IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private First Class (E-3) **JEFFREY G. EUGENE** United States Army, Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 18-0209/AR Crim. App. Dkt. No. 20160438

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S REQUEST TO CRIMINAL INVESTIGATION COMMAND [CID] THAT HIS CELL PHONE BE RETURNED WAS A WITHDRAWAL OF THE THIRD PARTY CONSENT TO SEARCH GIVEN BY APPELLANT'S WIFE IN APPELLANT'S ABSENCE.

II.

WHETHER THE ARMY COURT ERRED IN DETERMINING THE APPLICABILITY OF THE INEVITABLE DISCOVERY DOCTRINE WHERE (1) THE CID AGENTS FAILED TO TAKE ANY STEPS TO OBTAIN A WARRANT AND (2) THE CASE TOOK A "DEAD-END" UNTIL THE WARRANTLESS SEARCH.

I.

WHETHER APPELLANT'S REQUEST TO CRIMINAL INVESTIGATION COMMAND [CID] THAT HIS CELL PHONE BE RETURNED WAS A WITHDRAWAL OF THE THIRD PARTY CONSENT TO SEARCH GIVEN BY APPELLANT'S WIFE IN APPELLANT'S ABSENCE.

1. **Appellant objectively revoked any consent previously obtained.**

As the military judge found, "following the interview, [appellant] asked SA Nations if he could have his phone back. Special Agent Nations refused to return the cell phone." (JA 247). The standard under the Fourth Amendment for determining the scope of a suspect's consent, including whether consent has been withdrawn, "is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *United States v. Wallace,* 66 M.J. 5, 8 (C.A.A.F. 2008) (citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)) (internal quotation marks omitted). Appellant's request was a revocation of any extant consent in the ongoing seizure and any future searches of his personal property and therefore necessitated a warrant.

Appellant did not ask to look at his phone or get contact information from the phone; he asked to have the phone back – permanently. (JA 247). A reasonable person would understand this as a request to take immediate possession of the phone and for exclusive dominion and control over it. This request inherently precluded the ongoing seizure and any further search. Furthermore,

despite knowing that appellant had a greater privacy interest and greater possessory interest in the telephone than his spouse, the Criminal Investigation Command (CID) never asked appellant for consent to search his phone after he initially waived his right to remain silent. (JA 208-12). In fact, appellant specifically told CID that he had never authorized *anyone* to access his phone. (JA 210). Furthermore, following the interview, CID documented that they knew they needed to obtain his consent prior to searching the phone. (JA 244). The combination of that conveyance, and CID's rejection of appellant's explicit request for the return of his phone, constituted "communication understandable to those conducting the search that the consent has been withdrawn." *United States v. Coleman*, 14 M.J. 1014, 1016 (C.M.A. 1982). An attempt to recover property, even if unsuccessful, reasonably conveys that the owner no longer consents to law enforcement's ongoing possession.

2. <u>Appellant could revoke previously given third party consent.</u>

A third party has authority to consent to a search and seizure when he possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). That consent "is valid as against the absent, nonconsenting person with whom that authority is shared." *Id*. at 170. This case law is consistent with *Georgia v. Randolph*, 547 U.S. 103 (2006), which this court has interpreted as

"reaffirming the constitutional sufficiency of third party consent absent the objection of a present, nonconsenting person with whom the authority is shared." *United States v. Rader*, 65 M.J. 30, 32-33 (C.A.A.F. 2007).

"When a co-occupant of property is physically present at the time of the requested search and expressly states his refusal to consent to the search, a warrantless search is unreasonable." Mil. R. Evid. 314(e)(2)(discussion). The government errs in treating this as a requirement that appellant had to be physically present at the time Mrs. Eugene originally consented. (Gov't Br. 14). To the contrary, as the record makes clear, searches that discovered the incriminating evidence had not occurred before appellant became physically present and revoked his consent. (JA 122-23, 185). After appellant was physically present at CID and revoked consent, any future searches could not be consent searches and any future searches thus required a warrant.

The government's reliance on *United States v. Weston* is misplaced given the significant factual distinctions from this case. 67 M.J. 390 (C.A.A.F. 2009). In *Weston*, Weston was not physically present at the location to be searched, declined consent *prior* to law enforcement obtaining consent from his wife, and the thing searched was their house – an object in which he and his wife had an equal expectation of privacy. *Id*. at 391. Here, Mrs. Eugene originally provided consent, but appellant revoked that consent *later* when his military leadership permitted him

to be physically present at the site of the search – CID – and, although Mrs. Eugene could access the phone, all parties knew it was appellant's personal property. (JA 246-47). Additionally, unlike tangible property, the normal procedure for digital property is a seizure followed by a search rather than a search followed by a seizure. Thus digital evidence is similar to the urine in *United States v. Dease*, where this Court permitted revocation of consent prior to the search that actually revealed incriminating information. 71 M.J. 116, 119 (C.A.A.F. 2012).

This case is analogous to that of a co-occupant of property arriving while law enforcement had begun, but not yet completed, searching the property. At that point, employing the *Georgia v. Randolph* rule, law enforcement would no longer have consent and would need a warrant to continue. Anything they searched or seized with the co-occupant's consent would be admissible, and any further search of the property would require a warrant. That is precisely what should have happened in this case. Here, however, the lawful search that occurred prior to the revocation was not relied upon by the government at trial, (JA 173, 176), and a warrant was neither sought nor obtained for the subsequent searches that revealed incriminating information.

3. The holding of *Georgia v. Randolph* should not be limited to dwellings.

In *United States v. King*, the 3rd Circuit categorically concluded that the *Randolph* rule is limited to dwellings and *never* applies to personal effects. 604

F.3d 125, 137 (3d Cir. 2010). No other circuit court has adopted this approach. To the contrary, the 9th Circuit has interpreted *Randolph* as applying to more than dwellings. *See United States v. Murphy*, 516 F.3d 1117, 1122 (9th Cir. 2008). Recently, the 11th Circuit held the search lawful when a law enforcement officer began a consent search of a mutually owned computer, but stopped and obtained a warrant before searching further when the co-owner arrived and objected. *United States v. Thomas*, 818 F.3d 1230, 1241 (11th Cir. 2016). Appellant submits the same approach would have been reasonable under the Fourth Amendment in this case. Had CID obtained a warrant or search authorization once the now present co-owner revoked consent, the evidence would have been admissible, just as it was in *Thomas*.

Lastly, since *King* was decided, the Supreme Court has issued opinions highlighting the importance of and vastness of information contained within a cell-phone. These opinions undercut the rationale in *King*, related to the uniqueness of a residence within in Fourth Amendment jurisprudence. *See Riley v. California*, 134 S. Ct. 2473, 2491 (2014) ("A cell phone search would typically expose to the government far *more* than the most exhaustive search of a house."); *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) ("A person does not surrender all Fourth Amendment protection by venturing into the public sphere.").

The rationale underlying the Supreme Court's decision in *Randolph* is based on an assessment of "widely shared social expectations" and "customary social usage." 547 U.S. at 111, 116. As the Court noted:

> [I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions.

Id. at 113.

Here the "widely shared social expectations" regarding cell phones weigh in appellant's favor and render his revocation effective. If a spouse says, "look at these pictures on my husband's cellphone," and the husband is not present, a friend or visitor would ordinarily have no reservations. To the contrary, if the husband was in the same room or arrived thereafter and said, "don't look at my phone – give it back," any sensible person would ordinarily cease looking and return the phone. The Supreme Court has continued to employ this type of analysis in deciding Fourth Amendment cases. *See Fernandez v. California*, 571 U.S. 292, 303-04 (2014). Furthermore, a "diminished privacy interest does not mean that the Fourth Amendment falls out of the picture entirely." *Riley*, 134 S. Ct. at 2488. Thus the Fourth Amendment's reasonableness requirement vindicates appellant's ability to revoke consent in this case.

II.

WHETHER THE ARMY COURT ERRED IN DETERMINING THE APPLICABILITY OF THE INEVITABLE DISCOVERY DOCTRINE WHERE (1) THE CID AGENTS FAILED TO TAKE ANY STEPS TO OBTAIN A WARRANT AND (2) THE CASE TOOK A "DEAD-END" UNTIL THE WARRANTLESS SEARCH.

1. **Inevitable discovery does not apply because an officer testifies that normal procedure is to obtain a warrant.**

The government relies on Special Agent (SA) Nations' testimony as sufficient to establish inevitable discovery because "routine police procedure would have discovered the evidence absent any illegal search." (Gov't Br. 23). At the motions hearing, SA Nations testified that if appellant had told him that appellant had not authorized anyone to access his phone, SA Nations would have sought a warrant. (JA 112). Remarkably, SA Nations in fact asked this exact question to appellant, appellant told him he had not given anyone access to his phone, and SA Nations did not seek a warrant. (JA 210). Furthermore, SA Nations testified that had appellant asked for his phone back, he would have "contacted the military magistrate at that point." (JA 113). However, the military judge found as a fact that appellant did ask for his phone back and the government does not challenge this finding on appeal. (JA 247). Contrary to his testimony, SA Nations never contacted the military magistrate. In essence, SA Nations testified to two preconditions that would have led him to seek a warrant. However,

appellant factually fulfilled both of these preconditions and, despite this, CID sought neither warrant nor search authorization. Accordingly, any reliance on SA Nations' testimony to support inevitable discovery is misplaced.

The documentary evidence in this case highlights that, despite his later testimony, SA Nations understood appellant had revoked consent, that investigators needed a warrant, and that information was conveyed to his successor. On June 16, 2015 at 1200, 11 days after appellant revoked consent, SA Tsuno typed:

> Case file reassigned to SA Tsuno. SA Nations briefed SA Tsuno on the investigation. The investigation requires the following actions:
> Draft of DoD IG Subpoena request.[1]
> *Obtain consent from PFC Eugene to search his cell phone.*

(JA 244) (emphasis added).

This information was not placed in the file by an unaware supervisor, contrary to the government's assertion. (Gov't Br. 25). An agent assigned to this case, briefed by SA Nations that he needed to get consent from appellant, entered this information into the CID file. Despite documenting this directive, the government obtained neither consent nor a warrant. Given the disconnect between

[1] The government notes on brief that the reference to a subpoena and an earlier reference related to a federal search warrant may relate to evidence in the possession of third parties. (Gov't Br. 25). This is possible, but the government bore the burden at trial, by clear and convincing evidence, and put on no evidence to that effect. Mil. R. Evid. 314(e)(5).

SA Nations' testimony and what actually happened, and in light of the documented but ignored need for further authorization, the government cannot show the inevitable discovery of the contents of the cellphone in this case. Thus, there remains insufficient evidence that the police in this case would have ever actually obtained a warrant. Absent this showing, the evidence must be suppressed.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

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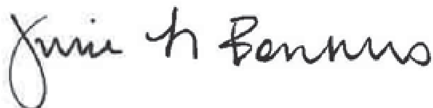

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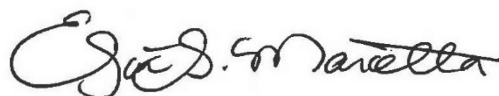

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court and the Government Appellate Division on August 23, 2018.

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