IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **CHRISTOPHER J. NELSON** LCpl (E-3) U.S. Marine Corps, Appellant	**BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 21-0304/MC Crim. App. Dkt. No. 202000108

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

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Table of Contents

Table of Cases, Statutes, and Other Authorities

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES COURTS OF APPEALS

STATUTES

MILITARY RULES OF EVIDENCE, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019)

Issue Presented

DID THE MILITARY JUDGE AND THE COURT BELOW ERR IN FINDING THAT APPELLANT VOLUNTARILY PROVIDED HIS SMART PHONE PASSCODE TO LAW ENFORCEMENT WHEN THE LAW ENFORCEMENT OFFICIAL CONDUCTING THE INTERROGATION ASSERTED THAT HE POSSESSED A SEARCH AUTHORIZATION FOR THE PHONE AND APPELLANT ONLY PROVIDED HIS PASSCODE BECAUSE APPELLANT BELIEVED HE HAD "NO CHOICE?"

Statement of Statutory Jurisdiction

The Convening Authority (CA) approved a court-martial sentence that included a bad-conduct discharge. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(3) (2019). This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ. 10 U.S.C. § 867 (2019).

Statement of the Case

A general court-martial composed of a military judge alone convicted LCpl Christopher Nelson ("Appellant"), consistent with a conditional plea, of two specifications[1] of Article 81, UCMJ, 10 U.S.C. § 881 (2019) and six specifications

[1] After the announcement of findings, Specification 2 of Charge I was conditionally dismissed as an unreasonable multiplication of charges with Specification 3 of Charge I.

of Article 112a, UCMJ, 10 U.S.C. § 912a (2019). (J.A. at 173; 179.)

The military judge sentenced Appellant to be reduced to paygrade E-1, to be confined for a period of twenty-four months, and to be discharged with a bad-conduct discharge. (J.A. at 176.)

The convening authority (CA) approved the reduction and the bad-conduct discharge, and pursuant to a pretrial agreement, suspended all confinement in excess of eighteen months. (J.A. at 178.)

The Navy-Marine Corps Court of Criminal Appeals ("NMCCA") affirmed the findings and sentence. *United States v. Nelson*, NMCCA No. 202000108 (May 4, 2021) ("Op.").

This Court granted Appellant's timely petition for rehearing on 31 August 2021.

Statement of Facts

The charges in this case—involving different drug offenses—arose from an investigation unrelated to Appellant conducted by the Criminal Investigative Division ("CID"). (J.A. at 54-55.) The separate investigation involved allegations of domestic assault concerning two other servicemembers. (*Id.*); (J.A. at 127-28). During this separate investigation, initiated by CID on 6 February 2019, one of those servicemembers was interviewed. She purportedly made allegations

involving unlawful drug use by Appellant and others. (J.A. at 55; 128.) Following those allegations, CID Investigator Hotel[2] decided to interview Appellant. (*Id.*)

On 30 April 2019, Appellant's senior staff non-commissioned officer escorted Appellant to the CID building, where Investigator Hotel was waiting to interview him. (*Id.*) The interrogation was conducted in a small room with only Investigator Hotel and Appellant in the room. (J.A. at 128.) During the majority of the interview, the door was closed. (*Id.*)

The interview began at 0907 on 30 April 2019. (*Id.*) Approximately fifteen minutes into the interview, after being informed that he was suspected only of "wrongful use, possession, etc. of controlled substances," at 0922, Appellant signed an Article 31(b) and *Miranda* rights advisement. (J.A. at 56; 128.)

At approximately 0959, Investigator Hotel asked Appellant if he would be willing to turn over his smart phone, an Apple iPhone 6, to CID. Appellant responded, "I'd rather not." (J.A. at 129.)

Appellant then admitted to cocaine *use* but to nothing more. (*Id.*)

At approximately 1023, Investigator Hotel again told Appellant, "I'd like to do a search of your phone." (*Id.*) Appellant again declined to allow a search of his

[2] The Navy-Marine Corps Court of Criminal Appeals used the acronym "Investigator Hotel" in its decision. He is referred to throughout this brief by that acronym. The CID Investigator is referred to as "Investigator Hardesty" or "Agent Hardesty" in the Joint Appendix.

phone. (*Id.*) Despite Investigator Hotel's urging, Appellant also declined to make a written statement of any kind. (*Id.*)

Because Appellant would not consent to a search of his smart phone, Investigator Hotel told Appellant that he would obtain a search authorization from Appellant's Commanding Officer in order to search the phone. (*Id.*) In response to this statement, Appellant said, "I guess at that point I'd have no choice." (*Id.*)

At approximately 1031, Investigator Hotel tried for a *fourth* time to gain Appellant's consent to search his phone. Appellant told Investigator Hotel, "I'd be willing to let a lawyer look at my messages . . . ." (*Id.*) Despite Appellant's reference to wanting to confer with an attorney about the text messages on his phone, Investigator Hotel did not terminate the interview. (*Id.*) Nor did Investigator Hotel ask any additional questions about what Appellant meant by this. (J.A. at 71.) Instead, Investigator Hotel continued to interrogate Appellant, asking him questions about, *inter alia*, the urinalysis program. (J.A. at 129.)

At approximately 1036, Investigator Hotel asked for Appellant's consent to search his smart phone for a *fifth* time. (*Id.*) Appellant again declined, and responded, "[N]ot without knowing whether I'd be incriminating myself." (*Id.*)

After approximately an hour and half of questioning, Investigator Hotel terminated the first interrogation. (J.A. at 70-71.) Investigator Hotel then took a photograph of Appellant and escorted him to be fingerprinted. (J.A. at 129.)

Investigator Hotel then seized Appellant's smart phone. (*Id.*) At that point, Investigator Hotel did not have a command authorization or any other warrant to either search or seize Appellant's phone. (*Id.*)

It was not until the *next morning* that Investigator Hotel obtained a Command Authorization for Search and Seizure ("CAAS") of Appellant's phone, having kept the phone in the possession of law enforcement for nearly twenty-four hours without either a warrant or Appellant's consent. (*Id.*)

The following afternoon, on 1 May 2019, at 1354, Investigator Hotel again summoned Appellant to question him, this time at the Office of the Day at the Headquarters Building of Appellant's command. (J.A. at 130.) Although he intended to question Appellant about alleged drug activity, Investigator Hotel *did not* provide an Article 31(b) or *Miranda* rights advisement prior to this second interrogation. (*Id.*)

Instead, Investigator Hotel informed Appellant that Appellant's Commanding Officer had issued a command authorization for the search and seizure of Appellant's smart phone. (J.A. at 58.) Investigator Hotel then placed Appellant's previously seized smart phone in front of Appellant and asked him to unlock it with his passcode. (J.A. at 130.) Appellant responded, "I will if I don't have a choice." (J.A. at 87.)

Appellant then entered his passcode into the phone. (*Id.*; J.A. at 130.)

Utilizing the passcode Appellant provided, Investigator Hotel later conducted an extraction of the data on Appellant's smart phone utilizing the Universal Forensic Extraction Device ("UFED") utility. (J.A. at 130.) The data on Appellant's phone contained inculpatory information pertaining to wrongful use, introduction, and distribution of various controlled substances. (*Id.*)

The information obtained from Appellant's phone was then used to charge him with the various charges that form the basis of this case: *viz*., three specifications of conspiracy to wrongfully distribute and introduce controlled substances in violation of Article 81, UCMJ, two specifications of wrongful distribution, one specification of wrongful introduction with intent to distribute, and three specifications of wrongful use in violation of Article 112a, UCMJ. (J.A. at 45-48.) The charges were referred to a general court-martial. (*Id.*)

Before trial, Appellant filed a motion to suppress evidence obtained from his smart phone under M.R.E. 304. (J.A. 178; 116.)

After an evidentiary hearing, the military judge denied Appellant's motion and admitted the evidence over his objection. (J.A. at 145.)

Appellant and the government then entered into a pretrial agreement "to enter a conditional plea of guilty in writing as to all charges and specifications, preserving the right to review or appeal any adverse determination on the motion to suppress evidence . . . ." (J.A. at 149.) That agreement further stated that

Appellant "understand[s] that if I prevail on further review or appeal, I will be allowed to withdraw my conditional pleas of guilty in accordance with R.C.M. 910(a)(2)." (*Id.*)

The military judge accepted Appellant's conditional guilty pleas. He found Appellant guilty of all charges and specifications, except for Specification 2 of Charge I, which was conditionally dismissed due to an unreasonable multiplication of charges with Specification 3 of Charge I. (J.A. at 173; 179.)

Summary of the Argument

The Fifth Amendment and Article 31(b) protects servicemembers from making testimonial communications that are compelled, or involuntary. Following two interrogations by CID Investigator Hotel, Appellant provided his smart phone passcode to law enforcement, but he did so *involuntarily* for two reasons. First, Appellant provided the passcode only after Investigator Hotel first threatened to obtain and then asserted that he had obtained a search authorization for the phone. Second, Appellant refused consent for Investigator Hotel to search his phone five separate times, which is direct evidence that he did not voluntarily provide his passcode so that a search would inevitably occur. The lack of voluntariness of Appellant's statement was made plain when asked by Investigator Hotel for the passcode for the sixth time, Appellant responded, "I will if I don't have a choice." (J.A. at 87.)

A statement is only voluntary if it is the "product of an essentially free and unconstrained *choice* by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, (1973) (emphasis added). Because law enforcement's threat of a warrant is "instinct with coercion," *United States v. White*, 27 M.J. 264, 266 (C.M.A. 1988), this Court and the United States Supreme Court have routinely held that consent to search is *not* voluntary when it is given only after law enforcement has claimed to have a warrant. *Id.*; *see also Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (a search is not lawful "on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant"). Because consent to search is involuntary when based on the threat of search authorization, a statement made in response to the threat of a search authorization that would permit such a search to occur is likewise involuntary, as happened in this case.

Here, Appellant did not voluntarily provide his phone's passcode to law enforcement because he only gave law enforcement the passcode after the investigator asserted that he had obtained a search authorization. After the investigator informed Appellant that he had a warrant, Appellant provided the code because he believed he had "no choice" but to do so. (J.A. at 87; 129.) Having no choice in a matter, of course, is by definition involuntary.

The involuntariness of Appellant's statement is further evidenced by his refusal to provide consent to search the phone's contents five separate times. The record is plain that Appellant never provided consent to search his phone, and refused such consent, despite multiple demands by CID. Because "badgering an unrepresented suspect into granting access to incriminating information threatens the core Fifth Amendment privilege…," *Mitchell*, 76 M.J. 413, 419 (C.A.A.F. 2017), the record shows that because Appellant refused to provide consent to search his smart phone, he did not voluntarily provide his phone's passcode so that a search would inevitably occur.

The court below misapplied this Court's precedent and U.S. Supreme Court precedent by finding that Appellant *voluntarily* provided his passcode under these circumstances.

In making this finding, the decision below also announced an entirely new standard of review on the *legal* question of whether an accused's statement to law enforcement is voluntary. Specifically, the court of appeals applied a "clearly erroneous" standard of review to the legal question of voluntariness, and declared, in effect, that it would defer to a military judge's interpretation of a legal question that appellate courts instead have a duty to review *de novo*.

An accused does not *voluntarily* provide a phone's passcode to law enforcement when the passcode is provided only after law enforcement has

asserted that it obtained a warrant, only after the accused has refused consent to search the phone, and only after an accused believes he has "no choice" but to provide the code. Because the court of appeals found otherwise, while applying a "clearly erroneous" standard of review on a pure question of law that should be reviewed *de novo*, the decision below should be reversed.

Argument

THE COURT BELOW ERRED IN FINDING THAT APPELLANT VOLUNTARILY PROVIDED HIS SMART PHONE PASSCODE TO LAW ENFORCEMENT WHEN THE LAW ENFORCEMENT OFFICIAL CONDUCTING THE INTERROGATION ASSERTED THAT HE POSSESSED A SEARCH AUTHORIZATION FOR THE PHONE AND APPELLANT ONLY PROVIDED HIS PASSCODE BECAUSE APPELLANT BELIEVED HE HAD "NO CHOICE."

Standard of Review

The Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000). The military judge's *factual* findings on a motion to suppress are reviewed "under the clearly-erroneous standard and *conclusions of law* under the *de novo* standard." *Id.* (emphasis added).

Discussion

I. The court below applied a "clearly erroneous" standard of review to the *legal* question of whether Appellant's statement was voluntary, when it should have reviewed that question *de novo.*

The court below applied the incorrect standard of review by using a "clearly erroneous" standard in addressing the *legal* question of voluntariness, in conflict with this Court's plain precedent. Op. at 7. The question of whether a statement is voluntary is a *legal* question that an appellate court reviews *de novo*. *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) ("The voluntariness of a confession is a question of law that this Court reviews *de novo*."); *see also United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996) ("Voluntariness of a confession is a question of law that an appellate court *independently* reviews, *de novo.*") (emphasis added). The court below contravened this Court's precedent by failing to apply *de novo* review to the central *legal* question in this case.

Application of the abuse of discretion standard on the legal question of voluntariness was essential to the lower court's decision. After acknowledging that the question of voluntariness in this case "is a close call," the court then cited to the abuse of discretion standard and asserted that in order for Appellant to prevail on the key legal issue in the appeal the "challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Op. at 7 (*quoting United States v. Lyold*, 69 M.J. 95, 99 (C.A.A.F. 2010)). But in reviewing a

motion to suppress, the "clearly erroneous" standard only applies to questions of fact, not law. *United States v. Macomber,* 67 M.J. 214, 218 (C.A.A.F. 2009). In other words, a military judge abuses his discretion not if his *legal* conclusions are "arbitrary, fanciful, clearly unreasonable, or clearly erroneous," as the lower court held, Op. at 7, but rather if the judge "misapprehends the law." *United States v. Macomber*, 67 M.J. at 218. And questions of law—like the one at issue in this case—are *always* reviewed *de novo*. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011) ("Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed *de novo*.").

The extent to which the military judge resolved *factual* questions surrounding Appellant's statement *those* questions should not be disturbed unless the findings are "clearly erroneous." *United States v. Cottrill*, 45 M.J. 485, 488 (C.A.A.F. 1997). For example, the time the interrogation began, the size of the room, and whether the investigator "appear[ed] calm during the interrogation and the tone was conversational," (J.A. at 128), are all factual findings the military judge made to which the "clearly erroneous standard *does* apply. *United States v. Ford,* 51 M.J. 445, 451 (1999). But, here, "no dispute exists as to the relevant facts." *United States v. Simpson*, 54 M.J. 281, 283–84 (C.A.A.F. 2000). Instead, "[a]t issue is whether the military judge erred as a matter of law in denying appellant's motion to suppress." *Id. That* question "is ultimately a legal question,"

Cottrill, 45 M.J. at 488, to which appellate courts apply a *de novo* standard of review, "and this Court owes no deference to the appellate court below or the military judge in deciding this question." *Id.*[3] In no circumstance should the court below have applied a "clearly erroneous" standard to the pure legal question of whether Appellant's statement was voluntary.

Applying a "clearly erroneous" standard in cases involving the admissibility of a statement by an accused, such as occurred in this case, is particularly problematic because it is the *government*, not Appellant, that has the burden of establishing by a preponderance of the evidence that a statement is voluntary. Mil. R. Evid. 304(e); *Simpson*, 54 M.J. at 283–84. By requiring that "appellant must come forward with conclusive argument that there was an abuse of discretion," Op. at 7 (quoting *Houser*, 36 M.J. 392, 397 (C.A.A.F. 1993), on the question of voluntariness, the court below essentially shifted the burden of proving voluntariness from the government to Appellant.

To support its application of a heightened standard of review on the legal question, the decision below cited to *Lloyd*, and *Houser*. But both of those cases involved the admission of expert testimony—a discretionary question that requires

[3] Even if there are mixed questions of fact and law necessary to resolve the question of voluntariness here—and there isn't—when the decision "involves developing auxiliary legal principles of use in other cases," *de novo* review should still be used. *U.S. Bank Nat. Ass'n v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 967 (2018).

weighing the reliability of a witness and whether a witness's testimony has probative value, among other things. Mil. R. Evid. 401. Whether expert testimony should be admitted into evidence is quintessentially a discretionary issue in which the military judge is best positioned to assess reliability and probative value. By contrast, the question of whether a statement is voluntary is a legal inquiry where appellate courts can and should independently review the record and apply the law *de novo*.

The appellate court's reliance on *Lloyd* and *Houser* was also misplaced because the burden is different in cases that examine the admissibility of expert testimony than cases that examine whether a statement is voluntary. Specifically, the proponent seeking to admit expert testimony bears the burden of establishing each factor. *Houser*, 36 M.J. at 397. By contrast, as set out above, the government always bears the burden of proving that an accused's statement is voluntary. Mil. R. Evid. 304(e); "The prosecution bears the burden of establishing by a preponderance of the evidence that the confession was voluntary." *Freeman*, 65 M.J. at 453. When the court of appeals stated that a military judge's legal conclusion regarding the voluntariness of Appellant's statement would not be disturbed unless it was "clearly erroneous," or absent "conclusive argument," it announced that it would defer to the military judge on a legal question. That conclusion is in direct conflict with *Cottrill*, *Lewis, Bubonics*, and this Court's

other precedent requiring *de novo* review on the question of whether an appellant's statement is voluntary.

The appellate court's application of a heightened standard of review that should only apply to *factual* questions on the central *legal* question in this case was an essential basis for appellate court's conclusion that Appellant's statement was voluntary. Because the appellate court applied the wrong standard of review to the key legal question on appeal, the court below should be reversed on that basis alone.

II. The court below erred by sustaining the admission of evidence obtained in violation of Appellant's rights against self-incrimination when Appellant was compelled to provide his telephone passcode under threat of search authorization, and Appellant only provided the code because he believed he had "no choice" but to do so.

The court below also erred by affirming the military judge's admission of evidence from Appellant's smart phone because it was acquired as the result of Appellant's involuntary statement made in violation of his Fifth Amendment and Article 31(b) rights against self-incrimination. Under the Fifth Amendment, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V; *see also* Art. 31(a), UCMJ, 10 U.S.C. § 831 ("No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.").

The U.S. Supreme Court has referred to the right against self-incrimination as the "mainstay of our adversary system of criminal justice." *Johnson v. State of N.J.*, 384 U.S. 719, 729 (1966). It has explained "[t]he essence of this basic constitutional principle is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle v. Smith*, 451 U.S. 454, 462 (1981). A violation of the Fifth Amendment occurs when "the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408, (1976).

If an individual is compelled to answer an incriminating question, "his answers are inadmissible against him in a later criminal prosecution.'" *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (citation and quotation marks omitted). The Fifth Amendment bars not only the admission of the compelled statements, but also the "evidence derived directly and indirectly therefrom" and "prohibits the prosecutorial authorities from using the compelled testimony in any respect." *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *see also Mitchell*, 76 M.J. 413 at 418 ("The privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would

furnish a link in the chain of evidence needed to prosecute. . . .") (citation and quotation marks omitted).

The Fifth Amendment's protections against self-incrimination apply to communications made during a custodial interrogation[4] that are "[1] testimonial, [2] incriminating, and [3] compelled." *United States v. Castillo*, 74 M.J. 160, 165 (C.A.A.F. 2015) (quoting *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). The first two factors are not at issue in this appeal. First, as this Court has directly held, asking a person for a smart phone passcode is questioning intended to illicit incriminating information. *Mitchell*, 76 M.J. at 418 ("asking Appellee to *state* his passcode involves more than a mere consent to search; it asks Appellee to provide the Government with the passcode itself, which is incriminating information in the Fifth Amendment sense, and thus privileged"). Second, providing the passcode is a testimonial communication.[5] *See United States v. Hubbell*, 530 U.S. 27, 44-45 (2000) (providing documents pursuant to a subpoena when the government had no knowledge of the existence of the documents is

[4] There does not appear to be any dispute that Appellant was in custody and subject to interrogation at the time he provided his telephone passcode. The military judge found and NMCCA affirmed that "Both the 30 April and 1 May meetings were 'custodial…'" Op. at 4-5. Additionally, a request by law enforcement for a telephone passcode "qualifies as an interrogation." *Mitchell*,76 M.J. at 418.

[5] The military judge found and NMCCA affirmed that "The request for the Passcode on 1 May qualified as a request for an incriminating testimonial statement and sought information that is privileged for Fifth Amendment purposes." Op. at 5

testimonial); *see also In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1341 (11th Cir. 2012) (holding that compelling defendant to produce data protected by a passcode "trigger[s] Fifth Amendment protection because it would be testimonial, and such production would extend to the Government's use of the drives' contents."). The remaining question then is whether Appellant was compelled to provide his phone's passcode to law enforcement. He was.

The court below erred in finding that Appellant voluntarily provided his passcode to law enforcement because he only did so after the CID investigator asserted he had a warrant, and Appellant believed he had "no choice" but to do so. A communication made during custodial interrogation "is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [*Miranda*] rights when making the statement." *Berhuis v. Thompkins*, 560 U.S. 370, 382 (2010). Voluntariness turns on whether the "defendant's will was overborne" when he gave the statement, and the test is whether the statement was a "product of an essentially free and unconstrained *choice* by its maker." *Schneckloth*, 412 U.S. at 225-26 (emphasis added); *United States v. Benner*, 57 M.J. 210, 213(C.A.A.F. 2002) (same). Under M.R.E. 304(f)(6), "the prosecution has the burden of establishing . . . by a preponderance of the evidence that a statement by the accused was made *voluntarily* before it may

be received into evidence." *Id.* (emphasis added). The government has failed to meet its burden that Appellant voluntarily provided his phone passcode to law enforcement and the court below erred in concluding otherwise.

This is so for two reasons. First, this Court has routinely held that consent is not voluntary when it is obtained after law enforcement threatens to obtain a search authorization, and an accused provided consent to search only *after* law enforcement asserted that it had a warrant. *United States v. McClain*, 31 M.J. 130, 133 (C.M.A. 1990); *see also White*, 27 M.J. at 266. Second, Appellant refused to provide consent to search his phone *five times*, (J.A. at 129), which is direct evidence that he did not voluntarily provide his phone's passcode so that a search would inevitably occur. Indeed, Appellant only provided his passcode after he believed he had "no choice" but to do so. (*Id.*; J.A. at 87.) That is the opposite of a "free and unconstrained *choice,*" *Schneckloth*, 412 U.S. at 225-26 (emphasis added), and thus is not voluntary under the Fifth Amendment or Article 31(b).

A. Appellant did not voluntarily provide his telephone passcode to law enforcement because he provided it under the threat of a command search authorization.

Appellant did not voluntarily provide his passcode because he did so only after law enforcement asserted it had a search authorization for the phone. As a result of the search authorization, Appellant believed he had "no choice" but to provide the passcode. This Court has routinely held that consent to search is not

voluntary when it is given only after law enforcement has claimed to have a warrant. In *White*, this Court found that "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." 27 M.J. at 266. The threat of a warrant creates a "situation . . . instinct with coercion . . . ." *Id.* And "[w]here there is coercion there cannot be consent." *Id.* This holding is based on U.S. Supreme Court precedent that a search cannot be lawful "on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant." *Bumper*, 391 U.S. at 548. This has been the general rule in federal courts since the Supreme Court decided *Bumper*.

In *McClain*, the Court of Military Appeals specifically set out several common scenarios in which consent is purportedly obtained following a reference by law enforcement to a command search authorization. 31 M.J. at 133. There, the Court of Military Appeals directly held that "Consent obtained with threat of actual search warrant or search authorization" is "[n]ot admissible by virtue of consent." *Id.* The same is true here.

If consent to search is not voluntary after law enforcement threatens to obtain a warrant under the Fourth Amendment, as the law plainly establishes, then an incriminating statement made after law enforcement asserts it has a warrant that would allow such a search to occur is likewise not voluntary under the Fifth

Amendment. The Supreme Court in *Malloy v. Hogan* discusses the Fourth and Fifth Amendments "as running almost into each other" when law enforcement "forcibl[y] and compulsory extort[s]…a man's own testimony." 378 U.S. 1, 8–9, (1964). Or, as the Court put it *Mapp v. Ohio*, "The philosophy of [the Fourth and Fifth] Amendment[s] and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." 367 U.S. 643, 657 (1961).

Observing the overlap in Fourth Amendment consent searches and Fifth Amendment protections, in *United States v. Mitchell*, this Court held that "asking Appellee to *state* his [phone] passcode involves more than a mere consent to search; it asks Appellee to provide the Government with the passcode itself, which is incriminating information in the Fifth Amendment sense, and thus privileged." 76 M.J. at 418. In other words, if there is no voluntary consent to search, there cannot be a voluntary testimonial statement that would allow such a search such to occur.

In this case, the record indisputably shows that Appellant did not voluntarily consent to a search of his smart phone and therefore did not voluntarily provide his passcode so that a search of the phone would inevitably occur. Specifically, Appellant refused to provide consent to search his smart phone *five separate times*.

(J.A. at 129.) Because Appellant would not provide consent to the search, the CID investigator interrogating Appellant, Investigator Hotel, informed Appellant during the first interrogation that he would seek search authorization for the phone. During the second interrogation, Investigator Hotel informed Appellant that he had obtained a search authorization for the phone. (*Id.*) Appellant's reaction to law enforcement's reference to the search authorization was nearly identical on both occasions.

On April 30, 2019, after Appellant refused consent to search his smart phone several times, Investigator Hotel told Appellant that he would obtain a search authorization from Appellant's Commanding Officer in order to search the phone. (J.A. at 129.) In response to this statement, Appellant said, "I guess at that point I'd have no choice," but to provide consent to search. (*Id.*) The investigator then seized Appellant's phone. (*Id.*)

The next day, Investigator Hotel obtained a search authorization, and summoned Appellant back into a command office space for a second interrogation. (*Id.*) There, the investigator placed Appellant's phone on the table in front of him and informed Appellant that he obtained authorization from Appellant's commanding officer to search the phone. (*Id.*) Investigator Hotel did not readvise Appellant of his Article 31(b) and *Miranda* rights. (*Id.*) The investigator then asked if Appellant would enter his passcode to unlock the phone. In response,

Appellant stated, "I will if I don't have a choice," and he then entered his passcode. (J.A. at 87.)

The fact that Appellant believed he did not have a choice when he provided his passcode was evident by both his statements to law enforcement. They each show that if Appellant believed he *did* have a choice as to whether to provide information so that a search of his phone could occur, he would choose *not to provide that information*. Plainly, the *only* reason Appellant provided his passcode was the result of "mere acquiescence to the color of authority," *United States Wallace*, 66 M.J. 5, 10 (C.A.A.F. 2008), based on investigator's assertion that he had command authorization to search the phone. Here, just as in *White*, "when the servicemember is given no option, what results is mere acquiescence, not consent." 27 M.J. at 266. Thus, Appellant plainly did not provide his passcode "voluntarily," or as a product of a "free and unconstrained choice." *Schneckloth*, 412 U.S. at 225-26.

Instead, as the record makes plain, Appellant provided his passcode to law enforcement only after the CID investigator informed Appellant that he had obtained a command search authorization and only after Appellant believed he had "*no* choice" but to provide his code. That is precisely the fact pattern that established the bright line rule in *Bumper*, *White*, and *McClain* that consent under these circumstances is not voluntary.

The government has the burden of proving that Appellant's statement is voluntary. Under M.R.E. 304(f)(6). We know from the record that Appellant did not want to provide his passcode to law enforcement. (J.A. at 87; 129.) We also know that he only did so after the law enforcement investigator conducting the interrogation asserted that he had a search authorization from Appellant's commanding officer to search the phone. (*Id.*) Whether Appellant believed that the search authorization eliminated his choice of whether to provide the passcode, or whether to acquiesce to authority, when Appellant provided his passcode to law enforcement he was not making a "free and unconstrained choice." *Schneckloth*, 412 U.S. at 225-26. Appellant did so precisely for the opposite reason: Because believed he had "no choice." (J.A. at 129.)

B. Appellant did not provide his smart phone passcode to law enforcement voluntarily because Appellant previously refused consent to search his phone five separate times.

Appellant's multiple refusals to allow law enforcement to search his phone also shows that Appellant did not voluntarily provide his passcode so that a search would inevitably occur. During Appellant's first interrogation on 30 April 2019, the CID investigator asked Appellant for consent to search his phone on *five* separate occasions. (J.A. at 129.) Appellant refused to allow the investigator to search his phone each and every time, telling him at various points, "I'd rather not," and "[N]ot without knowing whether I'd be incriminating myself." (*Id.*)

Indeed, at one point, Appellant told the investigator that he would only let an attorney review the contents of his phone. (*Id.*) Based on these and other statements, the military judge found that, while Appellant agreed to speak with Investigator Hotel, he also "refused to consent to a search of his iPhone." (J.A. at 144.) Appellant's refusal to consent to a search of his phone is direct evidence that he did not voluntarily provide the phone's passcode so that a search would inevitably occur.

The military judge thus simultaneously found that Appellant *knowingly* refused consent to search his phone, but *voluntarily* provided information that would ensure a search of the phone would occur. The court below erred in sustaining that inherently contradictory legal conclusion. In the context of a search and seizure, "consent to one is not, without more, consent to the other . . . . " *Wallace*, 66 M.J. at 8. And "[t]he scope of any consent search may not exceed the scope of the actual consent given." *Florida v. Jimeno,* 500 U.S. 248, 251 (1991). The same is true here.

Appellant cannot simultaneously *knowingly* refuse to provide consent to search his phone while providing a voluntary statement that he *knows* will allow a search of the same object. Instead, consent to *speak* with the CID investigator did not establish consent to incriminate himself regarding the *contents of his phone*. On the contrary, Appellant's *refusal* to provide any information pertaining to his

smart phone is direct evidence that whatever voluntary statements Appellant did make to law enforcement, those statements did not include voluntarily providing his phone's passcode.

As the court below observed, "When juxtaposed against his earlier refusals to let [the CID investigator] search his phone or provide his passcode, Appellant's unlocking the phone may evidence acquiesce to authority or mistaken belief that the CASS extinguished his right to refuse to provide the passcode." Op. at 7. The court below described the question of voluntariness as "a close call." *Id.* But when viewed in light of Appellant's repeated refusal to allow a search of his phone, as well as the investigator's statement regarding the search authorization, and Appellant's response to that statement that "I will if I don't have a choice," (J.A. at 87), it is not close.

As this Court held in *Wallace,* acquiescence is not free and voluntary consent. 66 M.J. 5, 7 (C.A.A.F. 2008). And "badgering an unrepresented suspect into granting access to incriminating information threatens the core Fifth Amendment privilege . . . ." *Mitchell*, 76 M.J. at 419. Law enforcement demanded Appellant's passcode five separate times during a lengthy interrogation. Appellant refused every time. And he relented only after he believed he had no choice. The court below erred in finding that this involuntary statement was voluntary.

III. The government cannot meet its burden of proving that the evidence derived from Appellant's smart phone as a result of his involuntary statement would have been inevitably discovered.

The "inevitable discovery" rule does not allow admission of evidence derived from Appellant's phone. Under M.R.E. 304(a), evidence derived from an involuntary statement "is inadmissible at trial" unless a narrow and clearly enumerated exception applies. Under M.R.E. 304(b), evidence derived from Appellant's involuntary statement should be excluded unless the government can establish "by a preponderance of the evidence," that "the evidence would have been obtained even if the statement had not been made." *See also Mitchell*, 76 M.J. at 420 (discussing and rejecting the inevitably discovery exception in the context of a Fifth Amendment violation involving a smart phone passcode). The government bears the burden of establishing the admissibility of derivative evidence. Mil. R. Evid. 304(f)(6).

Here, there are at least two reasons why the government cannot meet its burden to show that the contents of Appellant's smart phone would have been "inevitably discovered" in the absence of Appellant's involuntary statement.

First, the record establishes that CID may *never* have been able to retrieve the contents of Appellant's smart phone without the passcode. Although the government eventually procured a warrant to search Appellant's smart phone, that warrant may have been worthless because it is unlikely the government would be

able to search the phone without the passcode. Indeed, the entire reason CID questioned Appellant was to obtain the passcode so a search could occur that CID was unable to conduct without the passcode.

Although his testimony was inconsistent, Investigator Hotel testified that CID was only able to "unlock" one out of two iPhones that were the same model as Appellant's smart phone. (J.A. at 66, 77-78.) Ultimately, Investigator Hotel could not conclude one way or the other whether law enforcement would be able to unlock Appellant's phone in the absence of his passcode. When asked, "So you did not know at the time whether or not D.S.F.L. would be able to successfully unlock that phone?," Investigator Hotel responded, "I did not. No, sir. It's a case by case basis." (J.A. at 66-67.) On this record, either law enforcement had a one out of two chance of unlocking Appellant's phone without the passcode, or law enforcement didn't know whether it could unlock the phone without the passcode. In other words, on this record, the government did not and cannot not prove by a preponderance of evidence that law enforcement would have been able to unlock Appellant's phone and search the contents without the passcode. Mil. R. Evid. 304(b). Thus, the government cannot show that the contents of Appellant's phone would have been inevitably discovered in the absence of the Fifth Amendment and Article 31(b) violations.

Second, even if law enforcement could unlock the contents of the smart phone, the record demonstrates that the government may not have had time to do so. Appellant's phone was seized on 30 April 2019. (J.A. at 129.) Investigator Hotel testified that even if a smart phone's security can successfully be bypassed, the timeline on bypassing the security is unclear, and in one case it took "up to seven months," after which time investigators simply gave up trying to unlock the phone because the servicemember had already reached his EAOS. (J.A. at 76.) Thus, the government may not have learned of the contents of Appellant's phone for many months after it was seized. Appellant's End of Active Obligated Service was 30 September 2019. Although Appellant was suspected of *using* a controlled substance at the time of the phone's seizure, in the absence of the contents of Appellant's smart phone, the government would have no evidence of any other alleged crimes. Because alleged *use* of a controlled substance is generally handled as an administrative matter, it is entirely possible—indeed probable—that the government would not have put Appellant on a legal hold based on this allegation alone, and thus would not have obtained the contents of Appellant's phone until after the military no longer had jurisdiction over him. Indeed, in the absence of the evidence obtained from Appellant's phone, it is questionable that court-martial charges would have ever been brought and would likely not have been brought prior to Appellant's EAOS.

As a result, it is simply "mere speculation and conjecture" that CID would have obtained the contents of Appellant's phone if Appellant had not provided the passcode. *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) ("[M]ere speculation and conjecture as to the inevitable discovery of the evidence is not sufficient when applying this exception.") (internal citations omitted). Consequently, the government cannot establish that the "inevitable discovery" exception applies in this case.

Conclusion

The military judge and NMCCA incorrectly found that Appellant voluntarily provided his smart phone passcode to law enforcement. This Court should reverse and vacate the decision of NMCCA and enter an order directing the military judge to suppress the contents of Appellant's phone.

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I certify that the foregoing was caused to be delivered electronically to this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 1, 2021

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