talk concerning Appellant's prior assignments and off-duty activities. (JA at 203 ¶¶7-8.) SA JL described OSI's mission, and

[1] Trial defense counsel described the room as a "standard interrogation room." (JA at 86.)

told Appellant that this was his opportunity to provide his side of the story. (JA at 203 ¶9.) Only seven minutes after entering the interview room, SA JL read Appellant his Article 31, UCMJ rights. (JA at 203 ¶10.) Appellant responded that he was not willing to answer questions unless his attorney was present. (JA at 203 ¶11.)

After Appellant invoked his right to counsel, SA JL told him that the agents had administrative processes they needed to accomplish, such as taking photographs and fingerprints. (JA at 203 ¶13.) SA JL then asked Appellant, "do you mind if we look through your phone?" (JA at 203 ¶13.) Appellant responded "no," and SA JL confirmed "so you give us consent to search your phone?" (JA at 203 ¶13.) Appellant asked what the agents were looking for, and SA JL response, "anything related to the offense under investigation." (JA at 203 ¶13.) Appellant concluded, "there is nothing, but yeah." (JA at 192, 203 ¶13.) SA JL stated "okay, we will follow up with the paperwork here in a little bit." (JA at 192.)

SA JL reassured Appellant he would not be leaving in handcuffs. (JA at 203 ¶13.) SA JL offered Appellant a restroom break, which he declined. (JA at 203 ¶13.) When asked by SA JL, Appellant provided the address of a potential witness, Ms. LB. (JA at 203 ¶14.) SA JL left the room, propping the door open when he left, leaving SA KD to fill out paperwork with Appellant. (JA at 203 ¶15.) SA JL returned to take pictures of Appellant. (JA at 203 ¶16.)

After taking photographs, the agents procured administrative information in order to complete an Air Force Form 1364 consent form. (JA at 204 ¶17.) The agents confirmed what kind of cellular phone Appellant possessed, and his phone number. (JA at 204 ¶17.) SA JL put the information Appellant provided into the consent form, as SA KD engaged in small talk with Appellant about his holiday plans. (JA at 198, 204 ¶18.) SA JL provided Appellant the consent form, and asked him if he was okay to sign it. (JA at 204 ¶19.)

Appellant read the form and signed it. (JA at 198, 204 ¶19.) On the consent form, Appellant was re-notified that OSI was investigating the sexual assault of a child. (JA at 198.) He was also notified that he had the right to refuse consent:

I know that I have the legal right to either consent to a search, or to refuse to give my consent. I understand that if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that if I do not consent, a search cannot be made without a warrant or other authorization recognized in law.

(JA at 198.)

Appellant confirmed that he was giving investigators consent to search his cellular phone for any evidence associated with sexual assault of a child. (JA at 198.) Through the consent form, Appellant allowed OSI to take any materials they considered evidence of the offense:

Before deciding to give my consent, I carefully considered this matter. I am giving my consent voluntarily and of my own free will, without having been subjected to any coercion, unlawful influence or unlawful inducement and without any promise of reward, benefit, or immunity having been made to me. The investigators have my permission to take any letters, papers, materials, articles or other property they consider to be evidence of an offense, including contraband for use as evidence in any criminal prosecution hereafter initiated. I have read and understand this entire acknowledgment of my rights and grant of my consent for search and seizure.

(JA at 198.)

After Appellant completed the form, SA JL left the room and reentered one minute later. (JA at 204 ¶21.) SA JL asked Appellant "Just so we don't mess up your phone or anything, can you give us the password?" (JA at 204 ¶21.) In response, Appellant provided his four digit passcode. (JA at 204 ¶21.)

After Appellant turned over his phone and provided his passcode, another agent took the phone to the detachment's conference room in order to create a digital copy of its contents. (JA at 38, 101, 204 ¶22.) The agent performed the extraction using a Cellebrite UFED system. (JA at 38-39.) The extraction was completed prior to Appellant leaving the OSI office. (JA at 50, 102.) After the extraction, OSI returned the phone to Appellant. (JA at 40, 102.) OSI had no information regarding whether evidence of an offense would be contained on Appellant's phone. (JA at 43.)

A review of an extraction report produced the same day, revealed text messages sent from Appellant to his stepdaughter, AH. (JA at 102-03, 178-81, 210-11.) In the text exchange, Appellant told AH that he was going to kiss her where it smells funny:

AH: Hows It Goin .-. ??

Appellant: I'm going to kiss you where it smells funny

AH: Im a White Crayonnn!!

Appellant: Nope Still going to kiss you

AH: You gon Kiss a Crayon ??

Appellant: Nope where you smell funny

(JA at 178.)

AH, feeling uncomfortable, tried to avoid the lewd comments by stating that she was a white crayon and that her hair and armpits smell funny. (JA at 160-61, 178.) Appellant responded by stating that AH was going to get a big wet kiss. (JA at 179-80.) The conversation concluded with Appellant telling AH he was going to take a shower with her:

Appellant: I'm going to take a shower with u

AH: Why ??

Appellant: Why not

AH: Cuz Its Weird ..

(JA at 179.) Through a representation letter sent via email the afternoon of his interview, Appellant revoked his consent to search. (JA at 49, 199-201.)

Prior to trial, Appellant moved to suppress his provision of his passcode and all derivative evidence. (JA at 183.) Appellant argued that OSI violated Edwards by requesting consent to search his cellular phone and for his passcode after Appellant asserted his right to counsel. (JA at 186.)

In addition to the written submissions, the military judge heard evidence and argument on the motion. (JA at 32-99.) During the motions hearing, Appellant

testified. (JA at 65.) According to Appellant, he had enabled the security features on the iPhone 5s that OSI seized. (JA at 67.) This allegedly included the setting where if someone inputted a passcode incorrectly ten times, the phone would wipe itself. (JA at 67-68.)

Appellant also testified that he gave OSI permission to search his phone: "They asked me if they could search my phone and I gave them authorization to search my phone…." (JA at 70.) He also testified that he gave OSI his password. (JA at 70.) According to Appellant, his signature was on the consent form, and he read the form prior to signing it. (JA at 71-72.) When asked why he provided OSI the password to his phone after requesting an attorney, Appellant testified "I – at the time I didn't think it was relevant to the case, honestly." (JA at 73.)

Prior to hearing arguments, the military judge noted that the Military Rules of Evidence allowed him to require Appellant to specify the grounds on which he moved to suppress evidence. (JA at 74.) The military judge found the defense motion somewhat ambiguous, and asked defense counsel "what exactly is it that you are challenging and what is your legal basis for doing so?" (JA at 74.)

Defense counsel asserted that they were moving to suppress based on Edwards, arguing that "it was involuntary because it was after what should have been a valid rights advisement." (JA at 74.) Defense counsel also asserted under Article 31 because "[h]e invoked that right; it wasn't respected." (JA at 75.) He

also asserted as basis the Fifth and Sixth Amendment, "right to counsel, right to silence." (JA at 75.)

When the military judge asked whether the defense was challenging Appellant's providing of the password as involuntary, defense counsel responded "not just the -- not just the password but also the consent to search itself." (JA at 75.) The military judge clarified yet again, confirming that the defense was challenging only the statement providing the password and whether or not Appellant voluntarily gave consent. (JA at 75.) At no point during oral argument did defense counsel mention scope of consent, take issue with the fact that OSI made a copy of Appellant's cellular phone, or contend that the cellular phone information should be suppressed because Appellant had revoked his consent. (JA at 86-99.)

In his written ruling, the military judge made extensive findings of fact. (JA at 202-05.) The military judge found that Appellant "understood that he was being asked for consent to allow law enforcement to search the contents of his phone for evidence relating to allegations of sexual assault of his stepdaughter." (JA at 204 ¶20.) He also determined that Appellant "understood that he had a right not to consent." (JA at 204 ¶20.) He also concluded that Appellant "chose to provide consent to law enforcement to search the contents of his phone because he did not believe any relevant information would be found on the phone." (JA at 204 ¶20.)

In his analysis, the military judge observed that the length of detention was very short, that the interview was conducted during the normal duty day, Appellant was an NCO serving as an intelligence analyst, OSI did not make threats or use force, and did not use any intimidating or deceptive tactics. (JA at 206.) The military judge found that Appellant did not acquiesce to authority, but voluntarily provided search authority after deliberation. (JA at 206.)

Ultimately, the military judge concluded that the request for Appellant's passcode was not a reinitiation of interrogation, and did not open a more generalized discussion relating directly or indirectly to the investigation. (JA at 206 ¶38.) He found that the agents did not engage in any questioning or actions that they should have known was reasonably likely to elicit an incriminating response. (JA at 206 ¶38.) The military judge determined that Appellant was not coerced into providing his passcode. (JA at 207 ¶39.) He found that "their question was logically connected to the consent, which the accused had just formalized approximately one minute later." (JA at 206 ¶38.) The military judge also determined that Appellant's provision of his passcode was not an incriminating response, as the passcode was not testimonial. (JA at 207 ¶39.) Accordingly, the military judge did not suppress evidence obtained from Appellant's cellular phone. (JA at 207 ¶40.)

During findings, defense counsel crossed examined SA JL, highlighting the voluntariness of Appellant's grant of consent and his provision of the passcode. (JA at 139, 144.)

SUMMARY OF THE ARGUMENT

A request for consent to search does not implicate the Fifth Amendment, Miranda v. Arizona, 384 U.S. 436 (1966), or Edwards v. Arizona, 451 U.S. 477 (1981). In this case, Appellant voluntarily consented to OSI performing a search of his cellular phone. OSI's request for Appellant's cellular phone passcode was merely part and parcel of that consent. As such, OSI's request, and Appellant's response, did not implicate the Fifth Amendment or Edwards.

Alternatively, even if this Court determines that the Fifth Amendment is implicated in this case, Appellant's provision of his passcode was not sufficiently incriminating or testimonial to fall under Fifth Amendment protections, Miranda, or Edwards. The Fifth Amendment privilege, and the prophylactic rules designed to protect it, only apply to communications that are compelled, incriminating and testimonial. In this case, an application of the foregone conclusion doctrine demonstrates that Appellee's passcode was not a testimonial communication. Furthermore, his passcode provided no information relating to a criminal offense, and cannot be considered, in and of itself, incriminating. Accordingly, his claim for relief under the Fifth Amendment and Edwards fails.

Concerning Appellee's other arguments for relief, by failing to raise scope or withdrawal of consent as bases for suppression at trial, Appellant waived those issues. Even if he had not waived those issues, Appellant has not demonstrated the military judge committed plain error. Appellant's unlimited consent included the right to copy and retain evidence. What's more, Appellant has not demonstrated that he revoked consent prior to OSI searching the digital copy of his cellular phone. More importantly, Appellant had no privacy interest in the copy of his cellular phone, as such copy was owned, possessed, and controlled by OSI.

ARGUMENT

I.

OSI'S REQUEST FOR APPELLANT'S CELLULAR PHONE PASSCODE EFFECTUATED THE PREVIOUSLY GRANTED CONSENT TO SEARCH, AND IS OUTSIDE THE BOUNDS OF FIFTH AMENDMENT PROTECTIONS. ALTERNATIVELY, APPELLANT'S PROVISION OF HIS PASSCODE WAS NOT SUFFICIENTLY TESTIMONIAL OR INCRIMINATING TO INVOKE EDWARDS OR THE FIFTH AMENDMENT.

Standard of Review

The military judge's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion. United States v. Keefauver, 74 M.J. 230, 233 (C.A.A.F. 2015). Findings of fact are reviewed under the clearly erroneous standard, and conclusions of law are reviewed de novo. United States v. Monroe,

52 M.J. 326, 330 (C.A.A.F. 2000) (citation omitted). This Court "consider[s] the evidence 'in the light most favorable to the' prevailing party." United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996).

"A military judge's determination that a person has voluntarily consented to a search … is a factual determination that will 'not be disturbed on appeal unless it is unsupported by the evidence or clearly erroneous.'" United States v. Radvansky, 45 M.J. 226, 229 (C.A.A.F. 1996) (quoting United States v. Kosek, 41 M.J. 60, 64 (C.M.A. 1994)).

Law

1) Consent to search law generally

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. Const. amend IV. "[A] search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). A search conducted pursuant to consent is "one of the specifically established exceptions to the requirements of both a warrant and probable cause…." Bustamonte, 412 U.S. at 219. This exception is codified in Mil. R. Evid. 314(e)(1): "Evidence of a search conducted without probable cause is admissible if conducted with lawful consent."

A consent to search must be voluntary. Mil. R. Evid. 314(e)(4). The government must demonstrate consent by clear and convincing evidence. Mil. R. Evid. 314(e)(5). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Bustamonte, 412 U.S. at 227. When determining whether consent was voluntary, this Court has looked to six nonexclusive factors. United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015). These factors include:

> (1) the degree to which the suspect's liberty was restricted;
> (2) the presence of coercion or intimidation;
> (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors;
> (4) the suspect's mental state at the time;
> (5) the suspect's consultation, or lack thereof, with counsel; and
> (6) the coercive effects of any prior violations of the suspect's rights.

United States v. Wallace, 66 M.J. 5, 9 (C.A.A.F. 2008).

A granting of consent can be limited in scope. Mil. R. Evid. 314(e)(3). Scope of consent is determined through the objective reasonableness standard. Wallace, 66 M.J. at 8 (citing Florida v. Jimeno, 500 U.S. 248, 251 (1991)). The test is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Wallace, 66 M.J. at 8 (quoting Jimeno, 500

U.S. at 248).

Finally, consent may be withdrawn at any time. Mil. R. Evid. 314(e)(3). By providing for withdrawal of consent, Mil. R. Evid. 314(e)(3) is not intended to allow an accused to reclaim abandoned property, but rather protect an accused's privacy interest. United States v. Dease, 71 M.J. 116, 120 (C.A.A.F. 2012).

2) Fifth Amendment law generally

The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. The "Fifth Amendment comes into play 'only when the accused is compelled to make a testimonial communication that is incriminating." United States v. Doe, 487 U.S. 201, 209 n.8 (1988) (quoting Fisher v. United States, 425 U.S. 391, 408 (1976)).

In Miranda, the Supreme Court crafted a number of "prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation." Maryland v. Shatzer, 559 U.S. 98, 103 (2010) (quoting Miranda, 384 U.S. at 467). The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. The Court held that prior to questioning a suspect in custody, law enforcement must warn the suspect that he has a right to remain silent, the right to an attorney, and that any statements he

makes may be held against him. Id.

The Court clarified that if the suspect indicates he is unwilling to submit to questioning, law enforcement must not interrogate him. Id. at 445. Likewise, if the suspect asserts his right to counsel, interrogation must cease until counsel is made available. Id. Of course, a suspect may knowingly waive these rights. Id. at 475

In Edwards, the Supreme Court crafted a "second layer of prophylaxis" to protect a suspect's rights after he has invoked his right to counsel. McNeil vs. Wisconsin, 501 U.S. 171, 176-77 (1991) (citing Edwards, 451 U.S. at 484-85). Under Edwards, once a suspect invokes his right to counsel, he "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. The Edwards rule seeks to ensure that law enforcement "will not take advantage of the mounting coercive pressures of prolonged police custody … by repeatedly attempting to question a suspect who previously requested counsel until the suspect is badgered into submission…." Shatzer, 559 U.S. at 105 (internal citations and quotations omitted).

The Supreme Court has gone on to define "interrogation" for the purposes of Miranda and Edwards. "[T]he Miranda safeguards come into play whenever a

person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Thus, the term interrogation under Miranda "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301. The second portion of the definition "focuses primarily upon the perceptions of the suspect, rather than the intent of the policy." Id.

The Supreme Court has categorically excluded "routine booking questions," which are necessary to secure "the biographical data necessary to complete booking or pretrial services." Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990). This exclusion includes information like "name, birth information, address, height, weight…." United States v. Dougall, 919 F.2d 932, 935 (5th Cir. 1990)

3) Compelled production and Fifth Amendment jurisprudence

Several federal and state courts have examined the application of the Fifth Amendment to password-protected or encrypted electronic devices and have reached contradictory conclusions. *See generally* United States v. Venegas, 594 Fed. Appx. 822, 827 (5th Cir. 2014); State v. Stahl, No. 2D14-4283, 2016 Fla. App. LEXIS 18067 (Fla. Dist. Ct. App. Dec. 7, 2016); SEC Civil Action v. Huang, No. 15-269, 2015 U.S. Dist. LEXIS 127853 (E.D. Pa. Sept. 23, 2015).

Commonwealth v. Gelfgatt, 11 N.E.3d 605, 612 (Mass. 2014); Commonwealth v. Baust, 89 Va. Cir. 267 (Va. Cir. Ct. 2014); United States v. Fricosu, 841 F.Supp. 2d 1232 (D. Col. 2012); In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011 (In re Grand Jury), 670 F.3d 1335 (11th Cir 2012); United States v. Kirschner, 823 F.Supp. 2d 665 (E.D. Mich. 2010); In re Grand Jury Subpoena to Boucher (In re Boucher), 2:06-MJ-91, 2009 U.S. Dist. LEXIS 13006 (D.Vt. Feb. 19, 2009); United States v. Gavegnano, 305 Fed. Appx. 954 (4th Cir. 2009) (per curiam).

With the exception of Gavegnano, these cases do not address situations where a suspect is asked for and voluntarily provides consent to search a password-protected device, and are therefore not analogous to Appellant's case. The aforementioned federal and state courts that have tackled similar issues have almost uniformly relied on a series of Supreme Court cases: United States v. Fisher, 425 U.S. 391 (1976); United States v. Doe, 465 U.S. 605 (1984) ("Doe I"); Doe v. United States, 487 U.S. 201 (1988) ("Doe II"); and United States v. Hubbell, 530 U.S. 27 (2000). Furthermore, this Court in United States v. Mitchell, 76 M.J. 413 (C.A.A.F. 2017) recently considered whether asking an accused to input his passcode after service of search warrant implicated the Fifth Amendment.

a. Fisher (1976)

In Fisher, the Supreme Court introduced the "foregone conclusion" doctrine. In that case, the Internal Revenue Service served a summons on taxpayers' lawyers demanding the lawyers produce certain documents pertaining to the preparation of tax returns that were listed in the summons. Fisher, 425 U.S. at 393-95. Reaffirming that the Fifth Amendment privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications," the Supreme Court found that the compelled production of the documents did not violate the taxpayer's Fifth Amendment privilege. Id. at 409. The Supreme Court explained that whether an act of production was "testimonial" and "incriminating" for Fifth Amendment purposes would "depend on the facts and circumstances of particular cases or classes thereof." Id. at 410.

Despite the fact that the act of production in Fisher had some communicative value – it tacitly conceded that papers existed and were in the possession of the taxpayer – the act was not sufficiently testimonial to invoke the Fifth Amendment privilege. Id. at 411. Since the documents were of a kind "usually prepared by an accountant working on the tax returns of his client," the existence and location of the papers were a "foregone conclusion." Id. As such, the Government did not rely on the taxpayer's "truthtelling" to prove the existence of or access to the

documents. Id. The taxpayer's concession that such papers existed "add[ed] little or nothing to the sum total of the Government's information." Id. Thus, the act of production was a question "not of testimony but of surrender." Id. (quoting In re Harris, 221 U.S. 274, 279 (1911)).

b. Doe I (1984)

In Doe I, a grand jury subpoenaed various business records related to Doe's sole proprietorship. Doe, 465 U.S. at 606. The Supreme Court found that although the contents of the business records themselves were not privileged under the Fifth Amendment, the compelled act of production of those records was protected. Id. at 611-14. Distinguishing Fisher, the Supreme Court refused to overturn the District Court's factual findings that the act of production would involve testimonial self-incrimination. Id. at 613. The enforcement of the subpoena would compel Doe to admit the business records existed, were in his possession, and were authentic. Id. at 613, n.11. Importantly, the government was unable to otherwise show that it already knew all the documents demanded in the subpoena existed; thus, it was "attempting to compensate for its lack of knowledge by requiring [Doe] to become, in effect, the primary informant against himself." Id. at 614, n.12.

c. Doe II (1988)

In Doe II, the Government subpoenaed Doe to sign a consent form directing any bank where he had a bank account to turn over all of its documents relating to

that bank account to a grand jury. Doe, 487 U.S. at 205, n.2. The consent directive did not reference any specific banks or account numbers. Id. at 205. The Supreme Court found that Doe's act of signing the consent directive was not a "testimonial communication" protected by the Fifth Amendment. Id. at 207. Signing the consent directive did not "force [Doe] to express the contents of his mind," nor did it communicate any factual assertions to the Government. Id. at 210, n.9; 215. Thus, like in Fisher, the Government did not rely on any "truthtelling" in Doe's consent directive to show the existence of, or his control over the bank records that were ultimately produced. Id. at 215.

d. Hubbell (2000)

In Hubbell, the Government served a subpoena on Hubbell compelling him to produce 11 categories of documents before a grand jury. Hubbell, 530 U.S. at 31. After Hubbell was granted immunity "to the extent allowed by law," he produced 13,120 pages of documents and records. Id. The Supreme Court found that the derivative use of these compelled documents violated the Fifth Amendment. Id. at 44-45. The Supreme Court reiterated that the act of production could implicitly communicate statements of fact, and in Hubbell's case, would admit that the documents "existed, were in his possession or control, and were authentic." Id. at 36.

The relevant question was whether the Government "has already made 'derivative use' of the testimonial aspect of [the act of production] . . . in preparing its case for trial. Id. at 41. The Supreme Court found that the Government used Hubbell's truthful acknowledgement of the existence of the 13,120 pages as a "lead to incriminating evidence" or "a link in the chain of evidence needed to prosecute." Id. at 42. The Supreme Court also commented that in identifying hundreds of documents responsive to the subpoena, Hubbell had to "make extensive use of 'the contents of his own mind,'" which was "like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." Id. at 43 (internal citations omitted).

The Supreme Court refused to apply the "forgone conclusion" doctrine from Fisher. Id. at 44. It reasoned that in Fisher the Government already knew the tax documents were in the attorney's possession, and could independently confirm the document's existence and authenticity through the accountants who created them. Id. at 44-45. However, in Hubbell, the Government could not show any prior knowledge of the existence or whereabouts of the 13,120 pages Hubbell ultimately produced. Id. at 45. The government needed Hubbell's "assistance both to identify the potential sources of information and to produce those sources." Id. at 41.

e. <u>Mitchell (C.A.A.F. 2017)</u>

After Mitchell invoked his right to counsel, investigators informed him they had a verbal search authorization for his cellular phone. <u>Mitchell</u>, 76 M.J. at 415-16.) After retrieving Mitchell's cellular phone from him, investigators noticed Mitchell's cellular phone was protected by a passcode. <u>Id.</u> at 416. When investigators first asked him Mitchell to provide his passcode, he refused. <u>Id.</u> He did however input his passcode when investigators asked him to unlock the cellular phone. <u>Id.</u>

Ultimately, this Court held that investigators violated Mitchell's "Fifth Amendment right to counsel as protected by <u>Miranda</u> and <u>Edwards</u>." <u>Id.</u> at 417. This Court held that "asking Appellee to state his 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." <u>Id.</u> at 418. This Court also determined that having Mitchell input his passcode was also protected, as it furnished a link in the chain of evidence needed to prosecute. <u>Id.</u>

This Court found that Mitchell's actions constituted a statement that he owned the phone and had the passcode. <u>Id.</u> This Court determined that since it was "enforcing the 'prophylactic' Miranda right to counsel and the 'second layer of prophylaxis' established in Edwards," it did not need to address whether

Mitchell's actions were testimonial or compelled. Id. at 418-19. This Court reasoned 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." Id. at 419.

Analysis

The fact that Appellant consented to the search of his phone distinguishes this case from Mitchell. A request for consent to search property does not implicate the Fifth Amendment. Appellant's provision of the passcode did nothing more than facilitate his knowing and voluntary consent. Accordingly, neither the Fifth Amendment, Miranda, nor Edwards applied to OSI's request for Appellant's passcode.

Alternatively, even if this Court finds the Fifth Amendment applicable, Appellant is still not entitled to relief.[2] The Fifth Amendment privilege, and the prophylactic rules protecting it, only apply to communications that are compelled, incriminating, and testimonial. Appellant's passcode was not testimonial, as his

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[2] The United States recognizes that our secondary position in this case appears to conflict with aspects of this Court's opinion in Mitchell. However, our position is this case is wholly different because in Mitchell this Court addressed "limits on asking a suspect to unlock his phone *when the device has been seized pursuant to a valid search and seizure authorization*." Mitchell, 76 M.J. at 415 (emphasis added). The government's position is that this is a consent case and therefore wholly different. Therefore, should this Court need to revisit any aspect of its analysis in Mitchell, it would need to so only with respect to its application in consent cases.

ownership and access to the phone were a foregone conclusion. Neither was his passcode incriminating. Accordingly, the military judge did not err when he denied Appellant's motion to suppress.

4) OSI's request for Appellant's passcode was outside the bounds of the Fifth Amendment privilege as the passcode was part and parcel of Appellant's consent

The Fifth Amendment "privilege against self-incrimination protects only testimonial evidence, not physical evidence." United States v. Roa, 24 M.J. 297, 299 (C.M.A. 1987) (citing Schmerber v. California, 384 U.S. 757 (1966)). "[A] request for consent to search…is not interrogation, and the consent thereby given is not a statement." Id. (citations omitted). Put another way, "Because consent 'is not a statement' and a request for consent is not an 'interrogation,' giving consent to search is a neutral fact which has no tendency to show that the suspect is guilty of any crime." United States v. Burns, 33 M.J. 316, 320 (C.M.A. 1991).[3]

Using the above rationale, this Court has determined that requests by law enforcement for consent to search after an accused invokes his Fifth Amendment/Article 31 right to counsel, do not implicate the Fifth Amendment. Roa, 24 M.J. at 297-99; Burns, 33 M.J. at 319-21. The federal circuits likewise

[3] *See also* United States v. Frazier, 34 M.J. 135, 137 (C.M.A. 1992) (identifying that a request for consent to search does not "infringe upon Article 31 of Fifth Amendment safeguards...."); United States v. Hutchins, 72 M.J. 294, 297 (C.A.A.F. 2013) (holding that a request for consent to search was not an interrogation).

have held that consenting to a search does not implicate the Fifth Amendment because consent is not of a testimonial or communicative nature. *See* United States v. Cooney, 26 Fed. Appx. 513, 523 (6th Cir. 2002) (finding a unanimous agreement among federal courts that consenting to a search does not implicate the Fifth Amendment).

In United States v. Hidalgo, 7 F.3d 1566 (11th Cir. 1993), the Eleventh Circuit Court of Appeals found that a request for consent to search after invocation of the right to remain silent did not violate the Fifth Amendment. The Court reasoned that Fifth Amendment protections did not apply because a consent to search was not of a testimonial or communicative nature. Id. at 1568.

As the above demonstrates, the Fifth Amendment privilege does not apply to a request for a consent to search, regardless of whether an accused has invoked his right to counsel. In this case, Appellant consented to the search of his cellular phone not due to coercive nature of custody, but because Appellant did not think OSI would discover any evidence. (JA at 204 ¶20.) The procuring of his password simply effectuated Appellant's consent. This is effectively booking questions for the purposes of a consent search. *See* Innis, 446 U.S. at 301 (excepting out from Miranda questions "normally attendant to arrest and custody").

Appellant's passcode was, for all intents and purposes, the key to the property Appellant consented to be searched. Requesting access to the property to

be searched should be considered a question normally attendant to consent. To hold otherwise would require finding that the Fifth Amendment allows investigators to request a consent to search, but prohibits them from requesting access to the property once consent is granted.

This seems to be the rationale utilized by this Court's predecessor in United States v. Morris, 1 M.J. 352 (C.M.A. 1976). In Morris, the appellant was in custody and investigators asked for his consent to search a vehicle. Morris, 1 M.J. at 353. Prior to asking for consent, the investigator asked who owned the vehicle. Id. The CMA reaffirmed that neither a Miranda nor Article 31, UCMJ warning precede a consent to search. Id.

Importantly, the CMA recognized that "Implicit within an individual's consent to a search is an acknowledgement of ownership or, at the very least, dominion and control over the property to be searched." Id. at 354. Regarding ownership of the vehicle, the CMA held "such inquiry even though custodial was not an 'interrogation,' that is, a questioning designed or likely to induce an admission regarding a suspected offense." Id.; *but see* United States v. Smith, 3 F.3d 1088 (7th Cir 1993) (holding that although consent to search is not an incriminating statement, questions as to ownership implicates the Fifth Amendment); United States v. Henley, 984 F.2d 1040, 1043 (9th Cir. 1993) (question confirming ownership of vehicle after consent violated Miranda). In

other words, the question was just prefatory to effectuate a request for consent to search.

The United States appreciates that in Mitchell, this Court reasoned that "asking Appellee to state his 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. However, this rationale cannot be transposed to this case, as the appellee in Mitchell was compelled to provide his cellular phone through a search authorization. Id. at 415-16. In other words, Mitchell was not a consent case. This case is.

The critical fact in this case is Appellant provided OSI consent to search his cellular phone. The requesting of his consent, and his ultimate granting of consent, did not implicate the Fifth Amendment. OSI's request was an extension of the request for consent to search the phone. It was merely a request to access to that cellular phone, and to effectuate the voluntarily provided consent. OSI's request for a means to access the property should be considered a question normally attendant to a consent search, just as requesting a name and address are questions normally attendant to arrest and custody. Accordingly, this Court should hold that OSI's request for a passcode in this case was part and parcel of the request for consent. It merely effectuated the previously granted consent to search, and is

outside the bounds of Fifth Amendment protections.

5) Alternatively, OSI's request for Appellant's passcode did not constitute interrogation, therefore Fifth Amendment protections do not apply.

Even if this Court finds that OSI's request for Appellant's passcode implicated the Fifth Amendment, Appellant is still not entitled to relief. Appellant's provision of his passcode was not sufficiently testimonial or incriminating to implicate the Fifth Amendment, as his ownership and access to the phone were a foregone conclusion.

As the following analysis demonstrates, this Court must first determine whether the communication at issue actually qualifies for Fifth Amendment protection. In other words, was such communication was compelled, incriminating, and testimonial. To answer the question of whether Appellant's passcode was testimonial, this Court should look to the foregone conclusion doctrine. In cases involving the production of real evidence, the foregone conclusion doctrine exists to define whether the act of production is sufficiently testimonial to implicate the Fifth Amendment, Miranda, and Edwards. In this case, Appellant's provision of his passcode was not sufficiently testimonial to warrant Fifth Amendment privilege. Neither was his passcode incriminating. Accordingly, he was not entitled to protection under either Miranda or Edwards.

a. Fifth Amendment privileges protect only against compelled, incriminating, and testimonial communications.

The Fifth Amendment "protects a person only against being incriminated by his own compelled testimonial communications." Fisher, 425 U.S. at 409. "If a compelled statement is 'not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence." Doe v., 487 U.S. at 208 n.6 (quoting In re Grand Jury Subpoena, 826 F. 2d 1166, 1172 n. 2 (2d Cir. 1987) (concurring opinion)).

Similarly, testimonial statements that present no danger of incrimination are not protected by the Fifth Amendment. Doe, 487 U.S. at 210. Put simply, "[t]o qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." United States v. Castillo, 74 M.J. 160, 165 (C.A.A.F. 2015) (quoting Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 189 (2004)).

To be testimonial, statements must "explicitly or implicitly, relate a factual assertion or disclose information." Doe, 487 U.S. at 210. Nontestimonial actions, such as submitting a blood sample, providing a handwriting or voice exemplar, standing in a lineup, or wearing certain clothing items can be directed because they are not of a testimonial or communicative nature. Id.

For instance, in Schmerber, the Supreme Court considered whether the petitioner's rights were violated when officers instructed hospital staff perform a

blood draw, despite Appellant refusal on the advice of counsel. Schmerber, 384 U.S. at 758-59. The Court found that the blood draw did not implicate the Fifth Amendment, holding "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis." Id. at 765.

The above authorities demonstrate that only compelled, testimonial, and incriminating statements fall under the Fifth Amendment privilege. It stands to reason that Miranda and Edwards, rules designed to protect the Fifth Amendment privilege, have no application unless a statement is in fact testimonial, incriminating, and compelled. This is in fact the same rationale courts have utilized to determine that a request for consent to search does not fall under Fifth Amendment, Miranda, or Edwards protections.

b. Without a showing that a communication is testimonial, incriminating, and compelled, there can be no Edwards violation.

Jurisprudence on requests for consent and the Fifth Amendment demonstrate that only testimonial and incriminating communications fall under Miranda and Edwards protections. This Court's predecessor held that a request for consent to search submitted after an accused requests counsel does not implicate Edwards because a consent to search is not testimonial. In Burns, the CMA held, "[b]ecause consent 'is not a statement' and a request for consent is not an 'interrogation,' giving consent to search is a neutral fact which has no tendency to show that the

suspect is guilty of any crime." Burns, 33 M.J. at 320. In other words, granting consent is neither testimonial nor incriminating.

In Roa, on which Burns relied, the CMA reasoned that although Edwards requires the cessation of interrogation until counsel is present, "the privilege against self-incrimination protects only testimonial evidence…." Roa, 24 M.J. at 299. The CMA determined that the consent was neither incriminating, nor a statement. Id. ("Neither Article 31, UCMJ, 10 U.S.C. § 831, nor Fifth-Amendment safeguards are infringed by a request for consent to search, as such a request is not interrogation, and the consent thereby given is not a statement").

Thus, Roa and Burns demonstrate that a request for a consent to search post-invocation is not barred by Edwards because a consent to search is neither testimonial nor incriminating. The Eleventh Circuit Court of Appeals used similar rational in Everett v. Sec'y, Fla. Dep't of Corr, 779 F.3d 1212 (11th Cir. 2015). In that case, the Eleventh Circuit determined that a request for consent to collect DNA was not barred by Edwards as furnishing of the consent was not testimonial or communicative. Everett, 779 F.3d at 1244 (citing Doe, 487 U.S. at 210).

The Fifth Circuit Court of Appeals came to the same conclusion in United States v. Daughenbaugh, 49 F.3d 171 (5th Cir 1995). In that case, the Fifth Circuit held that a request for a handwriting exemplar did not implicate Edwards because "a handwriting sample is nontestimonial evidence beyond the scope of the right

against self-incrimination." Daughenbaugh, 49 F.3d at 174; s*ee also* United States v. Gonzalez, Nos. 95-5004 &95-5026, 1995 U.S. App. LEXIS 34730 (4th Cir. 1995) (unpub. op.) (request for consent to search hotel room after invocation did not implicate Edwards because request did not "elicit testimonial evidence of guilt").

Edwards exists only to protect the Fifth Amendment privilege. It stands to reason that communications that would never fall subject to the Fifth Amendment privilege would not receive protection from Edwards. The above authorities demonstrate as much. Accordingly, the United States respectfully asserts that in order to determine whether Edwards barred OSI's request for Appellant's passcode, this Court must determine in this case whether Appellant's provision of his passcode was testimonial and incriminating.

c. The foregone conclusion doctrine is relevant to this case as it assists in determining whether an act or communication is testimonial.

The foregone conclusion doctrine is relevant in this case because it assists in determining whether an act of production is testimonial. In Fisher, the Supreme Court held that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." Fisher, 425 U.S. at 408. The Court recognized that an act of production concedes the existence of the property at issue, as well as its possession

and control by the producing party. Id. at 410. To resolve this issue, the Court found that the act of production in that case did not rise to the level of a testimonial statement because the existence and location of the property at issue was a foregone conclusion, and would have added little to the government's information. Id. at 411. Specifically, the Court held: "It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment." Id.

Thus, it is apparent that the foregone conclusion doctrine pertains to whether an act of production is testimonial for Fifth Amendment privileges. If this Court holds that the request for Appellant's passcode implicates the Fifth Amendment, it must determine whether supplying of the passcode amounted to a testimonial statement by utilizing the foregone conclusion doctrine.

d. Under the facts of this case, Appellant's provision of the passcode was not sufficiently testimonial or incriminating to invoke Edwards or the Fifth Amendment.

"In order to be privileged, it is not enough that the compelled communication is sought for its content. The content itself must have testimonial significance." Doe, 487 U.S. at 212 n. 10. In this case, the only information that Appellant's act of entering his password actually conveyed to the United States was that Appellant owned the phone and that Appellant knew the password to his phone. The ownership of the phone in Appellant's possession was never in

question. Appellant's actions did not communicate any information whatsoever about the contents of the phone or about the offense which with Appellant was ultimately charged.

The two factual assertions conveyed by Appellant's act were "foregone conclusions" as described in Fisher. The fact that Appellant knew the passcode to his own phone was self-evident. It is "a near truism" that any owner of a personal cellular phone would know its password. *See* Fisher, 425 U.S. at 411 (Noting that a compelled handwriting exemplar forces a suspect to admit his ability to write, but such an assertion is a "near truism.") The implicit assertions that Appellant owned the phone and knew the passcode added nothing to the government's case.

As in Fisher, the government did not rely on any "truth-telling" by Appellant in order to search the phone. The Government did not make use of the "truths" asserted by Appellant: that he possessed the phone and knew the password. That information was already known or self-evident, and was not needed or even helpful in examining the contents of Appellant's phone for evidence.

The physical act of unlocking the phone enabled OSI to access the contents the phone, but the testimonial aspects of the act did not provide them with any significant information "that will assist the prosecution in uncovering evidence." Doe II, 487 U.S. at 215. This fact distinguishes Appellant's case from Hubbell. The constitutional problem with the act of production in Hubbell was that

Hubbell's compelled testimony confirmed the documents produced in response to the subpoena actually existed. The government needed Hubbell's "assistance both to identify the potential sources of information and to produce those sources." Hubbell, 530 U.S. at 41. In other words, there was *testimonial value* in the acknowledgement of the existence of the documents that provided the "link in the chain of evidence." After Hubbell was forced to confirm the existence of these documents, the Government then used its new-found knowledge of the same documents to prosecute him.

Here, however, Appellant's act of providing the password and allowing the agents to search the phone had no testimonial value. It did not reveal to the Government for the first time that the phone existed. It did not confirm that any particular evidence existed on the phone. Nor did entering the password point the agents toward any particular information contained on the phone or suggest to them where to look. Like in Doe II, the government still had to search the phone and locate evidence "by the independent labors of its officers." Doe II, 487 U.S. at 216. This was not a situation where the government was "attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself." Cf. Doe I, 465 U.S. at 614, n.12.

Finally, the fact that the passcode may have de-encrypted data on Appellant's cellular phone is not an act distinct from providing the passcode.

Appellant did not conduct such a translation himself using his own mind. That process occurred automatically when Appellee entered his passcode. Under such circumstances, Appellant's act of unlocking his phone, automatically resulting in de-encryption, were neither testimonial or incriminating for purposes of Edwards or for invoking the Fifth Amendment privilege against self-incrimination.

Since the assertions implicit in the act of unlocking the phone were foregone conclusions in this case, they were not "testimonial," and thus, not protected by the Fifth Amendment, Miranda, or Edwards. Neither was the passcode in and of itself incriminating, as it communicated nothing about the offenses under investigation. Roa, 24 M.J. at 301 (Everett, C.J., concurring in the result). As such, the military judge did not err when he denied Appellant's motion to suppress at trial. Accordingly, Appellant's claim for relief must be denied.

6) Appellant has not demonstrated that the military judge committed plain error[4] when he did not suppress the evidence derived from Appellant's cellular phone on the basis of exceeding the scope of consent as Appellant's unlimited scope of consent included the ability to copy the contents of his cellular phone

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[4] As demonstrated below, Appellant waived any challenges based on exceeding the scope of consent or withdrawal of consent. *See* Issue II, infra. If this Court determines the issue was not waived, it should conclude that Appellant's failure to make a motion or objection on these grounds at trial constituted forfeiture. United States v. Harcrow, 66 M.J. 154, 156-58 (C.A.A.F. 2008). If an alleged error is forfeited, this Court reviews for plain error. United States v. Goings, 72 M.J. 202, 205 (C.A.A.F. 2013). Therefore, it is Appellant's burden to demonstrate the military judge's failure to grant Appellant's motion to suppress due to exceeding the scope of consent or withdrawal of consent amounted to plain and obvious error.

Although not raised at trial, and therefore waived, Appellant argues that OSI exceeded the scope of his consent by creating a digital copy of some of the information contained on his cellular phone. (App. Br. at 17-18.) Appellant contends that he never provided OSI consent to copy the contents of his phone. (App. Br. at 18.)

Even if Appellant did not waive this challenge, he has not demonstrated plain error for two reasons. First, Appellant did consent to retaining evidence derived from his cellular phone. Second, even if he did not affirmatively consent, a valid consent to search includes the right to copy evidence.

When requesting Appellant's consent to search OSI specifically stated they wanted to "look through his phone," "search his phone" for "anything related to the offense under investigation," and Appellant verbally consented without limitation. (JA at 203-04.) Appellant again consented, this time in writing, to the search of his cellular phone for "all content on the above phone for any evidence." (JA at 182, 204.) The signed consent was titled "Consent for Search and Seizure." (JA at 182, 204.) Furthermore, the last two sentences of the written consent form state: "The investigators have my permission to take any letters, papers, materials, articles or other property they consider to be evidence of an offense, including contraband for use as evidence in any criminal prosecution hereafter initiated." (JA at 182.) On the stand at trial, Appellant admitted that he read the consent

form, signed it, and authorized the search and seizure of his cellular phone. (JA at 72.)

OSI's conclusion that the scope of Appellant's consent included the copying of the contents of his cellular phone is objectively reasonable. *See* Wallace, 66 M.J. at 8 (quoting Jimeno, 500 U.S. at 248) (the test for scope of consent is what a "typical reasonable person [would] have understood by the exchange between the officer and the suspect"). Appellant never limited his consent in any way. Furthermore, Appellant gave OSI the right to keep evidence from his cellular phone. It was reasonable for OSI to conclude that his consent allowed them to copy the contents of the phone and return it to Appellant instead of holding the phone in perpetuity.

What's more, the law has recognized that "a valid consent to a search … carries with it the right to examine and photocopy." United States v. Ponder, 444 F.2d 816, 818 (5th Cir. 1971). So regardless of whether Appellant expressly consented to copying of the evidence, a consent to search carries with it a right to copy the evidence. Accordingly, even if Appellant did not waive this challenge, he has failed to show plain error as his unlimited consent carried with it the right to copy the contents of his cellular phone.

7) Appellant has not demonstrated that the military judge committed plain error when he did not suppress the evidence derived from Appellant's cellular phone on the basis of withdrawal of consent

Appellant argues that he withdrew consent prior to investigators searching his cellular phone. (App. Br. at 21-22.) He contends that the investigator's act of copying all of Appellant's cellular phone data was not a search, that Appellant has a privacy interest in copies of evidence made by investigators, and that the "search" (as defined by Appellant) was conducted after consent was withdrawn. (App. Br. at 21-22.)

Even if Appellant did not waive this issue, he has once again failed to demonstrate plain error. First, Appellant has not demonstrated that he revoked consent prior to OSI examining the contents of his cellular phone. Second, Appellant does not have a privacy interest in a legally obtained copy.

a. Appellant has not demonstrated that he withdrew consent prior to OSI reviewing their digital copy of his cellular phone

Appellant has not demonstrated that OSI did not search their digital copy of Appellant's cellular phone prior to revocation of consent. On the morning of 22 December 2014, Appellant consented to the search of his phone. (JA at 202-04.) OSI agents made a copy of Appellant's cellular phone data immediately after Appellant consented. (JA at 204.) The agents created a "cell phone extraction report" after they copied Appellant's cellular phone data. (JA at 210.) An OSI agent reviewed this cell phone extraction report that same day, 22 December 2014.

(JA at 210.)

Appellant's withdrawal of consent, while emailed on 22 December 2014, was not sent until "3:30 PM" later that afternoon. (JA at 204.) SA JL testified during motions that the extraction report was already compiled prior to Appellant leaving OSI the day of his interview. (JA at 50-51.) Accordingly, there is no evidence that Appellant's consent was withdrawn prior to the OSI's "search" of their copy of Appellant's cellular phone data, and the evidence this Court does have suggests the opposite.[5] As such, Appellant is not entitled to relief.

b. Appellant has no privacy interest in a copy.

Even if Appellant could show that he revoked consent prior to OSI reviewing the digital copy of his cellular phone, he had no privacy interest in that copy. Federal jurisdictions have refused to suppress copies of lawfully copied information. In Mason v. Pulliam, the Fifth Circuit Court of Appeals affirmed an order that directed the return of original records and documents voluntarily provided to an IRS agent after withdrawal of consent. Mason v. Pulliam, 557 F.2d 426, 429 (5th Cir. 1977). In doing so, the Court nonetheless "refused to require the return of copies made prior to the demand by Mason's attorney." Mason, 557 F.2d

[5] Although Appellant identifies that the burden at trial was on the government to demonstrate consent, Appellant did not raise revocation of consent as a basis for suppression. Thus, the government had no responsibility to address this issue. *See* Mil. R. Evid. 311(d)((5)(c). Furthermore, even if Appellant did not waive this challenge, he forfeited it. Thus, under the plain error standard, it is his burden to demonstrate plain and obvious error at this stage. Humphries, 71 M.J. at 214.

at 429 (emphasis added).

Similarly, the Ninth Circuit Court of Appeals further extended and clarified Mason's rationale regarding the use of lawfully copied records, holding that "any evidence gathered or copies made from the records [before revocation] should not be suppressed." United States v. Ward, 576 F.2d 243, 244-45 (9th Cir. 1978) (emphasis added). In a published decision, AFCCA has also held that an accused does not have a privacy interest in a digitally created copy. *See* United States v. Lutcza, 76 M.J. 698 (A.F. Ct. Crim. App. 2017) ("Appellee retained a privacy interest in his cell phone—his property—but not in the copy created by AFOSI, which was not Appellee's property").

In this case, OSI took a digital copy, akin to a snapshot, of some of the digital information on Appellant's phone with his consent. (JA at 204.) This is a modern-day analogy to the volumes of documents copied by the IRS in Mason. It was a lawful obtained copy, controlled and owned by OSI. As such, Appellant had no privacy interest in that copy, and is not entitled to relief.

II.

AFCCA CORRECTLY HELD THAT APPELLANT WAIVED ANY CHALLENGE RELATING TO THE SCOPE AND WITHDRAWAL OF HIS CONSENT TO SEARCH, AS APPELLANT DID NOT RAISE THESE ISSUES IN ARGUMENT AND AFFIRMATIVELY TOLD THE MILITARY JUDGE THAT HIS MOTION WAS BASED ONLY ON OTHER GROUNDS.

Standard of Review

Whether an appellant has waived an issue is a question of law reviewed de novo. United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017).

Law and Analysis

When an appellant intentionally waives a challenge, it is extinguished and may not be raised on appeal. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Recently, this Court reaffirmed this principle when it held "[w]hen an error is waived ... the result is that there is no error at all and an appellate court is without authority to reverse a conviction on that basis." United States v. Chin, 75 M.J. 220, 222 (C.A.A.F. 2016) (quoting United States v. Weathers, 186 F.3d 948, 955 (D.C. Cir. 1999)). Whereas forfeiture is a failure to assert a right in a timely fashion, waiver is "the 'intentional relinquishment or abandonment of a known right.'" Gladue, 67 M.J. at 313 (quoting United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))). An appellant can waive issues that involve "many of the most fundamental protections afforded by the constitution." Gladue, 67 M.J. at 314 (quoting United States v. Mezzanatto, 513 U.S. 196, 201 (1995)).

Appellant waived any challenge to the scope and withdraw of his consent to search by failing to raise the issues at trial. Motions to suppress are waivable and must be raised prior to entry of pleas. *See* Mil. R. Evid. 311; R.C.M. 905(b)(3). In

his motion to suppress and argument, Appellant did not raise scope of the search as a basis for suppression.

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 states that failure to raise a timely suppression motion constitutes waiver of the issue. Mil. R. Evid. 311(d)(3) allows the military judge to require the defense to specify the grounds upon which the defense moves to suppress evidence. When a specific motion has been required, the prosecution's burden to prove that evidence was not obtained as a result of an unlawful search or seizure extends only to the grounds specified. Mil. R. Evid. 311(d)(5)(C)

Appellant's suppression motion was based only on Edwards and the overall voluntariness of the search, but Appellant never raised a suppression motion regarding the actual search of Appellant's phone. This is perhaps best demonstrate by the lack of any discussion by the military judge in his ruling on the issues of scope and withdrawal of consent. (JA at 202-207.) By not raising withdrawal and scope of consent as basis for suppression, Appellant waived the issues pursuant to Mil. R. Evid. 311(d)(2)(A).

What's more, the military judge affirmatively questioned trial defense counsel on the basis for his objections. (JA at 74.) Trial defense counsel responded with Edwards and the "consent to search itself," which the military

judge interpreted as voluntariness. (JA at 75.) When the military judge confirmed that these were only two bases, trial defense counsel responded "Yes, Your Honor." (JA at 75.) By leaving the military judge with the impression that he was only asserting two bases for suppression, Appellant "affirmatively indicated he would not contest" the search of his cellular phone on other grounds. *See* Ahern, 76 M.J. at 198; *see also* United States v. Jacobs, 31 M.J. 138 (C.M.A. 1990) (rejecting a new basis of suppression which was not raised at trial).

Thus, even independent of Mil. R. Evid. 311, Appellant waived his right to challenge admission of the evidence derived from his cellular phone on the grounds of exceeding the scope and withdrawal of consent. AFCCA did not err in this regard. *See* (JA at 11-12.)

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and amicus curiae counsel on 18 October 2017.

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