IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF OF NOTRE DAME LAW STUDENTS AS AMICUS CURIAE IN SUPPORT OF APPELLANT
v.	)	
Sergeant (E-5) **EDWARD J. MITCHELL II,** United States Army, Appellee.	)	Crim. App. Dkt. No. 20150776
	)	USCA Dkt. No. 17-0153/AR

JIMMY GURULÉ
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(574) 631-5917
jimmy.gurule.1@nd.edu

MARAH MCLEOD
Associate Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(574) 631-5487
marah.s.mcleod16@nd.edu

Index of Brief

Issue....1

Statement of Statutory Jurisdiction....1

Statement of the Case....1

Statement of Facts....1

Statement of Interest....2

Argument....2

I. The act of production doctrine does not apply to the entry of a passcode into a phone....2

II. Appellee's action of entering his phone's passcode did not satisfy the three-part test for finding a violation of the right against self-incrimination....9

A. Appellee's act of entering his passcode was not a testimonial statement....10

B. Appellee's action of entering his passcode was not compelled....13

C. Appellee's action of entering his passcode was not incriminating....14

Conclusion....16

Table of Authorities

United States Supreme Court

Crawford v. Washington, 541 U.S. 36, 51 (2004).....9, 12–13

Doe v. United States, 487 U.S. 201 (1988).....8, 10–11

Fisher v. United States, 425 U.S. 391 (1976).....2–4, 7, 13–14

Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004).....9–10, 13–14

Schmerber v. California, 384 U.S. 757 (1966).....14

United States v. Hubbell, 530 U.S. 27 (2000).....3, 12

United States v. Wade, 388 U.S. 218 (1967).....11

United States Courts of Appeals

United States v. Doe (In re Grand Jury Subpoena Duces Decum), 670 F.3d 1335 (11th Cir. 2012).....2, 4–7

State Courts

State v. Stahl, 206 So. 3d 124 (Fla. Dist. Ct. App. 2016).....7–9

Constitutional Provisions, Statutes, Rules, and Other Authorities

U.S. CONST. amend V.....9

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF OF NOTRE DAME LAW STUDENTS AS AMICUS CURIAE IN SUPPORT OF APPELLANT
v.	)	
Sergeant (E-5) **EDWARD J. MITCHELL II,** United States Army, Appellee.	)	Crim. App. Dkt. No. 20150776
	)	USCA Dkt. No. 17-0153/AR

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

ISSUE PRESENTED

I. WHETHER THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN A SUSPECT VOLUNTARILY UNLOCKS HIS PHONE WITHOUT GIVING HIS PERSONAL IDENTIFICATION NUMBER TO INVESTIGATORS.

STATEMENT OF STATUTORY JURISDICTION

Appellant's Statement of Statutory Jurisdiction is accepted.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

Appellant's Statement of Facts is accepted.

STATEMENT OF INTEREST

Pursuant to Rule 26(a)(2) of the Court's Rules of Practice and Procedures this brief of an *amicus curiae* is filed by invitation of the Court.

ARGUMENT

I. THE ACT OF PRODUCTION DOCTRINE DOES NOT APPLY TO THE ENTRY OF A PASSCODE INTO A PHONE.

In this case, Appellee's entry of a passcode to unlock his phone does not implicate the act of production doctrine and is not protected by the Fifth Amendment. Two primary cases upon which Appellee relies, *Fisher v. United States* and *United States v. Doe (In Re Grand Jury Subpoena Duces Tecum)*, involved the production of documents and computer files, not merely the entry of a passcode, and are not controlling. 425 U.S. 391 (1976), 670 F.3d 1335 (11th Cir. 2012) [hereinafter "*Doe [11th Cir.]*"]. Furthermore, Appellee is inviting the Court to extend the act of production doctrine to the act of entering a phone passcode, which this Court should refuse to do.

Fisher is not controlling or applicable, because there the Court was deciding whether the production of documents pursuant to a grand jury subpoena violated the Fifth Amendment right against self-incrimination. In the present case, Appellee is challenging the entry of a phone passcode, nothing more. In *Fisher*, the IRS issued a subpoena to attorneys representing taxpayers who were under

criminal investigation. The subpoena sought documents that had been prepared by the taxpayers' accountants prior to the investigation, which the taxpayers had transferred to their attorneys. *Fisher*, 425 U.S. at 394–95. The Court held that the attorneys could be compelled to produce the documents without infringing the taxpayers' privilege against self-incrimination, because the subpoenaed documents had been created by the taxpayers' accountants prior to the investigation and not under compulsion. *Id.* at 396; 400–01. The compelled production of voluntarily created documents did not implicate the Fifth Amendment.

The Court in *Fisher* acknowledged that an act of production might have "communicative aspects of its own," such as acknowledging the existence, possession and authentication of the evidence.[1] *Id.* at 410. However, it determined that the existence and location of the taxpayers' documents were a "foregone conclusion." *Id.* at 411. The government in *Fisher* was already aware of the existence and location of the documents and their production "add[ed] little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Id.* In other words, the act of production in *Fisher* communicated nothing new.

---

[1] "By producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." United States v. Hubbell, 530 U.S. 27, 35 (2000) (internal quotation marks omitted) (citing *Fisher*, 425 U.S. at 409–10).

In our case, *Fisher* and the "foregone conclusion" rule are inapplicable because the Appellee is not challenging the act of producing his phone to the government, but merely the entry of a passcode to unlock the phone. In *Fisher*, the government had prior knowledge of the existence and location of relevant tax documents. There, the government relied on the defendants, through a court order, to produce the evidence in the first place. Here, Appellee produced his phone by handing it to investigators, pursuant to a verbal search and seizure authorization. J.A. 405. Appellee focuses only on the entry of a passcode to unlock the phone, portraying this as an act of production. This attempt fails because the government already possessed the phone, produced when Appellee handed investigators his phone, and the challenged conduct happened after the act of production.

The concern in *Fisher*, which led to the "foregone conclusion" exception, was that the act of producing documents might communicate incriminating facts. That concern is not present here. Appellee's later entry of the passcode merely unlocked and decrypted the phone; it did not communicate the existence, location or authentication of any documents on the phone. The foregone conclusion doctrine has no application with respect to the entry of the phone passcode in this case.

Appellee also relies on *Doe [11th Cir.]*, where the Eleventh Circuit held that the defendant's production of the contents of his computer hard drives had

testimonial significance under the Fifth Amendment. *Doe [11th Cir.]* is inapposite, because no such testimonial act is present in this case. In *Doe [11th Cir.]*, authorities lawfully seized digital media during a child pornography investigation, but forensic examiners were "unable to access certain portions of the hard drives." *Doe [11th Cir.]*, 670 F.3d at 1339. The court issued a subpoena for the defendant to "*produce* the 'unencrypted contents' of the digital media, and 'any and all containers or folders thereon.'" *Id.* (emphasis added). The defendant refused, and "the district court held [him] in contempt," over the defendant's Fifth Amendment objections. *Id.* at 1340. The Eleventh Circuit reversed. *Id.* at 1341. The Court reasoned: "What is at issue is whether the *act of production* may have some testimonial quality sufficient to trigger Fifth Amendment protection when the *production* explicitly or implicitly conveys some statement of fact" even though the files would not be themselves testimonial. *Id.* (second emphasis added). The Eleventh Circuit concluded that "(1) Doe's decryption and production of the contents of the drives would be testimonial, not merely a physical act; and (2) the explicit and implicit factual communications associated with the decryption and production are not foregone conclusions." *Id.* at 1346. Because the government had already conceded that the production was compelled and incriminatory, the *Doe* court held that the defendant could invoke the Fifth Amendment to refuse the subpoena.

The holding in *Doe [11th Cir.]* offers little guidance in this case, because there the defendant challenged both the decryption and production of evidence, whereas here Appellee challenges only the unlocking of his phone with a passcode. In *Doe [11th Cir.]* the government was unable to decrypt a specific area of storage on the files and their efforts to compel the production of the files resulted in the defendant being held in contempt. Here, investigators only asked Appellee to unlock his phone, not to produce any specific files the government was unable to access. *Doe [11th Cir.]* does not stand for the proposition that decryption of files alone triggers Fifth Amendment protection; it holds that decryption and production of computer files does so. Here Appellee is merely challenging the government's request to unlock his phone; he does not challenge the production of the phone itself. The facts in *Doe [11th Cir]* are therefore distinguishable and the court's reasoning is inapplicable to the present case.

Furthermore, the decision in *Doe [11th Cir.]* should not be construed to extend the act of production doctrine to merely unlocking a phone. As noted by Appellee, in the five years since *Doe [11th Cir.]* no federal circuit court of appeals has construed the act of production doctrine so broadly. Appellee's Answer 14 n.1. The Eleventh Circuit stated that the defendant was subpoenaed to *produce* unencrypted contents of defendant's encrypted computer drives. The Eleventh Circuit never considered whether the decryption of computer files by itself

constituted an act of production. *Doe [11th Cir.]*, 670 F.3d at 1341. Furthermore, the word *produce* may serve as a convenient short form to explain what the defendant in *Doe [11th Cir.]* was doing. But used there, it is not consistent with the term of art as applied in *Fisher*. In the present case, the government was in full possession and control of the evidence. Appellee could not produce something he did not have control over, and therefore his entering of the passcode is not an act of production. The distinction is vital, should be recognized, and the act of production doctrine should not be extended to "serve as a general protector of privacy." *Fisher,* 391 U.S. at 401.

A case more on point supports Appellant's position that unlocking a phone is not protected by the Fifth Amendment. In *State v. Stahl,* the defendant was charged with video voyeurism and after initially giving consent to search his phone, withdrew that consent after the phone was retrieved by authorities. 206 So. 3d 124, 128 (Fla. Dist. Ct. App. 2016). The State attempted to compel the defendant to provide the passcode so they could retrieve the evidence, but the trial court denied the motion. *Id.* The appellate court, however, disagreed, but before reaching its holding considered that "the information sought by the State, that which it would require [the defendant] to provide, is the passcode to [his] iPhone—the iPhone that the State had a warrant to search based on probable cause." Furthermore, "[t]he State ha[d] not asked [the defendant] to *produce* the

photographs or videos on the phone." *Id.* at 133 (emphasis added).[2] It reasoned that "by providing the passcode, [the defendant] would not be acknowledging that the phone contains evidence of video voyeurism" and that "providing the passcode does not 'betray any knowledge [the defendant] may have about the circumstances of the offenses' for which he is charged. *Id.* at 134 (quoting *Doe v. United States*, 487 U.S. 201, 219).

Here, the issue is whether Appellee's mere entry of a passcode is an act of production, and the Court should decline to extend the doctrine to such act. As the Florida appellate court observed, it is far from clear that the act of production doctrine should apply to the entry of a passcode, when the government already has lawful possession of a phone. While several of the briefs before the Court assume the act of production analysis applies, this is not the case. The decision to expand the doctrine would be done without adequate authority, and is one best left to the Supreme Court. The Supreme Court in *Fisher* recognized that it should not "cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy." *Fisher*, 425 U.S. at 401. A

[2] The appellate court implied that the entering of the passcode did not need to be considered an act of production, but neither defendant nor the State treated it as anything else, "likely because relevant—but not determinative—case law addresses the privilege in the context of producing decrypted documents or files, clearly acts of production." *Stahl*, 206 So. 3d at 133 n.9.

similar view should be taken towards Appellee's entry of a passcode into his phone. In considering Appellee's Fifth Amendment rights, the analysis should be one "under the traditional analysis of the self-incrimination privilege." *Stahl*, 206 So. 3d at 133 n.9. A higher burden should not be imposed on the government beyond the consideration of what the defendant is communicating, here it is merely his ability to unlock the phone.

The act of production doctrine does not apply to Appellee's entry of a phone passcode, and therefore his Fifth Amendment rights were not violated. Furthermore, the Court should decline to extend the act of production doctrine to the act of entering a passcode in this case.

II. APPELLEE'S ACTION OF ENTERING HIS PHONE'S PASSCODE DID NOT SATISFY THE THREE-PART TEST FOR FINDING A VIOLATION OF THE RIGHTAGAINST SELF-INCRIMINATION.

The Fifth Amendment provides that "No person. . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege only applies where "a communication. . . [is] testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). Further, one only acts as a witness when his communication is in the form of "[a]

solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51.

Here, Appellee's act of entering his passcode was neither testimonial, compelled, nor incriminating. Additionally, the act of entering the passcode was not a solemn declaration, and was not for the purpose of proving a fact. Each of these conclusions stands as an independent reason for this Court to find that Appellee's Fifth Amendment rights were preserved in this case.

A. Appellee's Act of Entering His Passcode Was Not a Testimonial Statement.

The amicus's most significant contribution to the case is the argument that entering a phone passcode is not a testimonial statement. Communications are only protected by the Fifth Amendment if they are testimonial in nature. *Hiibel*, 542 U.S. at 189. Determining whether a statement is testimonial requires a fact-intensive inquiry, which "depends on the facts and circumstances of the particular case." *Doe* 487 U.S. at 214–15. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* at 211.

The Supreme Court has emphasized the requirement of communication or disclosure of information in several cases. In *Doe*, the Court found that "[the order

to sign the consent form] would not [have testimonial significance], because neither the form, nor its execution, communicates any factual assertions, implicit or explicit, or *conveys any information to the Government*." *Id.* at 215 (emphasis added). In *United States v. Wade,* the Court wrote: "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is . . . not compulsion to *disclose* any knowledge he might have." 388 U.S. 218, 222 (1967) (emphasis added). Even where the action at issue is withdrawal of a suspect's blood and subsequent chemical analysis, the Court has held that such actions are not testimonial.

The act of entering a passcode on a phone is not a testimonial statement, because it did not communicate any new information to the Government. When Appellee entered his passcode, it did not "relate a factual assertion or disclose information" to the investigators. *Doe* 487 U.S. at 211. The only information the Government could be said to have gained from Appellee entering his passcode was the fact that the phone was in his possession and control, and that he had access to its contents. Because Appellee had already given over his phone, he had effectively conceded possession, control, and access to that phone. The investigators were already aware of the fact that the Appellee had an iPhone in his possession and control. J.A. 392. Moreover, it is reasonable to infer that a person

who has a phone in his pocket is also capable of accessing the phone's contents. Here, there was no communication of added factual information, and therefore entry of a passcode was not a testimonial statement for Fifth Amendment purposes.

Moreover, a consistent interpretation of the Constitution's Fifth and Sixth Amendment further demonstrates that the act challenged here was not testimonial. The Fifth Amendment prohibits compelling a person to be a "witness" against himself in a criminal case. Under the Sixth Amendment, the accused has a right to confront the "witnesses" against him. In the context of the Sixth Amendment, the Supreme Court stated:

> The text of the Confrontation Clause. . . applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."

Crawford, 541 U.S. at 51 (internal citations omitted).

The word "witness" should not be interpreted any differently in this Fifth Amendment context than it is under the Sixth Amendment. Therefore, this Court should adopt the definition of "witness" articulated by Justice Scalia in *Crawford:* a person who "bears testimony," and "testimony" is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." As Justice Thomas wrote in a concurrence to a different case in the Fifth Amendment context, joined by Justice Scalia, "if the term "witnesses" in the Compulsory Process

Clause has an encompassing meaning, this provides reason to believe that the term 'witness' in the Self-Incrimination Clause has the same broad meaning." *Hubbell*, 530 U.S. at 55 (Thomas, J., concurring).

The Sixth Amendment defines witness as a person bearing testimony. The Fifth Amendment protection against being a witness against oneself is only implicated if that person makes a testimonial statement. In the Sixth Amendment context, the Supreme Court has said that bearing testimony is a solemn declaration. Appellee's act of entering a phone passcode in this case does not share the "common nucleus" of solemnity that defined the "core class" of testimonial statements cited by Justice Scalia in *Crawford*—such as affidavits, custodial examinations, or prior testimony. Entering the passcode was not a "solemn declaration" at all. And he did not enter the passcode for the purpose of establishing or proving some fact. Appellee was not acting as a witness against himself. Therefore, Appellee's action of entering his passcode was not a testimonial statement and did not violate his Fifth Amendment right against self-incrimination.

B. Appellee's Action of Entering His Passcode was Not Compelled.

"To qualify for the Fifth Amendment privilege a communication must be testimonial, incriminating, and compelled." *Hiibel*, 542 U.S. at 189. However, "[T]he Fifth Amendment is limited to prohibiting the use of 'physical or moral

compulsion' exerted on the person asserting the privilege." *Fisher*, 425 U.S. at 397. The Court has noted that "there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession." *Schmerber v. California*, 384 U.S. 757, 765 n.9 (1966).

Appellee's action of entering his passcode was not compelled. There was no moral or physical compulsion as required by *Fisher*. 425 U.S. at 397. This is not a case in which the pain, danger, or severity inevitably caused Appellee to prefer to enter his passcode, as contemplated by the Court in *Schmerber*. 384 U.S. at 765 n.9. In fact, there was no danger or pain at all. Appellee simply entered his passcode when requested to do so. The choice presented to Appellee here was not an impossible one. There was no moral or physical compulsion, and therefore, his action of entering the passcode to his phone was not compelled.

C. Appellee's Action of Entering His Passcode was Not Incriminating.

The Fifth Amendment protects against compelled "incriminating" statements that are testimonial in nature. *Hiibel*, 542 U.S. at 189. Whether or not an action is incriminating is a fact-specific question, and like the question of whether a statement is testimonial, "depend[s] on the facts and circumstances of particular cases or classes thereof." *Fisher*, 425 U.S. at 410. As the Court noted in *Fisher*, "When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in

common experience, the first would be a near truism and the latter self-evident." *Id.* at 411. Therefore, compelling a defendant to produce a handwriting exemplar is not "incriminating" and does not violate the right against self-incrimination.

The action of entering a passcode on a phone was not incriminating in the present case. Appellee argues that "Sergeant Mitchell's production of his iPhone when asked if he had a phone. . . indicated to investigators that SGT Mitchell was in possession of the iPhone and knew he was in possession of the iPhone." Appellee's Answer 15. However, this was not new information. Before asking Appellee for his phone, an investigator saw Appellee take his phone out of his pocket to check the date. J.A. 392. Therefore, the investigator had prior knowledge that Appellee owned an iPhone. Appellee further argues that when he entered his passcode on his phone, it "explicitly admitted that SGT Mitchell knew the passcode to the phone." Appellee's Answer 15. It is hardly unreasonable to assume that a person who is carrying a phone in his pocket knows how to access that device. It is "a near truism" and as "self-evident," as the knowledge gained from a handwriting exemplar in *Fisher*. The three things the Government learned from Appellee when he unlocked the phone (that he had possession, control, and access to the phone) were things the investigators knew before they seized Appellee's phone. These conclusions were therefore not incriminating, and therefore did not violate his right against self-incrimination.

CONCLUSION

WHEREFORE this Honorable Court should set aside the military judge's ruling.

JIMMY GURULÉ
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(574) 631-5917
jimmy.gurule.1@nd.edu

MARAH MCLEOD
Associate Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(574) 631-5487
marah.s.mcleod16@nd.edu

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and transmitted by electronic means with the consent of the parties to counsel for Appellee CPT Joshua B. Fix, joshua.b.fix2.mil@mail.mil; counsel for Appellant CPT Samuel E. Landes, samuel.e.landes.mil@mail.mil; *amicus curiae* in support of Appellee Jamie Williams, jamie@eff.org; *amicus curiae* in support of Appellee Brett Max Kaufman, bkaufman@aclu.org; *amicus curiae* in support of Appellee Arthur B. Spitzer, aspitzer@acludc.org; *amicus curiae* in support of Appellee Professor Stephen Smith, ssmith31@nd.edu; *amicus curiae* in support of Appellant United States Air Force Appellate Government Division, MAJ Mary Ellen Payne, mary.payne.2@us.af.mil; and the Clerk of the Court William A. DeCicco, efiling@armfor.uscourts.gov, on March 18, 2017.

JIMMY GURULÉ
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(574) 631-5917
jimmy.gurule.1@nd.edu

MARAH MCLEOD
Associate Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(574) 631-5487
marah.s.mcleod16@nd.edu

CERTIFICATE OF COMPLIANCE WITH RULE 24(c)

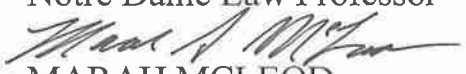
1. This brief complies with the type-volume limitation of Rule 24(c) because:

   This brief contains 3,505 words.

2. This brief complies with the typeface and type style requirements of Rule 37

JIMMY GURULÉ

Amicus Curiae on behalf of Appellant
Notre Dame Law Professor



MARAH MCLEOD

Amicus Curiae on behalf of Appellant
Notre Dame Law Professor

Dated: March 18, 2017