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	)	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20160438 USCA Dkt. No. 18-0209/AR

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FOR 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.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3), which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." In a case reviewed under subsection (a)(3), "action need be taken only with respect to issues specified in the grant of review." UCMJ art. 67(c).

STATEMENT OF THE CASE

On 28 April 2016, 25 May 2016, and 15-16 June 2016, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of attempted viewing of child pornography and four specifications of attempted sexual abuse of a child in violation of Article 80, UCMJ, 10 USC § 880. The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for twenty-six months, and to be dishonorably discharged from the service. The convening authority approved the adjudged sentence on 4 October 2016.

The Army Court affirmed the findings and sentence on 28 February 2018. Appellate defense counsel filed a Petition for Grant of Review on 27 April 2018. On 30 April 2018, this Court granted appellate defense counsel's Motion for Leave to File the Supplement separately from Petition, and on 17 May 2018, the supplement was filed. On 18 June 2018, this Court granted appellant's petition for review. On 18 July 2018, appellant filed his petition for review.

STATEMENT OF FACTS

In June 2015, appellant deployed to a field exercise. (JA 27). He was unable to bring his cellular phone to the field, so he gave the phone to his wife, Mrs. Brianna Eugene. (JA 27). He provided her the phone so she could pay his bills and because he was not allowed to take the phone to the field. (JA 245). Appellant placed no limitations on Mrs. Eugene's use of his phone. (JA 245). Mrs. Eugene had access to the phone; she registered her fingerprint on the phone when appellant purchased the phone or shortly thereafter. (JA 245) After dropping appellant off for his field exercise, Mrs. Eugene discovered inappropriate messages and photos of a sexual nature on the phone. (JA 27-28, 245). Appellant appeared to be engaged in sexually charged communications with several women under the age of eighteen. (JA 27-28). Infuriated by the messages and images she observed, Mrs. Eugene forwarded the messages to a noncommissioned officer in appellant's command, who advised her to go to the police. (JA 32-34).

Mrs. Eugene subsequently voluntarily went to the Army Criminal Investigative Division (CID) office at Schofield Barracks, Hawaii on 2 June 2015. (JA 33-34). Special Agent (SA) Nations interviewed Mrs. Eugene. (JA 83-84). At the start of the interview, SA Nations determined that Mrs. Eugene (1) currently possessed the phone; (2) could open her husband's phone with her thumbprint; and (3) occasionally used the phone. (JA 34, 87). Mrs. Eugene showed SA Nations the Kik Application appellant used to talk with underage girls. (JA 50). SA Nations subsequently obtained consent from Mrs. Eugene to search and seize the phone. (JA 88, 213, 246).[1] Mrs. Eugene provided a statement to SA Nations. (JA 87, 242-243). She told SA Nations that her husband, appellant, had been communicating with fourteen and sixteen-year old girls. (JA 058). Mrs. Eugene told CID that the photos and videos she discovered included nude images of minors and "masturbation videos." (JA 58, 243). Had Mrs. Eugene not provided consent, SA Nations would have obtained authorization to seize and search the phone. (JA 90, 246).

[1] Mrs. Eugene claimed at the suppression hearing that she did not have authorization from her husband to use the phone and did not even know the passcode when she received it. (JA 63-64). The military judge specifically found appellant and his wife did not testify credibly. (JA 247). During her testimony at the hearing Mrs. Eugene said that she told CID she "normally accessed [her] husband's phone with [her] thumbprint and his passcode" (JA 54), but also stated that she guessed his passcode when she received the phone that June and then saved her thumbprint onto the phone. (JA 54).

Following the interview of Mrs. Eugene, SA Nations conducted interviews and collected statements from the noncommissioned officers at appellant's unit who saw the inappropriate photos. (JA 94-95).

On 5 June 2015, SA Nations brought appellant into the CID office for an interview. (JA 208-212). Appellant waived his rights (JA 206) and made a statement to SA Nations acknowledging he engaged in communications with women under the age of eighteen (JA 208-212). Following the interview, appellant asked for his phone to be returned. (JA 247). Special Agent Nations declined to return the phone. (JA 247). At the suppression hearing, appellant explained to the military judge that he wanted his phone back because, "It's my only phone and we are in the military, it is kind of hard not to have a phone. You miss a lot of appointments and stuff. It was my only phone." (JA 138). During the interview with SA Nations, appellant never told anyone at CID not to search his phone even though he knew his wife had provided the device to CID. (JA 246-247). CID never obtained a search authorization for the phone and relied on the consent of Mrs. Eugene alone. (JA 247). Special Agent Nations testified that had consent been revoked, he would have obtained a warrant from a military magistrate. (JA 113).

Shortly thereafter, the case was transferred to SA Tsuno. (JA 182, 244). Special Agent Nations briefed SA Tsuno on the case. (JA 182). Special Agent

Nations informed SA ST that the case involved child pornography and that, at that time, they were unable to obtain data from the Kik Messenger application through the logical extraction. (JA 182-183). Special Agent Tsuno attempted to obtain information from the Kik Corporation but learned that the company could not verify certain information required for the investigation. (JA 184-185). Due to that limitation, CID conducted another search on the phone, this time while it was connected to a network. (JA 185). This allowed the CID agent to contact individuals with whom appellant communicated. (JA 185). When CID was unable to obtain the cooperation of the parents of the victims, they decided to wait on the digital forensic examination of appellant's phone. (JA 190). That examination led to the evidence the government relied upon for the court-martial.

SUMMARY OF THE ARGUMENT

Appellant did not unambiguously revoke his wife's third party consent to search his cellular phone when he asked the CID special agent, at the close of his interview, if he could get his phone returned. Appellant did not revoke consent to search the phone because, under the totality of the circumstances, his statement was ambiguous. Moreover, appellant could not revoke his wife's consent to search the phone because the plain language of Mil. R. Evid. 314 does not authorize him to revoke consent. Finally, to the extent appellant revoked the consent to seize the phone, his revocation was ineffective because the seizure was complete.

The Army Court did not err in its application of the inevitable discovery doctrine. When the illegality occurred, the government agents possessed evidence or leads that would have inevitably led to discovery of the evidence in a lawful manner had the illegality not occurred.

STANDARD OF REVIEW

An appellate court reviews "a military judge's ruling on a motion to suppress for abuse of discretion." *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). The judge's conclusions of fact are reviewed under a clearly-erroneous standard and conclusions of law under the de novo standard. *Id.* "In reviewing a ruling on a motion to suppress, [the court] considers the evidence 'in the light most favorable to the' prevailing party." *Id.* (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). "The abuse of discretion standard calls 'for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

LAW AND ARGUMENT

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.

"[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). "[A] search conducted pursuant to a valid consent is constitutionally permissible." *Id*. at 222. The Supreme Court has stated that "[t]he touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citations omitted). Once a suspect has consented to a search, the consent may be withdrawn at any time prior to the search. Military Rule of Evidence (Mil. R. Evid.) 314(e)(4); *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016).

A third party with common authority over the property being searched may also provide consent. *United States v. Matlock*, 415 U.S. 164, 171 (1974). "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary

consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority or other sufficient relationship to the premises or effects to be inspected." *Id*. Even if a third party does not have actual authority to grant consent, a search will not be suppressed if law enforcement reasonably believed the third party had authority to grant consent. *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990).

"'Withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by unequivocal act or statement.'" *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005) (quoting *United States v. Gray*, 369 F.3d 1024, 1026 (8th Cir. 2004). "'Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.'" *Id*. (quoting *Burton v. United States*, 657 A.2d 741, 746-47 (D.C. App. 1994). In order to withdraw consent, there must be "some 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).

Courts have examined equivocal statements or actions that did not result in a withdrawal of consent. For example, in *United States v. Gray*, the Eighth Circuit

Court of Appeals found that the defendant's expression of impatience with the length of the search (calling it "ridiculous" and stating he was "ready to go now") did not amount to an unequivocal revocation of consent. *Gray*, 369 F.3d at 1026. In *United States v. $304,980.00 in United States Currency*, 732 F.3d 812, 820 (7th Cir. 2013), the Seventh Circuit Court of Appeals found that a defendant writing "UNDER PROTEST" on a consent form "never unequivocally withdrew his consent." The defendant had previously provided verbal consent to the officers. Moreover, his conduct following his equivocal revocation of consent was "wholly consistent with his consent and inconsistent with revocation or limitation of that consent." *Id*. at 821. "He engaged the officer in casual conversation and even volunteered that he had been in trouble with the law in the past." *Id.* Searches under the Fourth Amendment are only prohibited when they are unreasonable, and "[p]olice officers do not act unreasonably by failing to halt their search every time a consenting suspect equivocates." *Id*.

Courts have found unequivocal statements when the defendant clearly states his intent to withdraw consent for the search. (see *United States v. Miner*, 484 F.2d 1075, 1076 (9th Cir. 1973) (finding that the statement "No, it's personal" withdrew implied consent to search); (*United States v. Dichiarinte*, 445 F.2d 126, 128 (7th Cir. 1971)) (finding that the statement "The search is over. I am calling off the search" revoked consent to search).

The concepts of "search" and "seizure" are two separate legal concepts. *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008). An accused may revoke his consent for seizure or search of an item or a place, or both. The standard is that of "objective reasonableness" (whether "the typical reasonable person have understood the exchange between the officer and the suspect"). *Id*. at 8. For example, in *Wallace*, the appellant consented to a general search of his home and computer. *Id*. at 6. Later, when the authorities were removing his computer, he stated, "you can't take that." *Id*. Those unequivocal words "may have revoked his consent to seize the computer, but disapproval of the seizure cannot, without more, affect the consent to search in the first place." *Id*. at 8.[2]

1. Appellant did not unambiguously revoke his wife's consent to search.

Appellant argues that his request to SA Nations for his phone, given at the end of his lengthy interview with CID where he provided incriminating statements, revoked his wife's consent to search the phone. This court should determine his request was ambiguous and therefore the consent to search was never revoked.

Appellant provided a statement to CID following a proper rights warning, which he waived. (JA 206). During the interview, he never refused consent to

[2] The appellant in *Wallace* later acquiesced to the seizure of the computer. This court found that this was not voluntary under a totality of circumstances analysis. *Wallace*, 66 M.J. at 9-10. Nevertheless, the military judge did not err in *Wallace* when she denied the suppression motion due to the inevitable discovery doctrine. *Id*. at 10.

search his phone or told the CID agent not to search his phone. (JA 246). He never refused consent or expressed concern that his wife was using his phone without his consent. (JA 246). At the end of the interview, appellant requested that SA Nations return his phone; SA Nations refused this request. (JA 247). Appellant requested the phone in order to use the phone – because it was his "only phone" and it is hard to get around in the military without one. (JA 138, 250).

As determined by the military judge, appellant's request, at most, amounted to a revocation of his wife's consent for CID to seize the phone and was not an unequivocal request for CID not to search the phone. (JA 150). While appellant did not need to use any "magic words" to revoke consent, the revocation must be "unequivocal." In this case, asking SA Nations to return a cellular phone is not an unequivocal statement revoking consent to seize, much less consent to search. Appellant inquired to the CID agent on whether he could get his phone back. A person can request a phone be returned for numerous reasons: to obtain phone numbers for contacts, to use the phone, or to prevent CID from searching the phone. The numerous reasons why appellant may have wanted the phone demonstrate the equivocal nature of his request in regards to the consent to search and seize.

The military judge found that appellant never made any statement objecting to the actual search of the phone. Appellant made potential incriminating

statements throughout his interview with CID and never once objected to any portion of the interview or investigation process during his interview. His actions were "wholly consistent with his consent and inconsistent with revocation or limitation of that consent." *$304,980.00 in United States Currency*, 732 F.3d at 821.

Moreover, at his suppression hearing, appellant did not state he wanted the phone back to stop a search or seizure. He wanted the phone because he wanted to use the phone. While this court reviews his statement under an objective, not subjective, standard, his statement at the suppression hearing is revealing. His desire to use the phone indicates he did not make any statements that would have objectively and unambiguously indicate he was revoking the consent to search the phone. His subjective desire does not even unambiguously show that he intended to revoke his wife's consent to seize the phone, particularly in light of his statement and overall cooperation with CID during his lengthy interview.

Reviewing the record as a whole and applying what "the typical reasonable person [would] have understood" from that exchange, it is not clear that appellant revoked his consent to search the phone. *Wallace*, 66 M.J. at 8.

2. Appellant could not revoke third party consent.

Even if this court is inclined to find that appellant unequivocally revoked his wife's consent, the court should still deny appellant relief because appellant could

not revoke his wife's consent to seize and search the phone. Military Rule of Evidence 314 governs consent searches and their revocation in the military. The plain language of the rule does not allow an appellant non-contemporaneous revocation of third party consent. Military Rule of Evidence 314(e)(3) states "[c]onsent may be limited in any way *by the person granting consent*, including limitations of time, place, or property, and may be withdrawn at any time." Mil. R. Evid. 314(e)(3) (emphasis added). The plain language of the rule appears to only allow the person who granted consent to later revoke the consent. Moreover, the discussion section of the rule indicates that only a contemporaneous revocation of consent is valid, stating:

> 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 as to that co-occupant and evidence from the search is inadmissible as to that co-occupant.

Mil. R. Evid. 314(e)(2)(discussion)(emphasis added).

Here, assuming appellant unambiguously revoked his wife's consent to search or seize the device, that revocation occurred non-contemporaneously and several days following Mrs. Eugene's consent.

Citing *George v. Randolph*, appellant argues he could revoke his wife's consent. However, this misapplies the Supreme Court's holding in that case and potentially contradicts this court's holding in *United States v. Weston*.

First, the Supreme Court's decision in *Randolph* was limited to specific facts of that case. Citing *Katz v. United States*, the court discussed how common authority is understood under the Fourth Amendment, stating:

> The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Georgia v. Randolph, 547 U.S. 103, 110 (2006) (quoting *Katz v. United States*, 389 U.S. 347, 352-353 (1967).

In other words, when a party shares possession of and authority over property, each assumes the risk that the other may permit the authorities to search that property. *Randolph*, 547 U.S. at 111.

Moreover, the court in *Randolph* explicitly limited its holding. The opinion "[drew] a fine line" when it found "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Randolph*, 547 U.S. at 121. The concurring opinion from Justice Breyer emphasized that he "stress[ed] the totality of the circumstances . . . The court's opinion does not apply where the

objector is not present and objecting." *Randolph*, 547 U.S. at 126 (Breyer, J. concurring) (citations omitted). *Georgia v. Randolph* creates an exception to the general rule on third party consent: when a potential defendant is present and objects, the police cannot rely on third party consent to enter a dwelling.

This court has noted the limited application of *Randolph.* "*Randolph* stands for the narrow proposition that 'a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.'" *United States v. Wallace*, 66 M.J. 5, 8-9 (C.A.A.F. 2008) (quoting *Randolph*, 547 U.S. at 120). In *United States v. Weston*, this court found that although the appellant refused consent to search his house, the search was nevertheless reasonable after the CID agent received permission from his wife. *United States v. Weston*, 67 M.J. 390, 394 (C.A.A.F. 2009). In that case, appellant and his wife voluntarily went to the Provost Marshal's Office following a report the appellant had surreptitiously recorded another soldier changing in the latrine. *Id*. At 391. The *Weston* appellant invoked his rights and refused to grant the CID agent permission to search his house. *Id.* The same agent later obtained permission to search the premises from the *Weston* appellant's wife. *Id*. The *Weston* appellant challenged the validity of the search. *Id.*

This court held the search was reasonable. This court found that because the *Weston* appellant was not present at the house, the agent only needed the consent from his wife in order to search the premises. It is the "express refusal by a physically present co-occupant that renders a warrantless search unreasonable and invalid as to him." *Weston*, 67 M.J. at 393 (citing *Randolph*, 547 U.S. at 106).

The Third Circuit Court of Appeals has held that the Supreme Court's holding in *Randolph* applied to only dwellings and not personal effects. *United States v. King*, 604 F.3d 125, 137 (3rd Cir. 2010). In that case, appellant King lived with his girlfriend, Larkin, and her two-year old daughter, whom they sexually abused. *Id.* at 131. When the authorities learned of the abuse, they came to the house and arrested Larkin on an outstanding bench warrant. *Id.* The *King* appellant and his girlfriend were both physically present when the police entered the residence. *Id.* 132. The officers asked Larkin for permission to seize the computer and hard drive, which she granted. *Id.* The officers seized the items over appellant King's objections. *Id.* Larkin also provided them with her passwords for her internet accounts and e-mail. *Id.* The agents reviewed incriminating communications between Larkin and appellant King. *Id.* They then executed a search warrant for appellant King's residence and computer.

The *King* appellant moved to suppress all evidence claiming the entry of his home and seizure of his computer violated the Fourth Amendment, which was

denied. *Id.* at 133. On appeal, the court considered his motion to suppress in light of the Supreme Court's rulings in *Randolph* and *United States v. Matlock*, 415 U.S. 164 (1974). *Id.* at 137.[3] The court found that the holding in *Randolph* did not extend to personal effects. *Id.* Because the *King* appellant placed the hard drive in a computer owned by Larkin and did not password protect the device, he "assumed the risk that Larkin would consent to its seizure." *Id.* The seizure of the hard drive was reasonable despite the *King* appellant being physically present and objecting to the seizure.

The facts here are analogous. Appellant provided his phone to his wife. He placed no limitations on her use of the phone. She demonstrated her access and control of the phone when she unlocked the device with her thumbprint; her statement to CID further established authority to access and use the device. The government obtained her consent to search the device. Assuming, *arguendo*,

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[3] The Ninth Circuit Court of Appeals has applied *Randolph* to situations beyond a dwelling. *United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008). That case involved the search of a storage unit, not a personal effect. *Id.* at 1119-1120. Moreover, in *Murphy*, the appellant refused consent to search the premises *prior* to the third party consenting to the search. *Id.* The facts at issue here are distinguishable from *Murphy*; the item in question was a cellular phone, not a premise, Mrs. Eugene demonstrated her possession and authority over the phone, and any alleged objection from appellant occurred after CID already obtained consent to search the phone. Finally, the court in *King* persuasively explained why the holding in *Randolph* should not apply to personal effects. *King*, 604 F.3d at 136-137. Moreover, this court has previously declined to apply the Ninth Circuit's reasoning in *Murphy* in a slightly different fact pattern. See *Weston*, 67 M.J. at 393.

appellant later unequivocally withdrew that consent, his withdrawal was ineffective. This was a personal effect similar to the hard drive at issue in *King* and not a dwelling like in *Randolph*. This is also not the same as *Dease*, where appellant withdrew *his* consent after granting consent to seize and search his urine. *United States v. Dease*, 71 M.J. 116, 119 (C.A.A.F. 2012)(emphasis added). This result is entirely consistent with Mil. R. Evid. 314(e)(3), which allows the party granting consent to withdraw that consent at any time. Considering the plain language of Military Rule of Evidence 314(e)(3), the Supreme Court's narrow opinion in *Randolph*, the Third Circuit's clarifying opinion in *King*, and this court's decision in *Weston*, this court should find appellant could not withdraw his wife's consent under the facts presented here.

3. Appellant cannot revoke a completed seizure.

Even if appellant could have revoked his wife's consent to seize the cellular phone, this court should find the revocation was ineffective because the seizure was complete.

Search and seizure are separate concepts. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

While M.R.E. 314(e)(3) states that consent "may . . . be withdrawn at any time," this court has indicated that consent may only be withdrawn prior to the completion of the seizure. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). In that case, the *Hoffman* appellant provided consent for investigators to search his barracks room and for the removal of items desired for the investigation. *Id*. at 123. The *Hoffman* appellant then revoked his consent when he noticed the investigators collecting his digital media. *Id*. The investigators seized the items anyway. *Id*. This court noted:

> Appellant withdrew his consent while the media were still sitting in his room. While the agents may have moved the media to a central location in the room, they did not meaningfully interfere with it until they removed it. As the seizure of the media occurred after Appellant had withdrawn his consent, the seizure violated the Fourth Amendment.

Id. at 124. While this court did not explicitly state consent could not be withdrawn following a completed seizure, the text of the decision indicates that result.

Moreover, in *Dease*, this court noted that "'consent could be withdrawn at any time' provided of course that the search has not already been conducted." *Dease*, 71 M.J. at 120. Logically, the same applies to a seizure. As the Army Court of Criminal Appeals discussed, Military Rule of Evidence 316(d)(2) states the consent requirement of M.R.E. 314 applies to consent seizures. (JA 4).

Appellant could not revoke the seizure because it had already been completed when CID meaningfully interfered with appellant's property interest when they collected the phone.

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.

The doctrine of inevitable discovery "provides an exception to the exclusionary rule, 'allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means.'" *Hoffmann*, 75 M.J. at 124 (quoting *Wallace*, 66 M.J. at 10). In order for the doctrine to apply, the prosecution must establish "'that when the *illegality occurred*, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.'" *Hoffmann*, 75 M.J. at 125 (quoting *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012). Warrantless searches have been upheld when "overwhelming probable cause and routine police procedure made discovery of the evidence inevitable." *Wallace*, 66 M.J. at 9 (citing *United States v. Owens*, 51 M.J. 204

(C.A.A.F. 1999). This inevitable discovery doctrine is codified by Military Rule of Evidence 311(b)(2), which states, "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." Even if there is no parallel investigation, "[w]hen the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies." *United States v. Owens*, 51 M.J. 204, 210-211 (C.A.A.F. 1999).

In this case, overwhelming probable cause existed and routine police procedures would have discovered the evidence. Appellant concedes probable cause existed, but argues CID would not have inevitably discovered the evidence because they took no steps to obtain a warrant between the time appellant asked for his phone back and when they conducted the digital forensic examination (or at any point past that date). Appellant's argument would eviscerate the inevitable discovery rule; in *every* case where the government failed to seek a warrant, the defense would argue inevitable discovery should not apply because the government had a chance to seek a warrant and did not. Had the government sought a warrant, there would be no need for inevitable discovery because the search would be lawful.

If the government presents "no evidence that the police would have obtained a warrant," then the evidence would not be inevitably discovered – the police would not have obtained a warrant. *United States v. Keefauver*, 74 M.J. 230, 237 (C.A.A.F. 2015) (citing *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014). The government produced sufficient evidence through the testimony of SA Nations that routine police procedure would have discovered the evidence absent any illegal search.

This is analogous to the situation in *United States v. Wallace.* In that case, this court found that the inevitable discovery doctrine applied to a situation where an appellant initially provided consent to search his computer, and then, as a matter of law, terminated his consent. *Wallace,* 66 M.J. at 14. Appellant Wallace made statements to investigators admitting to a sexual relationship with a young girl and communication with her over e-mail and instant messenger. *Id.* This court noted that even though the consent to search the computer had been terminated, the fact that "the law enforcement officers proceeded on the belief that they had consent underscores that this is not a case involving intent to evade the warrant requirement." *Id*.

Assuming that appellant's request for his phone to be returned terminated the consent to search, the same factors that applied in *Wallace* apply here. The CID agents had overwhelming probable cause to search the phone. Mrs. Eugene

made a statement to CID that appellant had been communicating by phone with someone who was fourteen years old and someone who was sixteen years old. (JA 58, 242). These conversations were sexual in nature and Mrs. Eugene told CID that the photos and videos she discovered included naked images of minors and "masturbation videos." (JA 58, 243). Special Agent Nations testified that had he not obtained consent to search the phone, he would have sought authorization from a military magistrate in order to seize and search the phone. (JA 90). Had appellant told SA Nations appellant did not grant his wife consent to use the phone, SA Nations would have obtained a warrant from a military magistrate. (JA 112). Had appellant asked for his phone back, SA Nations would have contacted a military magistrate. (JA 113). When the alleged illegality occurred, the investigators "possessed. . . evidence or leads that would have inevitably led to the discovery of the evidence and the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *Hoffmann*, 120 M.J. at 125. The investigators acted in good faith; they believed they had consent to search the phone, otherwise they would have sought a warrant.

Appellant argues that the inevitable discovery doctrine does not apply because the government made no attempts to obtain a warrant "despite repeatedly recognizing the obligation to do so." (Appellant's Br. 26). Appellant cites JA 244, the Case Activity Summary, which instructs the agent to obtain a federal search

warrant, submit a DOD IG subpoena request, and obtain consent from appellant to search his phone. (Appellant Br. 27-28). Of the three instructions on the Case Activity Summary, the only one of potential relevance is the instruction to "Obtain consent from PFC Eugene to search his cell phone." (JA 244). The federal search warrant and DOD Inspector General Subpoena likely do not relate to appellant's phone, but to third parties that may have evidence in the case.[4] Even the annotation to obtain consent from PFC Eugene has marginal relevance without further testimony from a witness. This could have been placed in the file to strengthen the case; it could have been placed in the file by a supervisor who was unaware of Mrs. Eugene's consent or unaware of her authority to consent. The parties did not question SA Nations about the Case Activity Summary during the suppression hearing. The defense submitted the Case Activity Summary at the conclusion of the suppression hearing and there was no further evidence on that issue. (JA 156).

Relying on *United States v. Allen*, 159 F.3d 832 (4th Cir. 1998), appellant argues that the inevitable discovery doctrine is inapplicable in this case. *Allen* is

[4] Special Agent Nations testified that it was standard practice to obtain a magistrate's search and seizure authorization if consent was not granted; there is no evidence he would have obtained a DOD IG subpoena or Federal search warrant in order to search appellant's phone. Those types of authorizations would likely target external actors not under military control, such as internet service providers.

distinguishable from the facts here. In *Allen*, the court reviewed whether the government would have inevitably discovered cocaine located in a duffle bag belonging to the *Allen* appellant. *Allen*, 159 F.3d at 838. The government produced evidence that a police dog *could* find the cocaine in the duffle bag, but then did not produce evidence that the police would actually use the dog in that manner. *Id*. at 840. Moreover, the police did not have probable cause to search the bag and never established how they would have found the illegal substance. *Id.* Routine police procedure would not have discovered the evidence absent the illegal search.

The facts differ here. Special Agent Nations testified that he would have obtained a warrant had consent been revoked or had he been aware consent had been revoked. "A finding of inevitable discovery necessarily rests on facts that did not occur." *Allen*, 159 F.3d at 840. The investigators here did not obtain a warrant. A finding of inevitable discovery rests on the premise that they would have obtained a warrant if the facts were different – that is, if they did not believe they had valid consent. When the government establishes "overwhelming probable cause and routine police procedure made discovery of the evidence inevitable," then the doctrine applies. *Wallace*, 66 M.J. at 10. "To take advantage of this doctrine, the prosecution must establish, by a preponderance of the evidence, 'that *when the illegality occurred*, the government agents possessed, or were actively

pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.'" *Hoffman*, 75 M.J. at 124-25.

The government possessed evidence that would have inevitably led to the discovery of the evidence had the illegality not occurred. The government established that routine police procedures would have discovered the evidence. Once they obtained a warrant, CID would have conducted the same searches they conducted under the belief that there was valid consent to search the phone. The government would have inevitably obtained the evidence. This is no different than the inevitable discovery upheld by the majority in *Wallace*. This court should therefore affirm the military judge's ruling.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court answer the specified questions in the negative and affirm the findings and sentence.

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I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 17th August 2018 and electronically filed to Defense Appellate on August 17, 2018.

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