IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S *Appellant,* v. Senior Airman (E-4) **CHAD A. BLATNEY**, United States Air Force *Appellee.*	ANSWER TO APPEAL OF THE GOVERNMENT Before Panel No. 1 Misc. Dkt. No. 2016-16

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Issue Presented

Whether the military judge abused her discretion by suppressing evidence obtained from Appellee's cellular phone, where law enforcement requested that Appellee enter his password to decrypt the phone and disable security after invocation of his right to counsel?

Statement of the Case and Relevant Facts

The government does not dispute the military judge's findings of fact, which it concedes are fairly supported by the record. *See* Gov't Br. at 8. Likewise, the government concedes the doctrines of inevitable discovery and independent-source, along with the good faith exception, do not apply. *See* Gov't Br. at 18. SrA Blatney only disputes the military judge's finding that his consent to search his cellular phone was voluntary, *see* Appellate Exhibit (AE) IV, ¶76, as discussed in the argument section below. This dispute does not prevent affirming the military judge's ruling, as this Court may affirm on any ground presented in the record.

In sum, the military judge found that, on August 19, 2016, the Air Force Office of Special Investigations (OSI) engaged in a custodial interrogation of SrA Blatney. AE IV, ¶¶5,73. When informed that he was suspected of using a controlled substance in violation of Article 112a,

UCMJ, SrA Blatney unequivocally invoked his right to counsel. AE IV, ¶7,74. Subsequent to SrA Blatney's unequivocal request for counsel, an OSI agent requested and received verbal consent to search SrA Blatney's phone, residence, and car. AE IV, ¶7. The military judge found that the government had met its burden to show SrA Blatney's consent was voluntary. AE IV, ¶76.

While a written consent form was being accomplished, OSI reinitiated conversation with SrA Blatney and asked additional questions. The military judge found that SrA Blatney was in "continuous custody, and only responded to further OSI-initiated interrogations. There was no reinitiation of communication on the part of the accused, nor could there have been. Upon returning to the interview room, [an OSI agent] began speaking with the accused, asking questions." AE IV, ¶77. The military judge found that the questions by OSI "were clearly other than those normally attendant to arrest and custody," and there was no necessity for OSI to ask SrA Blatney "to identify his house, his car or his cell phone." AE IV, ¶78.

After SrA Blatney signed the consent form, the OSI agent asked him if there was "a lock on your phone?" SrA Blatney replied, "Yes." AE IV, ¶9. OSI requested that SrA Blatney unlock his phone by entering the passcode, and then use his passcode a second time to disable security settings. AE IV, ¶9. SrA Blatney complied with the request, while an OSI agent supervised him entering a series of numbers to unlock the phone. AE IV, ¶9-11. At the time, OSI did not have probable cause. AE IV, ¶13. Subsequently, an extraction of the phone was made, and the phone returned to SrA Blatney. AE IV, ¶14.

Law enforcement did not need the passcode in order to copy the contents of the phone, it merely needed SrA Blatney to enter his passcode and disable the security settings. AE IV, ¶9. Law enforcement did not access SrA Blatney's phone by requesting that he use his fingerprint to

activate biometric capability. AE IV, ¶¶1-18.

The military judge found that law enforcement's request to SrA Blatney to enter his password and unlock his phone "was a request to provide the government with evidence of a testimonial or communicative in nature; to request a nonverbal incriminating statement. The request required the accused to disclose the contents of his mind to accomplish the act – a specialized arrangement of numbers known only to the accused. The action is a nonverbal statement." AE IV, ¶79. Likewise, the military judge found that the law enforcement "wanted to access the accused's phone and knew incriminating evidence was a reasonable consequence of such questioning." AE IV, ¶80.

After dismissing the independent source doctrine and the good faith exception, the military judge concluded that SrA Blatney's post invocation statements to OSI and all evidence subsequently gathered from the cell phone was inadmissible as derivative evidence of a violation of SrA Blatney's right to counsel. AE IV, ¶¶82-85.

This appeal followed.

Jurisdiction

Under Article 62(a)(1)(B), UCMJ, 10 U.S.C. § 862(a)(1)(B), this Court only has jurisdiction to consider government appeals, as relevant here, on "[a]n order or ruling *which excludes evidence that is substantial proof of a fact material* in the proceeding" in a court-martial where a punitive discharge may be adjudged. *See United States v. Lutcza*, ___ M.J. ___, No. 2016-13, slip op. at 3 (A.F. Ct. Crim. App., Jan. 18, 2017) (emphasis added).[1]

[1] The decision in *Lutcza*, although relevant as the most recent pronouncement by this Court on searches of cellular phones, does not dictate the outcome here, as that case addressed the Fourth Amendment and whether an accused has a reasonable expectation of privacy in copies, rather than a request for a password after invocation of the right to counsel. No copy would have been obtained here but for the disregard of SrA Blatney's request for counsel.

On December 2, 2016, the trial counsel gave notice of intent to appeal the military judge's ruling "that suppresses evidence obtained from the Accused's cellular telephone . . . ." *See* Appellate Exhibit (AE) XI, ¶ 2. Likewise, on December 22, 2016, the Chief, Government Trial and Appellate Counsel Division gave notice of appeal to this Court, indicating the key issue on appeal was whether "the search of Appellee's cell phone" and "cellular phone data" should have been suppressed. *See* Memorandum for Air Force Court of Criminal Appeals from AFLOA/JAJG (attached to Vol. I).

In the government's opening brief, however, it only makes a vague allegation that the evidence suppressed qualifies as "substantial proof of a fact material to the proceedings," with no explanation why it qualifies as such. Gov't Br. at 3. The record indicates that the prosecution proceeded with *voir dire*, tailoring its questions as if the purported "material" evidence had been suppressed. R. 72. The court-martial sat a panel, and continued the case to March 7, 2017. R. 170.

As the entire investigation leading to SrA Blatney's court-martial is premised on a random urinalysis conducted on August 8, 2016, it is unclear why the prosecution cannot proceed with the evidence it has. *See* AE IV, ¶3. The government does not even appear to contend that the suppressed evidence is case dispositive.

"[P]rosecution appeals are disfavored and are permitted only upon specific statutory authorization." *United States v. Vargas*, 74 M.J. 1, 6 (C.A.A.F. 2014) (quoting *United States v. Bradford*, 68 M.J. 371, 373 (C.A.A.F. 2010)). Although the military judge's ruling "exclude[d] evidence," it is unclear how this evidence was both "substantial proof" of evidence that was "a fact material to the proceedings." Article 62(a)(1)(B).

"Federal courts are courts of limited jurisdiction. They possess only that power

authorized by Constitution and statute." *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) (quotations omitted). "Every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction. . . . The burden to establish jurisdiction rests with the party invoking the court's jurisdiction." *Id.* The government cannot meet its burden by vague conjecture. Accordingly, this case should be remanded for want of jurisdiction in the absence of the government showing specific facts that place it within the ambit of Article 62, UCMJ.

Assuming without conceding jurisdiction, the military judge's ruling should be affirmed.

Summary of Argument

Repeated questioning by law enforcement, while SrA Blatney was in custody and after he requested to speak with an attorney, violated SrA Blatney's rights under the Fifth Amendment, *Edwards v. Arizona*, 451 U.S. 477 (1981), and Mil. R. Evid. 305(c)(2). As a result of this illegal questioning, SrA Blatney made statements about his possession and control of the iPhone, and performed testimonial acts for police, such as decrypting and unlocking the iPhone at their direction. The military judge did not err in finding the police violated the Fifth Amendment and *Edwards*, nor did she err by suppressing the decrypted iPhone and its contents under Mil. R. Evid. 305(c)(2).

Standard of Review

The standard of review in a government appeal reflects the foundational principle that such an appeal is to be "unusual, exceptional, [and] not favored." *Carrol v. United States*, 354 U.S. 394, 400 (1957). "In an Article 62, UCMJ, 10 U.S.C. § 862, petition, this Court . . . reviews the evidence in the light most favorable to the prevailing party at trial." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citing *United States v. Baker*, 70 M.J. 283, 287–88 (C.A.A.F. 2011)), *reconsideration denied*, 73 M.J. 264 (C.A.A.F. 2014). Further, "[i]n ruling on Article 62

appeals, [this Court] 'may act only with respect to matters of law.'" *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008) (quoting Article 62(b), UCMJ, 10 U.S.C. §862(b)). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Baker*, 70 M.J. at 287.

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008)(citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). This standard of review "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Freeman*, 65 M.J. at 453 (citations omitted). The abuse of discretion standard requires more "than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)(quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). "[A]n abuse of discretion occurs when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)(internal citation omitted).

Conclusions of law, such as the trial court's finding of a violation of the Fifth Amendment, are reviewed de novo. *United States v. Piren*, 74 M.J. 24, 27 (C.A.A.F. 2015)(citation omitted). Significantly, however, when reviewing a ruling on a motion to suppress, this Court considers the evidence in the light most favorable to the prevailing party. *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011)(quoting *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010)).

This Court is therefore "bound by the military judge's findings of fact unless they were clearly erroneous." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). "The clearly erroneous standard is a very high one to meet . . . If there is 'some evidence' supporting the military judge's findings [this Court] will not hold them . . . 'clearly erroneous.'" *United States v. Leedy*, 65 M.J. 208, 213 n. 4 (C.A.A.F. 2007)(citations omitted).

Argument

This Court should affirm the military judge's ruling suppressing evidence obtained from SrA Blatney's statements where law enforcement requested that SrA Blatney enter his password to decrypt his phone and disable security after invocation of his right to counsel, as suppression is appropriate under Mil. R. Evid. 305(c)(2) and *Edwards v. Arizona*.

There are compelling and nuanced arguments for how the Fifth Amendment applies to the testimonial decryption of data and the use of passcodes to "unlock" digital media. This Court need not rely on such arguments in this case, however, because a straightforward application of Mil. R. Evid. 305(c)(2) conclusively supports the order of the military judge suppressing the evidence at issue.

A. Mil. R. Evid. 305(c)(2) compels suppression of the evidence at issue

The Military Rules of Evidence explicitly state: "An individual may claim the most favorable privilege provided by the Fifth Amendment to the United States Constitution, Article 31, *or these rules*." Mil. R. Evid. 301(a)(emphasis added).

The Military Rules of Evidence are clear and unambiguous: "If a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible against the accused unless counsel was present for the interrogation." Mil. R. Evid. 305(c)(2). It is a basic tenant of interpreting statutes and rules that the "plain language will

control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). This principle is equally applicable to the Military Rules of Evidence. *See United States v. McNutt*, 62 M.J. 16, 20 (C.A.A.F. 2005).

The government concedes that "apparently" Mil. R. Evid. 305(c)(2) provides "greater protections for military members" despite its frustration that the President has not explained "why" to its satisfaction. *See* Gov't Br. at 45, n 18. These "greater protections" are dispositive here, because the conduct of law enforcement fell within the plain meaning of Mil. R. Evid. 305(c)(2)'s prohibition. The government is free to advance its exceedingly narrow policy preferences for the rule, but the decision to modify it "rests with the President, not this Court." *United States v. Rodriguez*, 54 M.J. 156, 161 (C.A.A.F. 2000). "There is no rule of statutory construction that allows for [the government] to append additional language" to a rule of evidence "as it sees fit." *United States v. Simmermacher*, 74 M.J. 196, 201 n.4 (C.A.A.F. 2015). Accordingly, the military judge's ruling can be affirmed on this basis alone, notwithstanding the government's objection to the President's policy choices in promulgating the rule.

B. SrA Blatney did not voluntarily unlock his iPhone.

Statements made in response to questioning that violates the rule in *Edwards* are presumed to be involuntary. *Maryland v. Shatzer*, 559 U.S. 98, 100, 105 (2009). This presumption holds unless: (1) at least two weeks have lapsed since the suspect invoked his or her right to counsel, *id.* at 110; (2) the suspect reinitiated communication with police, *Edwards*, 451 U.S. at 484-85; or (3) the suspect has an attorney present. *Id.*

None of the exceptions to the well-settled rule in *Edwards* apply here. In her analysis, the military judge failed to address the presumption of involuntariness from *Shatzer*, *see* AE IV, ¶76, which was held applicable to the military in this Court's published decision in *United States*

v. Kerns, 75 M.J. 783, 789 (A.F. Ct. Crim. App., Sep. 22, 2016) (observing that "nothing in our superior court's treatment of *Shatzer* suggests that the 14-day rule is inapplicable to the military"). As the military judge failed to address in her analysis the presumption reaffirmed in both *Kerns* and *Shatzer*, her finding that SrA Blatney voluntarily consented after invoking his right to counsel was an abuse of discretion, as it was influenced by an erroneous view of the law. *See United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (holding an abuse of discretion occurs if the military judge's decision "is *influenced by an erroneous view of the law*." (quoting *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)) (emphasis added).

Accordingly, if the finding of voluntariness is potentially outcome-determinative, as the government contends citing *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004), this Court should merely remand for new fact-finding on that basis alone, without expressing a view of the underlying merits.[2] *See United States v. Buford*, No. 2016-04, slip op. at 2 (A.F. Ct. Crim.

[2] As evidenced by our sister service's treatment in a case addressing a similar issue, it is preferable to have a ruling from the military judge that considers all the appropriate facts and law before venturing into this murky area of the law. *See United States v. Mitchell, I*, 2016 CCA LEXIS 179, at *7 (A. Ct. Crim. App. Mar. 18, 2016) (holding the military judge's factual findings were ambiguous, incomplete, and insufficient to perform a proper review under Article 62, UCMJ and returning for clarification without expressing disapproval of the military judge's ultimate ruling). Our sister service court ultimately affirmed the military judge's ruling excluding evidence of the accused's compliance with a request to unlock his cell phone. *See United States v. Mitchell, II*, No. 20150776 (Army Ct. Crim. App., Aug. 29, 2016) (affirming military judge's ruling that "appellee's 'statement' of entering his personal identification number . . . into his iPhone was obtained in violation of appellee's Fifth Amendment right against self-incrimination and Fifth Amendment right to counsel, as appellee was again subjected to law enforcement-initiated custodial interrogation after invoking his right to counsel"), *available at* https://www.jagcnet.army.mil/Portals/Files/ACCAOther.nsf/SDD/F62166B9FC7EAFDA8525801F00706C20/$FILE/sd-mitchell,%20ej.pdf (last accessed Jan. 31, 2017). The Judge Advocate General of the Army has certified the case for review to the U.S. Court of Appeals for the Armed Forces. *See* Daily Journal, Dec. 22, 2016, No. 17-0153/AR, *available at* http://www.armfor.uscourts.gov/newcaaf/journal/2016Jrnl/2016Dec.htm (last accessed Jan. 31, 2017).

App., Jun. 9, 2016) (holding "the military judge failed to make adequate findings of fact and omitted analysis necessary to permit us to determine whether she abused her discretion in suppressing Appellee's admissions to law enforcement investigators), *petition granted by United States v. Buford*, No. 16-0689/AF (C.A.A.F.) (Grant Order, Oct., 7, 2016) (decision pending).

Even so, the government concedes that this Court could "still uphold the suppression of Appellee's act of unlocking the phone" if it finds a violation of *Edwards*. Gov't Br. at 28. Assuming for argument's sake, that the finding of voluntariness is valid, SrA Blatney contends the military judge's suppression of evidence was still correct under the facts of this case.

C. Law enforcement may not reinitiate questioning after invocation of the right to counsel – to include asking a suspect to enter a passcode and disable security features on a phone.

An accused once "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85. The *Edwards* rule applies to custodial interrogation. *Id.* When in custody, "*all* questioning must cease after an accused requests counsel." *Smith v. Illinois*, 469 U.S. 91, 98 (1984)(emphasis original).

Edwards does not just prohibit "further interrogations," it prohibits further communications, exchanges, or conversations that *may…* lead to further interrogations. *United States v. Hutchins*, 72 M.J. 294, 297-298 (C.A.A.F. 2013). The rule's "[f]undamental purpose . . . is to '[p]reserve[e] the integrity of an accused's choice to communicate with police only through counsel.'" *Hutchins*, 72 M.J. at 297-98 (quoting *Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (alterations in original)). *Hutchins* added that "[t]he need for such a rule is to provide added protection against the coercive pressures of continuous custody after an individual has invoked

his right to counsel, because he is 'cut off from his normal life and companions, thrust into and isolated in an unfamiliar, police-dominated atmosphere, where his captors appear to control his fate.'" *Id.* at 298 (quoting *Shatzer*, 559 U.S. at 106).

In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Court held "inquiries or statements, by either an accused or a police officer, *relating to routine incidents of the custodial relationship*, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*." *Id.* (emphasis added). Typically, to effect an *Edwards* "initiation," the accused must "evince[] a willingness and a desire for a generalized discussion *about the investigation*." *Id.* at 1045-46; *accord id*. at 1055 (Marshall, J., dissenting) (emphasis added). The burden remains on the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right o have counsel present during the interrogation. *Id.* at 1045; *see also United States v. Seay*, 60 M.J. 73, 78 (C.A.A.F. 2004). "[I]interrogation" "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (U.S. 1980).

Although a request for consent to search does not infringe upon Article 31, UCMJ or the Fifth Amendment, *United States v. Frazier*, 34 M.J. 135, 137 (C.A.A.F. 1992), the *Edwards* rule continues to prohibit further "communication, exchanges, or conversations" that may lead to further interrogation. *See United States v. Maza*, 73 M.J. 507, 520 (N.M. Ct. Crim. App. 2014). Applying these principles, this Court recently held that "law enforcement investigators who ask a suspect for a password to a cell phone that they believe contains evidence of an offense is more than a routine incident of the custodial relationship." *United States v. Bondo*, No. ACM 38438, 2015 CCA LEXIS 89, at *18 (A.F. Ct. Crim. App. Mar. 18, 2015) (unpublished opinion).

The government itself concedes that the military judge "correctly cited much of the relevant law," but because her conclusion came to a different result than that preferred by the government, it argues she "applied that law incorrectly and thereby abused her discretion." Gov't Br. at 18. The government is incorrect. The military judge exhaustively considered and faithfully applied the relevant law, ultimately concluding the "request by OSI to have the accused use his passcode to unlock the cell phone was more than extension of the original request for consent to search. It was more than routine incidents of a custodial relationship. [Law enforcement] wanted to access the accused's phone and knew incriminating evidence was a reasonable consequence of such questioning." AE IX, ¶80. As explained below, SrA Blatney's act of unlocking his cell phone at the request of law enforcement and further disabling security was a testimonial act.

1. SrA Blatney made a testimonial act by unlocking his cell phone and disabling security at the request of law enforcement.

An act of production is testimonial if it implicitly conveys incriminating statements of fact, such as the existence, possession, control, or authenticity of documents. *United States v. Hubbell*, 530 U.S. 27, 36 (2000). One of the touchstones of whether an act is testimonial is whether it requires an individual to use "the contents of his own mind." *Doe* [11th Cir.], 670 F.3d at 1345 (citing *Curcio*, 354 U.S. at 128). Whether an act is testimonial in nature is highly fact-specific and should not be overturned unless the factual findings of the trial court are clearly erroneous. *See United States v. Doe*, 465 U.S. 605, 613-14 (1984) [hereinafter "Doe [1984]."

Investigators' questions to SrA Blatney about his passcode sought for him "to disclose the contents of his own mind," *Curcio v. United States*, 354 U.S. 118, 128 (1957). SrA Blatney's compliance with this request by accepting a phone offered to him by law enforcement as his

own, entering his passcode under supervision, and changing his cellular phone's settings was a direct consequence of this request for information to aid law enforcement's ongoing investigation. Therefore, the unencrypted cellular phone and its contents were derived from continued custodial interrogation after SrA Blatney invoked his right to counsel. As such, the phone and all contents thereof are inadmissible.

Further, SrA Blatney entering his passcode, changing the phone's settings, entering his passcode again, and returning the phone to the police was a testimonial act. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988) [hereinafter "*Doe [1988]*"]. Testimonial acts can include such things as: the production of a perfume bottle concealed on an individual's person, *United States v. Powell*, 40 M.J. 1, 7-8 (C.M.A. 1994); the production of documents, *Hubbell*, 530 U.S. at 45; and the decryption of digital media. *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d 1335, 1352-53 (11th Cir. 2012) [hereinafter "*Doe [11th Cir.]*"].[3] *See also United States v. Newson*, 54 M.J. 823 (A.C.C.A. 2001) (collecting military cases where nonverbal conduct by a suspect is considered a "statement").

[3] As of the writing of this brief, *Doe [11th Cir.]* is the only United States Circuit Court of Appeals *published* opinion the undersigned appellate defense counsel has found that squarely address the issue of whether compelled decryption or passcode production is testimonial and therefore protected by the Fifth Amendment. Various other courts have reached similar results. *See, e.g., United States v. Kirschner*, 823 F. Supp. 2d 665 (E.D. Mich., 2010) (passcode production); *SEC Civil Action v. Huang*, 2015 U.S. Dist. LEXIS 127853 (E.D. Pa., Sep. 23, 2015) (unpublished opinion) (passcode production); *State v. Trant*, 2015 Me. Super. LEXIS 272 (Super. Ct. Me., Oct. 27, 2015) (unpublished opinion) (decryption of an iPhone 6). *But see, e.g., United States v. Gavegnano*, 305 Fed. App'x 954 (4th Cir. 2009) (per curiam) (unpublished opinion); *United States v. Fricosu*, 841 F. Supp. 2d 1364 (S.D. Fl. 2012); *Commonwealth v. Gelfgatt*, 468 Mass. 512 (2014); *In re Grand Jury Subpoena (Boucher)*, 2009 U.S. Dist. LEXIS 13006 (D. Vt., Feb 19, 2009)(unpublished opinion).

SrA Blatney's identification of his phone when asked was a testimonial act. This act indicated to investigators that SrA Blatney possessed an iPhone and that his possession was knowing and conscious. The testimonial significance of this fact is not diminished by law enforcement's confiscation of the iPhone prior to SrA Blatney's interrogation. After investigators asked him for the passcode to the iPhone, SrA Blatney's acceptance of the iPhone when handed to him by investigators was a statement that implicitly admitted that he knew the passcode. When the police continued to question SrA Blatney about the passcode, his entering it explicitly admitted that SrA Blatney knew the passcode to the iPhone, which implicitly suggested: (1) the iPhone was password-protected; (2) without the password the iPhone could not be used; (3) SrA Blatney created the password; (4) SrA Blatney was the only person who could use the iPhone; and (5) SrA Blatney was the person responsible for anything done with the phone. The remembering, recalling and entering of a password is not a simple physical act. Such remembering, recalling and entering a password requires the use of the contents of SrA Blatney's mind and is testimonial in nature. Likewise, disabling the cell phone's passcode protection was testimonial in nature.

This testimonial act is similar to both the classic "combination lock" hypothetical, and the compilation of data at issue in *Hubbell*. *See Hubbell*, 530 U.S. at 43, 45. The similarity to the compilation of data in *Hubbell* is reinforced by the fact that SrA Blatney had to do more than simply type his passcode into the iPhone in order to unlock it, he also had to change the iPhone's internal settings and enter his passcode again, necessitating use of his own personal knowledge of how the device worked. The decryption of encrypted information was also found to be testimonial by the Eleventh Circuit in *Doe [11th Cir.]*, as discussed in more detail later in this brief.

For these reasons, SrA Blatney suffered not one *Edwards* violation, but several successive *Edwards* violations, each successive violation derivative of its predecessor. This Court should affirm the court below based on the investigators' repeated violations of the Fifth Amendment, the *Edwards* rule, and Mil. R. Evid. 305(c)(2).[4]

2. The "foregone conclusion" exception does not apply.

The "foregone conclusion" exception to the exclusionary rule was established in the context of whether an individual's production of certain documents, created by his accountant, violated that individual's right against self-incrimination. *Fisher v. United States*, 425 U.S. 391, 394-95 (1976). The Supreme Court determined it did not under the facts of that case because although the act of production may have been testimonial, the government was otherwise aware of the existence, possession, control and authenticity of the documents at issue. *Id*. at 411. Later, the Supreme Court explained the same rationale is not applicable to situations where the government seeks a general class of documents without specific knowledge of individual documents. *Hubbell*, 530 U.S. at 44-45.

The "foregone conclusion" exception to the exclusionary rule for the compelled production of documents does not apply to the evidence in this case for three reasons: First, this Court should decline to extend the "foregone conclusion" exception to evidence obtained through *Edwards* violations. Second, whether government knowledge of the contents of SrA Blatney's cell phone is a "foregone conclusion" is a factual determination. The government did

[4] The government's reliance on this Court's decision in *United States v. Griffing*, No. ACM 38443, 2015 CCA LEXIS 101, at *12 n.7 (A.F. Ct. Crim. App. Mar. 23, 2015) (unpublished opinion) is simply misplaced as that decision relates to the search of a dormitory room and stands for nothing other than the routine proposition, recognized by the military judge, that one may give consent to search after invocation of the right to counsel. See id. ("Instead, he simply consented to the search.").

not ask the military judge to make a finding on this matter, and should not be permitted to raise it for the first time on appeal. Third, under any standard of review, the "foregone conclusion" exception does not apply to the evidence at issue in this case.

(a) ***This Court should decline to extend the "foregone conclusion" exception to evidence obtained in violation of the* Edwards *rule.***

As discussed above, the "foregone conclusion" exception was developed in the context of grand jury subpoenas and summonses for document production. *See, e.g.*, *Fisher*, *supra*; *Hubbell*, *supra*; *Doe [11th Cir.]*, *supra*. Indeed, the exception is suited to the context of a judicial or quasi-judicial order of production, where there is an appropriate remedy immediately available in the form of a motion to quash. In such cases, the entire process can be carefully shepherded by the courts. This case is different. This case involves a flagrant and repeated violation of the *Edwards* rule by law enforcement in the field. Unlike those cases involving a grand jury subpoena, SrA Blatney did not have immediate recourse to the courts when he was being held in police custody and interrogated by investigators who ignored his request for legal counsel.

The policy concerns in ensuring summonses, subpoenas, and judicial orders are appropriately tailored and different than the policy concerns in preventing police interrogation that persists in the face of a suspect's unambiguous request for legal representation. As the Ninth Circuit has explained: "The application of privilege to a document production is different from a blanket privilege claim at an interview. An unscripted interview is undefined, so a court cannot make a reasoned assessment of privilege before particular questions have been posed." *United States v. Bright*, 596 F.3d 683, 691 (9th Cir. 2010) (explaining why a blanket privilege was unavailable in response to an IRS summons). For this reason, this Court should decline to extend the "foregone conclusion" exception to evidence gained through *Edwards* violations.

(b) ***This Court should not for the first time on appeal apply the foregone conclusion doctrine when the government had the burden on this issue at trial and failed to develop the record.***

The Supreme Court has noted that whether an act of production is testimonial, to include whether the foregone conclusion exception applies, is an inherently factual issue. *See Doe [1984]*, 465 U.S. at 613-14. The Eighth and Ninth Circuit Courts of Appeals therefore hold that whether the government's knowledge of the evidence sought is a foregone conclusion – and therefore whether the exception applies – is a question of fact to be found by the trial court. *United States v. Norwood*, 420 F.3d 888, 895 (8th Cir. 2005) (citing *Doe [1984]*), *Bright*, 596 F.3d at 690 (citing *Norwood*). Therefore, those circuits review such findings for "clear error." *Id.*

This Court should adopt the same principle: Whether the facts conveyed in response to an *Edwards* violation are already known to the government is a question of fact. As such, this Court should defer to the findings of the military judge, and reverse only if her findings are clearly erroneous.

Here, the military judge's ruling does not explicitly address the foregone conclusion doctrine, but she correctly noted that the government had the burden to prove "the evidence would have been obtained even if the unlawful search or seizure had not been made" which is a related concept. AE IV, ¶85. The government has not demonstrated that it sought for the military judge to make a factual finding on the "foregone conclusion" doctrine at trial. For example, the government failed to reference the "foregone conclusion" doctrine as a basis for its argument to the military judge. *See* AE VII. Later, the military judge graciously agreed to reconsider and enter additional facts at the request of the government over defense objection. R.

173; AE X. The government again neglected to address the "foregone conclusion" doctrine.

As it had ample opportunity, the government should not be permitted on appeal to raise factual matters for the first time when the military judge did not have the chance to make findings on the issue. The military judge should not be penalized where the government had the burden and failed to request a factual finding supporting its theory on appeal.

(c) ***The existence, possession, control, and authenticity of the iPhone and its contents were not a foregone conclusion.***

As discussed above, the "foregone conclusion" exception may allow the government to compel the production of documents, even when such production would otherwise be testimonial, in the limited circumstance where the government is already aware of the existence, possession, control and authenticity of the documents in question. *See Fisher*, 425 U.S at 394-95, 411. This exception does not, however, apply to the production of a general class of documents. *See, e.g.*, *Hubbell*, *supra*. It is also not enough that the government has reasonable grounds to suspect that an individual will have certain records. *United States v. Ponds*, 454 F.3d 313, 325-26 (D.C. Cir. 2006) (holding that government knowledge that a car was normally parked at Ponds' apartment did not show the government knew of the existence, possession, or control of any documents relating to the car that might be in Ponds' possession).

When the government does not know of the existence, possession, control, and authenticity of specific files or documents prior to obtaining them, the foregone conclusion exception does not apply. *Hubbell*, 530 U.S. at 44-45. Mere suspicion that certain evidence exists is not sufficient to establish the "foregone conclusion" exception. *Doe [11th Cir.]*, 670 F.3d at 1346 (citing *Hubbell*).

Here, the government did not present sufficient evidence that it had knowledge of the requisite particularity to satisfy the "foregone conclusion" exception. The fact that the

government had to ask detailed questions about what type and color of phone SrA Blatney possessed, and the lack of knowledge as to the specific data files or text ultimately found on the phone that was allegedly inculpatory is sufficient to defeat application of this doctrine.

The government's contention that the government had indications SrA Blatney had a phone and likely knew the password as being sufficient to satisfy the foregone conclusion doctrine—even extending to the contents of that device—is a broad proposition that would wholly swallow the Fifth Amendment within the test for probable cause. *See, e.g*. *Ponds*, 454 F.3d at 325-26 (the facts describe better than probable cause to believe Ponds would have documents relating to the car normally parked outside his apartment); *Doe [11th Cir.]*, 670 F.3d at 1339 (a warrant based on probable cause was issued to search the relevant digital media for child pornography); *Bright*, 596 F.3d at 693-94 (the facts describe probable cause to believe that the Brights possessed the two additional credit cards that did not meet the foregone conclusion exception). Under the cited cases, even the existence of probable cause to search for certain evidence does not mean that the government's knowledge of the existence, possession, control, and authenticity of that evidence is a foregone conclusion. Here, the government admitted it did not have probable cause that SrA Blatney's iPhone might contain any evidence prior to the *Edwards* violation at issue in this case. Thus, there was little if any link between the evidence investigators had in their possession, and the iPhone now at issue. For these reasons, and for the reasons discussed above, the "foregone conclusion" exception is inapplicable on the facts of this case.

D. The military judge's remedy was appropriate.

The unlocked, decrypted iPhone, and all the contents thereof are evidence derived from the interrogation of SrA Blatney, which was conducted after he requested counsel. As such,

suppression of this evidence is not only appropriate, but required.

The government's argument that the contents of the iPhone can be meaningfully distinguished from SrA Blatney's decryption and unlocking of the phone is unpersuasive. Even if the decrypted contents of the iPhone are characterized as evidence merely derivative of SrA Blatney's decryption and unlocking of his phone, the contents are still inadmissible under both Mil. R. Evid. 305(c)(2) and the Fifth Amendment. The Supreme Court has held that immunity for compelled testimony must include immunity from both direct and derivative use in order to be coextensive with the protections of the privilege against self-incrimination. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). "Supreme Court precedent is clear: Use and derivative use immunity establishes the critical threshold to overcome an individual's invocation of the Fifth Amendment privilege against self-incrimination. No more protection is necessary; no less protection is sufficient." *Doe [11th Cir.]*, 670 F.3d at 1351 (citing *Kastigar*, 406 U.S at 460).

Likewise, the government's reliance on *United States v. Patane*, 542 U.S. 630, 639 (2004) is misplaced. *Patane* is a plurality decision that deals with a nominal failure to read a suspect his *Miranda* rights where the suspect interrupted the reading to assert he already knew his rights. *Id.* at 635. The leading opinion, in which three justices join, states that the statements at issue in the case were voluntary, and therefore the fruit of the poisonous tree doctrine did not apply. *Id.* at 636. Unlike the situation in *Patane*, however, this case involves a violation of the *Edwards* rule, and not merely the warning requirement of *Miranda*. Unlike the suspect in *Patane*, SrA Blatney explicitly invoked his Fifth Amendment rights, and that invocation was ultimately disregarded by investigators.

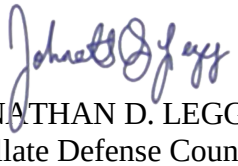
The right against self-incrimination "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those

which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).[5] Therefore, it is appropriate to suppress both direct and derivative evidence stemming from SrA Blatney's statements to investigators after they disregarded his invocation of his Fifth Amendment rights. This is a straightforward application of *Edwards* and the Fifth Amendment, and under Mil. R. Evid 305(c)(2).

Conclusion

WHEREFORE, the SrA Blatney respectfully requests that this Honorable Court affirm the ruling below.

Respectfully submitted,



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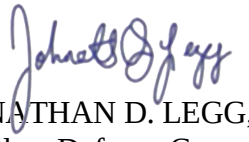
[5] The government urges this Court to take a "narrow reading of *Hoffman*," in part relying on a blog post written by a professor. *See* Gov't Br. at 39, n.14. The cited blog post appears to impeach the reasoning of the first blog post the government cited from the same professor. *See* Gov't Br. at 34, n.10. The most recent blog indicates that the professor now agrees "[a]fter thinking it over" that "[w]hen the government seeks disclosure or a password, the government is seeking a testimonial statement and the foregone conclusion doctrine isn't relevant." Orin Kerr, "A Revised Approach to the Fifth Amendment and Obtaining Passcodes," The Volokh Conspiracy, THE WASHINGTON POST (Sep. 25, 2016). Of course, it is the province of law professors to continually publish new commentary. This Court should rely on the law, rather than the often "revised approaches" taken by various law professors.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on January 31, 2017.



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