IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private First Class (E-3) **ETHEN D. BLACK** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. ARMY MISC 20210310 USCA Dkt. No. _____/AR

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

Issue Presented

WHETHER THE ARMY COURT ERRED IN ITS ABUSE OF DISCRETION ANALYSIS BY (1) CREATING A NOVEL TEST FOR COMMON AUTHORITY, (2) FAILING TO GIVE DEFERNCE TO THE MILITARY JUDGE'S FINDINGS, (3) COMPARING A MODERN CELL PHONE TO A TRADITIONAL "CONTAINER," AND (4) FINDING ERROR BASED ON A DIFFERENCE OF OPINION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 62, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 862 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

Private First Class (PFC) Ethen Black, appellant, is charged with one specification of possession of child pornography, in violation of Article 134, UCMJ. (Charge Sheet). On April 19, 2021, the military judge granted a defense motion to suppress evidence obtained from appellant's cell phone, along with other evidence derived from that search. (App. Ex. VIII). On April 21, 2021, the government filed a motion for reconsideration. [1] (App. Ex. IX). On April 30, 2021, the military judge denied the government's motion for reconsideration. (App. Ex. XII). On May 3, 2021, the government filed a notice of appeal in accordance with Article 62, UCMJ. (App. Ex. XIII). On October 22, 2021, the Army Court issued its opinion and determined the military judge abused his discretion by suppressing the evidence derived from appellant's cell phone.

Reasons to Grant Review

This case presents this Court with an opportunity to further define the limits of the Fourth Amendment as it pertains to cell phones and other electronic devices. In this case, appellant let an acquaintance, Private First Class (PFC) Avery, use his

[1] In its motion for reconsideration, the government asked the military judge to reconsider the arguments it originally presented to the court; however, the government also raised a new distinct theory of admissibility: that evidence of child pornography would have been inevitably discovered on appellant's cell phone. (App. Ex. IX). The military judge denied the motion for reconsideration on all grounds, including inevitable discovery. The Army Court did not address the issue of inevitable discovery in its opinion. (Appendix A).

cell phone for a single night, while PFC Avery pulled guard duty and appellant slept. The two soldiers agreed PFC Avery was allowed to call and text his girlfriend, play games, and watch YouTube videos. Later that night, outside the agreed-to parameters of use, PFC Avery discovered what he believed to be inappropriate images of clothed adults and children in the phone's photo gallery. Without informing appellant, PFC Avery gave the phone to the company first sergeant. Without obtaining a search authorization, the first sergeant conducted a more in-depth search and ultimately discovered what he believed to be child pornography. (R. at 14-84).

This Court should grant appellant's petition for three reasons. First, the Army Court decided a question of law in a way that conflicts with the applicable decisions of this Court and the Supreme Court of the United States. Specifically, the Army Court invented a *requirement* to place "express" restrictions or password protection on an electronic device to prevent ceding common authority over it. (Appendix A at 9) ("permitting a third party's use of an electronic device requires that a person place express *restrictions* on its use or password protect those portions of the device for restricted access in order to prevent common authority over the device.") (emphasis in original).

Neither this Court nor the Supreme Court has ever endorsed such a narrow test regarding the third-party consent doctrine. To the contrary, in *United States v.*

Reister, this Court stated in the absence of express restrictions, "the question remains" whether the relevant item is "impliedly off-limits." 44 M.J. 409, 414 (C.A.A.F. 1996); *see also United States v. Duran*, 957 F.2d 499, 505 (7th Cir. 1992) ("[t]wo friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another."). The correct test for common authority rests on "mutual use of the property by persons generally having joint access or control for most purposes[,]" and cannot be decided by analyzing just two exclusive factors. *United States v. Matlock*, 415 U.S. 164, 188, n.7 (1974).

Second, the Army Court erred by analogizing appellant's cell phone to a traditional "container." Although it paid lip service to this Court's decision in *United States v. Wicks*, 73 M.J. 93 (C.A.A.F. 2014), the Army Court's opinion treats modern cell phones no different than any other traditional container. For example, the Army Court held appellant should have placed express restrictions on the use of his phone or password protected *each individual "portion" of the phone* to prevent ceding common authority over all of it. (Appendix A at 9).

Finally, the Army Court erred in its abuse of discretion analysis by substituting its own discretion for the military judge's by finding error merely on a difference of opinion. For example, in analyzing the military judge's conclusion that appellant's eventual consent failed to attenuate the taint from the prior

unlawful search, the Army Court disagreed with the military judge's conclusion that "no intervening circumstances remove[d] the taint of the unlawful search." (Appendix A at 15). However, at trial, even the government *conceded* that no intervening circumstances existed. (App. Ex. V). Nevertheless, the Army Court acknowledged the military judge applied the correct legal test by analyzing the *Brown*[2] factors, but substituted its own discretion for the military judge's and simply listed the intervening circumstances it determined to be persuasive. (Appendix A at 15-17).

Similarly, in evaluating the third *Brown* factor, the military judge found "the CID agents either did know, or should have known, that the search conducted by SFC Manglicmot was potentially unlawful."[3] (App. Ex. VIII, p. 9). This finding is amply supported by the record because Army Criminal Investigation Command (CID) agents interviewed SFC Manglicmot prior to questioning appellant and learned that SFC Manglicmot took appellant's phone from a third party without appellant's knowledge. (R. at 63). Nonetheless, the Army Court ignored the military judge's finding and made its own factually erroneous finding that "CID had no obvious reason to believe that SFC JM's actions were unlawful." (Appendix A at 18).

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[2] *Brown v. Illinois*, 422 U.S. 590 (1975).
[3] Sergeant First Class Manglicmot was the acting first sergeant for appellant's company. (R. at 22).

Statement of Facts

In October of 2020, appellant was training at the Joint Readiness Training Center (JRTC) in Fort Polk, LA.[4] (R. at 14). One of appellant's duties included twelve-hour guard duty shifts at the Tactical Communication Node (TCN). (R. at 14; App. Ex. IV). Between October 10 and 11, 2020, appellant completed the "first cycle" of guard duty, which was during the day. (R. at 14). Appellant's replacement, Private First Class (PFC) William Avery, relieved appellant for the night shift. (R. at 14).

A. Private First Class Avery borrows appellant's cell phone for limited purposes.

At the conclusion of appellant's twelve-hour shift, PFC Avery asked if he could use appellant's phone for the night because PFC Avery's phone was broken. (R. at 41). This was the first time PFC Avery had ever asked to use appellant's phone. (R. at 15). Although they were in the same company, appellant and PFC Avery were barely acquaintances; PFC Avery didn't even know appellant's first name. (App. Ex. IV, p.1). Private First Class Avery told appellant he wanted to use the phone for two specific reasons: to call and text his girlfriend. (R. at 42). Appellant agreed to allow his phone to be used for those purposes, and told PFC Avery he could also use the "YouTube app[.]" (R. at 42).

[4] At the time, appellant was nineteen years old. (R. at 54). He is a high school graduate and also attended "career tech college[.]" (R. at 54).

Private First Class Avery agreed "he would keep the phone in one location and *only* use it to call and text his girlfriend, as well as you [sic] use the YouTube app." (R. at 42) (emphasis added). Private First Class Avery "promised" to restrict the use of appellant's phone to only those uses. (R. at 42). Appellant gave PFC Avery the Personal Identification Number (PIN)[5] for his phone "so that [PFC Avery] wouldn't have to wake [appellant] up in the middle of the night in order to unlock the phone himself." (R. at 43). After that discussion, appellant went to bed. (R. at 42).

Private First Class Avery believed that appellant *told him* that he could use the phone to call and text his girlfriend. (R. at 16). Additionally, PFC Avery testified that appellant gave him permission to use the "YouTube app" and play a game called "Among Us." (R. at 16). Private First Class Avery did not ask permission to use any other feature on appellant's phone. (R. at 16).

B. Private First Class Avery "accidentally" peeks in appellant's photo gallery.

After appellant went to bed, PFC Avery began his guard shift and used appellant's phone in the manner they had discussed.[6] (R. at 17, 22). At some

[5] According to PFC Avery, appellant used a pencil and wrote the PIN onto a desk in the staff duty area. (App. Ex. IV, p.1).

[6] On redirect, PFC Avery claimed he did not use appellant's phone for anything other than calling/texting his girlfriend and using the YouTube app. (R. at 22). However, in a sworn statement, PFC Avery stated he also called Specialist (SPC) Dakota Vaughan, another member of his unit. (App. Ex. IV, p.1).

point, a notification banner appeared on the phone that stated that "a photo gallery [had been] finished." (R. at 17). Private First Class Avery testified that he "swiped [the notification] off" but the photo gallery opened up anyway.[7] (R. at 17). When the gallery opened, PFC Avery saw an "array of pictures" and recognized several fully clothed female soldiers from his company in the pictures. (R. at 17-18). According to PFC Avery, it appeared the individuals in the pictures might be unaware they were being photographed. (R. at 17-19). Private First Class Avery only remembered seeing four pictures on the phone and admitted all of the individuals in the pictures were fully clothed adults.[8] (R. at 17-19). Private First Class Avery then showed two of his friends, SPC Dakota Vaughan and PFC Nicholas Medina, the pictures on appellant's phone. (App. Ex. IV, p.1).

C. Sergeant First Class Manglicmot searches appellant's phone.

After viewing the pictures, PFC Avery, SPC Vaughan, and PFC Medina called their acting first sergeant, SFC Joshua Manglicmot, thinking the pictures

[7] In his sworn statement, PFC Avery stated he "accidentally clicked on the notification." (App. Ex. IV, p.1).

[8] In the first photo, the soldier was wearing her "full" uniform, (R. at 17); in the second photo, the soldier was clothed and hiking outside, (R. at 18); in the third photo, the soldier was wearing her uniform and appeared to be inside a military vehicle, (R. at 19); in the fourth photo, the soldier was in a barracks room and clothed. (R. at 19).

might implicate "SHARP".[9] (App. Ex. IV, p.1; R. at 22). The soldiers informed SFC Manglicmot they observed "inappropriate photos of females from [sic] their buttocks and in positions that pretty much seem like they didn't know that the photos were being taken."[10] (R. at 26). Sergeant First Class Manglicmot received the phone call at approximately 0100 hours on October 11, 2020 and promptly made his way to the TCN. (App Ex. IV, encl. 2; R. at 26). After arriving at the TCN, SFC Manglicmot told the soldiers, "anything they say to [him] will make a SHARP case unrestricted." (App. Ex. IV, encl. 2). Private First Class Avery then told SFC Manglicmot about the four pictures he found on appellant's phone. (R. at 19).

Private First Class Avery "offered" to "show [SFC Manglicmot] *the pictures*, so he would know what the whole situation was, so he could possibly take action, like actions that [PFC Avery] couldn't take [himself]."[11] (R. at 23) (emphasis added). When the military judge asked PFC Avery why he gave SFC

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[9] "SHARP" is the Army acronym for the Army's Sexual Harassment/Assault Response and Prevention Program. Army Reg. 600-20, Army Command Policy, ch. 7 (24 July 2020).

[10] There are multiple factual discrepancies between most of the witnesses' testimony and sworn statements attached to the parties' motions. For example, SFC Manglicmot testified that the soldiers only informed him of inappropriate photos involving female soldiers from his company. (R. at 26). However, in a sworn statement, SFC Manglicmot stated the soldiers also told him about photos of "dependents…[and] children…with their buttocks being taken without being informed." (App. Ex. IV, encl. 2).

[11] Sergeant First Class Manglicmot testified that *he* asked for the phone. (R. at 27).

Manglicmot the phone, PFC Avery stated, "[i]t was just to show him what I had found." (R. at 84). Private First Class Avery did not tell SFC Manglicmot that he could look through any other files or folders on appellant's phone. (R. at 84-85). Similarly, SFC Manglicmot did not ask for permission from PFC Avery or appellant to look at anything beyond the initial set of pictures. (R. at 84-85).

When PFC Avery gave SFC Manglicmot appellant's phone, the photo gallery containing the photos that worried PFC Avery was already open and visible on the screen. (R. at 28, 84). Sergeant First Class Manglicmot saw the various photos of clothed adult female soldiers in his company. (R. at 29). Thereafter, SFC Manglicmot "backed out" of the original photo gallery and then opened and searched other folders on appellant's phone. (R. at 29-32).

According to SFC Manglicmot, one of the thumbnails "seemed like it was . . . zoomed in on [a] minor." (R. at 29). Although the minor was fully clothed, SFC Manglicmot thought the photo focused on the minor's "buttocks region[.]" (R. at 30). Sergeant First Class Manglicmot testified that he had to "back[] out" of the original photo gallery to view the photo of the minor; but he was not sure the sequence of events regarding the search, but admitted he scrolled through image after image during his search. (R. 29-31). "Yeah, I backed out of the—like any other phone, you've got the little back button at the bottom, I pushed that back and that's when it opened up to, I guess, the other folders . . . . (R. at 29-31).

Sergeant First Class Manglicmot decided to open and search through the other photo galleries because he had an "inkling" that "maybe there was something else that was deeper, that we should know about." (R. at 31). As SFC Manglicmot continued his search of appellant's phone, he observed "icons that you could tell were pornographic in nature," although the "first ones [he] saw were, you know, older adults." (R. at 31).

After still more opening and searching, SFC Manglicmot finally found photos that he believed to be child pornography. (R. at 33). He ceased searching the phone, and instead of retaining possession, told the soldiers to put the phone back in the TCN. (R. at 34). Prior to opening and searching through various folders on appellant's phone, SFC Manglicmot did not even attempt to contact law enforcement. (R. at 31, 34). After seeing what he believed was child pornography, he called the CID offices at both Fort Polk and at their home station of Schofield Barracks, but could not get in touch with an agent to assist him. (R. at 34).

D. Army law enforcement agents rush into action.

The next morning, SFC Manglicmot again contacted CID with the help of the brigade judge advocate. (R. at 35). Shortly thereafter, a law enforcement agent arrived and spoke with SFC Manglicmot. [12] The agent told SFC Manglicmot,

[12] Although both SFC Manglicmot and appellant thought the agent was from CID, he was actually an officer from the Military Police Investigations (MPI) office. (App. Ex. VI, ex. 4, p.2).

"[y]ou're going to go [to appellant's sleeping area], you're going to grab him, you're going to bring him outside. You're not going to take anything from him, just get him out to the car." (R. at 35). Sergeant First Class Manglicmot failed to followed the agent's directions, and instead told appellant, "we have reason to believe that you are doing something on your phone that you should not be doing. We'll need to take your phone." (R. at 44).

Once SFC Manglicmot brought appellant outside, either SFC Manglicmot or the agent seized appellant's phone.[13] (R. at 44-47). The agent gave appellant a "pat down[,]" handcuffed him, and then placed him in a vehicle. (R. at 47). Sergeant First Class Manglicmot rode with appellant and the agent to the Fort Polk CID office, with appellant remaining in handcuffs. (R. at 47). After waiting for a period of time, a second agent, CID Special Agent (SA) JM, told appellant he was being investigated for the manufacturing, distribution, possession, and viewing of child pornography. (R. at 48). Appellant immediately requested a lawyer. (R. at 48).

[13] Appellant could not recall if he "gave [the phone] directly to the CID agent or if [he] gave it to [SFC Manglicmot] first, and then [SFC Manglicmot] handed it off to the CID agent." (R. at 44-45). According to CID's notes, appellant's company commander seized the phone and "provided it to [SFC Manglicmot] in order to ensure appellant did not delete or manipulate his phone during transportation to [CID]." (App. Ex. VI, ex. 4, p.2).

Even though appellant had asked for an attorney, SA JM nonetheless asked appellant for consent to search his phone. (R. at 49). When appellant asked what would happen if he declined, the agent warned him she would go "to her superior to see if she could get authorization to search the phone" without his consent. (R. at 49). Appellant then relented and gave SA JM consent to search his phone, which was already in CID's possession. (R. at 49-50).

E. The military judge grants the defense motion to suppress evidence.

On March 22, 2021, defense counsel filed a motion to suppress all evidence derived from SFC Manglicmot's unlawful search of appellant's phone. (App. Ex. III, V). The government filed its response on March 30, 2021 and presented four distinct arguments: (1) PFC Avery had common authority over appellant's phone and consented to a full search, (2) SFC Manglicmot was acting in a private capacity when he searched appellant's phone, (3) appellant's subsequent consent cured the illegal taint of SFC Manglicmot's search, and (4) the exclusionary rule should not be applied to appellant's case. (App. Ex. V). On April 19, 2021, after considering evidence, witness testimony, and argument, the military judge granted the defense motion, and suppressed the evidence derived from the cell phone. (App. Ex. VIII).

1. The military judge ruled PFC Avery did not have common authority over appellant's phone.

The military judge found that neither appellant nor PFC Avery had an "expectation" that PFC Avery "would do anything more than make phone calls, send text messages, play games, and watch YouTube" on appellant's phone. (App. Ex. VIII). Consequently, the military judge found a lack of common authority because he determined PFC Avery' use of appellant's phone was "not the type of mutual use of property that establishes joint access or control for most purposes." (App. Ex. VIII).

2. The military judge ruled SFC Manglicmot exceeded the scope of PFC Avery's consent.

The military judge found that, even if PFC Avery had common authority over the entire phone, he still did not consent to a full search of the phone for child pornography. (App. Ex. VIII). Specifically, the military judge determined PFC Avery only consented to a search of the photo gallery or folder that was open when he handed the phone to SFC Manglicmot. (App. Ex. VIII).

3. The military judge ruled appellant's consent did not cure the taint of SFC Manglicmot's unlawful search

The military judge analyzed the *Brown* factors in assessing whether appellant's consent cured the taint of SFC Manglicmot's unlawful search.[14] (App. Ex. VIII). He determined all of the *Brown* factors favored appellant.

Two days after making his initial ruling, on April 21, 2021, the government filed a motion for reconsideration, requesting the court to "vacate its previous ruling and deny Defense's motion to suppress evidence." (App. Ex. IX). The government regurgitated its prior arguments, but also presented a new and distinct theory of admissibility: that the discovery of child pornography on appellant's phone was inevitable. (App. Ex. IX).

On April 30, 2021, the military judge denied the government's motion for reconsideration based on its new argument. (App. Ex. XII). In his second written findings and conclusions, the military judge only addressed the newly-raised issue of inevitable discovery. (App. Ex. XII).

F. The Army Court's Opinion.

Following a government appeal in accordance with Article 62, UCMJ, the Army Court reversed the military judge's ruling. The Army Court determined the

[14] The Brown factors include (1) the temporal proximity of the primary illegality to the subsequent confession or consent, (2) the presence or absence of intervening circumstances, and, (3) the purpose and flagrancy of the official misconduct. *Brown,* 422 U.S. at 603-04.

military judge abused his discretion by concluding (1) PFC Avery did not have common authority over appellant's phone, (2) PFC Avery did not consent to a search for child pornography, and (3) appellant's eventual consent did not cure the taint of the prior unlawful search.[15]

Regarding common authority, the Army Court determined the military judge relied upon an "incorrect legal principle" by "focus[ing] on the affirmative permissions [appellant] provided PFC [Avery]" instead of any "express restrictions" appellant placed on PFC Avery's use of the phone. (Appendix A at 9). Citing this Court's decision in *United States v. Rader*, the Army Court stated, "permitting a third party's use of an electronic device requires that a person place express *restrictions* on its use or password protect those portions of the device for restricted access in order to prevent common authority over the device." (Appendix A at 9).

Regarding the second issue, the scope of PFC Avery's consent, the Army Court determined the military judge erred by "focusing on the subjective view of the individual providing consent." (Appendix A at 12). According to the Army Court, "a reasonable person would have understood the exchange between SFC [Manglicmot] and PFC [Avery] as one in which PFC [Avery] gave SFC [Manglicmot] general consent to search for inappropriate photos on the phone."

[15] The Army Court did not address the issue of inevitable discovery.

(Appendix A at 12). The Army Court analogized the search of appellant's phone to a search of closed containers within a vehicle. (Appendix A at 13) ("[p]olice do not have to request permission to search each closed container in a vehicle because general consent to search the car includes consent to examine a closed container on the floor of a car.").

Finally, as to the third issue, the Army Court determined the military judge abused his discretion by finding the second and third *Brown* factors favored appellant. (Appendix A at 13-19). Despite the government's concession at trial, the Army Court found "the totality of the intervening circumstances weigh[ed] in favor of the Government." (Appendix A at 17). Additionally, the Army Court found that "neither SFC [Manglicmot's] actions nor those of the CID agents involved rose to the level of being purposeful . . . or flagrant." (Appendix A at 17).

Issue Presented

WHETHER THE ARMY COURT ERRED IN ITS ABUSE OF DISCRETION ANALYSIS BY (1) CREATING A NOVEL TEST FOR COMMON AUTHORITY, (2) FAILING TO GIVE DEFERENCE TO THE MILITARY JUDGE'S FINDINGS, (3) COMPARING A MODERN CELL PHONE TO A TRADITIONAL "CONTAINER," AND (4) FINDING ERROR BASED ON A DIFFERENCE OF OPINION.

Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party

which prevailed at trial," which in this case is appellant. *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted). A military judge's decision to exclude evidence is reviewed for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). These standards also apply to interlocutory appeals under Article 62, UCMJ. *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017).

Law

A. Common Authority.

One "jealously and carefully drawn" exception to the warrant requirement of the Fourth Amendment "recognizes the validity of searches with the voluntary consent of an individual possessing authority." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citing *Jones v. United States*, 357 U.S. 493, 499 (1958); *Illinois v. Rodriguez*, 491 U.S. 177, 181 (1990)). "Voluntary consent to search may be obtained from the person whose property is to be searched or from a fellow occupant who shares common authority over the property." *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009) (citing *United States v. Matlock*, 415

U.S. 164, 171 (1974); *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008)).

Common authority is "not to be implied from the mere property interest a third party has in the property." *Matlock*, 415 U.S. at 188, n.7. Instead, the "authority which justifies the third-party consent doctrine" rests upon "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." *Id* (emphasis added). If a third party with common access over certain property consents to a search, "that consent is valid as against the absent, nonconsenting person with whom that authority is shared." *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007) (citing *Matlock*, 415 U.S. at 177).

B. Scope of Consent.

The Supreme Court's standard for measuring the scope of a consent is one "of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). "Even though that is a question of law, factual circumstances are highly relevant when determining what [a] reasonable person would have believed to be the outer bounds of the consent that was given."

United States v. Gallegos-Espinal, 970 F.3d 586, 591 (5th Cir. 2020) (quotes and citations omitted).

C. Fruit of the Poisonous Tree.

"Evidence derivative of an unlawful search, seizure, or interrogation is commonly referred to as the 'fruit of the poisonous tree' and is generally not admissible at trial." *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006) (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). However, "[t]he granting of consent to search may sufficiently attenuate the taint of a prior [Fourth Amendment] violation." *Id*. at 339. "The threshold question is whether consent is voluntary, without influence of the prior unlawful search." *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012).

Put differently, the government must demonstrate a break in the causal connection between the illegality and the consent, such that the consent was "sufficiently an act of free will to purge the primary taint." *Wong Sun*, 371 U.S. at 486 (1963). On the other hand, "[s]uppression is not appropriate . . . if 'the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint.'" *United States v. Camacho*, 661 F.3d 718, 729 (1st Cir. 2011) (quoting *Segura v. United States*, 468 U.S. 796, 805 (1984)). "The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated

that the deterrent effect of the exclusionary rule no longer justifies its cost." *United States v. Cordero-Roasario*, 786 F.3d 64 (1st Cir. 2015) (quoting *Brown*, 422 U.S. at 609 (1975)).

In *Brown*, the Supreme Court set forth three factors to assess whether the taint of a Fourth Amendment violation has been sufficiently attenuated: (1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the original unlawful conduct. *Conklin*, 63 M.J. at 338 (citing *Brown*, 422 U.S. at 603-04). The *Brown* factors are not dispositive; instead, they are "examined in aggregate to determine the effect of an appellant's consent." *Dease*, 71 M.J. at 122 (citing *Brown*, 422 U.S. at 603-04).

Argument

A. The Army Court erred by inventing a novel test to determine the existence of common authority and by failing to give deference to the military judge's findings.

Here, the Army Court erred by inventing a novel, two-part test, requiring an individual to either (1) place "express" restrictions on a third party's use of a digital device or (2) password protect the device to prevent ceding common authority over it. (Appendix A at 9). Additionally, the Army Court erred by failing to give deference to the military judge's finding that neither appellant nor PFC Avery had any "expectation" that PFC Avery "would do anything more than

make phone calls, send text messages, play games, and watch YouTube" on appellant's phone.

1. Under the law of common authority, there is no requirement that an individual must place express restrictions or password protection on a digital device to prevent ceding common authority over it.

In *Reister*, a case involving common authority, this Court stated in the absence of express restrictions, "the question remains" whether the relevant item is "impliedly off-limits." 44 M.J. 409, 414 (C.A.A.F. 1996). Although this Court determined no implied restrictions existed in *Reister*, it was still a relevant factor. Similarly, in *Rader*, this Court considered whether there was an implied "understanding" regarding restricted use of the property, but under the circumstances of that case, found any purported restriction was "tacit and unclear." 65 M.J. 30, 34 (C.A.A.F 2007)

In cases involving common authority, the existence of implied restrictions is always relevant because of "the great significance given to widely shared social expectations[.]" *Randolph*, 547 U.S. at 111. For example, "two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another." *Duran*, 957 F.2d at 505.

Moreover, the Army Court's narrow test fails to account for the unique privacy concerns that modern cell phones present. *See Riley v. California*, 573

U.S. 373, 396 (2014) ("a cell phone search would typically expose to the government far more than the most exhaustive search of a house."); *see also United States v. Wicks*, 73 M.J. 93, 102 (C.A.A.F. 2014) (finding a traditional container rule inappropriate for computer technologies).

In its opinion, the Army Court, contrary to *Wicks*, viewed appellant's cell phone akin to a traditional container, requiring appellant to "password protect" each individual "portion" of the phone he wished to keep private. (Appendix A at 9). However, as this Court explained in *Wicks*:

> The problem with applying 'container' metaphors is that modern computer technologies, such as cell phones and laptops, present challenges well beyond computer disks, storage lockers, and boxes. Because of the vast amount of data that can be stored and accessed, as well as the myriad ways they can be sorted, filed, and protected, it is not good enough to simply analogize a cell phone to a container.

73 M.J. at 102. Consequently, cell phones should be treated the same as other containers "in which a person possesses the highest expectations of privacy." *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993) (citations omitted). In that context, "[t]he shared control of 'host' property does not serve to forfeit the expectation of privacy in containers within that property." *Id*. (citing *United States v. Karo*, 468 U.S. 705, 725-27 (1984) (O'Connor, J., concurring)).

While "express" restrictions and password protection may be relevant factors to consider when analyzing the existence of common authority, they are not

the only factors, nor are they the most important factors. Accordingly, the Army Court erred by straying from the actual test for common authority and focusing almost entirely on the existence of "express" restrictions and password protection.

2. The Army Court failed to give deference to the military judge's finding that neither appellant nor PFC Avery had an "expectation" that PFC Avery "would do anything more than make phone calls, send text messages, play games, and watch YouTube."

Because appellant did not place any "express" restrictions on PFC Avery's use of his phone, the Army Court simply concluded "[a]s in *Rader*, any 'restrictions'. . . were tacit and unclear." (Appendix A at 10). That conclusion was erroneous for two reasons. First, the Army Court disregarded the military judge's finding that appellant had placed implied restrictions on the phone's use, and neither appellant nor PFC Avery had an "expectation" that PFC Avery "would do anything more than make phone calls, send text messages, play games, and watch YouTube."[16] Second, the facts of *Rader* are inapposite to this case.

The military judge acknowledged appellant did not place any "express" restrictions on the phone. Nevertheless, the military judge essentially found an

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[16] That sentence is contained in the "Conclusions of Law" portion of the military judge's findings and conclusions. However, it is actually a finding of fact. *See United States v. Cossio*, 64 M.J. 254 (C.A.A.F. 2007) (findings of fact consist of "things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequence, or interpretation.'") (quoting *Black's Law Dictionary* 628 (8th ed. 2004)). The joint understanding that PFC Avery would only use appellant's phone for the purposes they discussed was a "circumstance" that "actually existed."

implied restriction: appellant and PFC Avery had a shared understanding about the specific, and limited, ways in which PFC Avery would use appellant's phone. Thus, according to the military judge, the understanding between appellant and PFC Avery was sufficiently clear.

As was the case in *United States v. Gore*, "[a] preliminary issue before this Court is determining the decisional facts in this case." 60 M.J. 178, 184-85 (C.A.A.F. 2004). On matters of fact, this Court is bound—and the Army Court was supposed to be bound—by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous. *Id*. at 185. Nonetheless, the Army Court ignored the military judge's finding and simply replaced it with its own conclusion.

Moreover, the Army Court's reliance on *Rader* is misguided. At the outset, *Rader* was not an Article 62, UCMJ case; thus, the standard of review favored the government. 65 M.J. at 31. Additionally, the facts in this case don't square with *Rader*. Airman Rader purchased a computer from one of his housemates, Airman First Class (A1C) Davis.[17] *Id.* Significantly, Airman Rader did not move the computer after purchasing it; he kept it in A1C Davis' room. *Id.* Over the course of approximately *six months*, Airman Rader allowed A1C Davis and a third

[17] According to A1C Davis, Airman Rader "was in the process of purchasing the computer" but had not "paid for it completely."

individual, A1C Thacker, to use the computer. *Id.* Airman Rader also allowed A1C Davis to perform "routine maintenance" on the computer approximately every two weeks. *Id.* Further, Airman Rader linked his computer to computers owned by A1C Davis and A1C Thacker via a local access network (LAN) for the purpose of playing games and sharing files. *Id.*

Given those facts, it is hardly surprising the military judge found A1C Davis had common authority over the computer. All three airmen treated the computer as common property with each individual having an equal right to access it. Their *repeated* use of the computer over a significant period of time constituted "mutual use" and "joint access" for most purposes. *Matlock*, 415 U.S. at 171 n.7. Because A1C Davis used the computer as if it were his own, it was incumbent upon Airman Rader to communicate his intent to restrict use of the computer to certain areas.

Here, PFC Avery did not use appellant's phone in the same way A1C Davis used Airman Rader's computer. Unlike A1C Davis, PFC Avery never used appellant's phone in the past and had to *ask permission* to use it. Moreover, appellant explicitly told PFC Avery which areas of the phone he was allowed to use. Although appellant did not expressly restrict PFC Avery from accessing the phone's photo gallery, it was reasonable for the military judge to conclude appellant did not authorize PFC Avery to access any area of the phone outside of the four areas they discussed. Appellant did not specifically tell PFC Avery that he

could not access his online banking applications, but that was similarly implied when the two soldiers agreed to what activities PFC Avery *could* do.

B. The Army Court erred by comparing appellant's cell phone to a traditional container.

At trial, the military judge determined SFC Manglicmot exceeded the scope of PFC Avery's consent because PFC Avery only consented to a search of the photos contained within the photo gallery that was already open when PFC Avery handed the phone to SFC Manglicmot. (App. Ex. VIII). However, the Army Court determined this was error because, in its view, PFC Avery consented to a search of *any* area of the phone "potentially containing inappropriate photos of children." (Appendix A). Specifically, relying upon *Florida v. Jimeno*, 500 U.S. 248 (1991), the Army Court stated:

> Police do not have to request permission to search each closed container in a vehicle because general consent to search the car includes consent to examine a closed container on the floor of the car. *Jimeno*, 500 U.S. at 251. Given that PFC AM provided general consent to view suspicious photos on the cell phone, SFC JM was authorized to "back out" of the open photo gallery he was viewing and search other folders potentially containing inappropriate photos of children.

The Army Court's comparison of closed containers in vehicles to the "other folders" on appellant's phone is inapt, especially considering this Court's decision in *Wicks*, 73 M.J. at 102 ("[b]ecause of the vast amount of data that can be stored and accessed, as well as the myriad ways they can be sorted, filed, and protected, it

is not good enough to simply analogize a cell phone to a container."); *see also United States v. Bosyk*, 933 F.3d 319, 359 (4th Cir. 2019) (the Supreme Court's decision in *Riley* "render[ed] the analogy between cell phones and containers inapt.").

Viewed objectively, PFC Avery only consented to a search of the photos contained in the folder that was "open" and "visible" to SFC Manglicmot. *See Jimeno*, 500 U.S. at 251 "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). Private First Class Avery did not tell SFC Manglicmot to look in other folders on the phone; he showed him a single photo gallery without any further instruction to look beyond that initial folder.

Indeed, even SFC Manglicmot recognized he was exceeding the scope of PFC Avery's consent. He "backed out" of the initial photo gallery to indulge his "inkling" that there "might be more things" on the phone, not because he intended to continue searching for the type of photos PFC Avery described. (R. at 31; App. Ex. VIII). These actions are hallmarks of government actors exceeding the scope of consent to search.

C. The Army Court found error in the military judge's analysis of the *Brown* factors based on a difference of opinion.

Because the abuse of discretion standard requires "more than a mere difference of opinion[,]" a military judge's decision "warrants reversal only if it was arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 292 (C.A.A.F. 2011). "Even if another court may have drawn other findings based on the evidence, the military judge's decision cannot be reversed based on a mere difference of opinion or an impermissible reinterpretation of the facts by appellate courts." *Id*.

Here, the military judge reasonably concluded appellant's eventual consent did not cure the taint of SFC Manglicmot's unlawful search. The military judge applied the correct law by analyzing the *Brown* factors. (App. Ex. VIII). Indeed, the Army Court agreed the first factor weighed in appellant's favor. (Appendix A at 15). However, the Army Court determined the military judge abused his discretion by concluding the second and third *Brown* factors favored appellant. (Appendix A at 15-19). A closer analysis reveals the Army Court's objections are merely a difference of opinion.

1. The military judge did not abuse his discretion by finding a lack of intervening circumstances.

Critically, the government believed that there were no intervening circumstances. They waived consideration of this second *Brown* factor when, at

trial, they stated, "there were admittedly no intervening circumstances." (App. Ex. V). The government's concession left little reason for the military judge to conduct detailed fact-finding and legal analysis on this issue; there was nothing left to decide. *See United States v. Suarez*, ARMY 20170366, 2017 CCA LEXIS 631 (Army Ct. Crim. App. 27 Sep. 2017) (mem. op.) (declining to consider issue government *conceded* at trial).

Nonetheless, the Army Court ignored the government's concession and actually faulted the military judge for making a "conclusory" finding regarding a lack of intervening circumstances. What's more, the Army Court took the extraordinary step of scouring the record identifying what it deemed intervening circumstances, despite the government's concession at trial and the ensuing lack of development of that issue. In doing so, the Army Court ignored "the general rule that a legal theory not presented at trial may not be raised for the first time on appeal absent exigent circumstances." *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010) (citations omitted).

Putting aside the Army Court's improper analysis of the issue, their conclusions were also incorrect. The intervening circumstances upon which the Army Court relied did *not* remove the taint of SFC Manglicmot's unlawful search. In fact, many of the purported intervening circumstances outlined in the Army Court's opinion were identical to those found in *Conklin* where this Court found

they were not "sufficient to remove the taint from the initial illegal search." 63 M.J. 333, 339.

As in *Conklin*, the "voluntariness of Appellant's consent" is not determinative because "the granting of consent does not cure all ills." *Id.* at 338. Additionally, it is of little relevance that SFC Manglicmot—the individual who performed the unlawful search—was different from the CID agent who obtained appellant's consent because the CID "agents would not have been interested in talking to Appellant but for the information relayed to them as a direct result of the unlawful search that had just taken place." *Id.* at 339.

The government correctly conceded and waived this second *Brown* factor, and the military judge applied it in appellant's favor. The Army Court erred when it ignored the government's concession, substituted its own judgement for that of the military judge, and then relied on improper facts as evidence of intervening circumstances.

2. The military judge did not abuse his discretion by finding the government's conduct to be "unwise, avoidable, and unlawful."

With respect to the third *Brown* factor, the Army Court again substituted their opinion for that of the military judge, and once again, their conclusions were incorrect. The Army Court "disagree[d]" with the military judge's conclusion that the third *Brown* factor weighed in appellant's favor because, in its view, "[n]either SFC JM's actions nor those of the CID agents involved rose to the level of being

purposeful, meaning intended to violate [appellant's] Constitutional rights, or flagrant." (Appendix A at 17). However, in *Conklin*, this Court found the third *Brown* factor favored the appellant even though the government agents were not acting with "bad motive or intent[.]" 63 M.J. at 339; *see also United States v. Hernandez*, 279 F.3d 302, 309 (5th Cir. 2002) ("[t]he police misconduct, however, was not flagrant. . . . Nevertheless, consideration of the [*Brown*] factors leads this court to conclude that the causal connection between the violation and the consent was not broken.").

Here, like in *Conklin*, the military judge found the government's conduct to be "unwise, avoidable, and unlawful." (App Ex. VIII); *Conklin*, 63 M.J. at 339. That conclusion is amply supported by the record. Similar to the non-commissioned officer in *Conklin*, SFC Manglicmot both exceeded his authority and failed to address the situation through any number of other lawful means at his disposal. *See id.* at 336-37 (non-commissioned officer performed illegal search of computer instead of seeking search authorization).

Instead of limiting his search to the folder containing photos of soldiers in his company, SFC Manglicmot unlawfully expanded the search. As SFC Manglicmot testified, his original intent in looking at appellant's phone was to "validate that those were my Soldiers in [the] inappropriate photos." (R. at 29). Once SFC Manglicmot completed that task, there was no reason for SFC

Manglicmot to further search appellant's phone, much less expand the scope of the search. No emergency existed; SFC Manglicmot had not been informed that anyone was in danger or in need of immediate assistance. Yet, he still chose to search the folders on appellant's phone because he had "an inkling". (R. at 29-31).

The best evidence of SFC Manglicmont's intent to search beyond the scope of consent was his own honest testimony when he admitted that he aimed to dig deeper before calling for help. "I just had an inkling just to check. I don't know why." (R. at 31). As that testimony demonstrates, SFC Manglicmot was performing an illegal search, digging for material beyond what had been originally brought to his attention. To make matters worse, SFC Manglicmot performed this rogue investigation knowing he was going to have to contact others because of his understanding of the Army's SHARP program. Accordingly, the military judge was correct to conclude that SFC Manglicmot's actions were "unwise and avoidable." (App. Ex. VIII).

In reaching his ultimate conclusion, the military judge found "the CID agents either did know, or should have known, that the search conducted by SFC [JM] was potentially unlawful." (App. Ex. VIII, p. 9). This fact is amply supported by the record because CID agents interviewed SFC Manglicmot prior to questioning appellant and learned that SFC Manglicmot took appellant's phone from a third party without appellant's knowledge. Nonetheless, the Army Court

ignored the military judge's finding and made its own finding that "CID had no obvious reason to believe that SFC JM's actions were unlawful." (Appendix A at 18).

Conclusion

At every opportunity the Army Court ignored this Court's precedent and substituted their own opinions for the measured analysis of the military judge who saw and heard the evidence. What's more, the conclusions they reached in second-guessing the military judge were incorrect. Based on the foregoing, appellant requests this Honorable Court grant his petition for review.

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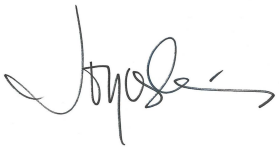

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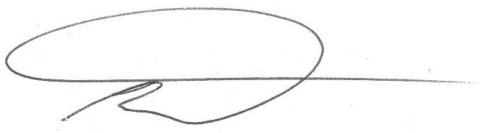

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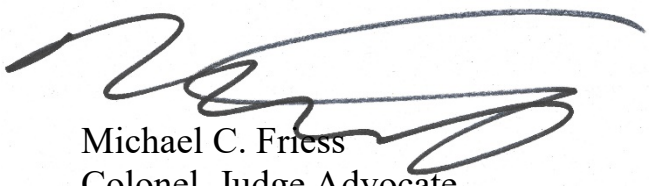

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APPENDIX A: ARMY COURT OPINION

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, WALKER. and PARKER
Appellate Military Judges

UNITED STATES, Appellant
v.
Private First Class ETHEN D. BLACK
United States Army, Appellee

ARMY MISC 20210310

Headquarters, 25th Infantry Division
Mark A. Bridges, Military Judge
Colonel Marvin J. McBurrows, Staff Judge Advocate

For Appellant: Captain Karey B. Marren, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Captain Allison L. Rowley, JA; Captain Karey B. Marren, JA (on brief and reply brief).

For Appellee: Captain Joseph A. Seaton, Jr., JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Captain Andrew R. Britt, JA; Captain Joseph A. Seaton, Jr., JA (on brief).

22 October 2021

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Judge:

When an individual authorizes a third party use of his cell phone without any express restrictions or limitations on its use, the contents of which are not encrypted or password protected, and provides the passcode for general access to the phone, he frustrates his expectation of privacy in the contents of the cell phone. In doing so, he provides the third party common authority over this cell phone and assumes the risk that the third party will allow others to view the contents of the cell phone, including government agents.

On appeal before this court pursuant to Article 62, Uniform Code of Military Justice [UCMJ],[1] the government argues that the military judge erred in holding that third party consent to search appellee's cell phone was unlawful and suppressing evidence of child pornography found on appellee's cell phone. We agree and reverse.

I. BACKGROUND

A. *Events Leading to the Discovery of Child Pornography*

In October 2020, appellee was located at the Joint Readiness Training Center (JRTC) at Fort Polk, Louisiana where his unit was conducting training. Appellee's duties while at JRTC included guard duty at the Tactical Communication Node (TCN) from 0800 to 2000. As appellee was finishing his shift, a soldier serving on the next shift, Private First Class (PFC) AM, requested to borrow appellee's cell phone because PFC AM's phone was broken. This was the first time PFC AM had requested to use appellee's cell phone. Appellee agreed to let PFC AM use his phone for the night to call and text his girlfriend, use the YouTube application, and play a designated game. While appellee and PFC AM discussed the intended purposes for which PFC AM would be borrowing the cell phone, appellee did not expressly restrict PFC AM's use of the cell phone or its content.

In order to allow PFC AM freedom of access to the phone, appellee provided the personal identification number (PIN) code to unlock the phone. In fact, appellee wrote the PIN on the table at which PFC AM would be working during his guard shift. Some time during the night, a notification appeared on the cell phone pertaining to a photo gallery. When PFC AM attempted to "swipe" away the notification, he inadvertently opened the photo gallery displaying an array of photographs. The photo gallery was neither encrypted nor password protected. The first photo PFC AM noticed was of a female soldier in uniform laying on her side with the focus on her buttocks. The photo appeared to be taken without her knowledge. He then viewed photos of at least three other female soldiers he recognized who were clothed in the photos but did not appear to be aware they were being photographed. PFC AM then informed the other two soldiers on guard shift what he observed and let them view the photos as well.

Concerned that these photos were inappropriately obtained, one of the soldiers contacted Sergeant First Class (SFC) JM, the acting first sergeant, and reported that

[1] 10 U.S.C. §862 (2012).

there was a potential "SHARP"[2] incident involving numerous soldiers in the unit. Sergeant First Class JM arrived at the TCN at approximately 0125. The soldiers described the suspicious photos they viewed on appellee's cell phone of female soldiers in the unit that seemed inappropriate because they focused on the buttocks area and appeared to be taken without the females' consent. They also informed SFC JM that there were similar photos of clothed civilian adults and children. Sergeant First Class JM asked PFC AM for the phone so he could verify what the soldiers reported to him because it sounded like it could be a sexual harassment issue which would be in "CID's lane."[3] Private First Class AM willingly provided the cell phone to SFC JM and unlocked it so he could view the photos. He gave SFC JM the cell phone "to show him the pictures, so he would know [what] the whole situation was, so he could possibly take action, like actions that I couldn't take myself."

When PFC AM handed over the unlocked phone to SFC JM it was already open to the photo gallery containing the suspicious photos of female soldiers, civilian adults, and children. Upon viewing the surreptitiously taken photographs, particularly a photo "zoomed in" on the buttocks of a child while at the Post Exchange, SFC JM became concerned that "maybe there was something else that was deeper, that we should know about" and "maybe there's more things here." At that point, he exited the folder he was viewing and noticed icons of other folders that appeared pornographic in nature. In viewing the contents of one of those folders, SFC JM discovered what he believed to be child pornography. He immediately closed the folder and handed the phone back to PFC AM. He then advised the soldiers to leave the phone at the TCN and not inform appellee what they had seen on the phone.

The following morning, SFC JM informed his commander and the brigade legal advisor of having viewed potential child pornography on appellee's cell phone. The brigade legal advisor then contacted CID. At approximately 1015 that same morning, SFC JM retrieved appellee from his tent and told him to bring his cell phone with him. Appellee was escorted to a CID agent who immediately handcuffed appellee, seized his cell phone and wallet, and transported him and SFC JM to the CID office at Fort Polk. At some point that morning, SFC JM told appellee "we have reason to believe you are doing something on your phone that you shouldn't be

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[2] "SHARP" is the Army acronym for the Army's Sexual Harassment/Assault Response and Prevention Program. Army Reg. 600-20, Army Command Policy, ch. 7 (24 July 2020).

[3] "CID" is the acronym for Criminal Investigation Command (CID), the Army's law enforcement agency.

doing." However, no one informed appellee that they had found suspicious photos on his cell phone, to include CID. Once at the CID office, an agent removed the handcuffs and placed appellee in the waiting area. While no longer restrained, appellee remained in "custody" and was not free to leave the CID office. When read his rights for suspicion of possessing, viewing, distributing, and manufacturing child pornography, appellee requested a lawyer and did not make a statement. Following the rights invocation, the CID agent asked appellee for consent to seize and search his cell phone. At 1253, appellee provided written consent to seize and search his cell phone for pictures and videos. At the time he provided this consent, appellee was aware that he was being investigated for the possession, viewing, manufacture, and distribution of child pornography and any evidence found on the cell phone could be used against him in a court of law. A few days later CID obtained a search warrant to seize and search appellee's laptop computer. Suspected child pornography was located on both appellee's cell phone and laptop computer.

B. Military Judge Suppresses the Child Pornography

This case arises out of an interlocutory appeal under Article 62, UCMJ, in a pending court-martial. Appellee is charged with one specification of possession of child pornography on his cell phone, in violation of Article 134, UCMJ, which was referred to a general court-martial.

Defense counsel filed a motion to suppress the evidence obtained from appellant's cell phone and any evidence derived therefrom. After conducting a hearing, the military judge granted the defense motion and suppressed the evidence. In a detailed written ruling, the military judge concluded that the acting first sergeant's warrantless search of appellee's phone was unlawful because: (1) the soldier who borrowed appellee's cell phone did not possess common authority over the phone such that he could consent to the search of appellee's cell phone, nor did the soldier consent to a search for child pornography; (2) the private search doctrine was inapplicable to the acting first sergeant because he searched appellee's cell phone in his official capacity; and, (3) the acting first sergeant's search of appellee's phone exceeded the scope of the private search by the soldier who borrowed appellee's phone. The military judge further held that appellee's subsequent consent to search of his cell phone, obtained by law enforcement, did not attenuate the taint of the acting first sergeant's unlawful search. Lastly, in holding that the exclusionary rule warranted suppression of the evidence, the military judge found that the acting first sergeant's initial unlawful search combined with CID's failure to inquire into underlying facts of the lawfulness of that search, "is the type of law enforcement and official conduct that the exclusionary rule was designed to deter."

The Government filed a request for reconsideration asking that the military judge not only reconsider his original ruling but also raised a new argument of inevitable discovery as a theory of admissibility of the child pornography. The

military judge denied the government's request that the court reconsider its original ruling but did consider the government's new argument of inevitable discovery. In an additional detailed written ruling, the military judge held that the inevitable discovery exception was inapplicable, finding that government failed to establish that the evidence "would inevitably have been discovered in a lawful manner had the illegality not occurred." *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012) (quoting *United States v. Kozak*, 12 MJ. 389, 394 (C.M.A. 1982)). The military judge concluded that the government failed to demonstrate by a preponderance of the evidence that "photographs of the clothed, female soldiers, absent evidence of child pornography, would have been reported to CID" or "that CID would have investigated the matter or conducted a search of the accused's phone." In arriving at this decision, the military judge rejected a CID agent's statement that she would have investigated the photos of clothed female soldiers as a potential Article 117a or 120c, UCMJ, offense because CID "did not investigate the matter when given the opportunity to do so" given that those photos were not included in CID's investigation of appellee.

II. LAW AND DISCUSSION

A. Standard of Review

In an Article 62, UCMJ, appeal, we review the evidence in the light most favorable to the prevailing party. *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (citation omitted). Therefore, this court is "'bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous.'" *United States v. Becker*, __ M.J. ___, No. 21-0236, 2021 CAAF LEXIS 844, at *16 (C.A.A.F. 14 Sep. 2021) (quoting *Pugh*, 77 M.J. at 3).

We review a military judge's decision to suppress evidence for an abuse of discretion. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015) (citations omitted). While the military judge's findings of fact are reviewed under a clearly erroneous standard, conclusions of law are reviewed de novo. *Id.* A military judge abuses his discretion when he: (1) "predicates his ruling on findings of fact that are not supported by the evidence"; (2) "uses incorrect legal principles"; (3) "applies correct legal principles to the facts in a way that is clearly unreasonable"; or, (4) "fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F 2010); *United States v. Solomon*, 72 M.J. 176, 180-81 (C.A.A.F. 2013)). The abuse of discretion standard requires "more than a mere difference of opinion[;]" rather, the military judge's ruling must be "arbitrary . . . , clearly unreasonable, or clearly erroneous." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (cleaned up). In other words, "[w]hen judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached

upon weighing of the relevant factors." *United States v. Cannon*, 74 M.J. 746, 750 (Army Ct. Crim. App. 2015) (cleaned up).

The government asserts the military judge abused his discretion in holding: (1) the soldier who borrowed the cell phone, PFC AM, lacked common authority over the phone such that he could consent to a search of the phone; (2) appellee's consent to search failed to attenuate the taint of any unlawful search by the acting first sergeant; (3) inevitable discovery was inapplicable to the facts of this case; and, (4) the first sergeant's unlawful search coupled with CID's failure to inquire into the lawfulness of that search justified application of the exclusionary rule and thereby suppression of the child pornography.

B. Fourth Amendment and Reasonable Expectation of Privacy in Cell Phones

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." U.S. Const. amend. IV. Whether a search is reasonable depends, in part, on whether the person who is subject to the search has a subjective expectation of privacy in the object searched and that expectation is objectively reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967). A warrantless search is presumptively unreasonable unless it falls within "a few specifically established and well-delineated exceptions." *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (cleaned up); *see Mincey v. Arizona*, 437 U.S. 385, 390 (1978) ("[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.'") (quoting *Katz*, 389 U.S. at 357). "The military has implemented the Fourth Amendment through Military Rules of Evidence . . . 311–317)." *Hoffmann*, 75 M.J. at 123. Where the government obtains evidence from a search based upon one of these exceptions, it "bears the burden of establishing that the exception applies." *Wicks*, 73 M.J. at 99 (quoting *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000)); *see also* Military Rule of Evidence [Mil. R. Evid.] 311.

Applying these principles, there is no question that an individual has a reasonable expectation of privacy in the contents of a cell phone. Given the nature of modern cell phones, they can "serve as an electronic repository of a vast amount of data akin to the sorts of personal 'papers[] and effects' the Fourth Amendment was and is intended to protect." *Wicks*, 73 M.J. at 99 (alteration in original). As our superior court has recognized, every federal court of appeals "has held there is nothing intrinsic about cell phones that place them outside the scope of ordinary Fourth Amendment analysis." *Id.* (citing numerous federal circuit cases recognizing the privacy interests in a cell phone and the requirement for a warrant to search the

contents of a cell phone unless an exception exists). Therefore, cell phones may not be searched without probable cause and a warrant unless the search falls within one of the recognized exceptions to the warrant requirement.

In this case, the military judge properly concluded that appellee had a reasonable expectation of privacy in the contents of his cell phone, generally. However, once appellee lent his phone to another soldier without any restrictions[4] on its use and provided the passcode, he frustrated his reasonable expectation of privacy in the contents of the cell phone.

C. Third Party Authority to Consent to a Search

Voluntary consent to search is a well-recognized exception to the warrant requirement. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). In justifying a warrantless search by proof of voluntary consent, the government "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 over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Therefore, "[v]alid consent to search can be provided, under some circumstances, by a third party." *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2014) (citing *Matlock*, 415 U.S. at 170–71).

The common authority which justifies third party consent does not rest upon the law of property but rather, on the "mutual use of the property by persons generally having joint access or control for most purposes . . . ." *Matlock*, 415 U.S. at 176 n.7; *see Chapman v. United States*, 365 U.S. 610 (1961) (landlord could not validly consent to the search of a house he had rented to another); *Stoner v. California*, 376 U.S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room). Accordingly, common-authority rights under the Fourth Amendment can be broader than the rights that property law provides. *Georgia v. Randolph*, 547 U.S 103, 110 (2006) (citing *Illinois v. Rodriguez*, 497 U.S. at 181–82). Third party consent law was incorporated into Mil. R. Evid. 314(e)(2) which provides that, "[a] person may grant consent to search property when the person

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[4] For example, in his findings of fact—findings supported by the record—the military judge noted, in part: "The accused did not expressly give PFC Avery permission to look at photographs or videos on his phone. On the other hand, the accused did not expressly restrict PFC Avery's use of the cell phone or its content." Later, however, the military judge noted: "Under the circumstances, it would be unreasonable to conclude that PFC Avery had unfettered authority to use the phone." As noted in the body of this opinion and for the reasons explained therein, we find this conclusion to be erroneous and an abuse of discretion.

exercises control over that property." The determinative factor as to whether a third party can provide valid consent is "the degree of control that an individual has over property." Mil R. Evid. 314 analysis at A22-30 (2016).

The third party consent exception to the warrant requirement is premised upon the assumption of risk. *United States v. Jackson*, 598 F.3d 340, 347 (7th Cir. 2010); *United States v. Basinksi*, 226 F.3d 829, 834 (7th Cir. 2000) ("[W]here a defendant allows a third party to exercise actual or apparent authority over the defendant's property, he is considered to have assumed the risk that a third party might permit access to others, including government agents."). Allowing a third party full access and control of an item containing various compartments results in an assumption of risk that the third party may allow someone full access to that item in its entirety, including law enforcement. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) ("Petitioner argues that [the third party] only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of [the third party's] consent. Petitioner, in allowing [the third party] to use the bag and in leaving it in his house, must be taken to have assumed the risk that [the third party] would allow someone else to look inside.").

D. Third Party Possessed Common Authority Over Appellee's Cell Phone

The control a third party exercises over property or effects is a question of fact. *Rader*, 65 M.J. at 33. In this case, the findings of fact include the following: (1) appellee agreed to loan his cell phone to PFC AM for the duration of PFC AM's guard shift based upon PFC AM's request to use the phone to text, call, play games, and watch YouTube; (2) appellee did not expressly authorize PFC AM to view the photographs on the cell phone, however, neither did appellee restrict PFC AM's use of the cell phone or its content; (3) appellee provided PFC AM with the cell phone's passcode, granting him general access to the phone during his guard shift; and, (4) the contents of the cell phone were not encrypted or otherwise protected once a user gained general access to the cell phone. The military judge's findings of fact as to PFC AM's control over appellee's cell phone are properly based upon facts developed in the record and we do not find that they are clearly erroneous. However, whether these facts rise to the level of "joint access or control for most purposes" is a question of law. *Id.* (quoting *United States v. Reister*, 44 M.J. 409, 415 (C.A.A.F. 1996).

The military judge held that PFC AM did not possess common authority over appellee's cell phone and therefore, did not have the authority to consent to its search. Finding that appellee loaned out his cell phone for one night, the military judge concluded that appellee understood that PFC AM would only use the phone for texting, calling, viewing YouTube, and playing games. Despite PFC AM's ability to access any area of the phone and appellee's lack of express restrictions on the use of

the phone, the military judge found that there was no expectation by appellee that PFC AM would view anything else, or use any other functions, on the cell phone. Given these circumstances, the military judge found "it would be unreasonable to conclude that PFC AM had unfettered authority to use the phone" and concluded, "[t]his is not the type of mutual use of property that establishes joint access or control for most purposes."

First, we find that military judge erred in concluding that PFC AM did not have unfettered authority to use appellee's phone. The military judge's factual findings that: (1) appellee provided the passcode to access the cell phone; (2) the photos viewed by PFC AM and the other soldiers were not encrypted or otherwise protected; and, (3) appellee did not expressly restrict PFC AM's use of the cell phone or its content clearly establish that PFC AM had unfettered access to the contents of appellee's cell phone. This conclusion is further supported by the military judge's finding that PFC AM "had the ability to delve into any area of the phone." While appellee may have not expected PFC AM would use the phone for anything other than four outlined purposes, appellee failed to expressly delineate any restrictions on PFC AM's use of the cell phone verbally, by encryption, or by password protection. The military judge abused his discretion in concluding that PFC AM did not have unfettered access to appellee's phone based upon the facts before him. Appellee agreeing to allow PFC AM to use his cell phone without any express restrictions and providing the passcode for unlimited access to the contents provided PFC AM unfettered control and access of the phone and its contents.

The military judge further erred in concluding that PFC AM lacked common authority over appellee's phone by relying upon an incorrect legal principle. Rather than focus on any express restrictions appellee placed on PFC AM's use of the phone, the military judge improperly focused on the affirmative permissions appellee provided PFC AM. Specifically, the military judge relied upon appellee's "understanding" that PFC AM would only use the phone for texting, phone calls, playing games, and watching YouTube and appellee's lack of affirmative permission for PFC AM to use the phone for any other purposes in concluding PFC AM lacked common authority over the cell phone. However, permitting a third party's use of an electronic device requires that a person place express *restrictions* on its use or password protect those portions of the device for restricted access in order to prevent common authority over the device. *Rader*, 65 M.J. at 34, *see also United States v. Eugene*, ARMY 20160438, 2018 CCA LEXIS 106, at *6 (Army Ct. Crim. App. 28 Feb 2018) (mem op.) (wife possessed common authority over husband's cell phone when he permitted her to use the phone to pay bills, allowed her to register her fingerprint on the phone for access, and did not place any restrictions on her use of the cell phone), aff'd, 78 M.J. 132 (C.A.A.F. 2018). In *Rader*, the court found third party common authority over a computer where appellant authorized the use of the computer without express restrictions and did not password protect the file at issue. *Id.* In doing so, the court expressly recognized "'[i]n the personal computer

context, courts examine whether the relevant files were password-protected or whether defendant otherwise manifested an intention to restrict third-party access.'" *Radar*, 65 M.J. at 34 (quoting *United States v. Aaron*, 33 F.App'x 180, 184 (6th Cir. 2002) (per curiam) (unpublished opinion)).[5]

Common authority law does not require that a person expressly authorize each distinct use or access of an area of an electronic device to a third party. Rather, it is the lack of restrictions on use or lack of password protection of areas of an electronic device upon which common authority law relies. Allowing unfettered access and exclusive control over an item without express restrictions results in the assumption of risk that a third party will access any portion of the device and may also allow others to access the item. Such unfettered access and control of the device frustrates any expectation of privacy by the lender. Once appellee agreed to PFC AM's use of the cell phone without explicit restrictions on its use and provided the passcode for unlimited access to its content, appellee assumed the risk that PFC AM would access any portion of the cell phone and may also allow others access to the contents of the cell phone. As in *Rader*, any "restrictions" on PFC AM's use of appellee's cell phone were tacit and unclear. The unfettered access and use PFC AM had of appellee's cell phone provided him "joint access or control for most purposes" of the cell phone. PFC AM possessed common authority over appellee's cell phone thereby giving him the authority to consent to its search.

E. Scope of Consent

Given that SFC JM's search of appellee's cell phone was conducted in his official capacity as the acting first sergeant, his search must satisfy the requirements of the Fourth Amendment. While PFC AM's voluntary consent to search appellee's cell phone is an exception to the Fourth Amendment warrant requirement, the scope of the consent provided is also relevant in determining whether SFC JM's search was reasonable. The military judge concluded that even if PFC AM possessed common authority to consent to a search of appellee's phone, PFC AM did not consent to search for child pornography. We find that the military judge abused his discretion in reaching this conclusion based upon an erroneous view of the law.

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[5] *See also United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007) (using a password showed that defendant affirmatively intended to exclude others from his password protected files); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (distinguishing joint access to the computer and its hard drive, for which co-user had authority to consent to search, from password-protected files; with respect to those files, co-user had no common authority where there was no access to the passwords).

A consensual search is reasonable under the Fourth Amendment so long as it remains within the scope of consent. *Michael C. v. Gresbach*, 526 F.3d 1008, 1015 (7th Cir. 2008). Whether a search remained within the scope of consent is a question of fact to be determined from the totality of all the circumstances. *Jackson*, 598 F.3d 340, 348 (7th Cir. 2010). The scope of consent to search under the Fourth Amendment is reviewed under a standard of objective reasonableness and asks "what would the typical reasonable person have understood by the exchange between the [law enforcement agent] and the [person who gives consent]." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *see also Gresbach*, 526 F.3d at 1015. A person giving consent to search may limit his consent by placing limitations on "time, place, or property." M.R.E. 314(e)(3). While investigators must account for any express or implied limitations on a consent to search, "[t]hose limitations, however, cannot be determined on the basis of the subjective intentions of the consenting party." *United States v. Wallace*, 66 M.J. 5, 8 (C.A.A.F. 2007) (rejecting appellant's argument that he was under the "impression" that law enforcement would only search his computer for emails and concluding that appellant had provided written consent to a broad search of his computer).

"The scope of a search is generally defined by its express object." *Jimeno*, 500 U.S. at 251 (citing *United States v. Ross*, 456 U.S. 798 (1982)). While a suspect may delimit the scope of a search to which he consents, "if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization." *Id.* at 252 (upholding the search of a paper bag when a suspect provided consent to search the car in which the bag was located, the court noting that the suspect "did not place any explicit limitation on the scope of the search"); *United States v. Davis*, 967 F.2d 84, 88 (2d Cir. 1992) (upholding the search of closed containers within a footlocker when a third party consented to the search of the footlocker without explicit limitations); *United States v. Crain*, 33 F.3d 480, 484 (5th Cir. 1994) (upholding third party consent to search a vehicle as general consent to search and extending to the search of a paper bag located inside the vehicle); *United States v. Rich*, 992 F.2d 502, 508 (5th Cir. 1993) (upholding third party consent to "look inside" the vehicle was equivalent to general consent to search the vehicle and its contents, including containers such as luggage); *United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000) ("Generally, consent to search a space includes consent to search containers within that space where a reasonable officer would construe the consent to extend to the container") (citation omitted); *Jackson*, 598 F.3d at 349 (when someone consents to a general search, "law enforcement may search anywhere within the general area where the sought-after item could be concealed").

The military judge's findings of fact regarding the scope of consent were: (1) soldiers reported to SFC JM that they viewed inappropriate photos of female soldiers from the unit on appellee's phone appearing to focus on the buttocks area of females and seemingly taken without the females' consent; (2) the soldiers also viewed

similar photos of clothed civilian adults and children seemingly taken without their consent; (3) the soldiers contacted SFC JM for assistance so that he could see the photos and take appropriate action; (4) SFC JM asked PFC AM for appellee's cell phone so that he could verify what had been reported because it sounded like a sexual harassment incident which would be in CID's lane; (5) PFC AM willingly provided appellee's cell phone to SFC JM and unlocked it with the passcode; (6) when SFC JM was handed the phone, the photo gallery containing the concerning photos was already open; (7) upon viewing photos of civilian children SFC JM became concerned that there "might be more things here," exited the photo gallery he was viewing and viewed photos in other folders; and, (8) upon discovering what he believed was child pornography, SFC JM exited that folder, stopped viewing the contents of the phone, put the phone down, and reported his discovery to the chain of command and CID the following morning.

The military judge abused his discretion in concluding that even if PFC AM possessed the authority to consent to a search of the phone, he did not consent to a search for child pornography. We find that this conclusion was based upon an erroneous view of the law. The military judge relied upon the fact that PFC AM never expressly informed SFC JM that he could look at whatever he wanted on the phone and that PFC AM "gave the phone to SFC JM with the sole expectation of showing him the photographs he found of female soldiers in the unit." The military judge erred by focusing on the subjective view of the individual providing consent when the scope of consent is viewed objectively, focusing on what the typical reasonable person would understand based upon the exchange between PFC AM and SFC JM. The military judge further compounded this error by then holding that SFC JM was required to obtain affirmative permission from PFC AM to view any additional photos beyond what the soldiers had viewed since SFC JM suspected there may be more things at issue. In essence, the military judge concluded that PFC AM's scope of consent was strictly limited to viewing the same photos he and the other soldiers had viewed. This conclusion ignores the objective standard applicable to the scope of consent as well as law pertaining to express limitations on consent.

A reasonable person would have understood the exchange between SFC JM and PFC AM as one in which PFC AM gave SFC JM general consent to search for inappropriate photos on the cell phone. The soldiers contacted SFC JM regarding suspicious and concerning photos on appellee's cell phone involving both female soldiers in the unit, civilian adults and children. In requesting the phone, SFC JM asked to "verify" that appellee's cell phone contained inappropriate photos of soldiers and civilians, and *children*. When PFC AM willingly handed the cell phone to SFC JM, he did not place any restrictions or limitations on the scope of his consent, he simply handed him the phone. The military judge erroneously held that SFC JM was required to obtain additional express authorization to search beyond the specific photos the soldiers' viewed, ignoring PFC AM's general consent to search. In doing so, the military judge ignored the established law that the scope of a search

is "generally defined by its express object." *Jimeno*, 500 U.S. at 251; *see also United States v. Beckmann*, 786 F.3d 672, 679 (8th Cir. 2015) (holding that general consent to search a computer included the attached external hard drive and holding "[w]here a suspect provides general consent to search, only an act clearly inconsistent with the search, an unambiguous statement, or a combination of both will limit the consent"). A reasonable person would have understood the exchange between SFC JM and PFC AM to be consent to generally view photos on the cell phone to verify the soldiers' suspicions of inappropriate photos.

Police do not have to request permission to search each closed container in a vehicle because general consent to search the car includes consent to examine a closed container on the floor of the car. *Jimeno*, 500 U.S. at 251. Given that PFC AM provided general consent to view suspicious photos on the cell phone, SFC JM was authorized to "back out" of the open photo gallery he was viewing and search other folders potentially containing inappropriate photos of children. Upon viewing what he believed to be child pornography, he immediately closed the phone and stopped his search. Law enforcement then subsequently obtained voluntary consent to search for child pornography on the cell phone.

We find that the military judge abused his discretion in holding that SFC JM exceeded the scope of PFC AM's consent to search and hold that SFC JM's search of the phone was lawful.

F. Attenuation of Taint and the Exclusionary Rule

Even assuming appellee's cell phone was unlawfully searched, the Government argues that the military judge erred in finding that appellee's subsequent consent to search failed to attenuate any taint from the earlier unlawful search and applying the exclusionary rule. We agree, and hold that appellee's consent to search attenuated any taint of a prior unlawful search.

The exclusionary rule, which requires that trial courts exclude unlawfully seized evidence in a criminal trial, is the principal judicial remedy for deterring Fourth Amendment violations. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." *Stone v. Powell*, 428 U.S. 465, 486 (1976). However, the significant costs of this rule deem it "applicable only . . . where its deterrence benefits outweigh its substantial costs." *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (internal quotation marks omitted). "Suppression of evidence . . . has always been our last resort, not our first impulse." *Hudson*, 547 U.S. at 591. In determining the applicability of the rule, courts should "strike a balance between the public interest in determination of truth at trial and the incremental contribution that might [be] made to the protection of Fourth Amendment values . . . ." *United States v.*

Khamsouk, 57 M.J. 282, 292 (C.A.A.F. 2002) (quoting *Stone*, 428 U.S. at 488) (internal quotation marks omitted) (alteration in original). Given these principles, there are several recognized exceptions to the exclusionary rule, three of which involve the causal relationship between the unconstitutional act and the discovery of evidence. *Strieff*, 136 S.Ct. at 2061. The independent source doctrine permits the admission of evidence obtained in an unlawful search if officers acquired it from a separate, independent source. See *Murray v. United States*, 487 U.S. 533, 537 (1988). Second, the inevitable discovery doctrine permits the admission of evidence that would have been discovered sans the unconstitutional source.[6] *See Nix v. Williams*, 467 U.S. 431, 443–44 (1984). Third, and at issue in the present case, is the attenuation doctrine which permits the admission of evidence when the connection between the unconstitutional conduct is either remote or has been interrupted by an intervening circumstance. *Streiff*, 136 S. Ct. at 2061. In the instant case, if appellee's consent to search, albeit voluntary,[7] was obtained by exploitation of an unlawful search by SFC JM, it cannot sufficiently attenuate the taint of that search. We hold that appellee's consent to search was not obtained by the exploitation of an unlawful search.

The granting of a consent to search may sufficiently attenuate the taint of a prior Fourth Amendment violation. However, "the granting of consent to search does not cure all ills." *United States v. Conklin*, 63 M.J. 333, 338 (C.A.A.F 2006). The critical inquiry is whether appellee's consent to search was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Won Sun v. United States*, 371 U.S. 471, 486 (1963). The inquiry is not whether the evidence would have come to light "but for" the warrantless search by SFC JM but "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Khamsouk*, 57 M.J. at 289 (quoting *Brown v. Illinois*, 422 U.S. 590, 599 (1975). In determining whether appellee's consent to search attenuated the taint of an unlawful search, the military judge properly considered the requisite three factors outlined in *Brown*: (1)

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[6] In its appeal, the Government argues that the military judge erred in holding that the inevitable discovery doctrine is inapplicable in this case. Since we find that the military judge did not err in holding the inevitable discovery doctrine inapplicable in this case, we need not address it.

[7] The military judge concluded that "[t]he totality of the circumstances establish by clear and convincing evidence that [appellee's] consent to search the cell phone was voluntary." Based upon the military judge's findings of fact as to the circumstances under which appellee provided consent to search, we concur and will not address the voluntariness of appellee's consent to search.

temporal proximity of the constitutional violation and appellee's consent; (2) "the presence of intervening circumstances[;]" and, (3) "*particularly*, the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 603–04 (emphasis added); *see also Conklin*, 63 M.J. at 333, 338. "The Supreme Court has identified the third factor as 'particularly' important, presumably because it comes closest to satisfying the deterrence rationale for applying the exclusionary rule." *Khamsouk*, 57 M.J, at 291 (citations omitted).

The military judge correctly found that the first *Brown* factor, temporal proximity, weighed in favor of appellee. SFC JM's search of appellee's cell phone occurred at approximately 0125 hours on 11 October 2020, less than 12 hours prior to appellee's consent to search which appellee signed at 1253 later that same day. The Supreme Court has generally failed to find that this factor weighs in favor of attenuation unless "substantial time" elapses between the unlawful act and discovery of evidence. *Kaupp v. Texas*, 538 U.S. 626, 633 (2003); *Brown*, 422 U.S. at 604 (finding temporal proximity favored appellant when his first statement to law enforcement occurred only two hours after his illegal arrest); *Strieff*, 136 S.Ct. at 2062 (finding temporal proximity weighed in favor of appellant when mere minutes elapsed between an unlawful stop and discovery of drug contraband on appellant).

The military judge, however, abused his discretion and erred in concluding that "no intervening circumstances remove the taint of the unlawful search," the second *Brown* factor. We find that this factor weighs in favor of the government. The first intervening circumstance was that appellee's cell phone was returned to him for some period of time prior to his providing consent to search it. Sergeant First Class JM searched appellee's cell phone at approximately 0125 hours, and the following morning when appellee was retrieved from his tent, he was in possession of his cell phone. The proper return of appellee's cell phone provided him no indication that anything unlawful occurred while he lent it to PFC AM and broke the chain of illegality. The second intervening circumstance was that law enforcement personnel, who obtained appellee's consent to search, were not involved either directly or indirectly in SFC JM's search of appellee's cell phone. *United States v. Lopez-Garcia*, 565 F.3d 1306, 1316 (11th Cir. 2009) (holding that having a different law enforcement agent involved in obtaining statement from appellant than the law enforcement agent who conducted the appellant's arrest was an intervening circumstance); *but c.f.*, *Conklin*, 63 M.J. at 339 (recognizing that different law enforcement agents were involved in obtaining appellant's consent to search but because the offending government actors had briefed those agents on the unlawful search, it was not an intervening circumstance). The third intervening circumstance is that appellee was advised of his Article 31, UCMJ, rights which he invoked and requested an attorney. While such warnings are not alone sufficient to attenuate taint given the differing purposes of the Fourth and Fifth Amendments, they are nonetheless relevant of consideration. *Brown*, 422 U.S. at 601; *Taylor v. Alabama*, 457 U.S. 687, 690 (1982); *United States v. Conrad*, 673 F.3d 728, 734 (7th Cir.

2012); *Khamsouk*, 57 M.J. at 292 (holding that, while not dispositive of attenuation, the administration of Article 31 rights is an intervening circumstances); *United States v. Speiss*, 71 M.J. 636, 646 (Army Ct. Crim. App. 2012) (holding that the lack of law enforcement involvement in the illegal search and administration of Article 31, UCMJ, rights are intervening circumstances under the second *Brown* factor). More importantly, appellee was not informed by anyone, nor confronted by law enforcement, that a search of his cell phone resulted in the discovery of child pornography.[8] Another important intervening circumstance is that when law enforcement requested appellee's consent to search, appellee reflected on whether to provide consent.[9] *United States v. Whisenton*, 765 F.3d 939, 942 (8th Cir. 2014) (holding that "the presence of intervening circumstances that provide the defendant an opportunity 'to pause and reflect, to decline consent, or to revoke consent' help demonstrate that the illegality was attenuated.") (quoting *United States v. Greer*, 607 F.3d 559, 564 (8th Cir. 2010)); *United States v. Smith*, 919 F.3d 1, 11–12 (1st Cir. 2019) (holding that appellant's lack of immediate grant of consent to search his computer and instead, asking questions about the consequences of refusing to consent was an important intervening circumstance); *United States v. Oguns*, 921 F.2d 442, 447–48 (2nd Cir. 1990). The last relevant intervening circumstance is that appellee was advised, in writing, of his right to refuse to consent to a search of his cell phone. *Khamsouk*, 57 M.J. at 292 (holding that, while not dispositive of attenuation, a signed acknowledgement of the right to refuse consent is an intervening circumstance); *United States v. Delancy,* 502 F.3d 1297, 1311 (11th Cir. 2007) (holding that written notification of Fourth Amendment constitutional rights constituted an important intervening circumstance); *United States v. Kelley*, 981 F.2d 1464, 1471–72 (5th Cir. 1993) (holding that lack of police coercive tactics and being informed of the right to refuse consent "constitute sufficient intervening

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[8] The military judge made a finding of fact that "[a]t some point that morning, SFC JM told the [appellee], 'we have reason to believe you are doing something on your phone you shouldn't be doing,' or words to that effect." However, the military judge's findings of fact also state "[a]t the time that he gave consent to seize and search the cell phone, the [appellee] was not aware that PFC Avery, SFC [JM] or other soldiers had discovered pictures of female soldiers and child pornography on his cell phone."

[9] Upon being asked for consent to search his cell phone, appellee asked the CID agent what would happen if he refused to consent. The CID agent informed him that she would talk with her superior and see if she could obtain an authorization to search without his consent. We note that, in properly concluding that appellee's consent to search was voluntary, the military judge found that the CID agent's response was not designed to coerce the [appellee] nor did it have the effect of doing so.

circumstances to purge the taint of illegality from any unreasonable detention"); *United States v. Berry*, 670 F.2d 583, 605 (5th Cir. 1982) (en banc) (holding that, while not dispositive, being advised of the right to refuse consent was a relevant intervening circumstance). While the military judge outlined these intervening circumstances in his findings of fact, he did not expressly acknowledge what, if any of these factors, he considered an intervening circumstance in making his conclusory finding that "no intervening circumstances removed the taint of an unlawful search." The military judge's conclusion as to the second *Brown* factor was a clear error in judgment and abuse of discretion. We find the totality of the intervening circumstances weigh in favor of the Government.

Lastly, and most significantly, the military judge erred in concluding the third *Brown* factor, "the purpose and flagrancy of the official misconduct," weighed in favor of appellee and application of the exclusionary rule. The exclusionary rule exists to deter police misconduct. *Davis v. United States*, 564 U.S. 229, 236–37 (2011). "The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Strieff*, 136 S.Ct. at 2063. The military judge applied the exclusionary rule in concluding that the government's actions in this case, the actions of both SFC JM and the law enforcement agents, were "unwise, avoidable, and unlawful." In reaching this conclusion, the military judge faulted the CID agents for failing to specifically inquire into whether anyone consented to the search of appellee's cell phone or why SFC JM viewed photos other than just those viewed by the soldiers. In other words, although the evidence revealed that CID was relying on what appeared objectively to be a consensual search and one that did not exceed the scope of consent given, the military judge found this reliance in error, demanding more from the agents involved. He determined that SFC JM's unlawful search, coupled with CID's failure to inquire into the lawfulness of that search, is "the type of law enforcement and official conduct that the exclusionary rule was designed to deter." We disagree and find that the military judge's conclusion on this factor was unreasonable and a clear abuse of discretion.

Neither SFC JM's actions nor those of the CID agents involved rose to the level of being purposeful, meaning intended to violate appellee's Constitutional rights, or flagrant. Sergeant First Class JM, in his official capacity as acting first sergeant, properly responded to a call from his soldiers who were concerned that they had stumbled upon evidence of misconduct on appellee's cell phone. SFC JM knew that appellee had allowed PFC AM to borrow his phone and provided the pin code for unfettered access. Private First Class AM provided SFC JM consent to view photos on the phone. Sergeant First Class JM viewed images on the cell phone for the purpose of merely "verifying" what the soldiers had described to him. Upon viewing a particular photo of a child, SFC JM was concerned that there "might be more things here" in viewing additional photos. Even assuming his actions were unlawful, SFC JM's viewing of additional photos lacked purposefulness in that his

actions were not for "investigation" but for verifying the nature and scope of what the soldiers had described to him. Under these facts, any potential impropriety by SFC JM was neither purposeful or flagrant.

Similarly, the failure of the CID agents to further inquire into the facts and circumstances surrounding SFC JM's search of appellee's cell phone were not purposeful or flagrant. Upon getting a report that appellee's cell phone potentially contained child pornography, law enforcement interviewed SFC JM and PFC AM prior to seeking a consent to search from appellee. They were informed that: (1) appellee had authorized PFC AM to borrow his cell phone and provided the pin code; (2) PFC AM had viewed photos of clothed female soldiers which were concerning and contacted SFC JM; (3) SFC JM attempted to verify what the soldiers were reporting to him by viewing the photos of the female soldiers; (4) when SFC JM became concerned that there may be "more things here," he exited out of the photo gallery and opened other folders on the phone; and, (5) upon viewing a photo that appeared to be child pornography SFC JM stopped viewing any photos, put the phone down and reported the issue to his commander. Given these facts, CID had no obvious reason to believe that SFC JM's actions were unlawful. There was no obvious violation of appellee's expectation of privacy under the facts known by CID at the time of obtaining appellee's consent to search.

Law enforcement actions which are purposeful in violating an individual's Constitutional rights are the type of law enforcement conduct the exclusionary rule is meant to deter. *Brown*, 422 U.S. at 605 (finding law enforcement's actions purposeful and applying the exclusionary rule where the police acknowledged that they broke into Brown's apartment and arrested him without probable cause for the purpose of investigating a murder and that the "impropriety of the arrest was obvious" because Brown was arrested in a manner "calculated to cause surprise, fright, and confusion"); *Taylor*, 457 U.S. at 691–93 (suppressed a post-arrest confession because "the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up"). The actions of SFC JM in attempting to verify a report of concerning photos and CID's failure to inquire further into the search of appellee's cell phone that he voluntarily lent to another soldier is a far cry from the purposeful and flagrant misconduct warranting suppression in *Brown* and its progeny. If anything, CID's failure to inquire further as to SFC JM's search was merely negligent, which is not sufficient in applying the exclusionary rule. *Strieff*, 136 S.Ct. at 2063 (holding that a law enforcement officer's errors in judgment resulted in negligence but did not rise to a purposeful or flagrant violation of appellant's Fourth Amendment rights); *Brown*, 422 U.S. at 605 ("the impropriety of the arrest was obvious"). Neither SFC JM's conduct nor the actions of the CID agents in this case, viewed individually or collectively, are the type of conduct the exclusionary rule was designed to deter.

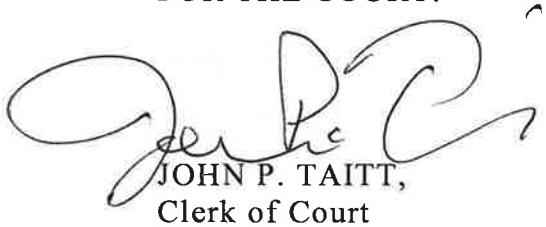
While the first *Brown* factor favors appellee, the second two *Brown* factors, particularly the third factor, favor the government. Appellee's consent was a voluntary act of free will. Further, appellee's consent was not the exploited product of an unlawful search by SFC JM, and thus, it was sufficiently attenuated from the taint of any prior illegality. Finally, application of the exclusionary rule, under the facts and circumstances in this case, served no deterrent value.

III. CONCLUSION

The appeal of the United States pursuant to Article 62, UCMJ, is GRANTED and the decision of the military judge is therefore **SET ASIDE**. We return the record of trial to the military judge for action consistent with this opinion.

Senior Judge ALDYKIEWICZ and Judge PARKER concur.

FOR THE COURT:



JOHN P. TAITT,
Clerk of Court

APPENDIX B: UNPUBLISHED CASES

United States v. Suarez

United States Army Court of Criminal Appeals

September 27, 2017, Decided

ARMY MISC[1] 20170366

[1] Corrected.

Reporter
2017 CCA LEXIS 631 *

UNITED STATES, Appellant v. Specialist AVERY J. SUAREZ, United States Army, Appellee

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Bliss. Michael J. Hargis, Military Judge. Colonel Charles C. Poché, Staff Judge Advocate.

Counsel: For Appellant: Captain Catharine M. Parnell, JA (argued); Lieutenant Colonel Eric K. Stafford, JA; Major Michael E. Korte, JA; Captain Samuel E. Landes, JA; Captain Catharine M. Parnell, JA (on brief); Colonel Tania M. Martin, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Samuel E. Landes, JA (reply brief).

For Appellee: Captain Joshua B. Fix, JA (argued); Lieutenant Colonel Christopher D. Carrier, JA; Major Todd W. Simpson, JA; Captain Joshua B. Fix (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO *ARTICLE 62*, UNIFORM CODE OF MILITARY JUSTICE

WOLFE, Judge:

In this case we consider an appeal by the United States, under *Article 62, Uniform Code of Military Justice*, *10 U.S.C. § 862 (2012 & Supp. IV 2017)* [hereinafter UCMJ]. The government claims that the military judge erred as a matter of law when he suppressed the results of a search of the accused's cell phone. We decline to address the merits of the government's arguments on appeal because we find that the government waived the underlying issues at the trial court. We therefore deny the government's **[*2]** appeal.

BACKGROUND[2]

An internet company provided local police in Richland, Washington, with information indicating that the accused was involved in child pornography offenses. Upon receipt of an affidavit, a military magistrate authorized a search of the accused's phone. The scope or legality of the search authorization is not part of this appeal.

On 28 February 2017, an agent from the Army Criminal Investigative Command (CID) seized the accused's phone from his person pursuant to the authorization. The accused was placed in handcuffs and brought to the CID offices at Fort Bliss and interrogated. The accused was read his rights in accordance with *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, and *Article 31(b)*, UCMJ. While the accused initially waived his rights, he later invoked his right to consult with counsel. The accused was released back to his unit.

There are two versions of events claiming to explain *when* CID asked the accused to provide his passcode to his phone to an investigator. The accused testified that he was asked for his passcode *before* he was advised of his rights under *Article 31(b)*, UCMJ. However, an agent from CID testified that the day after the interview, she sought out the accused to have him sign for personal **[*3]** property that CID was returning to him. During this exchange of personal property she testified that she asked the accused for the passcode to his phone.

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[2] We adopt the factual findings of the military judge as they are not clearly erroneous. *See United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011)*.

The military judge did not find it necessary to determine which version was the more likely. This is because, and critically, neither party asserts that the accused provided his passcode while being questioned after having waived his rights. Either the question was asked pre-warning (claims the accused), or post-invocation of his right to counsel (claims the government).

A search of the accused's phone revealed six images which the government alleges are child pornography. The accused moved to suppress his statement to CID revealing the passcode to his phone and the images that were subsequently discovered. The military judge granted the motion and the government appeals.

LAW AND DISCUSSION

The government makes numerous arguments as to why the military judge erred.

First, the government argues requesting a passcode is similar to requesting consent to search, which the Supreme Court has found is not an interrogation. *Fisher v. United States, 425 U.S. 391, 397, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)*.

Second, the government argues the request for the passcode was not a "communicative act" because *in this case* it did not **[*4]** amount to "an admission to the ownership and control of materials sought by the government." That is, as the phone already had been identified through business records and seized from the accused's person, ownership of the phone was a "foregone conclusion." *See Id. at 411*.

Third, the government argues that assuming the accused was asked to provide his passcode after he had been released from custody, there was no *Edwards* violation because, again, the question was not an interrogation and the accused's answer was not testimonial. *See Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*.

Fourth, the government argues that *Edwards* violations do not require the exclusion of derivative evidence. Here, the government asks us to focus on the constitutional answer to this question and not focus on the exclusionary rule contained in the Military Rules of Evidence.

Fifth, the government initially claimed that the military judge erred because the evidence would have been inevitably discovered. At oral argument the government conceded that this argument was conclusively resolved in the accused's favor by the United States Court of Appeals for the Armed Forces' decision in *United States v. Mitchell, 76 M.J. 413, 2017 CAAF LEXIS 856 (C.A.A.F. 2017)*.

We do not address the merits of the government's arguments. *Mitchell* explicitly did not **[*5]** resolve whether asking for a passcode is testimonial. *Id. at *12* ("We thus do not address whether Appellee's delivery of his passcode was 'testimonial' or 'compelled . . . .'"). We also leave this question unanswered.

It is also unclear, whether *Mitchell* dispatched the foregone conclusion doctrine as a general matter or just based on the facts of that particular case. *See Fisher, 425 U.S. at 411* (articulating the foregone conclusion doctrine such that the *Fifth Amendment* does not protect an act of production when any potentially testimonial component of the act of production—such as the existence, custody, and authenticity of evidence—is a "foregone conclusion" that "adds little or nothing to the sum total of the Government's information."); *Compare United States v. Apple Mac Pro Computer, 851 F.3d 238, 246-48 (3rd Cir. 2017)* (although dealing with the appeal of a civil contempt order for a suspect's failure to comply with a court order to decrypt devices containing suspected child pornography, the court concluded that even if it could assess the underlying issue of a *Fifth Amendment* privilege in the context of compelled decryption, it would be inapplicable because the magistrate judge issuing the order did not commit a clear or obvious error in applying the foregone conclusion doctrine to the facts of that case as

the **[*6]** government had provided evidence to show the files existed on the encrypted portions of the devices and that the suspect could access them), *with* *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d 1335, 1337, 1346-49 (11th Cir. 2012)* (determining that the *Fifth Amendment* does apply to compelled decryption and based on the facts before it, the forgone conclusion doctrine did not apply, as the government failed to show that any files existed on the hard drives and could not show with any reasonable particularity that the suspect could access the encrypted portions of the drives).

We do not reach the merits of the government's arguments because the United States waived most of the issues they assert on appeal when they conceded in their initial brief to the military judge that the accused's providing a passcode to a CID agent was testimonial and incriminating. In the brief to the military judge the government stated that "[a] statement is testimonial when its contents are contained in the mind of the accused and are communicated to the Government." The brief then stated "the Government concedes that the Accused's statement [providing the passcode] would be testimonial, incriminating, and compelled."

The government concession in **[*7]** the brief was initially limited to the assumption that CID asked for the accused's passcode before reading him his right's warning. That is, the government's concession assumed that CID asked the accused for his passcode before advising him of his *Article 31(b)*, UCMJ, rights. However, we can distinguish no reason why the statement would be testimonial pre-rights warning and non-testimonial after the accused has invoked his rights. If asking for the passcode is "testimonial" and "incriminating" before a rights warning is given, then it is also testimonial and incriminating after that same suspect has invoked his right to counsel.

However, if there is any doubt about the scope of the government's concession at trial, it was erased by the following exchange between the trial counsel and military judge.

> MJ: So, government, do you concede that asking someone for their passcode to a computer is asking for incriminating evidence or incriminating information that would trigger *5th Amendment* and *Article 31(b)* protections?
> TC: Uhm - - prior to being read one's rights, Your Honor, or in just in general?
>
> MJ: No. I am asking you, does - - asking someone for the passcode to their iPhone trigger *5th Amendment* protections and **[*8]** *Article 31(b)* protections?
> TC: Yes, Your Honor.

The military judge went on to confirm the government's concession two more times.[3] The military judge even noted that there was contrary case law that would support an argument that providing a passcode is not testimonial. The government maintained its position.

The government concession at trial included that the passcode was "testimonial" and "incriminating." In conceding the passcode was incriminating, the government necessarily conceded the request for the incriminating response was an interrogation. *See* Military Rule of Evidence [hereinafter Mil. R. Evid.] 305(b)(2) (defining an interrogation as "any

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[3] After the military judge granted the accused's motion to suppress the evidence the government requested reconsideration in light of our sister court's decision in *United States v. Robinson, 76 M.J. 663 (A.F. Ct. Crim. App. 2017)*. The motion stated that "the Government still concedes that stating as [sic] passcode is testimonial, the Government maintains its position that stating a passcode is not incriminating." The government's statement that they "maintain" their position that a passcode is not incriminating is hard to reconcile with their original motion where they stated that "the Government concedes that the Accused's statement would be testimonial, incriminating, and compelled." In any event, the government's position in the motion for reconsideration does not cause us to alter our approach to the case for two reasons: first, the government continued to clearly concede that providing the passcode was testimonial; second, the motion for reconsideration only asked the military judge to reconsider his decision on *5th Amendment* grounds, and not the *Article 31(b)*, UCMJ, grounds that we find to be controlling.

formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."). Thus, we are confused when the government argues to us on appeal that "even if [the accused] was in custody when [CID] asked for his passcode, [the accused] was not entitled to a rights warning because the request for the passcode, which was akin to a request for consent to search, was not 'interrogation.'

The government's argument misunderstands, as we see it, our role on appeal. Our job is not to determine whether the accused **[*9]** providing his passcode is testimonial. Our job is to determine whether the military judge *erred* when he found that providing the passcode was testimonial. In many cases these two questions will be the same.

However, when a party waives or forfeits an issue at trial the two questions diverge. When the government tells the trial judge that the accused's statement is testimonial and incriminating, we will never find that the military judge erred even if—and we do not decide this—in or own view the statements are not testimonial and incriminating.

The efficient appellate review of trial decisions depends on the preservation of issues at trial. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944)*. "Forfeiture is 'not a mere technicality and is essential to the orderly administration of justice.'" *Freytag v. Commissioner, 501 U.S. 868, 895, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)* (Scalia, J. concurring and quoting 9 C. Wright & A. Miller, Federal Practice and Procedure § 2472, p. 455 (1971)). "[A] trial on the merits, whether in a civil or criminal case, is the 'main event,' and not **[*10]** simply a 'tryout on the road' to appellate review." *Id.* (quoting *Wainwright v. Sykes, 433 U.S. 72, 90, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)*).

The waiver doctrine bars consideration of an issue that a party could have raised in an earlier appeal in the case. *See Brooks v. United States, 757 F.2d 734, 739 (5th Cir. 1985)*. It "serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and appeals." *Hartman v. Duffey, 88 F.3d 1232, 1236, 319 U.S. App. D.C. 169 (D.C. Cir. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1048 (1997)*. Regardless, whether waiver or forfeiture is the appropriate principle in a particular case, the preservation of issues is required for orderly appellate review.

The importance of waiver, the issue here, is all the more important as our jurisdiction to hear the government's appeal is provided by *Article 62*, UCMJ. While we have the authority to notice waived and forfeited issues when a case is on direct appeal under *Article 66*, UCMJ, no similar authority exists for interlocutory appeals.

In *United States v. Schelmetty, ARMY 20150488, 2017 CCA LEXIS 445* (Army Ct. Crim. App. 30 June 2017) (mem. op.), the appellant asked us to review the military judge's ruling excluding evidence under Mil. R. Evid. 412. In asking us to find error, appellant asserted for the first time on appeal new legal and factual theories in support of admitting evidence of the victim's sexual behavior. *Id. at *8*. We limited our ruling to determining whether **[*11]** the trial judge had erred based on the arguments made at trial. *Id. at *9*. Thus in *Schelmetty*, we refused to consider an argument on appeal that the victim's other sexual acts should have been admitted under the "consent" exception to Mil. R. Evid. 412 when the defense counsel during the motion's hearing stated that the issue was "not an issue of consent." *Id. at 10-11*.

In other words, in *Schelmetty* we reviewed whether the military judge erred by looking at the facts and legal theories of the case that had been brought to his attention at the time. We did not consider arguments or theories of the evidence that were advanced for the first time on appeal. Applying our

methodology in *Schelmetty* to the present case would lead us to accept the government's concessions at trial.

Indeed, we conclude that we *cannot* reject the government's concession in this case, even if we were otherwise inclined. The government argues that we should not accept its concession at trial and that we are not bound by the concession. We disagree. When the government makes a concession to *this* court we may choose to reject the concession. If a party misapplies the law in a brief to this court we are not required to adopt the flawed reasoning. That is **[*12]** what de novo review of an issue of law allows.

However, when the government concedes an issue at trial and the military judge accepts the concession, then the government cannot complain to this court that the military judge erred. We find the cases cited by the government to be unpersuasive. *United States v. Budka, 74 M.J. 220 (C.A.A.F. 2015)* (summ. disp.), is a case where the court of criminal appeals (CCA) rejected a government concession made at the CCA. *United States v. Emmons, 31 M.J. 108, 110 (C.M.A. 1990)*, is a case where the CCA and our superior court rejected the government's concession on appeal. Similarly, *United States v. McNamara, 7 U.S.C.M.A. 575, 578, 23 C.M.R. 39, 42 (1957)*, is a case where the court stated it was not bound by the government's concession on appeal to that appellant's claim of error. *United States v. Hand, 11 M.J. 321 (C.M.A. 1981)*, and *United States v. Patrick, 2 U.S.C.M.A. 189, 7 C.M.R. 65, 67 (C.M.A. 1953)*, are cases where the government's concessions were never accepted. In none of these cases did a party concede an issue at the trial level, have the concession accepted, and then argue to the appellate courts that the concession should be ignored. The closest case cited by the government on point, *zUnited States v. Taylor, 47 M.J. 322, 328 (C.A.A.F. 1997)*, is acknowledged by the government to be a citation to the dissenting opinion.

Our review, here, is to determine whether, under *Article 62(a)(1)(B)*,UCMJ, the military judge erred in his "ruling which exclude[d] evidence that is substantial proof of **[*13]** a fact material in the proceeding." That is, our review is to determine whether the trial judge erred as a matter of law, not to determine how we would decide the same issue in the first instance.

As the accused's counsel on appeal correctly summarized in oral argument, "'[S]hould' is an *Article 66* question, 'can' is an *Article 62* question . . . the problem with trying to overturn the concession here is: the question posed to this court is whether or not the military judge abused his discretion. And, saying that a military judge abused his discretion by accepting the concession of the very party who then claims he abused his discretion in accepting the concession, is—it fails to logically connect."

If asking for the accused's passcode to his phone invited a testimonial and incriminating response, the government was required to obtain a valid waiver of the accused's *Article 31(b)*, UCMJ, rights prior to asking for the passcode. Under Mil. R. Evid. 305(b)(2), action that triggers the requirement for *Article 31*, UCMJ, warnings includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." As either (1) no rights warning was **[*14]** given, or (2) the accused invoked his rights, we find no error when the military judge suppressed both the accused's statement and the derivative evidence from that statement.[4] Military Rule of Evidence 305(a) and (c) provide that statements obtained without a proper rights warning are defined as "involuntary" and are excluded along with any

[4] While the military judge noted the government's waiver and discussed in depth the government's concession during argument, his decision to suppress the evidence may have also reached the merits of the issue. The accused on appeal asks that we apply the Tipsy Coachman doctrine if we arrive at the same result as the military judge, albeit for different reasons. *United States v. Carista, 76 M.J. 511, 515 (Army Ct. Crim. App. 2017)*. We find this argument reasonable.

evidence derived from the statement by operation of Mil. R. Evid. 304(a) and (b).

It may be that the government's concession in this case was gratuitous and logically inconsistent with its stated goal of defeating the accused's motion to suppress. This inferred inconsistency is certainly an undercurrent in the government's arguments on appeal. However, except when necessary to address a claim such as ineffective assistance of counsel, we do not think it wise or necessary to try to determine why a party may have done what they did. The concession **[*15]** was made. The government maintained the concession even under repeated questioning by the military judge. As such, the substantive issue of this appeal was waived by the government at trial.

CONCLUSION

Accordingly, the appeal by the United States under *Article 62*, UCMJ, is DENIED.

Senior Judge MULLIGAN and Judge FEBBO concur.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Black*, Crim. App. Dkt. No. ARMY MISC 20210310, USCA Dkt. No. _____/AR, was electronically filed with the Court and the Government Appellate Division on December 20, 2021.

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